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Case #103-2023: Monitoring Inquiry – Essential Bodywear, LLC

BBB NATIONAL PROGRAMS

The Direct Selling Self-Regulatory Council

Case Number 103-2023: Monitoring Inquiry – Essential Bodywear, LLC

Company Description

Essential Bodywear, LLC (“Essential Bodywear” or the “Company”) is a direct selling company founded in 2003 and headquartered in Commerce, Michigan. The Company markets undergarments and shapewear for women.

Basis of Inquiry

The Direct Selling Self-Regulatory Council (“DSSRC”) is a national advertising self-regulation program administered by BBB National Programs. This inquiry was commenced by DSSRC pursuant to its ongoing independent monitoring process, which monitors advertising and marketing claims made in the direct selling industry.

Earnings Claims

DSSRC's inquiry involved 15 earnings claims disseminated by Essential Bodywear salesforce members. DSSRC informed Essential Bodywear of its concern that promises of financial freedom, free trips, and other express income claims communicate a message that existing and prospective Company salesforce members can earn significant income through the Essential Bodywear business opportunity and that the typical Company salesforce member receives free trips by virtue of participating in the Essential Bodywear program.

- “Y’all, one TWO HOUR, \$1,000 party (not hard to do), and you’ve earned \$250.”
 - “Wanna make money? Wanna have financial freedom?”¹
 - “new career; free travel; residual income”²
 - “financial freedom, free trips”
 - “I have earned a free trip to Costa Rica”
 - “My first month in the business I sold \$7,200 in product. I earned almost double my kit back in my first month”
-
- “...bring in more money than I was making at a full time desk job”
 - “Four FREE trips later, a NEW Tahoe later, a Disney World Trip, piano lessons, a professional housekeeper, countless other family 'extra' expenses, and countless friends made and fun conferences later...”
 - “...who would love to make an extra \$300 – 500 a month to pay bills, for daycare, vacation or savings”
 - “Would you like to earn \$600 or more a month?”
 - “Could you use an extra \$600 to \$800 a month of extra income? Wouldn’t it be nice to be able to pay for the band trip, soccer camp or dances classes?”

Company’s Position

In response to DSSRC’s Notice of Inquiry, Essential Bodywear noted that all of the claims identified by DSSRC were communicated between 2018 and 2019.

Essential Bodywear also maintained that the same posts were the subject of a 2019 inquiry that was commenced by DSSRC and that the claims had all been removed.

Essential Bodywear informed DSSRC that the Company had engaged in several training sessions with its independent salesforce members following the 2019 inquiry and that the salesforce members were instructed to include disclosures to accompany any reference to Company incentives and trips.

Analysis

As stated in the DSSRC Guidance for Earnings Claims in the Direct Selling Industry (the “DSSRC Earnings Claims Guidance”), a direct selling company is responsible for the earnings claims made by its salesforce members.³ DSSRC expressed its concern that all of the posts in this inquiry remain publicly available and that Essential Bodywear has not indicated to DSSRC that it has taken any steps to address its concerns.

Although Essential Bodywear informed DSSRC that the posts at issue had been the subject of a 2019 inquiry, DSSRC informed the Company that the posts that were identified in the subject inquiry were, in fact, different posts that communicated the same “free travel” claim. DSSRC also noted that none of the express earnings claims identified by DSSRC in this inquiry (e.g., “financial freedom”; “I earned almost double my kit back in my first month”; “...bring in more money than I was making at a full-time desk job”) were at issue in the 2019 inquiry.

While DSSRC appreciated the actions taken by Essential Bodywear in the 2019 inquiry to remove the posts at issue, when that inquiry was first commenced it was noted that the claims identified by DSSRC were representative of other, similar claims that the Company and/or its salesforce members may be communicating, and DSSRC expressed its expectation that Essential Bodywear address not only the claims enumerated in the inquiry, but also address any similar claims being communicated by its salesforce members in the Company’s marketing materials (i.e., that were not specifically identified by DSSRC) and take the appropriate remedial actions.⁴

DSSRC reviewed the claims stating that Company salesforce members can achieve “financial freedom” through participation in the Essential Bodywear business opportunity. While DSSRC will evaluate any claim based upon the context in which the claim appears and the potential net impression of such claim to the audience, some words and phrases commonly used in earnings claims can carry a particularly high risk of being misleading to consumers. Such words and phrases include claims such as “financial freedom,” “full-time income,” “replacement income,” “residual income,” and “career-level income.”⁵ It is a fundamental tenet of advertising law that an advertiser has the burden to support any reasonable interpretation of its claims.⁶ Accordingly, in its evaluation of Essential Bodywear’s “financial freedom” claims, DSSRC determined that it would be reasonable to interpret the financial freedom claims at issue in this inquiry as meaning that participants in the Company’s business opportunity would earn an amount of income to live the lifestyle that they desire. There has been no information provided by the Company, however, to indicate that the typical Essential Bodywear salesforce member can earn more than a modest or supplemental income from participating in the Company’s business opportunity.

