



May 10, 2022

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite CC-5610 (Annex B)  
Washington, DC 20580

Re: Earnings Claims ANPR, R111003

Truth in Advertising, Inc. (“TINA.org”) welcomes the opportunity to submit the following in conjunction with the Federal Trade Commission’s (“Commission,” “Agency” or “FTC”) March 11, 2022 request for comments regarding its consideration of proposing a rulemaking to address deceptive or unfair marketing using earnings claims.<sup>1</sup>

While the FTC is broadly considering proposing a rule to address deceptive or unfair marketing using earnings claims, TINA.org has focused its comments on the widespread use of false, unsubstantiated and misleading earnings claims employed by the direct selling industry.<sup>2</sup> After a brief introduction and summary of TINA.org’s expertise and interest in the matter at hand, this Comment explores the regulatory history surrounding earnings claims and other FTC rules – namely the Franchise and Business Opportunity rules – and discusses the exclusion of multilevel marketing (“MLM”) companies from these rules. The Comment then highlights the informational asymmetry that exists between MLM companies and consumers at large before exploring the near-universal use of deceptive earnings claims within the direct selling industry. Next, the Comment discusses issues relating to earning disclosures, arguing that no disclosure can remedy the deception of atypical earnings claims used to recruit and retain distributors. The Comment further addresses the harms suffered by failed distributors that are lured into MLMs as a result of deceptive earnings claims. The Comment then explains why direct selling self-regulation is not a viable substitute for a rule addressing deceptive earnings claims before turning to problems with targeted law enforcement actions. Finally,

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<sup>1</sup> Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13951 (proposed Mar. 11, 2022), <https://www.federalregister.gov/documents/2022/03/11/2022-04679/deceptive-or-unfair-earnings-claims>.

<sup>2</sup> Direct selling encompasses a variety of possible distribution and compensations methods, including multilevel marketing. That said, the vast majority of direct sales companies in existence today are MLM companies. As such, this Comment uses the terms interchangeably. Of note, it appears that the Direct Selling Association also conflates the two terms. Specifically, the DSA defines direct selling as “[a] business model that provides entrepreneurial opportunities to individuals as independent contractors to market and/or sell products and services .... Compensation is ultimately based on sales and may be earned based on personal sales and/or the sales of others in the sales team.” Direct Selling Association, [www.dsa.org](http://www.dsa.org) (last visited May 8, 2022).

TINA.org concludes its Comment by urging the Commission to initiate a rulemaking prohibiting deceptive or unfair marketing using earnings claims.

## INTRODUCTION

Atypical, and thus deceptive, earnings claims have become a fixture in the U.S. marketplace. Used by numerous industries to deceive consumers – from for-profit schools<sup>3</sup> to investment newsletters and services,<sup>4</sup> to online gaming platforms<sup>5</sup> – the scope and range of this deceptive and unfair marketing tactic is boundless. Over the years, TINA.org has collected thousands of examples of atypical earnings representations used by a diverse and varying number of companies to exploit consumers.

No industry better exemplifies the true breadth and variation of deceptive earnings claims used to manipulate consumers than the direct selling industry. As such, this Comment will primarily utilize TINA.org’s extensive data and research concerning the MLM industry to support its contention that the FTC should craft a rule that prohibits the marketing of any atypical earnings claims, whether they are express or implied.<sup>6</sup>

Every year millions of consumers, mostly women,<sup>7</sup> many of them in precarious financial situations,<sup>8</sup> pay to become sellers for MLM companies, enticed by tales and images of lavish

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<sup>3</sup> See, e.g., *Fed. Trade Comm’n v. DeVry Educ. Grp. Inc.*, No 2:16-cv-579 (C.D. Cal. 2016), <https://www.ftc.gov/system/files/documents/cases/160127devrycmpt.pdf>; *Fed. Trade Comm’n v. Univ. of Phoenix, Inc.*, No. 2:19-cv-5772 (D. Ariz. 2019), [https://www.ftc.gov/system/files/documents/cases/university\\_of\\_phoenix\\_ftc\\_v\\_uop\\_complaint\\_signed.pdf](https://www.ftc.gov/system/files/documents/cases/university_of_phoenix_ftc_v_uop_complaint_signed.pdf); *Mass. v. ITT Educ. Servs., Inc.*, No 16-0411 (Mass. Super. Ct. 2016), <https://www.mass.gov/doc/itt-complaint/download>.

<sup>4</sup> See, e.g., Letter from TINA.org to FTC Regarding Violations of Stipulated Order in *FTC v. Agora Financial, LLC et al.*, Case No. 19-cv-03100, D. Md. (June 16, 2021), [https://truthinadvertising.org/wp-content/uploads/2021/06/6\\_16\\_21-ltr-to-FTC-re-Agora-Order-Violations\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2021/06/6_16_21-ltr-to-FTC-re-Agora-Order-Violations_Redacted.pdf); Letter from TINA.org to Stansberry & Assoc. Inv. Rsch., LLC Regarding Deceptive Advertising (Mar. 11, 2014), [https://truthinadvertising.org/wp-content/uploads/2016/02/3.11.14-ltr-to-Stansberry\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2016/02/3.11.14-ltr-to-Stansberry_Redacted.pdf); Press Release, Fed. Trade Comm’n, Online Investment Site to Pay More Than \$2.4 Million for Bogus Stock Earnings Claims and Hard-to-Cancel Subscription Charges (March 8, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/online-investment-site-pay-more-24-million-bogus-stock-earnings-claims-hard-cancel-subscription>.

<sup>5</sup> See, e.g., Letter from TINA.org to FTC Regarding Deceptive Marketing on Roblox (Apr. 19, 2022), [https://truthinadvertising.org/wp-content/uploads/2022/04/4\\_19\\_22-Complaint-to-FTC-re-Roblox.pdf](https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf).

<sup>6</sup> TINA.org’s focus in this Comment on the direct selling industry is not an indication that the issue of deceptive earnings claims does not extend beyond MLM companies. To the contrary, a rule prohibiting atypical income claims is equally necessary for all companies that employ this marketing tactic.

<sup>7</sup> Annie Blackman, *Regulating the Reluctant: Policies That Benefit Vulnerable Participants in Multi-Level Marketing*, 25 UNIV. PA. J. L. & SOC. CHANGE 83, 94 (2021); Direct Selling in the United States: 2020 Industry Overview, [https://www.dsa.org/docs/default-source/research/dsa-industry-overview-fact-sheetd601b69c41746fcd88eaff000002c0f4.pdf?Status=Temp&sfvrsn=6e75d9a5\\_2%27](https://www.dsa.org/docs/default-source/research/dsa-industry-overview-fact-sheetd601b69c41746fcd88eaff000002c0f4.pdf?Status=Temp&sfvrsn=6e75d9a5_2%27).

<sup>8</sup> Press Release, Salary Finance, Pay Gap is Only the Start of Financial Inequality for Women (May 6, 2019), <https://www.prnewswire.com/news-releases/pay-gap-is-only-the-start-of-financial-inequality-for-women-300844184.html>. (“Based on the survey’s data, women are paid – on average – one-third less annually than men (\$58,027 v. \$79,517). Given this gulf between salaries for women and men, it’s unsurprising that women are also more likely to run out of money before payday than men (34 percent v. 25 percent); 41 percent of women report having less than \$500 in their checking/savings accounts, compared to only 18 percent of men. Women are also more likely than men to state that they do not earn enough to save (63 percent v. 51 percent).”); Rob Poindexter, 40 percent of Women Have Less Than \$100



lifestyles, or by the prospect of making money while staying home with their children. Few will earn a living wage, much less realize fabulous riches; half or more will actually *lose* money<sup>9</sup> as they struggle to recoup their initial investments through further spending on inventory, training and marketing, which in turn leads to a loss of savings, debt accumulation and – not infrequently – bankruptcy.<sup>10</sup>

TINA.org has found that false and unfounded earnings claims – explicit and implied – are not just prevalent, but almost universal in the direct selling industry,<sup>11</sup> and industry self-regulation has been wholly ineffective at stemming the tide of this deceptive marketing tactic. The costs of applying an earnings claim rule to MLMs would not be high,<sup>12</sup> particularly in comparison

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in Their Savings Accounts, New Survey Finds, GOBankingRates, Jan. 25, 2022 (“An alarming number of women have little to no money in their bank accounts, a recent GOBankingRates survey found. Forty percent of women have \$100 or less in their savings account versus just 26% of men. In addition, women are more likely to report having less in their checking accounts, with 40% saying they let their minimum checking account balance reach \$100 or less...”); Ana Hernández Kent, *Single Mothers Have Little Wealth to Withstand Outsized COVID-19 Impact*, Consumer & Community Context Vol. 3 No. 1, Nov. 2021, at 7 (“Among singles, unemployed mothers, in particular, reported high levels of financial instability. About one-third of single unemployed mothers were unable to pay monthly bills in full and on time, nearly half reported they were finding it difficult to get by or were just getting by, and 35 percent said they were worse off financially compared to 12 months ago. Employed mothers, other unemployed parents, and unemployed women without children struggled as well, though to a lesser degree.”)

<sup>9</sup> See Marguerite DeLiema et al., *AARP Study of Multilevel Marketing: Profiling Participants and Their Experiences in Direct Sales*, at 8-9 (2018), [https://www.aarp.org/content/dam/aarp/aarp\\_foundation/2018/pdf/AARP%20Foundation%20MLM%20Research%20Study%20Report%2010.8.18.pdf](https://www.aarp.org/content/dam/aarp/aarp_foundation/2018/pdf/AARP%20Foundation%20MLM%20Research%20Study%20Report%2010.8.18.pdf) (almost half of MLM participants and former participants surveyed reported net losses); see also Heidi Liu, *The Behavioral Economics of Multilevel Marketing*, 14 HASTINGS BUS. L. J. 109, 123-24 (2018), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1176&context=hastings\\_business\\_law\\_journal](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1176&context=hastings_business_law_journal) (“The majority of MLM consultants are likely to lose money from their participation.”)

<sup>10</sup> *LuLaRoe Distributors in Bankruptcy as Founder Touts Financial Freedom*, Truth In Advertising (Apr. 30, 2019), <https://truthinadvertising.org/articles/lularoe-distributors-face-bankruptcy-as-founder-touts-financial-freedom/>; *LuLaRoe Bankruptcy: By The Numbers*, Truth In Advertising (Apr. 30, 2019), <https://truthinadvertising.org/articles/lularoe-bankruptcy-infographic/>.

<sup>11</sup> See TINA.org’s DSA Companies’ Income Claims Investigation, <https://truthinadvertising.org/industries/mlm-income/>; TINA.org’s Beautycounter Income Claims Database, <https://truthinadvertising.org/evidence/beauty-counter-income-claims/>; TINA.org’s Digital Altitude Income Claims Database, <https://truthinadvertising.org/evidence/digital-altitude-income-claims-database/>; TINA.org’s HempWorx Income Claims Database, <https://truthinadvertising.org/evidence/hempworx-income-claims-database/>; TINA.org’s IML Income Claims Database, <https://truthinadvertising.org/evidence/imarketslive-income-database/>; TINA.org’s Jusuru Income Claims Database, <https://truthinadvertising.org/evidence/jusuru-income-claims-database/>; TINA.org’s Le-Vel Income Claims Database, <https://truthinadvertising.org/evidence/thrive-income-claims-database/>; TINA.org’s LuLaRoe Income Claims Database, <https://truthinadvertising.org/evidence/lularoe-income-claims-database/>; TINA.org’s Market America Income Claims Database, <https://truthinadvertising.org/evidence/market-america-database/>; TINA.org’s New U Life Income Claims, <https://truthinadvertising.org/evidence/new-u-life-income-claims-database/>; TINA.org’s Plexus Income Claims Database, <https://truthinadvertising.org/evidence/plexus-income-claims-database/>.

<sup>12</sup> All DSA-member companies are already required to abide by the DSA Code of Ethics as a condition of membership. DSA Code of Ethics (amended Dec. 13, 2018), <https://www.dsa.org/docs/default->

to the significant harm that could be averted to millions of potential participants, or in comparison to the costs of legal actions against individual companies.<sup>13</sup> Targeted enforcement has proven far from sufficient to curb industry abuses,<sup>14</sup> and has become even less viable since the Supreme Court foreclosed the principle avenue the Commission had relied on to seek monetary relief from offenders and make victims whole.<sup>15</sup> Moreover, a formal earnings claim rule will make it more feasible and efficient to bring legal actions when necessary, as well as provide market guidance on its own.

