

Smith, and Yan Lau, in the Bureau of Economics for all their work.

### Concurring Statement of Commissioner Christine S. Wilson on Advance Notice of Proposed Rulemaking Concerning Earnings Claims

Today, the Commission issues an Advance Notice of Proposed Rulemaking (“ANPRM”) to commence proceedings to address the use of false, unsubstantiated, or otherwise misleading earnings claims. As explained in this **Federal Register** document, despite the Commission’s aggressive enforcement efforts for decades to combat deceptive earnings claims, false claims about income opportunities continue to proliferate. While I remain skeptical of unleashing a tsunami of rulemakings to address common unfair or deceptive acts or practices, I do not oppose seeking comment on today’s ANPRM.

We contemplate this rule against the backdrop of *AMG Capital Mgmt., LLC v. FTC*.<sup>1</sup> The Supreme Court’s recent decision in *AMG* limits the Commission’s authority to use section 13(b) of the FTC Act to obtain monetary relief for consumers harmed by misleading earnings claims. While a rule would not prevent fraudsters from engaging in deceptive earnings claims, it would enhance the FTC’s ability to strip them of their ill-gotten gains and return that money to consumers. But for *AMG*, I would be skeptical about the need for rules regarding conduct frequently targeted by the FTC’s extensive fraud program. That said, a 13(b) fix would be preferable to having the FTC pursue a cornucopia of rules. And if a 13(b) fix is enacted during the pendency of this rulemaking, I likely would ask the Commission to terminate the process.

In the wake of *AMG*, the exploration of a potential Earnings Claims rule is appropriate for two reasons. First, whether false earnings claims are made by frauds or legitimate businesses, no benefit accrues to consumers or competition. In fact, a 2020 FTC Data Spotlight about “income scams” stated that the median loss associated with business and work-at-home opportunities is \$3,000.<sup>2</sup> Consumer losses related to deceptively marketed investment seminars are even higher, exceeding \$16,000.<sup>3</sup> For decades, the

Commission has challenged deceptive earnings claims in connection with coaching and mentoring schemes, multi-level marketing (“MLM”) arrangements, and work-from-home or other business opportunity scams, to name a few.<sup>4</sup> Despite decades of aggressive enforcement and extensive consumer and business education efforts, deceptive earnings claims persist.

Second, consumers cannot analyze the costs and benefits of investing significant resources to pursue coaching, training, MLM, or educational opportunities without accurate representations from sellers. But the true value of these opportunities is best assessed by the entities offering them. In other words, we see significant information asymmetries between consumers and the entities that make earnings claims. The monetary value of an opportunity is likely the central, material claim that consumers consider before spending hundreds, thousands, or even tens of thousands of dollars on financial-improvement opportunities. This ANPRM seeks information on how to ensure that when disclosures are made, they are substantiated.

For these reasons, I do not oppose an ANPRM that explores ways to incentivize establishing a reasonable basis for earnings claims.

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG–2022–0085]

RIN 1625–AA00

### Temporary Safety Zone; Tugs Champion, Valerie B, Nancy Anne and Barges Kokosing I, Kokosing III, Kokosing IV Operating in the Straits of Mackinac, MI

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for the navigable water within a 500-yard radius of several tugs and barges in the Straits of Mackinac. The safety zone is needed to protect personnel, vessels, and the marine environment from the potential hazards created by the work,

survey, and inspection conducted within the Straits of Mackinac. Entry of vessels or persons into the zone is prohibited unless specifically authorized by the Captain of the Port Sault Sainte Marie or their designated representative. Due to the lengthy duration of this safety zone, the Coast Guard is accepting and reviewing public comments until March 31, 2022. While this document is effective beginning April 15, 2022, the Coast Guard reserves the right to modify the safety zone if an issue is raised by the public comments that requires such a modification. We invite your comments on this proposed rulemaking.

**DATES:** Comments and related material must be received by the Coast Guard on or before April 11, 2022.

**ADDRESSES:** You may submit comments identified by docket number USCG–2022–0085 using the Federal Decision Making Portal at <https://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email LT Deaven S. Palenzuela, Sector Sault Sainte Marie Waterways Management Division, U.S. Coast Guard at (906) 635–3223 or email [ssmprevention@uscg.mil](mailto:ssmprevention@uscg.mil).

### SUPPLEMENTARY INFORMATION:

#### I. Table of Abbreviations

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code

#### II. Background, Purpose, and Legal Basis

On February 3, 2022, the Project Manager of Kokosing Industrial notified the Coast Guard that they are contracted by American Transmission Company (ATC) for the purpose of protecting their new 138kV submarine power cables installed in the Straits of Mackinac RNA in 2021. Pursuant to 33 CFR 165.944, Kokosing sent the Coast Guard a letter notifying their 2022 project proposal and request to anchor and work inside the regulated navigation area (RNA) within one nautical mile of submerged pipeline/cable.