As such, DSSRC recommended that Essential Bodywear take the necessary actions to facilitate removal of the subject social media posts that reference “financial freedom.”

Similarly, Essential Bodywear has provided no evidence to support the express, quantified earnings claims communicated by salesforce members regarding income that would be generally expected by the typical Company salesforce members (e.g., “Y’all, one TWO HOUR, \$1,000 party (not hard to do), and you’ve earned \$250.”; “My first month in the business I sold \$7,200 in product. I earned almost double my kit back in my first month”) nor the claim that the typical salesforce member can earn enough money to replace their income (i.e., “... bring in more money than I was making at a full time desk job”).

In the absence of any reliable Company earnings data to support these express income claims, DSSRC recommended that Essential Bodywear take action to remove such representations.

Regarding the travel incentive claims made by Essential Bodywear salesforce members (e.g., “free travel”; “free trips”; “Four FREE trips later, a NEW Tahoe later, a Disney World Trip, piano lessons, a professional housekeeper, countless other family 'extra' expenses” and “I have earned a free trip to Costa Rica”), section 2(F) of the DSSRC Earning Claims Guidance states that, for purposes of a DSSRC inquiry, an earnings claim is any claim, express or implied, communicated by either the direct selling company itself or by its independent salesforce members that conveys that salesforce members may earn or have earned company-sponsored incentives, including those lifestyle purchases described in section 2(B), and vacations or other rewards.⁷

Here, DSSRC was concerned that the statements by Essential Bodywear salesforce members that they have earned “free trips” would be interpreted by the reasonable consumer as meaning that the typical Company salesforce member receives free trips when participating in the Company’s business opportunity. However, there has been no evidence provided by Essential Bodywear to support such a consumer take-away. Section 11 of the DSSRC Earnings Claims Guidance states that “With respect to any earnings claim, if the direct selling company does not have substantiation that the experience of the individual making the claim or who is the subject of the claim is representative of what the audience will generally expect to achieve, the advertisement (e.g., social media post) should clearly and conspicuously disclose the generally expected results in the depicted circumstance. The direct selling company must possess adequate substantiation for the representation of the generally expected results.”⁸

In the omission of support for the claim, DSSRC recommended that the Company either demonstrate that it made a good faith effort to have the posts taken down or, alternatively, request that the salesforce member qualify such posts with the inclusion of material information such as consultant eligibility for the receiving free trips and the number or percent of Essential Bodywear salesforce members that have achieved this incentive.⁹

Lastly, Essential Bodywear maintained that a number of the posts that were identified by DSSRC were three or four years old and that the salesforce members were unresponsive to the Company’s requests made during 2020 training sessions to include disclosures of generally expected results in social media posts communicating atypical earnings claims. Notwithstanding the date of posts, the fact remains that the disseminated posts remain publicly available, and it is incumbent on Essential Bodywear to demonstrate to DSSRC that it made a bona fide good faith attempt to have the posts removed or modified.

DSSRC recognizes that removing social media posts that were communicated by unresponsive salesforce members can be a challenging endeavor for direct selling companies. Nevertheless, if the problematic claim was made by an active salesforce member and that salesforce member has been unresponsive to the direct selling company’s request to remove or modify the claim, it is expected that the company will take the appropriate enforcement actions against the salesforce members including either the termination or suspension of the salesforce member’s account pursuant to the Company’s policies and procedures.¹⁰

Alternatively, when a direct selling company is made aware of improper product (or income) claims that were made by an individual who was an active salesforce member when such claim was made but that has since become an inactive salesforce member of the company, DSSRC acknowledges that the direct selling company may not be able to require such salesforce members to remove a social media post. In that instance, DSSRC nonetheless recommends that the direct selling company make a bona fide, good faith effort to have the improper claim removed.¹¹ For example, DSSRC recommends that direct selling companies utilize the mechanism that many websites and social media platforms may have for removal of social media posts for trademark or copyright violations. Additionally, if the subject claim by a former salesforce member occurs on a website or platform without a reporting mechanism, DSSRC recommends that the Company should also contact the website or platform in writing and request removal of the subject claim or post.