Deceptive earnings claims have enticed large numbers of individuals to join MLM businesses with – in many cases – devastating consequences to their finances and personal lives. In 2008, the FTC abandoned financially desperate and unsophisticated consumers to be victimized by an industry awash in deceptive earnings claims when it excluded direct selling companies from the Business Opportunity Rule. It should not make that same mistake again. Now is the time to remedy the information deficit and surfeit of misinformation by which MLM companies (and their distributors) take advantage of millions of individuals and establish a rule that prohibits false, deceptive and/or misleading earnings claims.<sup>16</sup>

## INTEREST OF PETITIONER

TINA.org is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, independent experts, synergy organizations and government agencies to advance countermeasures that effectively prevent and stop deception in our economy.

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[source/code-of-ethics/dsa-code-of-ethics-december-2018.pdf](#). Further, many MLM companies have stated that they employ tactics to prevent deceptive marketing claims. *See, e.g.*, Letter from Forever Living to TINA.org (Feb. 2, 2018), [https://truthinadvertising.org/wp-content/uploads/2022/05/2\\_2\\_18-Forever-Living-Response.pdf](https://truthinadvertising.org/wp-content/uploads/2022/05/2_2_18-Forever-Living-Response.pdf); Letter from Nerium International to TINA.org (June 14, 2016), <https://truthinadvertising.org/wp-content/uploads/2016/06/Nerium-response-6-14-16.pdf>. As such, if these companies are to be believed, an income claims rule would not add any significant burden on them.

<sup>13</sup> *See, e.g.*, Complaint for Permanent Injunction and Other Equitable Relief, *Fed. Trade Comm'n v. Neora, LLC*, No. 3:19-cv-19699 (D.N.J. 2019); Amended Complaint for Permanent Injunction and Other Equitable Relief, *Fed. Trade Comm'n v. Noland*, No. 2:20-cv-47 ((D. Ariz. 2020), [https://www.ftc.gov/system/files/documents/cases/netforce\\_amended\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/netforce_amended_complaint.pdf); Amended Complaint for Permanent Injunction & Other Equitable Relief, *Fed. Trade Comm'n v. RagingBull.com*, No. 1:20cv-03538 (D. Md. Feb. 4, 2021), [https://www.ftc.gov/system/files/documents/cases/ragingbull.com\\_-\\_amended\\_complaint\\_for\\_permanent\\_injunction\\_and\\_other\\_equitable\\_relief.pdf](https://www.ftc.gov/system/files/documents/cases/ragingbull.com_-_amended_complaint_for_permanent_injunction_and_other_equitable_relief.pdf); Press Release, Fed. Trade Comm'n, As Scammers Leverage Pandemic Fears, FTC and Law Enforcement Partners Crack Down on Deceptive Income Schemes Nationwide (Dec. 14, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/12/scammers-leverage-pandemic-fears-ftc-law-enforcement-partners-crack-down-deceptive-income-schemes>.

<sup>14</sup> Rohit Chopra et al., *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 Univ. of Pa. L. Rev. 71 (2021), [https://www.pennlawreview.com/wp-content/uploads/2022/02/Chopra\\_Final-2.5.22.pdf](https://www.pennlawreview.com/wp-content/uploads/2022/02/Chopra_Final-2.5.22.pdf).

<sup>15</sup> *AMG Capital Mgmt. LLC v. FTC*, 141 S. Ct. 1341 (2021) (holding that Section 13(b) of the FTC Act does not authorize monetary relief); *see also Fed. Trade Comm'n v. Neora LLC*, 552 F. Supp. 3d. 628 (N.D. Tex. 2021); *Fed. Trade Comm'n v. Noland*, 2021 U.S. Dist. LEXIS 171265 (D. Ariz. 2021).

<sup>16</sup> Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13951.

At the center of TINA.org's efforts is its website, [www.tina.org](http://www.tina.org), which aims to reboot the consumer movement for the 21<sup>st</sup> century. The site provides information about common deceptive advertising techniques, consumer protection laws and alerts about specific deceptive marketing campaigns—such as nationally advertised “Built in the USA” vans manufactured abroad,<sup>17</sup> pillows and essential oils falsely marketed as able to treat chronic diseases,<sup>18</sup> and social media influencers deceptively marketing alcohol brands to minors.<sup>19</sup> The website functions as a clearinghouse, receiving consumer complaints about suspicious practices, which TINA.org investigates, and, when appropriate, takes up with businesses and regulatory authorities. The website is also a repository of information relating to consumer protection lawsuits and regulatory actions.

Through its collaborative approach and attention to emerging issues and complexities, TINA.org has become a trusted source of expertise on matters relating to consumer fraud, and has testified before Congress on issues related to consumer protection, deceptive marketing and economic justice.<sup>20</sup> TINA.org regularly draws on its expertise to advocate for consumer interests before the FTC and other governmental bodies and appears as *amicus curiae* in cases raising important questions of consumer protection law.<sup>21</sup>

Since its inception, TINA.org has filed legal actions against more than 250 companies and entities, published more than 1,200 ad alerts, written over 900 news articles, and tracked more than 4,000 federal class actions alleging deceptive marketing. Notably, since 2015, state and federal agencies have obtained more than \$250 million from wrongdoers based on TINA.org legal actions and evidence, and returned millions in ill-gotten gains to consumers.

For years, TINA.org has taken an active role in holding the direct selling industry accountable for its deceptive marketing. The nonprofit has documented more than 11,000 examples of deceptive earnings claims used by MLM companies and their agents to recruit and retain

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<sup>17</sup> TINA.org's Mercedes-Benz Investigation, <https://truthinadvertising.org/brands/mercedes-benz/>.

<sup>18</sup> TINA.org's MyPillow Investigation, <https://truthinadvertising.org/brands/mypillow/>; TINA.org's doTerra Investigation, <https://truthinadvertising.org/brands/doterra/>; TINA.org's Young Living Investigation, <https://truthinadvertising.org/brands/young-living/>.

<sup>19</sup> TINA.org's Diageo Investigation, <https://truthinadvertising.org/brands/diageo/>; TINA.org's Cîroc Investigation, <https://truthinadvertising.org/brands/ciroc/>.

<sup>20</sup> Bonnie Patten, Exec. Dir., TINA.org, Testimony Before the Subcomm. on Consumer Prot. and Com. of the Comm. on Energy and Com. (Feb. 4, 2021), <https://truthinadvertising.org/action/house-testimony-2021-summary-action/>; Bonnie Patten, Exec. Dir., TINA.org, Testimony Before the Subcomm. on Consumer Prot., Prod. Safety, and Data Sec. (Apr. 27, 2021), <https://truthinadvertising.org/action/senate-testimony-2021-summary-action/>.

<sup>21</sup> For example, TINA.org participated as *amicus curiae* in *AMG Capital Management, LLC v. Federal Trade Commission*. Brief of Amicus Curiae Truth In Advertising, Inc. In Support of Respondent, *AMG Capital Mgmt., LLC v. Fed. Trade Comm'n*, No. 19-508 (U.S. Dec. 7, 2020), [https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389\\_19-508%20brief.pdf](https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389_19-508%20brief.pdf). TINA.org also filed an *amicus curiae* brief in *Federal Trade Commission v. Quincy Bioscience Holding Co., Inc.*, which reinstated a Section 13(b) suit against a business falsely marketing a dietary supplement to the elderly as clinically proven to improve memory. Brief of Amici Curiae Truth In Advertising, Inc. et al. in Favor of Appellants and in Support of Reversal, *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc.*, 753 Fed. Appx. 87 (2d Cir. 2019) (No. 17-3745), [https://www.truthinadvertising.org/wp-content/uploads/2018/03/Prevagen\\_Amici-Curiae-brief.pdf](https://www.truthinadvertising.org/wp-content/uploads/2018/03/Prevagen_Amici-Curiae-brief.pdf).



distributors. The advocacy organization makes this information available to the public on its website, which features deceptive and atypical earnings claims by more than 140 MLMs.<sup>22</sup> TINA.org has also issued 143 warning letters to MLM companies concerning deceptive earnings claims, including 139 letters to members of the national trade association for the industry, the Direct Selling Association (“DSA”).<sup>23</sup> The nonprofit has filed 25 complaints with federal and state regulators and the Direct Selling Self-Regulatory Council (“DSSRC”) against 29 MLM companies providing ample documentation of deceptive and misleading earnings claims.<sup>24</sup> It has also successfully advocated for the FTC to initiate a penalty-offense

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<sup>22</sup> TINA.org investigations and databases, *supra* note 11.

<sup>23</sup> Letter from TINA.org to USANA Health Sciences (Nov. 3, 2021), [https://truthinadvertising.org/wp-content/uploads/2021/11/11\\_3\\_21-ltr-to-USANA-re-deceptive-marketing-redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2021/11/11_3_21-ltr-to-USANA-re-deceptive-marketing-redacted.pdf); Letter from TINA.org to Mary Kay, Inc. (Mar. 5, 2021), [https://truthinadvertising.org/wp-content/uploads/2021/03/3\\_5\\_21-letter-from-TINA-to-Mary-Kay.pdf](https://truthinadvertising.org/wp-content/uploads/2021/03/3_5_21-letter-from-TINA-to-Mary-Kay.pdf); Letter from TINA.org to Market America Worldwide (Oct. 8, 2020), [https://truthinadvertising.org/wp-content/uploads/2020/11/10\\_8\\_20-TINA-ltr-to-Market-America\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2020/11/10_8_20-TINA-ltr-to-Market-America_Redacted.pdf); Letters from TINA.org to DSA-member companies (Dec. 18, 2017), <https://truthinadvertising.org/wp-content/uploads/2017/12/DSA-Income-Claims-Notification-Letters-w-Intro.pdf>; Email from TINA.org to Plexus Worldwide (Feb. 2, 2017), [https://truthinadvertising.org/wp-content/uploads/2017/02/2\\_2\\_17-Email-from-TINA-to-Plexus.pdf](https://truthinadvertising.org/wp-content/uploads/2017/02/2_2_17-Email-from-TINA-to-Plexus.pdf); Letter from TINA.org to Nerium International (June 6, 2016), [https://truthinadvertising.org/wp-content/uploads/2016/06/6\\_6\\_16-ltr-from-TINA-to-Nerium\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2016/06/6_6_16-ltr-from-TINA-to-Nerium_Redacted.pdf); Letter from TINA.org to Jusuru International, Inc. (June 6, 2016), [https://truthinadvertising.org/wp-content/uploads/2016/06/6\\_6\\_16-ltr-from-TINA-to-Jusuru\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2016/06/6_6_16-ltr-from-TINA-to-Jusuru_Redacted.pdf); Letter from TINA.org to Kyani, Inc. (Mar. 28, 2016), [https://truthinadvertising.org/wp-content/uploads/2016/03/3\\_28\\_16-ltr-from-TINA-to-Kyani\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2016/03/3_28_16-ltr-from-TINA-to-Kyani_Redacted.pdf); Letter from TINA.org to Jeunesse Global, LLC (Sep. 25, 2015), [https://truthinadvertising.org/wp-content/uploads/2015/10/Sept-25-letter-to-Jeunesse\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2015/10/Sept-25-letter-to-Jeunesse_Redacted.pdf); Letter from TINA.org to Resorts360 Vacation Club (May 15, 2013), <https://truthinadvertising.org/wp-content/uploads/2016/02/Resorts360-letter-to-R.-Rutter-pdf-unsigned.pdf>.