The Captain of the Port Sault Sainte Marie (COTP) has determined that potential hazards associated with the work, survey, and inspection of underwater infrastructure within the

<sup>1</sup> *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

<sup>2</sup> Emma Fletcher, *Income scams: big promises, big losses*, FTC Consumer Protection Data Spotlight (Dec. 10, 2020), available at [https://www.ftc.gov/system/files/attachments/blog\\_posts/%20scams%3A%20big%20promises%2C%20big%20losses%20final\\_correlink.pdf](https://www.ftc.gov/system/files/attachments/blog_posts/%20scams%3A%20big%20promises%2C%20big%20losses%20final_correlink.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> See Section I of **SUPPLEMENTARY INFORMATION**, *supra*. See also Notice of Penalty Offense Authority Concerning Money-Making Opportunities, available at <https://www.ftc.gov/MMO-notice>.

Straits of Mackinac starting April 15, 2022 will be a safety concern for anyone within a 500-yard radius of the tugs and barges. The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters within a 500-yard radius of the working tugs and barges affiliated with the pipeline work in the Straits of Mackinac. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231).

### III. Discussion of Proposed Rule

In accordance with 33 CFR 165.944(c)(4), vessels are prohibited from anchoring in any charted submerged pipeline or cable areas within the Straits of Mackinac RNA; except when expressly permitted by the COTP. Kokosing underwent the proper procedures to notify the COTP their project proposal within the Straits of Mackinac RNA by submitting a letter requesting to anchor within one nautical mile of submerged infrastructure.

This rule establishes a temporary safety zone from April 15, 2022 to December 31, 2022. The safety zone will cover all navigable waters within 500 yards of the tugs and barges being used to work, survey, and inspect within the Straits of Mackinac Regulated Navigation Area. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the operation is conducted. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

### IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

#### A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a "significant regulatory action," under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size and location of the safety zone. Vessel traffic will be able to safely transit around this safety zone

which would impact a small designated area of the Straits of Mackinac. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via VHF-FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

#### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

#### C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

#### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the

relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

#### E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

#### F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone that will prohibit entry within 500 yards of tugs and barges used to work, survey, and inspect within the Straits of Mackinac. Normally such actions are categorically excluded from further review under paragraph L[60(a)] of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is

available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

#### G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

#### V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

**Submitting comments.** We encourage you to submit comments through the Federal Decision Making Portal at <https://www.regulations.gov>. To do so, go to <https://www.regulations.gov>, type USCG-2022-0085 in the search box and click "Search." Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using <https://www.regulations.gov>, call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

**Viewing material in docket.** To view documents mentioned in this proposed

rule as being available in the docket, find the docket as described in the previous paragraph, and then select "Supporting & Related Material" in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the <https://www.regulations.gov> Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

**Personal information.** We accept anonymous comments. Comments we post to <https://www.regulations.gov> will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

#### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record keeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

#### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

- 1. The authority citation for part 165 continues to read as follows:

**Authority:** 46 U.S.C. 70034, 70051; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.2.

- 2. Add § 165.T09-0085 to read as follows:

#### § 165.T09-0085 Safety Zone; Tugs Champion, Valerie B, Nanacy Anne and Barges Kokosing I, Kokosing III, Kokosing IV operating in the Straits of Mackinac, MI.

(a) **Location.** The following areas are safety zones: All navigable water within 500 yards of the Tugs Valerie B, Nancy Anne, Champion and Barges Kokosing I, III, and IV while conducting work, surveys, and inspection within the Straits of Mackinac.

(b) **Definitions.** As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sault Sainte Marie (COTP) in the enforcement of the safety zone.

(c) **Regulations.** (1) In accordance with the general regulations in § 165.23, entry into, transiting, or anchoring within the safety zone described in paragraph (a) is prohibited unless authorized by the Captain of the Port, Sault Sainte Marie or his designated representative. (2) Before a vessel operator may enter or operate within the safety zones, they must obtain permission from the Captain of the Port, Sault Sainte Marie, or his designated representative via VHF Channel 16 or telephone at (906) 635-3233. Vessel operators given permission to enter or operate in the safety zone must comply with all orders given to them by the Captain of the Port, Sault Sainte Marie or his designated representative.

(d) **Enforcement period.** This section will be enforced from April 15, 2022 to December 31, 2022.

Dated: March 8, 2022

**A.R. Jones,**

*Captain, U.S. Coast Guard, Captain of the Port Sault Sainte Marie.*

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