

United States Senate

May 28, 2020

Chairman Joseph Simons
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Simons:

We are writing to request that the Federal Trade Commission examine recent reports of potentially unfair and misleading tipping practices on Instacart and other online delivery services. Specifically, we are troubled by reports that online delivery services allow customers to “tip bait”—to offer a high tip to induce a shopper to accept an order and then unfairly reduce or zero-out the tip after the order has been completed, sometimes days later.¹ People are facing unprecedented economic hardship because of the COVID-19 pandemic and so it is more important than ever that we protect people from unfair and deceptive practices.

Shoppers risk their health and safety in order to deliver groceries and other goods to people who are sheltering in place—they should be able to count on reasonable compensation for that risk. However, some customers are deceiving shoppers by promising a large tip, only to unfairly reduce it or zero it out completely after the order is complete. Shoppers choose which orders to take based on the expected compensation, which is largely driven by the estimated tip. By permitting customers to “bait” shoppers with high tips that are then revoked, online delivery services facilitate the deception.

Section 5(a) of the Federal Trade Commission Act (FTC Act) prohibits “unfair or deceptive acts or practices in or affecting commerce.” Congress intentionally provided broad authority in Section 5(a) so that the FTC could address new and emerging market practices that may constitute unfair and deceptive practices. Instacart is one of several online delivery service companies that rely exclusively on workers who the company classifies as independent contractors—a classification that these workers have disagreed with and is being challenged in court.² Instacart treats these workers as though they are independent contractors who do not have the rights of employees under the *Fair Labor Standards Act* (29 U.S.C. 203 et seq.) and limits their legal rights through mandatory arbitration requirements in its terms of service.³ It is therefore particularly important that the FTC exercise its Section 5(a) authority to ensure these online companies are being fair and transparent with their workers.

¹ Sara Ashley O’Brien, Kaya Yurieff, “People are luring Instacart shoppers with big tips – and then changing them to zero,” CNN Business, April 9, 2020, available at: <https://www.cnn.com/2020/04/09/tech/instacart-shoppers-tip-baiting/index.html>

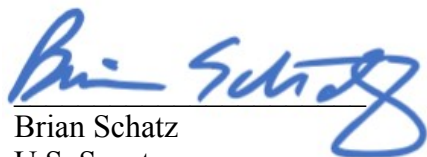
² Brittany Meiling, “Instacart shoppers probably aren’t independent contractors, San Diego judge rules,” Los Angeles Times, February 25, 2020, available at: <https://www.latimes.com/business/story/2020-02-25/instacart-ab5-shoppers-independent-contractors-san-diego>

³ Instacart, Terms of Service, available at: <https://www.instacart.com/terms>

This is not the first time that online delivery companies have faced public backlash over their methods of compensating workers on their platforms. In fact, in February 2019, Instacart announced several changes to how it compensates its workers in response to public outrage that they (and other delivery companies) used customer tips to offset workers' compensation from the delivery company.⁴ In making these changes, Instacart founder and CEO Apoorva Mehta said the company was "putting [Instacart's] shoppers more at the forefront of [the company's] decision making." Yet, at a time when Instacart shoppers are most vulnerable, Instacart's service is allowing customers to deceive and shortchange shoppers.

We appreciate the FTC's focus to date on unlawful conduct and consumer protection issues arising from the gig economy. Particularly in light of the COVID-19 pandemic and the unique risks that online delivery shoppers are taking, we believe the tipping policy at Instacart and other similar companies deserve scrutiny under Section 5(a).

Sincerely,



Brian Schatz
U.S. Senator

/s/ Chris Van Hollen

Chris Van Hollen
U.S. Senator



Sherrod Brown
U.S. Senator



Elizabeth Warren
U.S. Senator

⁴ Apoorva Mehta, Founder & CEO of Instacart, "State of Pay – Doing Right By Our Shoppers," February 6, 2019, available at: <https://medium.com/shopper-news/state-of-pay-doing-right-by-our-shoppers-81de4b66580>