<sup>24</sup> Letter from TINA.org to FTC Regarding Deceptive Marketing by Forever Living Despite Notices of Penalty Offenses (May 4, 2022), [https://truthinadvertising.org/wp-content/uploads/2021/12/5\\_4\\_22-ltr-from-TINA-to-FTC-re-Forever-Living\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2021/12/5_4_22-ltr-from-TINA-to-FTC-re-Forever-Living_Redacted.pdf); Letter from TINA.org to DSSRC Regarding Illegal Income Claims by Young Living Essential Oils, LC (Feb. 7, 2022), [https://truthinadvertising.org/wp-content/uploads/2022/03/2\\_7\\_22-Young-Living-Complaint-to-DSSRC.pdf](https://truthinadvertising.org/wp-content/uploads/2022/03/2_7_22-Young-Living-Complaint-to-DSSRC.pdf); Letter from TINA.org to Wash. Att’y Gen. Regarding Violations of Consent Decree in State of Wash. v. LLR, Inc. et al, Case No. 19-2-02325-2 SEA, King County Superior Court (Apr. 2, 2021), [https://truthinadvertising.org/wp-content/uploads/2021/04/State-of-Washington-v.-LLR-Inc.-et-al\\_Violations-of-Consent-Decree.pdf](https://truthinadvertising.org/wp-content/uploads/2021/04/State-of-Washington-v.-LLR-Inc.-et-al_Violations-of-Consent-Decree.pdf); Letter from TINA.org to DSSRC Regarding Illegal Income Claims by Mary Kay Inc. (Mar. 9, 2021), [https://truthinadvertising.org/wp-content/uploads/2021/07/3\\_9\\_21-TINA-complaint-to-DSSRC-re-Mary-Kay\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2021/07/3_9_21-TINA-complaint-to-DSSRC-re-Mary-Kay_Redacted.pdf); Letter from TINA.org to DSSRC Regarding Illegal Income Claims by Beautycounter (July 22, 2020), [https://truthinadvertising.org/wp-content/uploads/2020/10/7\\_22\\_20-TINA-ltr-to-DSSRC-re-Beautycounter.pdf](https://truthinadvertising.org/wp-content/uploads/2020/10/7_22_20-TINA-ltr-to-DSSRC-re-Beautycounter.pdf); Letter from TINA.org to DSSRC Regarding Illegal Income Claims by Primerica, Inc (June 5, 2020), [https://truthinadvertising.org/wp-content/uploads/2021/01/6\\_5\\_20-letter-to-DSSRC-re-Primerica.pdf](https://truthinadvertising.org/wp-content/uploads/2021/01/6_5_20-letter-to-DSSRC-re-Primerica.pdf); Letter from TINA.org to DSSRC Regarding Le-Vel Brands, LLC’s Use of Illegal Income and Health Claims to Promote the “Thrive Experience” (Mar. 11, 2020), [https://truthinadvertising.org/wp-content/uploads/2020/09/3\\_11\\_20-TINA-complaint-to-DSSRC-re-Le\\_Vel-Thrive.pdf](https://truthinadvertising.org/wp-content/uploads/2020/09/3_11_20-TINA-complaint-to-DSSRC-re-Le_Vel-Thrive.pdf); Letter from TINA.org to DSSRC Regarding Illegal Income Claims by iMarketsLive (Dec. 5, 2019), [https://truthinadvertising.org/wp-content/uploads/2020/09/12\\_5\\_19-letter-to-DSSRC-re-iMarketsLive.pdf](https://truthinadvertising.org/wp-content/uploads/2020/09/12_5_19-letter-to-DSSRC-re-iMarketsLive.pdf); Letter from TINA.org to FTC and FDA Regarding New U Life’s Deceptive Marketing of Somaderm Gel (Sep. 5, 2019), [https://truthinadvertising.org/wp-content/uploads/2019/09/9\\_5\\_19-ltr-re-New-U-Life-to-FTC-and-FDA.pdf](https://truthinadvertising.org/wp-content/uploads/2019/09/9_5_19-ltr-re-New-U-Life-to-FTC-and-FDA.pdf); Letter from TINA.org to DSSRC Regarding Illegal Income Claims by LuLaRoe (July 10, 2019), [https://truthinadvertising.org/wp-content/uploads/2021/04/7\\_10\\_19-complaint-to-DSSRC-re-LuLaRoe.pdf](https://truthinadvertising.org/wp-content/uploads/2021/04/7_10_19-complaint-to-DSSRC-re-LuLaRoe.pdf); Letter from TINA.org to DSSRC Regarding Illegal Income Claims by Young Living Essential Oils, LC (June 3, 2019), [https://truthinadvertising.org/wp-content/uploads/2020/04/6\\_3\\_19-ltr-to-DSSRC-re-Young-Living\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2020/04/6_3_19-ltr-to-DSSRC-re-Young-Living_Redacted.pdf); Letter from TINA.org to DSSRC Regarding Illegal Income



program to curb deceptive earnings claims by MLM companies, among others.<sup>25</sup> Most recently, TINA.org filed a complaint with the FTC against DSA-member company Forever Living Products International, LLC, documenting more than 5,500 inappropriate earnings claims (both direct and implied) made by the company to recruit and

Claims by Team National, Inc. (Apr. 30, 2019), [https://truthinadvertising.org/wp-content/uploads/2019/09/4\\_30\\_19-DSSRC-complaint-re-Team-National-1\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2019/09/4_30_19-DSSRC-complaint-re-Team-National-1_Redacted.pdf); Letter from TINA.org to FTC Regarding Illegal Income Claims by Multi-level Marketing Company Stream Gas & Electric (Sep. 10, 2018), [https://truthinadvertising.org/wp-content/uploads/2018/09/9\\_10\\_18-ltr-to-FTC-re-Stream\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2018/09/9_10_18-ltr-to-FTC-re-Stream_Redacted.pdf); Letter from TINA.org to Tex. Att’y Gen. Regarding Illegal Income Claims by Multi-level Marketing Company Stream Gas & Electric (Sep. 10, 2018), [https://truthinadvertising.org/wp-content/uploads/2018/09/9\\_10\\_18-ltr-to-TX-AG-re-Stream\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2018/09/9_10_18-ltr-to-TX-AG-re-Stream_Redacted.pdf); Letter from TINA.org to FTC Regarding Illegal Income Claims by Multi-level Marketing Company Team National (June 14, 2018), [https://truthinadvertising.org/wp-content/uploads/2018/06/6\\_14\\_18-letter-to-FTC-re-Team-National\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2018/06/6_14_18-letter-to-FTC-re-Team-National_Redacted.pdf); Letter from TINA.org to Fla. Att’y Gen. Regarding Illegal Income Claims by Multi-level Marketing Company Team National (June 14, 2018), [https://truthinadvertising.org/wp-content/uploads/2018/06/6\\_14\\_18-letter-to-FL-AG-re-Team-National\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2018/06/6_14_18-letter-to-FL-AG-re-Team-National_Redacted.pdf); Letter from TINA.org to FTC Regarding Deceptive Marketing for Nerium International Business Opportunity and Products (Jul. 12, 2016), [https://truthinadvertising.org/wp-content/uploads/2016/07/7\\_12\\_16-ltr-from-TINA-to-FTC-re-Nerium.pdf](https://truthinadvertising.org/wp-content/uploads/2016/07/7_12_16-ltr-from-TINA-to-FTC-re-Nerium.pdf); Letter from TINA.org to Tex. Att’y Gen. Regarding Deceptive Marketing for Nerium International Business Opportunity and Products (Jul. 12, 2016), [https://truthinadvertising.org/wp-content/uploads/2016/07/7\\_12\\_16-ltr-from-TINA-to-TX-AG-re-Nerium.pdf](https://truthinadvertising.org/wp-content/uploads/2016/07/7_12_16-ltr-from-TINA-to-TX-AG-re-Nerium.pdf); Letter from TINA.org to FTC Regarding Deceptive Marketing for Kyani Business Opportunity and Products (Apr. 5, 2016), [https://truthinadvertising.org/wp-content/uploads/2016/04/Kyani-FTC-Complaint\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2016/04/Kyani-FTC-Complaint_Redacted.pdf); Letter from TINA.org to Idaho Att’y Gen Regarding Deceptive Marketing for Kyani Business Opportunity and Products (Apr. 5, 2016), [https://truthinadvertising.org/wp-content/uploads/2016/04/Kyani-Idaho-AG-Complaint\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2016/04/Kyani-Idaho-AG-Complaint_Redacted.pdf); Letter from TINA.org to FTC Regarding Deceptive Marketing by Jeunesse Business Opportunity and Products (Oct. 19, 2015), <https://truthinadvertising.org/wp-content/uploads/2015/10/10-19-15-Letter-from-TINA-to-FTC-re-Jeunesse.pdf>; Letter from TINA.org to Fla. Att’y Gen Regarding Deceptive Marketing by Jeunesse Business Opportunity and Products (Oct. 19, 2015), [https://truthinadvertising.org/wp-content/uploads/2015/10/10-19-15-Letter-from-TINA-to-FL-AG-re-Jeunesse\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2015/10/10-19-15-Letter-from-TINA-to-FL-AG-re-Jeunesse_Redacted.pdf); Letter from TINA.org to FTC Regarding Resorts360 Vacation Club Pyramid Scheme (May 15, 2013), <https://truthinadvertising.org/wp-content/uploads/2016/02/5.15.13-letter-to-FTC-pdf-unsigned.pdf>; Letter from TINA.org to Wash. Att’y Gen. Regarding Resorts360 Vacation Club Pyramid Scheme (May 15, 2013), <https://truthinadvertising.org/wp-content/uploads/2016/02/5.15.13-letter-to-Washington-AG-pdf-unsigned.pdf>; TINA.org’s 2020 FTC MLM Database, <https://truthinadvertising.org/evidence/2020-ftc-mlm-database/>. See also Plaintiff Federal Trade Commission’s Objections and Responses to Defendant Neora’s Second Set of Interrogatories at 4, *Fed. Trade Comm’n v. Neora, LLC*, No. 3:20-cv-1979 (N.D. Tex. Mar. 23, 2021) (“Interrogatory 7: Please identify all Persons ... who provided information or assistance to You in connection with any of the allegations or claims made in the Complaint... Objections and Answers: Laura Smith, Bonnie Patten, Truth in Advertising, Inc. ... (“TINA.org”), transmitted to Plaintiff’s counsel various documents including communications with or relating to Defendants, and other information about Defendants published on the website of TINA.org. These documents, including all documents relating to the transmittal of these documents, were included in Plaintiff’s document production to Defendants ... A representative of Truth in Advertising, Inc., also provided Plaintiff with a thumb drive containing some of the hundreds of recordings and documents found at <https://www.truthinadvertising.org/nerium-income-claims-database...>”)

<sup>25</sup> Letter from TINA.org to FTC Regarding Multilevel Marketing Companies Use of Deceptive Marketing (June 30, 2021), [https://truthinadvertising.org/wp-content/uploads/2021/06/6\\_30\\_21-ltr-to-FTC-re-penalty-offense-authority\\_MLM.pdf](https://truthinadvertising.org/wp-content/uploads/2021/06/6_30_21-ltr-to-FTC-re-penalty-offense-authority_MLM.pdf). TINA.org also sent a copy of this letter to the more than 660 MLM companies it identified and listed in Appendix A of the letter.

retain distributors, and urging the Commission to use its Penalty Offense Authority to fine Forever Living and send a message to the industry that this kind of deception will no longer be tolerated.<sup>26</sup>

In addition to tracking deceptive earnings claims in the MLM industry, TINA.org has also documented hundreds of atypical earnings claims used by various other entities to market their products and services, including, for example, online gaming platform Roblox<sup>27</sup> and investment newsletter conglomerate Agora.<sup>28</sup> In each of these instances, large corporations used a multitude of deceptive earnings claims to lure susceptible populations – minors and senior citizens, respectively – to their products and services despite prior FTC warnings.<sup>29</sup>

In short, while a majority of TINA.org’s data regarding atypical earnings is pulled from the direct selling industry, there is no doubt that this deceptive marketing tactic is widespread and significantly impacts a demographically diverse population of consumers.<sup>30</sup>

## REGULATORY BACKGROUND

In 1978, the FTC established a rule regulating the sale of franchises and business opportunity ventures.<sup>31</sup> This rule, subsequently referred to as the “Original Franchise Rule,”<sup>32</sup> was “promulgated in response to widespread evidence of deceptive and unfair practices” surrounding such sales,<sup>33</sup> including evidence of widespread “misrepresentations and failure to disclose material facts.”<sup>34</sup> Those misrepresentations often included unfounded “‘get rich quick’ claims”<sup>35</sup> and “[u]nsubstantiated and atypical claims of profitability ... [including] deceptively glowing earnings projections or forecasts to prospective franchisees without

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<sup>26</sup> Letter from TINA.org to FTC Regarding Deceptive Marketing by Forever Living Despite Notices of Penalty Offenses (May 4, 2022), [https://truthinadvertising.org/wp-content/uploads/2021/12/5\\_4\\_22-ltr-from-TINA-to-FTC-re-Forever-Living\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2021/12/5_4_22-ltr-from-TINA-to-FTC-re-Forever-Living_Redacted.pdf).

<sup>27</sup> TINA.org’s Roblox Investigation, <https://truthinadvertising.org/brands/roblox/>.