Accordingly, should Essential Bodywear continue to be unsuccessful in facilitating removal of the social media posts at issue, it is recommended that the Company provide DSSRC with copies of its communication to the salesforce members responsible for the social media posts requesting that they remove or modify the posts as a demonstration of the Company’s good faith efforts to address DSSRC’s concerns and make a concerted effort to engage with the respective social media platform to request that the unauthorized post be removed.

As DSSRC has noted in previous inquiries, if a non-compliant post was made by a salesforce member that later became inactive, DSSRC recommends that, promptly upon learning of such a claim, a direct selling company should make a bona fide good faith effort to contact the former salesforce member to request that the improper claim be removed. DSSRC also recommends that the Company take additional steps to remove such claims from the marketplace including utilizing the mechanism that websites and social media platforms may have for removal of trademark or copyright violations. If the subject claim by a former salesforce member occurs on a website or platform

without a reporting mechanism, DSSRC recommends that the Company should also contact the website or platform in writing and request removal of the subject claim or post.

Conclusion

All of the social media posts in this inquiry remain publicly available and Essential Bodywear has not demonstrated to DSSRC that it has taken any steps to address its concerns. Accordingly, in the absence of any reliable earnings data to support these express income claims at issue, DSSRC recommended that Essential Bodywear take action to remove such representations or, when appropriate, request that the salesforce member qualify such posts with the inclusion of material information such as consultant eligibility for the receiving free trips and the number or percent of Essential Bodywear salesforce members that have achieved this incentive. Should the social media posts at issue continue to remain publicly available, DSSRC recommends that Essential Bodywear provide DSSRC with copies of its communication to the salesforce members responsible for the social media posts requesting that they remove or modify the posts as a demonstration of the Company's good faith efforts to address DSSRC's concerns.

Company Statement

"Essential Bodywear is aware of claims before 2020 on Social Media platforms that may have caused some confusion on income and trips. To rectify this issue:

1. We Had a Conference in 2020 where we went over the FTC guidelines on what you can say and what you can't. I shared the document given to us by the DSSRC, and each of them looks it over.
2. Each contacted each person on the file and asked to delete their post.

We are committed to adhering to the recommendations made by the DSA and DSSRC to make sure that we are compliant."

(Case #103-2023, closed on 1/26/23)

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[1] This claim was communicated by different Essential Bodywear salesforce members in 3 different social media posts.

[2] This claim was communicated by different Essential Bodywear salesforce members in 2 different social media posts.

[3] DSSRC Earnings Claims Guidance at <https://bbbprograms.org/programs/all-programs/dssrc/>, Section 2.

[4] More specifically, DSSRC's 2019 opening letter to Essential Bodywear stated that "The claims identified above are not intended to be exhaustive but rather are illustrative of the type of claims that are being made in the marketplace on behalf of Essential Bodywear."

[5] *Supra* at 3. See Section 5.

[6] See FTC Policy Statement Regarding Advertising Substantiation at <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-regarding-advertising-substantiation> and ACH Food Companies, Inc. (Mazola Pure Cooking Spray), NAD Case Report #4539, (August 2006) Swiss Research, Inc. (Sugar Sweetener) NAD Case Report # 4442 (January 2006); Colgate-Palmolive Company (Murphy Soft Wipes), NAD Case Report # 4431 (December 2005).

[7] *Id.* DSSRC also noted that section 2(B) of the DSSRC Earnings Claim Guidance states that earnings claims may also be express or implied claims pertaining to representations that suggest that the ability to make lifestyle purchases – such as homes, vehicles, vacations, etc. – are related to income earned from direct selling.

[8] *Supra* at 3.

[9] See Case# 12-2020 - Aloette Cosmetics ; Case# 24-2020 Le-Vel Brands LLC and Case# 12-2020 – Mary Kay Cosmetics and Case #40-2021 (for example, in the Mary Kay inquiry, DSSRC expressed its concern that Company incentives such as a car bonus or incentive trip reward would not be generally expected or achievable by the typical Mary Kay sales force member and, as such, DSSRC recommended that Mary Kay work with the sales force member responsible for the blog post to either remove reference to the Pink Cadillac or include a disclosure regarding the number of independent Mary Kay consultants who have received or who are eligible to receive the Mary Kay car incentive).


[10] Pursuant to section V(D)(3) of the Policies and Procedures for the Direct Selling Self-Regulatory Council, DSSRC may request that the Company provide DSSRC with copies of its request(s) to its salesforce member(s) and/or its request(s) to the applicable forum,

including the social media platform on which such claim was disseminated. Here, DSSRC made such a request to Essential Bodywear and the Company failed to provide the requested documentation.

[11] Le-Vel Brands (Case#57-2021); Gano Excel USA, Inc. (Case #30-2020); Daxen, Inc. (Case #52-2021).

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