<sup>28</sup> TINA.org’s Agora (Monument & Cathedral Holdings) Investigation, <https://truthinadvertising.org/brands/agora/>.

<sup>29</sup> See Notice from the FTC Regarding Penalty Offenses Concerning Deceptive or Unfair Conduct Around Endorsements and Testimonials, [https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/notice-penalty\\_offenses-endorsements.pdf](https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/notice-penalty_offenses-endorsements.pdf); List of October 2021 Recipients of the FTC’s Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct Around Endorsements and Testimonials (updated Oct. 21, 2021), <https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/list-recipients-endorsement-notice.pdf>; Stipulated Order for Permanent Injunction and Monetary Judgment, *Fed. Trade Comm’n v. Agora Fin., LLC*, No. 1:19-cv-3100 (D. Md. Feb. 8, 2021), [https://www.ftc.gov/system/files/documents/cases/de\\_62\\_-\\_stipulated\\_order\\_for\\_permanent\\_injunction\\_and\\_monetary\\_judgment\\_1.pdf](https://www.ftc.gov/system/files/documents/cases/de_62_-_stipulated_order_for_permanent_injunction_and_monetary_judgment_1.pdf).

<sup>30</sup> Letter from TINA.org to FTC Regarding Violations of Stipulated Order in *FTC v. Agora Financial, LLC et al.*, Case No. 19-cv-03100, D. Md. (June 16, 2021), [https://truthinadvertising.org/wp-content/uploads/2021/06/6\\_16\\_21-ltr-to-FTC-re-Agora-Order-Violations\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2021/06/6_16_21-ltr-to-FTC-re-Agora-Order-Violations_Redacted.pdf); Letter from Truth In Advertising to FTC Regarding Deceptive Marketing on Roblox (Apr. 19, 2022), [https://truthinadvertising.org/wp-content/uploads/2022/04/4\\_19\\_22-Complaint-to-FTC-re-Roblox.pdf](https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf).

<sup>31</sup> Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59614 (Dec. 21, 1978).

<sup>32</sup> *Id.*

<sup>33</sup> Disclosure Requirements, 43 Fed. Reg. at 59614.

<sup>34</sup> *Id.* at 59627.

<sup>35</sup> *Id.* at 59625-6.



having information which constituted reasonable basis in fact for making such claims.”<sup>36</sup> The Commission noted “the potential for serious economic injury as a result of concealment or misrepresentation of the material terms of the franchise business.”<sup>37</sup>

To remedy such abuses, the Rule required sellers of franchises and other business opportunity ventures to furnish certain disclosures to prospective buyers within a specified time frame, and regulated the earnings claims they could make to prospective buyers.<sup>38</sup> The emphasis on disclosures and preventing misrepresentations was an attempt to mitigate the “serious informational imbalance ... between prospective franchisees and their franchisors,”<sup>39</sup> resulting from the fact that there is often “simply no source other than the franchisor for much of the information necessary to make an informed investment decision”<sup>40</sup> and the “low level of business sophistication” of many prospective franchisees.<sup>41</sup>

An extensive review of the Franchise Rule, beginning in 1995,<sup>42</sup> confirmed that disclosure requirements were needed for sales of many kinds of business opportunities, because sales of “many business opportunities are permeated with fraud,” most frequently with regard to false or unsubstantiated earnings claims;<sup>43</sup> that “fraud is not only prevalent but persistent” in the business opportunity industry;<sup>44</sup> that sales of some types of business opportunities are “fraught with unfair and deceptive practices, in particular, false or unsubstantiated earnings claims”;<sup>45</sup> and that such practices are “widespread.”<sup>46</sup>

At the same time, the Commission found that franchises and other business opportunities are sufficiently different as to make different disclosure requirements appropriate.<sup>47</sup> Because most business opportunities are less expensive than franchises and involve relatively simple purchase agreements,<sup>48</sup> the Commission decided that some of the disclosures required of franchisors would impose unnecessary costs on business opportunity sellers and buyers.<sup>49</sup> Accordingly, a separate Business Opportunity Rule (“BOR”) was proposed in 2006,<sup>50</sup> which broadened the scope of business opportunities covered, but streamlined the disclosures required.<sup>51</sup> The initial proposed version of the BOR explicitly applied to MLMs, among other business opportunities.<sup>52</sup>

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<sup>36</sup> *Id.* at 59631.

<sup>37</sup> *Id.* at 59626.

<sup>38</sup> *Id.* at 59614.

<sup>39</sup> *Id.* at 59625.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Request for Comments Concerning Trade Regulation Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 60 Fed. Reg. 17656 (April 7, 1995).

<sup>43</sup> Business Opportunity Rule, 71 Fed. Reg. 19054, 19057 (proposed April 12, 2006).

<sup>44</sup> Business Opportunity Rule, 73 Fed. Reg. 16110, 16112 (proposed Mar. 26, 2008).

<sup>45</sup> Business Opportunity Rule, 76 Fed. Reg. at 76821.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 76817.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Business Opportunity Rule, 71 Fed. Reg. 19054.

<sup>51</sup> Business Opportunity Rule, 76 Fed. Reg. at 76820.

<sup>52</sup> Business Opportunity Rule, 71 Fed. Reg. at 19080.

However, the direct selling industry quickly responded with a campaign against including MLMs in the scope of the Rule. Intensive lobbying by the DSA and large political contributions by MLMs coincided with 81 members of Congress writing letters urging the FTC not to apply the BOR to MLMs.<sup>53</sup> Meanwhile, the industry orchestrated a barrage of comments to the FTC opposing regulation of MLMs, such that the Commission noted: “The record in this proceeding to date is largely comprised of thousands of letters from ... MLM distributors.”<sup>54</sup> In all, the Commission “received more than 17,000 comments. The overwhelming majority of these comments came from the multilevel marketing (‘MLM’) industry, including industry representatives, companies, and individual distributors.”<sup>55</sup> Thousands of the comments were simply form letters from distributors, solicited by their MLMs.<sup>56</sup> Thousands more followed the templates of industry form letters.<sup>57</sup>

The MLM industry campaign was successful – in 2008, the proposed rule was amended so that MLMs for the most part were not covered;<sup>58</sup> this version of the rule was finalized in 2011,<sup>59</sup> and remains in effect. The justifications offered for the amendment were largely based on the uncritical acceptance of industry comments. While the Commission acknowledged that “some MLMs engage in unfair or deceptive acts or practices ... includ[ing] operation of pyramid schemes and false or unsubstantiated earnings claims,” and that “[i]t is beyond a doubt that where they occur, these practices cause significant consumer harm,”<sup>60</sup> it nevertheless concluded that it could not determine “whether such deceptive practices are prevalent.”<sup>61</sup> Thus, the FTC chose to rely instead on law enforcement actions targeting particular instances of deceptive and unfair conduct within the MLM industry.<sup>62</sup>

Since the current version of the BOR was finalized in 2011, the FTC has brought eight cases against MLMs alleging that they were operating illegal pyramid schemes – each case also

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<sup>53</sup> Matt Stroud, *How Lobbying Dollars Prop Up Pyramid Schemes*, The Verge, Apr. 8, 2014), <https://www.theverge.com/2014/4/8/5590550/alleged-pyramid-schemes-lobbying-ftc> (noting spike of campaign contributions by various MLMs in 2006-2008, as revisions to the BOR were being debated)

<sup>54</sup> Business Opportunity Rule, 73 Fed. Reg. at 16118.

<sup>55</sup> *Id.* at 16113.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at n.36. A subsequent survey by nonprofit researchers found that many of the distributors who submitted comments against covering MLMs had been misled about the Rule by their companies, and – after the Rule was explained to them – were not actually opposed. Jon M. Taylor, *Regulatory Capture – The FTC’s Flawed Business Opportunity Rule*, at 46 (2014), [https://centerforinquiry.org/wp-content/uploads/sites/33/quackwatch/regulatory\\_capture.pdf](https://centerforinquiry.org/wp-content/uploads/sites/33/quackwatch/regulatory_capture.pdf). The survey found that some companies even submitted comments in the names of distributors who had declined to submit the form letters, essentially forging their comments. Jon M. Taylor, *Regulatory Capture – The FTC’s Flawed Business Opportunity Rule*, at 46 (2014), [https://centerforinquiry.org/wp-content/uploads/sites/33/quackwatch/regulatory\\_capture.pdf](https://centerforinquiry.org/wp-content/uploads/sites/33/quackwatch/regulatory_capture.pdf).

<sup>58</sup> Business Opportunity Rule, 73 Fed. Reg. 16110. MLMs were not categorically exempted from coverage, but the definition of a “business opportunity” was modified with the intention and consequence of not applying to most MLM business opportunities. Business Opportunity Rule, 76 Fed. Reg. at 76824 n.91.

<sup>59</sup> Business Opportunity Rule, 76 Fed. Reg. at 76816.

<sup>60</sup> Business Opportunity Rule, 73 Fed. Reg. at 16119.

<sup>61</sup> *Id.* at 16121.

<sup>62</sup> Business Opportunity Rule, 76 Fed. Reg. at 76823.

alleging false earnings claims<sup>63</sup> – as well as two cases alleging only deceptive earnings claims.<sup>64</sup> Those cases sought disgorgement and restitution under Section 13(b) of the FTC Act.<sup>65</sup> However, the U.S. Supreme Court has recently held in *AMG Capital Management*<sup>66</sup> that Section 13(b) does not authorize monetary relief, leaving uncertain the path forward for targeted enforcement actions and victim redress in FTC cases against MLM companies.

Moreover, in the intervening years since the BOR was implemented, it has become abundantly clear that deceptive earnings claims are commonly used by the direct selling industry to recruit and retain distributors,<sup>67</sup> and that federal, state and industry actions have been ineffective at deterring MLM companies from using these atypical earnings representations.<sup>68</sup>

TINA.org has identified more than 11,000 examples of MLM companies and their distributors using atypical income representations in their marketing material, reached out to more than 140 direct selling companies asking them to stop violating the law, and urged compliance with the law at several industry conferences.<sup>69</sup> Such actions have not persuaded the industry to mend its ways.

By way of example, and as mentioned above, TINA.org recently filed a complaint with the FTC regarding Forever Living after identifying more than 5,500 deceptive and atypical income claims, all made directly by the company and its high-level executives.<sup>70</sup> All of these income claims, including claims of earning a full-time income, achieving financial freedom, traveling the world, quitting one's job and providing for one's family during a pandemic, exist on the internet after the company received notice of the law concerning earnings claims by the

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<sup>63</sup> *FTC Pyramid Cases Post-Amway*, Truth In Advertising, Sept. 18, 2015 (last updated Oct. 14, 2021), <https://truthinadvertising.org/articles/ftc-pyramid-cases-by-the-numbers/>. (The FTC has brought a total of 31 such cases since its pivotal case against Amway. *In re Amway Corp.*, 93 F.T.C. 618 (1979).).

<sup>64</sup> Complaint for Permanent Injunction and Other Equitable Relief, *Fed. Trade Comm'n v. MOBE Ltd.*, No. 6:18-cv-862 (M.D. Fla. June 4, 2018),

[https://www.ftc.gov/system/files/documents/cases/mobe\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/mobe_complaint.pdf); Complaint for Permanent Injunction and Other Equitable Relief, *Fed. Trade Comm'n v. Digital Altitude LLC*, No. 2:18-cv-00729 (C.D. Cal. Jan. 9, 2018), [https://www.ftc.gov/system/files/documents/cases/digital\\_altitude\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/digital_altitude_complaint.pdf).

<sup>65</sup> 15 U.S.C. § 53(b). See also Rohit Chopra et al., *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 Univ. of Pa. L. Rev. at 73 (2021) ("Section 13(b) is the primary means by which the [FTC] brings enforcement actions.").

<sup>66</sup> *AMG Capital Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341 (2021).

<sup>67</sup> TINA.org investigations and databases, *supra* note 11.

<sup>68</sup> See, e.g., Truth In Advertising's 2020 FTC MLM Database, <https://truthinadvertising.org/evidence/2020-ftc-mlm-database/>; Letter from TINA.org to Joseph Kanada and Breana Roos, Assistant Att'ys Gen., State of Wash., Consumer Prot. Div. (Apr. 2, 2021), [https://truthinadvertising.org/wp-content/uploads/2021/04/State-of-Washington-v.-LLR-Inc.-et-al\\_Violations-of-Consent-Decree.pdf](https://truthinadvertising.org/wp-content/uploads/2021/04/State-of-Washington-v.-LLR-Inc.-et-al_Violations-of-Consent-Decree.pdf); Rohit Chopra et al., *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 Univ. of Pa. L. Rev. 71 (2021).

<sup>69</sup> TINA.org letters, *supra* note 21. See also Bonnie Patten of TINA.org Returns to the Summit, Jan. 18, 2018 in Austin Texas, Direct Selling Legal & Compliance Summit, Oct. 26, 2017, <https://dslsummit.org/2017/10/26/bonnie-patten-of-tina-org-returns-to-the-summit-jan-18-2018-in-austin-texas/>.

<sup>70</sup> Letter from TINA.org to FTC Regarding Deceptive Marketing by Forever Living Despite Notices of Penalty Offenses (May 4, 2022), [https://truthinadvertising.org/wp-content/uploads/2021/12/5\\_4\\_22-ltr-from-TINA-to-FTC-re-Forever-Living\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2021/12/5_4_22-ltr-from-TINA-to-FTC-re-Forever-Living_Redacted.pdf).

FTC, and after the company urged the Commission in 2006 to forego the BOR in favor of “the type of procedural safeguards companies like [Forever Living] have implemented.”<sup>71</sup>

As the narrative above recounts, for far too long the Commission pandered to the interests of the direct selling industry at the expense of vulnerable and susceptible consumers who were struggling to make ends meet. To fulfill its mission and protect consumers, the FTC needs to right its wrong and initiate a rulemaking to address deceptive and unfair marketing using earnings claims.

### **PROSPECTIVE MLM RECRUITS LACK INFORMATION ABOUT TYPICAL EARNINGS**

A “serious informational imbalance”<sup>72</sup> exists between prospective distributors, who often lack business sophistication and cannot in general obtain information about typical MLM earnings, expenses or workload,<sup>73</sup> and the majority of MLM companies that either do not disclose such information, or worse, provide misleading and/or deceptive information. Prospective distributors are often recruited through earnings claims lacking any “reasonable basis,”<sup>74</sup> “high pressure tactics”<sup>75</sup> and “failure to disclose material facts.”<sup>76</sup> MLM distributors face the “potential for serious economic injury as a result of concealment or misrepresentation of the material terms of the ... business”<sup>77</sup> – many distributors do not just fail to earn money, but actually lose significant sums.

Information about earnings is indisputably material to people considering distributing for an MLM: “[E]arnings claims are highly material to consumers in making their investment decisions and typically are the single most decisive factor in such decisions.”<sup>78</sup> “[W]hether

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<sup>71</sup> *Id.*; Letter from Forever Living Products to FTC Regarding Business Opportunity Rule, R511993 (May 31, 2006), [https://truthinadvertising.org/wp-content/uploads/2022/04/5\\_31\\_06-ltr-from-FL-to-FTC.pdf](https://truthinadvertising.org/wp-content/uploads/2022/04/5_31_06-ltr-from-FL-to-FTC.pdf) (“Please understand that we agree with the purpose behind the FTC proposed rule. ... We believe, however, that a better solution is to encourage or mandate the type of procedural safeguards companies like FLP have implemented over the past several decades, rather than the well intentioned but unworkable rules discussed in this letter.”).

<sup>72</sup> Disclosure Requirements, 43 Fed. Reg. at 59625.

<sup>73</sup> *Cf. id.*

<sup>74</sup> *Id.* at 59631.

<sup>75</sup> *Id.* at 59627.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 59626.

<sup>78</sup> Business Opportunity Rule, 76 Fed. Reg. at 76827; *see also* Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Keynote Remarks of FTC Chairwoman Ramirez at DSA Business & Policy Conference, at 2 (Oct. 25, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/993473/ramirez\\_-\\_dsa\\_speech\\_10-25-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/993473/ramirez_-_dsa_speech_10-25-16.pdf) (with respect to MLMs, “[e]arnings claims, regardless of whether they are express or implied, are highly relevant to consumers in making their investment decisions. In fact, we find that earnings claims are often the single most decisive factor in those choices. So it should be no surprise that the FTC takes earnings misrepresentations very seriously”); Direct Selling Ass’n, *In Direct Selling, Success is Different for Different People* (2019), [https://www.dsa.org/docs/default-source/research/dsa-2019successisdifferentfactsheet.pdf?sfvrsn=e261c0a5\\_2%27http://%27](https://www.dsa.org/docs/default-source/research/dsa-2019successisdifferentfactsheet.pdf?sfvrsn=e261c0a5_2%27http://%27) (showing that nearly half of consumers who join a direct selling company do so for long-term supplemental income); Robert A. Peterson, *Professional and Personal Benefits of a Direct Selling Experience*, at 2, <https://3vcm07307bnr2jg8679q77x8-wpengine.netdna-ssl.com/wp-content/uploads/2018/07/Professional-Personal-Benefits-Report.pdf> (showing that more than half of men and



other purchasers have actually achieved earnings as the seller represents” is “a highly material fact.”<sup>79</sup> However, prospective MLM recruits can only obtain this highly material information from the direct selling companies themselves. In this context “information asymmetry is expected as MLM firms have data on the distribution of past distributor income and expenses but may choose not to reveal that data, in whole or part, to the prospective distributor.”<sup>80</sup> Thus “recruits make decisions in the context of uncertainty and information asymmetry as MLM firms are not required to disclose current and former distributors’ typical earnings or expenses.”<sup>81</sup> Consequently, when MLM companies “mislead prospective participants about the odds of success, ... those prospects have little other information to use.”<sup>82</sup>

Unfortunately, the vast majority of MLMs never disclose accurate earnings information, opting instead to mislead consumers with representations of easily achievable financial success. As of 2017, TINA.org found income disclosure statements available for only 32 of 140 DSA member companies.<sup>83</sup> And of the five largest MLMs, only one provided an income disclosure statement for the United States as of 2017.<sup>84</sup>

Moreover, when MLMs do provide earnings information, it is often not sufficiently “full[] or accurate[] ... to allow for proper adjustment of expectations.”<sup>85</sup> For example, disclosures may be too complicated for most prospects to digest; they do not provide information about expected expenses, nor even make clear that there will be expenses to be considered; they may emphasize atypical earnings of top distributors; or key information may be omitted or relegated to fine print.<sup>86</sup>

Instead of providing information that would allow prospective distributors to realistically appraise earnings potential, MLMs, like the franchises that motivated the Original Franchise Rule, seek to recruit participants with “get rich claims”<sup>87</sup> and other unfounded earnings

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approximately one third of women who join a direct selling company do so because they want a “full-time direct selling job.”).

<sup>79</sup> Business Opportunity Rule, 76 Fed. Reg. at 76827.

<sup>80</sup> Stacie A. Bosley et al., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 Econ. Inquiry 1643, 1644 (2019), <https://onlinelibrary.wiley.com/doi/10.1111/ecin.12840>.

<sup>81</sup> Marguerite DeLiema et al., *Multi-Level Marketing as “Gig” Work: Worker Motivations, Characteristics, and Outcomes in the U.S.*, 25 J. of Lab. and Soc’y 83 (2021).

<sup>82</sup> Andrew Stivers, *The Alchemy of a Pyramid: Transmutating Business Opportunity Into a Negative Sum Wealth Transfer*, at 8 (2019), *Opportunity Into a Negative Sum Wealth Transfer*, 2 (Dec. 3, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3497682](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3497682).

<sup>83</sup> *Multilevel Marketing: The Day Job that Doesn’t Pay*, Truth In Advertising, Dec. 18, 2017, <https://www.truthinadvertising.org/mlm-income-claims-investigation>.

<sup>84</sup> Stacie A. Bosley et al., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 Econ. Inquiry at 1645 n.3.

<sup>85</sup> *Id.*

<sup>86</sup> Stacie A. Bosley et al., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 Econ. Inquiry at 1657-8; see also William Keep, *Do MLM Earnings Statements Constitute Deceptive Advertising?*, Truth In Advertising, Feb. 29, 2016, <https://truthinadvertising.org/blog/mlm-earnings-statements-constitute-deceptive-advertising/>; Bonnie Patten, *Jeunesse Income Disclosure Raises More Questions than Answers*, Truth In Advertising, Nov. 10, 2015, <https://truthinadvertising.org/blog/jeunesse-income-disclosure-raises-more-questions-than-answers/>.

<sup>87</sup> Disclosure Requirements, 43 Fed. Reg. at 59625.

claims, such as “a monthly earning potential of \$1,000,000”;<sup>88</sup> “Unlimited Income Potential”;<sup>89</sup> or “[If] you want to make over \$1 million a year, you can do that.”<sup>90</sup>



The informational imbalance is compounded by the lack of business sophistication and financial desperation of many prospective MLM distributors. A 2019 study found, for example, that greater numerical literacy and understanding of the concept of “expected value” were correlated with reduced interest in MLM participation,<sup>91</sup> while an AARP survey found that factors positively correlated with joining an MLM included single parenthood, low household income, and a recent bankruptcy filing, layoff or other negative life event,<sup>92</sup> which supports the assertion that “[o]ften, the poor and less formally educated are targeted by multilevel marketing.”<sup>93</sup> According to a civil complaint filed by distributors against the clothing MLM LuLaRoe, when recruiting distributors, the company “targeted women ... [with] a lack of formal business or finance training.”<sup>94</sup>

To make rational decisions about MLM participation, potential distributors need accurate information about what they can reasonably expect to earn, and that information needs to be presented in a way that is easily understood. As explained by Commissioner Phillips, in order not to be misleading, earnings claims need to factor in expenses rather than state gross income, and need to reflect typical earnings, not mean earnings – which may be significantly

<sup>88</sup>MyDailyChoice, Inc. DBA HempWorx, Direct Selling Self-Regulatory Council Case No. 9-2020, <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-9-2020-monitoring-inquiry-mydailychoice-inc.-dba-hempworx>.

<sup>89</sup>It Works!, Direct Selling Self-Regulatory Council Case No. 7-2019, <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-7-2019--monitoring-inquiry--it-works!>

<sup>90</sup>Letter from Fed. Trade Comm’n to Tranont (Apr. 24, 2020), [https://www.ftc.gov/system/files/warning-letters/covid-19-letter\\_to\\_tranont.pdf](https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_tranont.pdf).

<sup>91</sup>Stacie A. Bosley et al., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 Econ. Inquiry at 1646.

<sup>92</sup>See DeLiema, *supra* note 9; see also Sara Silverstein et al., *People Who Sell For Multilevel Marketing Companies Look Wildly Successful on Facebook, But the Reality Is Much More Complicated*, Business Insider (Aug. 6, 2019) (per U. C. Berkeley Professor of Business, MLM recruiting aims at “people who are at vulnerable places in their lives – perhaps someone who’s in a lot of debt, just had a baby, or lost a job”), [https://www.dsa.org/docs/default-source/research/dsa\\_2017\\_factsanddata\\_2018.pdf](https://www.dsa.org/docs/default-source/research/dsa_2017_factsanddata_2018.pdf).

<sup>93</sup>Casey Bond, *MLMs Are A Nightmare For Women And Everyone They Know*, HuffPost, June 27, 2019 (updated Jan. 29, 2021), [https://www.huffpost.com/entry/mlm-pyramid-scheme-target-women-financial-freedom\\_1\\_5d0bfd60e4b07ae90d9a6a9e](https://www.huffpost.com/entry/mlm-pyramid-scheme-target-women-financial-freedom_1_5d0bfd60e4b07ae90d9a6a9e) (quoting business reporter); see also Annie Blackman, *Regulating the Reluctant: Policies That Benefit Vulnerable Participants in Multi-Level Marketing*, 25 UNIV. PA. J. L. & SOC. CHANGE at 94-98 (noting that MLM recruiting often targets immigrants, Latinos, religious communities, new mothers, and other susceptible populations); Casey Bond, *10 Horror Stories That Prove MLM Companies Are Complete Trash*, HuffPost, Oct. 4, 2019 (updated Oct. 22, 2019), [https://www.huffpost.com/entry/mlm-horror-stories\\_1\\_5d952097e4b0da7f66211f35](https://www.huffpost.com/entry/mlm-horror-stories_1_5d952097e4b0da7f66211f35) (quoting former BossBabe distributor: “These companies have really targeted these low-income ... and very sheltered women”).

<sup>94</sup>Complaint at 6, *Hibbard v. LuLaRoe, LLC*, No. 34-2019-00270087 (Sup. Ct. of Cal. Nov. 27, 2019).

higher than typical earnings because of outlier high earners.<sup>95</sup> MLMs are not providing this type of information to potential recruits. Instead, the vast majority of MLMs are hiding the economic realities of joining their organizations in favor of presenting potential recruits and low-level distributors with atypical and unsubstantiated earnings claims.

### Deceptive Earnings Claims are Nearly Universal in the MLM Industry

In the years since 2008, when the Commission declared that it was difficult to gauge the prevalence of false or unsubstantiated earnings claims made by MLMs, the question has been decisively answered. “The problem of false earnings claims is widespread.”<sup>96</sup> In fact, TINA.org has found that they are nearly universal.<sup>97</sup> In many cases the impact of these claims is compounded by manipulative tactics used to pressure new recruits into signing contracts to represent MLMs and to incur expenses that they are likely to quickly regret.<sup>98</sup>



After investigating the marketing of every DSA member company as of November 2017,<sup>99</sup> TINA.org found that 137 out of 140 – more than 97 percent – were making or

<sup>95</sup> Noah Phillips, Comm’r, Fed. Trade Comm’n, Keynote Address to the College of New Jersey School of Business: Multilevel Marketing: The Consumer Protection Challenge, at 3-4 (Apr. 30, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1589560/phillips-mlm-keynote-tenj.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589560/phillips-mlm-keynote-tenj.pdf); see also Peter Vander Nat et al., *MLM Income Disclosures: When Average Does Not Equal Typical*, Truth In Advertising, Sept. 9, 2020, <https://truthinadvertising.org/blog/mlm-income-disclosures-when-average-does-not-equal-typical/>.

<sup>96</sup> Rohit Chopra et al., *The Case for Resurrecting the FTC Act’s Penalty Offense Authority*, 170 Univ. of Pa. L. Rev. at 108.

<sup>97</sup> TINA.org investigations and databases, *supra* note 11.

<sup>98</sup> In a survey of more than 1,000 individual MLM participants, more than 22 percent admitted that they had lied about their earnings. (Of course, a larger proportion may have actually done so.) Brittney Laryea, *Survey: Vast Majority of Multilevel Marketing Participants Earn Less Than 70 Cents an Hour*, Magnify Money (Sept. 17, 2018), <https://www.magnifymoney.com/blog/news/survey-vast-majority-multilevel-marketing-participants-earn-less-70-cents-hour/>.

<sup>99</sup> “DSA estimates that the sales made by its members account for more than 80 percent of all direct sales in the United States ....” Direct Selling Association, Frequently Asked Questions, <https://www.dsa.org/about/faq> (last visited May 8, 2022).

had made false or unsubstantiated earnings claims to entice prospective distributors into their MLM network.<sup>100</sup> Since then, TINA.org has continued to collect thousands of examples of DSA-member companies and others violating advertising laws with false and misleading income representations.<sup>101</sup> Indeed, grossly inflated earnings representations appear to be central to MLM promotional outreach. Among the most common are references to making unlimited income while staying home with one's children, achieving "financial freedom" or being able to quit one's job.<sup>102</sup> Typical earnings claims include:

- "Full time mommy, part time Pure Romance consultant making full time income!"<sup>103</sup>
- "Unlimited Income Potential"<sup>104</sup>
- "We have been able to put [our daughter] through 4 years of college ... with no college debt.... It breaks my heart to see families struggling ... financially, especially when we have such an amazing and LIFE CHANGING SOLUTION"<sup>105</sup>
- "Not every investment can bring financial freedom. But Paparazzi can!"<sup>106</sup>
- "We give you the means to achieve an extraordinary level of success"<sup>107</sup>
- "Enjoy unlimited earning potential"<sup>108</sup>
- "[Y]ou all have an opportunity to serve your community by offering them ... even in Covid-19 ... a business opportunity that affords people to replace much needed

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<sup>100</sup> *Multilevel Marketing: The Day Job That Doesn't Pay*, Truth In Advertising, Dec. 18, 2020, <https://truthinadvertising.org/articles/mlm-income-claims-investigation/>; Truth In Advertising's DSA Companies' Income Claims Investigation, <https://truthinadvertising.org/industries/mlm-income/>; see also Truth In Advertising, *Multilevel Marketing Income Claims: Don't Quit Your Day Job*, YouTube (Dec. 18, 2017), <https://www.youtube.com/watch?v=Z75TSCBiqQQ>. (video compiling numerous misleading earnings claims by MLM representatives).

<sup>101</sup> See, e.g. TINA.org's Forever Living Income Claims Database, <https://truthinadvertising.org/evidence/2022-forever-living-income-claims-database/>; TINA.org's USANA Income Claims Database, <https://truthinadvertising.org/evidence/usana-income-claims-database/>; TINA.org's Market America Income Claims Database, <https://truthinadvertising.org/evidence/market-america-database/>; TINA.org's Mary Kay Income Claims – 2021 Collection, <https://truthinadvertising.org/evidence/mary-kay-income-claims/>; TINA.org's Primerica Income Claims Database, <https://www.truthinadvertising.org/primerica-income-claims-database/>; TINA.org's Team Nat'l Income Claims Database, <https://www.truthinadvertising.org/team-national-income-claims-database/>.

<sup>102</sup> *Multilevel Marketing: The Day Job That Doesn't Pay*, Truth In Advertising, Dec. 18, 2017, <https://truthinadvertising.org/articles/mlm-income-claims-investigation/>; TINA.org's DSA Companies' Income Claims Database, <https://truthinadvertising.org/industries/mlm-income/>.

<sup>103</sup> Pure Romance, LLC, DSSRC Case No. 20-2020, <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-20-2020-compliance-pure-romance-llc>.

<sup>104</sup> It Works!, DSSRC Case No. 7-2019, <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-7-2019--monitoring-inquiry--it-works!>

<sup>105</sup> Letter from FTC to Isagenix International LLC (June 5, 2020), [https://www.ftc.gov/system/files/warning-letters/covid-19-letter\\_to\\_isagenix.pdf](https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_isagenix.pdf).

<sup>106</sup> Paparazzi Accessories, LLC, DSSRC Case No. 14-2020, <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-14-2020-monitoring-inquiry-paparazzi-accessories-llc>.

<sup>107</sup> Aloe Veritas, Inc., DSSRC Case No. 5-2019, <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-number-5-2019>.

<sup>108</sup> Magnolia and Vine, DSSRC Case No. 10-2020, <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-10-2020-monitoring-inquiry-magnolia-and-vine>.



income in a time where so many people are losing their jobs and being furloughed.”<sup>109</sup>

Still more extravagant claims are quite common:

- “[W]e are one of the only companies in the world that has a monthly earning potential of \$1,000,000”<sup>110</sup>
- “Whether you want to make an extra \$600 a month, an extra \$10,000 a month, or you want to make over \$1 million a year, you can do that”<sup>111</sup>
- “[T]he possibilities are endless, I have met those who make \$22,000/month”<sup>112</sup>
- “[I]’ve ... been able to create a very lucrative business that helps me literally live life on my terms. I live in a ... million-dollar house. I’m driving a Tesla.”<sup>113</sup>

MLMs and their distributors also often post images of lavish lifestyles,<sup>114</sup> or of large checks or piles of cash to convince recruits to sign up for the business opportunity.<sup>115</sup>



<sup>109</sup> *The Ugly Truth about Beautycounter*, Truth In Advertising (Jul. 17, 2020), <https://truthinadvertising.org/articles/the-ugly-truth-about-beautycounter/>.

<sup>110</sup> MyDailyChoice, Inc. DBA HempWorx, DSSRC Case No. 9-2020, <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-9-2020-monitoring-inquiry-mydailychoice-inc.-dba-hempworx>.

<sup>111</sup> Letter from FTC to Tranont (Apr. 24, 2020), [https://www.ftc.gov/system/files/warning-letters/covid-19-letter\\_to\\_tranont.pdf](https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_tranont.pdf).

<sup>112</sup> Letter from FTC to Arbonne Int'l, LLC (Apr. 24, 2020), [https://www.ftc.gov/system/files/warning-letters/covid-19-letter to arbonne international llc.pdf](https://www.ftc.gov/system/files/warning-letters/covid-19-letter%20to%20arbonne%20international%20llc.pdf).

<sup>113</sup> Letter from FTC to Pruvit Ventures, Inc. (Apr. 24, 2020), [https://www.ftc.gov/system/files/warning-letters/covid-19-letter\\_to\\_pruvit\\_ventures\\_inc.pdf](https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_pruvit_ventures_inc.pdf).

<sup>114</sup> Bonnie Patten, *Deceptive Income Claims – How Not to Market Your MLM Business*, Truth In Advertising, Sept. 14, 2020, <https://www.truthinadvertising.org/deceptive-income-claims-how-not-to-market-your-mlm-business>; see also, e.g., Direct Selling Self-Regulatory Council Administrative Closure #10, <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/dssrc-administrative-closure-10> (references to luxury automobiles).

<sup>115</sup> See, e.g., *Forever Living's Neverending Deceptive Income Claims*, Truth In Advertising, May 4, 2022, <https://truthinadvertising.org/articles/forever-livings-neverending-deceptive-income-claims/>; Direct Selling Self-Regulatory Council Administrative Closure #6, <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/dssrc-administrative-closure-6> (photograph of over-sized check for more than \$175,000).

## Disclosures Cannot Remedy Deceptive Marketing Involving Atypical Earnings Claims in the Direct Selling Industry

As a matter of law, a disclosure cannot be used as cover for a false earnings claim. The FTC has explained that, “[a] disclosure can only qualify or limit a claim to avoid a misleading impression. It cannot cure a false claim. If a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive. In that situation, the claim itself must be modified.”<sup>116</sup> As such, in all those instances in which the typical MLM distributor earns (nets) nothing with a company, marketing the MLM business opportunity for that company with atypical income claims is false and cannot be cured with a disclosure.

Moreover, when MLM companies do attempt to cure atypical earnings claims with disclosures, it does not work for a variety of reasons.<sup>117</sup> First, research has found that income disclosure statements can actually increase income expectations by providing

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<sup>116</sup> FTC’s *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, at 5 (Mar. 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. As the FTC has repeatedly noted, “what the headline giveth, the fine print cannot taketh away.” See Lesley Fair, *Full Disclosure*, Fed. Trade Comm’n: Business Blog (Sept. 23, 2014), <https://www.ftc.gov/business-guidance/blog/2014/09/full-disclosure>.

<sup>117</sup> As the District Court explained in its Preliminary Injunction ruling against Vemma:

a material omission as to income potential, such as a failure to disclose that the structure of a program ensures that the vast majority of consumers cannot achieve substantial income, is deceptive under the FTC Act. The “common-sense net impression” of representations controls. Thus, representations may be misleading despite the use of a disclaimer such as “results may vary” if the consumer may reasonably believe that a statement of unusual earning potential represents typical earnings.

Order at 10, *Fed. Trade Comm’n v. Vemma Nutrition Co.*, No. 2:15-cv-1578 (D. Ariz. Sept. 18, 2015), <https://www.ftc.gov/system/files/documents/cases/150924vemmaproceedings.pdf>.

The Court also found Vemma’s distributor income disclosure statement lacking. A high-level Vemma distributor argued that his training booklet, which contained earnings claims, was not misleading or deceptive because it contained the Vemma income disclosure. The Court disagreed stating:

But the income chart included in the revised Roadmap to Success is both misleading and difficult for a reasonable consumer to understand, and it does not suffice as a means to inform consumers of their likely income as Vemma Affiliates.

Order at 12, *Fed. Trade Comm’n v. Vemma Nutrition Co.*, No. 2:15-cv-1578 (D. Ariz. Sept. 18, 2015), <https://www.ftc.gov/system/files/documents/cases/150924vemmaproceedings.pdf>. See also Stacie Bosley et al., *Income Disclosure and Consumer Judgment in a Multi-level Marketing Experiment*, J. Consumer Aff. (under review) (“we find no significant effect of income disclosure on subjects’ interest in the MLM opportunity, on average.”); William Keep, *Do MLM Earnings Statements Constitute Deceptive Advertising?*, Truth In Advertising, Feb. 29, 2016, <https://truthinadvertising.org/blog/mlm-earnings-statements-constitute-deceptive-advertising/> (“[D]espite the availability of the data, MLM earnings statements fail to provide the information needed for a prospective distributor to assess the probability of a successful business venture.”).

concrete numbers for the outliers, i.e., the highest earners in the MLM company.<sup>118</sup> Second, disclosure statements can be so complicated that consumers are discouraged from reading them at all.<sup>119</sup> Third, disclosure statements frequently cherry-pick which information to disclose by, for example, omitting the percentage of distributors who do not earn any money<sup>120</sup> or providing only average earnings as opposed to a full breakdown of all earnings, thereby skewing the data to the company's advantage.<sup>121</sup> Fourth, disclosures frequently do not include expenses incurred by distributors but rather only provide gross earnings, thereby inflating the earnings data.<sup>122</sup> Finally, relevant research has identified "some concern that some individuals, when provided with income disclosure, might interpret the document as indication of approval by some regulatory agency rather than using the information to inform their personal expectations."<sup>123</sup>

In fact, disclosures in general are so ineffective that even in the healthcare industry, where consumers' lives, rather than their wallets, may be at stake, disclosures of drug risks do not alter consumer behavior or understanding.<sup>124</sup>

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<sup>118</sup> Stacie A. Bosley et al., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 Econ. Inquiry at 1644. See also Stacie Bosley et al., *Income Disclosure and Consumer Judgment in a Multi-level Marketing Experiment*, J. Consumer Aff. (under review) ("Across all subjects, interest in the MLM business opportunity appears to be unaffected by disclosure, on average..."); *Motivation in Direct Sales – Part 1*, MLM.com The Direct Sales Resource, Dec. 10, 2014, <https://www.mlm.com/the-power-of-drive-motivation-in-direct-sales-part-1/> (quoting a former MLM distributor as saying, "I saw that the top leaders were making anywhere from \$20,000 to \$100,000+ per month, and that's all I needed to see. I didn't go around asking those leaders how likely I'd be to make that much. Or what my chances were. That's nuts—my chances were whatever I wanted them to be...and I decided on 100%.")

<sup>119</sup> Stacie A. Bosley et al., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 Econ. Inquiry 1643.

<sup>120</sup> Stacie A. Bosley et al., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 Econ. Inquiry at 1658 ("[C]ompany-provided disclosures may not fully or accurately reveal information to allow for proper adjustment of expectations, especially when key information (e.g., share of nonearners) is excluded or demoted to fine print...") See also, e.g., Letter from Truth In Advertising to Fed. Trade Comm'n Regarding Deceptive Marketing by Forever Living Despite Notices of Penalty Offenses (May 4, 2022), [https://truthinadvertising.org/wp-content/uploads/2021/12/5\\_4\\_22-ltr-from-TINA-to-FTC-re-Forever-Living\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2021/12/5_4_22-ltr-from-TINA-to-FTC-re-Forever-Living_Redacted.pdf).

<sup>121</sup> See Peter Vander Nat et al., *MLM Income Disclosures: When Average Does Not Equal Typical*, Truth In Advertising, Sept. 9, 2020, <https://truthinadvertising.org/blog/mlm-income-disclosures-when-average-does-not-equal-typical/>; Bonnie Patten, *Jeunesse Income Disclosure Raises More Questions than Answers*, Truth In Advertising, Nov. 10, 2015, <https://truthinadvertising.org/blog/jeunesse-income-disclosure-raises-more-questions-than-answers/>.

<sup>122</sup> Stacie Bosley et al., *Income Disclosure and Consumer Judgment in a Multi-level Marketing Experiment*, J. Consumer Aff. (under review). See also Letter from Truth In Advertising to Fed. Trade Comm'n Regarding Deceptive Marketing by Forever Living Despite Notices of Penalty Offenses (May 4, 2022), [https://truthinadvertising.org/wp-content/uploads/2021/12/5\\_4\\_22-ltr-from-TINA-to-FTC-re-Forever-Living\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2021/12/5_4_22-ltr-from-TINA-to-FTC-re-Forever-Living_Redacted.pdf).

<sup>123</sup> Stacie Bosley et al., *Income Disclosure and Consumer Judgment in a Multi-level Marketing Experiment*, J. Consumer Aff. (under review).

<sup>124</sup> See Tony Antoniou et al., *Impact of acetaminophen product labelling changes in Canada on hospital admissions for accidental acetaminophen overdose: a population-based study*, Canadian Med. Ass'n J. (April 2022), <https://www.cmaj.ca/content/194/15/E542> (finding that acetaminophen label disclosures regarding the risk of overdose and safe use did not reduce the rate of acetaminophen overdose hospital admissions); Lisa M. Schwartz et al., *Communicating Uncertainties About Prescription Drugs to the Public: A National Randomized Trial*, 171 Arch Intern Med. 1463 (2011),

## Deceptive Earnings Claims Lead To Significant Consumer Harm

According to the Commission, “It is beyond a doubt that where [false or unsubstantiated earnings claims] occur, these practices cause significant consumer harm.”<sup>125</sup> In 2016, the then-FTC Chair similarly told the DSA: “[F]alse earnings representations ... cause real harm to consumers.”<sup>126</sup> As with franchises, there is “potential for serious economic injury as a result of concealment or misrepresentation of the material terms of the ... business.”<sup>127</sup>

Not only do most MLM distributors work significant hours without realizing any net earnings, a large proportion actually suffer losses that severely damage their financial and personal well-being. Pulled into a cycle of further spending on inventory, participation fees and marketing in seeking to recoup sunk costs,<sup>128</sup> many participants end up in debt or bankrupt; already financially precarious families lose their savings; college students drop out of school to pursue illusory fortunes; and in many cases personal relationships are permanently damaged.

While the direct selling industry likes to tout the relatively low costs of entry for new recruits, the reality is that there are meaningful and ongoing expenses a distributor must incur in order to qualify for all commissions and bonuses.<sup>129</sup> Selling for an MLM requires upfront expenditures – for inventory, joining and website fees, frequently updated marketing materials and paid trainings and training kits.<sup>130</sup> After joining, distributors are typically subject to

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<https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/1105910> (finding that label disclosures regarding the meaning of FDA-approval had a limited impact on consumer drug choice).

<sup>125</sup> Business Opportunity Rule, 73 Fed. Reg. 16110, 16119 (proposed Mar. 26, 2008).

<sup>126</sup> Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Keynote Remarks of FTC Chairwoman Ramirez at DSA Business & Policy Conference, at 2 (Oct. 25, 2016),

[https://www.ftc.gov/system/files/documents/public\\_statements/993473/ramirez\\_-\\_dsa\\_speech\\_10-25-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/993473/ramirez_-_dsa_speech_10-25-16.pdf).

<sup>127</sup> Disclosure Requirements, 43 Fed. Reg. at 59626. As noted, “earnings claims are highly material to consumers in making their investment decisions.” Business Opportunity Rule, 76 Fed. Reg. at 76827.

<sup>128</sup> See *LuLaRoe*, *supra* note 10; *infra* notes 131, 132, 134.

<sup>129</sup> See Rohit Chopra et al., *The Case for Resurrecting the FTC Act’s Penalty Offense Authority*, 170 Univ. of Pa. L. Rev. at 92 (if promises of large incomes made by MLMs to recruited participants “prove hollow, their losses can go far beyond what they paid into the scheme, especially if they pursued the opportunity full time, or took out loans to finance product purchases”); Sergio Pareja, *Sales Gone Wild: Will the FTC’s Business Opportunity Rule Put an End to Pyramid Marketing Schemes?*, 39 McGeorge L. Rev. 83, 88 n.32 (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1092188](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092188) (focus on the relatively small initial investment required to begin selling for an MLM “misses the point that, over time, the victims often lose large amounts of money”). The Commission recognized this in part. See Business Opportunity Rule, 73 Fed. Reg. 16110, 16119 (proposed Mar. 26, 2008) (“while MLM commenters contended that the cost of joining is typically very small, they often referred only to the minimum required fees, and did not mention all costs necessary to qualify for higher levels of compensation”).

<sup>130</sup> See, e.g., Laryea, *supra* note 98 (“Recruits are often expected to purchase ‘starter kits’ or inventory to start selling products”); Heidi Liu, *The Behavioral Economics of Multilevel Marketing*, 14 HASTINGS BUS. L. J. at 125 (MLMs may stress the purchase of “demonstration kits,” which may need to be updated frequently); Sergio Pareja, *Sales Gone Wild: Will the FTC’s Business Opportunity Rule Put an End to Pyramid Marketing Schemes?*, 39 McGeorge L. Rev. 83, 125 n.281 (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1092188](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092188) (noting ACN joining fee of \$499 and other costs associated with being a distributor).



further costs,<sup>131</sup> and to intense pressure to spend more – often well beyond what they can afford<sup>132</sup> – on marketing and training, as well as on further inventory, which they are often unable to sell. Attending company conventions is a common expectation, and an expensive one.<sup>133</sup> Still more spending is often required for eligibility for bonuses or in order to achieve higher ranks in the organization with purportedly higher earning potential.<sup>134</sup> When

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<sup>131</sup> See, e.g., Sergio Pareja, *Sales Gone Wild: Will the FTC's Business Opportunity Rule Put an End to Pyramid Marketing Schemes?*, 39 McGeorge L. Rev. 83, 125 n.281 (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1092188](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092188) (after initial joining fee of \$499, ACN distributors pay \$149 per year to continue as distributors, \$10+ per month in other fees, and significant sums for travel, accommodations and registration for “training” meetings); see also Heidi Liu, *The Behavioral Economics of Multilevel Marketing*, 14 HASTINGS BUS. L. J. at 125-6 9if ACN distributors do not request their sales revenues quickly enough, they “may be charged an Account Maintenance Fee”).

<sup>132</sup> See, e.g., Alden Wicker, *Multilevel-Marketing Companies Like LuLaRoe Are Forcing People Into Debt and Psychological Crisis*, Quartz, Aug. 6, 2017 (last updated Aug. 10, 2017), <https://qz.com/1039331/mlms-like-avon-and-lularoe-are-sending-people-into-debt-and-psychological-crisis/> (distributor “was urged to stop paying ... bills to invest in more inventory ... urged to get rid of television ... urged to pawn [her] vehicle”); Taylor Lorenz, *How Women Are Fighting The Marketers That Nearly Ruined Them*, The Daily Beast (Mar. 14, 2018), <https://www.thedailybeast.com/how-women-are-fighting-the-marketers-that-nearly-ruined-them> (husband and wife distributors “drained their retirement savings, broke the lease on their apartment to pump more money into Amway, and sacrificed nearly every small luxury in their lives,” ultimately losing more than \$100,000); see also LULARICH (Amazon Studios 2021); THE RISE AND FALL OF LULAROE (Discovery Plus and BuzzFeed Studios 2021).

<sup>133</sup> See, e.g., Caroline Thompson, *How to Get a Friend Out of an MLM*, Vice (Oct. 22, 2018), <https://www.vice.com/en/article/43e573/how-to-get-a-friend-out-of-an-mlm-herbalife-amway-younique-> (“In addition to being constantly pressured to stock up on new products to sell, MLMers are encouraged to attend large, out-of-state conferences hosted by their companies,” for example, “tickets to [doTERRA’s 2018 annual conference] were priced between \$125 and \$169. Attendees could go to the official doTERRA gala for another \$75, take a campus tour for \$10, and attend an “EMPOWERED SUCCESS TRAINING” session for another \$20. Couple in the cost of flying or driving to Salt Lake City, the cost of a hotel or Airbnb for the week, and meals, “networking” drinks and gala-appropriate outfits, doTERRA consultants who made the trip could easily drop thousands”).

<sup>134</sup> See, e.g., Business Opportunity Rule, 73 Fed. Reg. at 16118 (company “extracted money from its recruits by encouraging them to enter the MLM at the ‘manager’ level, which required a purchase of \$5,000 worth of products; to rent desk space for \$300 to \$500 per month; to subscribe to a phone line so they could recruit others; and to attend trainings and seminars at a cost of \$300 to \$1,000”); *LuLaRoe Distributors in Bankruptcy as Founder Touts Financial Freedom*, Truth In Advertising, Apr. 30, 2019 (last updated June 10, 2019), <https://truthinadvertising.org/articles/lularoe-distributors-face-bankruptcy-as-founder-touts-financial-freedom/> (distributor paid \$5,000 for “initial order kit,” followed by monthly purchases of more inventory to be eligible for bonuses, resulting in \$15,000 of debt in less than a year and filing for bankruptcy); Abby Vesoulis et al., *Pandemic Schemes: How Multilevel Marketing Distributors Are Using the Internet – and the Coronavirus – to Grow Their Businesses*, Time, July 9, 2020, <https://time.com/5864712/multilevel-marketing-schemes-coronavirus/> (Herbalife distributor lost close to \$10,000 after paying about \$2,500 “for the privilege of calling himself a supervisor, which he was told would help him earn more money faster”; paying \$700/month “to rent space for a storefront, which was recommended as a way to build up a clientele”; and attending “‘mandatory’ local training sessions and ‘highly encouraged’ national events in faraway cities”).

distributors fail to realize earnings, the solution commonly offered is that they should invest more,<sup>135</sup> ultimately leaving them with substantial debt and piles of unsold inventory.<sup>136</sup>

In the end, half or more of all MLM participants end up *losing* money.<sup>137</sup> Because many of those recruited to sell for MLMs lack financial sophistication, they often fail to realize that they are losing money until they find themselves substantially in debt.<sup>138</sup> A 2018 survey found that more than 30 percent of participants used a credit card to finance their MLM involvement, almost one in ten took out a personal loan, and about one in five borrowed money from friends and family members.<sup>139</sup> MLM participants have declared bankruptcy at some point in their lives at a significantly higher rate than members of the general population; 72 percent of those bankruptcies occurred after MLM participation; another 4 percent occurred while marketing for an MLM.<sup>140</sup> At LuLaRoe, for example, at least 115 current or former distributors filed for bankruptcy from 2016 to early 2019, a higher proportion than reached the highest tier of earners.<sup>141</sup>

MLM recruitment and sales marketing can take a severe personal toll as well. High-pressure marketing tactics often strain relationships, as distributors are pressured by their uplines to

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<sup>135</sup> See, e.g., Wicker, *supra* note 132 (distributor was told that her sales were declining because she did not have enough inventory, only to end up with “\$8,000 worth of inventory sitting in [her] home while [she] was running up to food banks to feed [her] family”); Bond, *supra* note 93 (distributor failing to make sales was advised to buy more Yunique makeup so that friends would see her wearing it and want to buy; she maxed out her credit card to spend \$2,500 that she had not recouped six months later).

<sup>136</sup> See, e.g., Laryea, *supra* note 98 (“[t]he financial burden of success ... may encourage participants to rack up debt to attend conferences and training or pay for marketing materials and other expenses”); Abby Vesoulis et al., *Pandemic Schemes: How Multilevel Marketing Distributors Are Using the Internet – and the Coronavirus – to Grow Their Businesses*, Time, July 9, 2020, <https://time.com/5864712/multilevel-marketing-schemes-coronavirus/> (“Countless distributors end up wallowing in merchandise they can’t sell and sinking into debt as they’re pushed to spend more money attending training seminars and bonding conferences”).

<sup>137</sup> DeLiema, *supra* note 9; Liu, *supra* note 9.

<sup>138</sup> See, e.g., Bond, *supra* note 93 (citing example of a Yunique distributor who found herself in “the red” when she left the MLM after approximately six months; and a Tupperware distributor who found: “[I]t looked like I made a lot of money. But I lost a lot of money”); see also Stephanie McNeal, *Millennial Women Made LuLaRoe Billions. Then They Paid The Price.*, BuzzFeed News Reporter, Feb. 22, 2020, <https://www.buzzfeednews.com/article/stephaniemcneal/lularoe-millennial-women-entrepreneurship-lawsuits> (LuLaRoe distributor: “I just didn’t realize that yes, I was bringing in all this money but I was also spending all this money on inventory”); Silverstein, *supra* note 92 (It Works distributor: Despite “being within the top 10% at least of the company,” “[b]y the time we figured all the losses, we were at least negative \$1,000 after 18 months”); Abby Vesoulis et al., *Pandemic Schemes: How Multilevel Marketing Distributors Are Using the Internet – and the Coronavirus – to Grow Their Businesses*, Time, July 9, 2020, <https://time.com/5864712/multilevel-marketing-schemes-coronavirus/> (Beachbody “coach” thought he had made \$4,000-5,000 for the year, until he did his taxes and realized, “I’m in the red. This isn’t helping me at all. In fact, I’m probably worse off than when I started”).

<sup>139</sup> Laryea, *supra* note 98.

<sup>140</sup> DeLiema, *supra* note 9. Although these results don’t show that MLM participation *caused* the bankruptcies, they “suggest[] that those who participate in MLM face greater risk of negative financial outcomes than those who are not involved.” *Id.* at 12-13. Even if other factors may have contributed to some of the bankruptcies, the bankruptcy statistics point to the consequences of MLMs preying on the most financially susceptible, see *supra* notes 7 and 8, underscoring the need for greater transparency in recruiting.

<sup>141</sup> *LuLaRoe Distributors in Bankruptcy as Founder Touts Financial Freedom*, Truth In Advertising, Apr. 30, 2019, <https://truthinadvertising.org/articles/lularoe-distributors-face-bankruptcy-as-founder-touts-financial-freedom/>.

convince friends, relations and acquaintances to buy from them or join the business opportunity.<sup>142</sup> Nearly a third of MLM participants in one survey who borrowed money from a friend or family member reported losing a friendship as a result.<sup>143</sup> TINA.org has seen numerous consumer complaints from families whose children dropped out or flunked out of college, sometimes abandoning scholarships, in order to pursue MLM dreams of wealth that never materialized.<sup>144</sup> Many distributors have reported psychological harm and even physical illness<sup>145</sup> resulting from the stress of being urged to market in ethically questionable ways and to blame themselves for their lack of success.<sup>146</sup> In sum, when new recruits and low-level distributors are misled by MLM earnings claims into making decisions they would not make if better informed, they often suffer serious harm as a consequence.

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<sup>142</sup> Bond, *supra* note 93.

<sup>143</sup> Laryea, *supra* note 98. More than 40 percent of married male distributors reported fighting with family and friends about their expenditures of time and money. *Id.*

<sup>144</sup> Below is a sampling of consumer complaints TINA.org received concerning Vemma Nutrition Company, a DSA-member company that the FTC alleged operated an illegal pyramid scheme and made deceptive income claims. See Order at 6, *Fed. Trade Comm'n v. Vemma Nutrition Co.*, No. 15-cv-1578 (D. Ariz. Sept. 18, 2015), <https://www.ftc.gov/system/files/documents/cases/150924vemmaporder.pdf> (“The evidence before the Court leaves little doubt that the FTC will ultimately succeed on the merits in demonstrating that Vemma is operating a pyramid scheme.”)

- “Unfortunately, my son has been introduced to this company (about a year ago) and has dropped out of college with the pursuit of getting rich without having to go to college . . . . In my personal family life, this company has interfered with my sons [sic] desire to complete his college degree. He was in his third year of college when he dropped out. . . . Not only did he drop out of college, but he has been living on the streets in his car for the past three weeks.”
- “My stepson has given up a four year, tuition free opportunity to attend university because Vemma has convinced him the college is just a financial burden. How is ‘free’ a ‘burden’?”
- “I was approached by friends who I’ve known since middle school. They told me they wanted to talk about a business opportunity, and told me I would be perfect for the business. They told me about Vemma, . . . . After politely telling them know [sic] they preceded to belittle me. Tell me that attending college was a waste of time and that I was “doing nothing with your life”. All members of Vemma proceeded to block me on social media sites. . . . I feel that Vemma has negatively affected social aspects of my life . . . .”
- “My son was caught up in [Vemma’s] YPR last fall. He failed classes and lost motivation toward his education. I could not reach him at all.”
- “It was the first time I had a strained relationship with my son. He’s never had an attitude with me.”

<sup>145</sup> See, e.g., McNeal, *supra* note 138 (LuLaRoe distributor reported developing self-hate and declining mental and physical health; another reported seeing many coworkers have nervous breakdowns); Wicker, *supra* note 132 (LuLaRoe distributor reported panic attacks requiring medication); Stephanie Asymkos, *Popular MLM Businesses Are Leaving Young Women Broke And Friendless*, Cashay, Feb. 4, 2020, <https://www.cashay.com/mlm-businesses-leave-young-women-broke-friendless-155931120.html> (distributor reported stress and diminished self-esteem).

<sup>146</sup> See, e.g., Lorenz, *supra* note 132 (MLMs “tend to make you feel like failing is your own fault”); Kellie Scott, *4 Reasons Not to Turn to an MLM for an Income Boost*, ABC Everyday, Feb. 4, 2021, <https://www.abc.net.au/everyday/mlms-are-not-the-answer-if-you-need-money/100006992> (a professor who studies MLMs explains “toxic positivity [] leaves people feeling ashamed when they don’t make it in direct selling”); Kate Kilpatrick, *Seeing Green With Herbalife*, Make the Road N.Y., Oct. 15, 2014, <https://maketheroadny.org/seeing-green-with-herbalife/> (community advocate against consumer fraud “believes that blame psychology is part of the Herbalife training”); Wicker, *supra* note 132 (participants who admit that they are struggling to make sales are told that they are not trying hard enough).

## **Direct Selling Self-Regulation Is Not a Viable Substitute For a Rule Prohibiting Deceptive Earnings Claims**

Deceptive earnings claims of the sort described above are not only illegal but also violate the DSA's Code of Ethics, the first article of which states: "No member company or independent salesperson for a member company shall engage in any deceptive, false, unethical or unlawful consumer or recruiting practice. Member companies shall ensure that no statements, promises or testimonials are made that are likely to mislead consumers or prospective independent salespeople."<sup>147</sup> Subsequent articles specifically prohibit deceptive and unsubstantiated earnings claims in recruiting potential distributors: "Member companies and their independent salespeople shall not make any factual representation to prospective independent salespeople that cannot be verified.... Member companies and their independent salespeople shall not present any selling opportunity to any prospective independent salesperson in a false, deceptive or misleading manner;" and "Earnings representations ... must be truthful, accurate, and presented in a manner that is not false, deceptive or misleading."<sup>148</sup>

Over the years, the DSA has used the existence of the Code as a shield to deflect criticism of its member companies. The Association asserts that it "leads the marketplace for direct selling in the United States by requiring companies to implement robust business ethics practices and consumer protection standards as an initial and continuing condition of membership."<sup>149</sup> In addition, the Association has stated that the "DSA enforces one of the most rigorous self-regulatory codes of ethics in business today, ensuring that direct selling companies not only follow the law, but in many cases exceed its requirements,"<sup>150</sup> and "[c]onsumers can be confident that DSA and its members will not tolerate unethical behavior, and the DSA Code backs up that assurance."<sup>151</sup>

Despite little to no evidence that the DSA has ever enforced its Code of Ethics, it has continually asserted that it takes a hardline stance on mandating Code adherence:

Every member of DSA is required to abide by DSA's Code of Ethics as a condition of membership. There are no exceptions to the rule. All companies that use the direct selling model must uphold the highest ethical business standards, including adherence to policies [sic] that protect consumers and members of the salesforce against unrealistic earnings, lifestyle, and product claims. DSA member companies are also subject to

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<sup>147</sup> DSA, Code of Ethics, §A.1(a) (amended Dec. 13, 2018), <https://www.dsa.org/docs/default-source/code-of-ethics/dsa-code-of-ethics-december-2018.pdf>.

<sup>148</sup> *Id.* at §§A.1(d); 8.b.

<sup>149</sup> Press Release, DSA Announces New Partnership with Momentum Factor to Bolster Code of Ethics Enforcement (June 16, 2016), <https://www.dsa.org/events/news/individual-press-release/dsa-announces-new-partnership-with-momentum-factor-to-bolster-code-of-ethics-enforcement>.

<sup>150</sup> Joseph Mariano, *Court Ruling Clarifies Protections Regarding Pyramid Schemes*, The Hill, June 12, 2014, <https://thehill.com/blogs/congress-blog/judicial/209086-court-ruling-clarifies-protections-regarding-pyramid-schemes/>.

<sup>151</sup> Press Release, Direct Selling Association Strengthens Its Self-Regulatory Framework With Additional Consumer Safeguards and Greater Transparency (June 2, 2015), <https://www.prnewswire.com/news-releases/direct-selling-association-strengthens-its-self-regulatory-framework-with-additional-consumer-safeguards-and-greater-transparency-300092399.html>.



ongoing review to ensure Code compliance and adherence to state and federal laws.<sup>152</sup>

Unfortunately, the DSA's rhetoric does not and has never aligned with how its member companies operate. Although the DSA Code of Ethics allows member companies to represent that they have adopted comprehensive compliance structures, the reality is that the vast majority of members have never adhered to the DSA Code of Ethics and there is no evidence to suggest that any member company has ever faced a penalty as a result of violating the Code.<sup>153</sup>

Notwithstanding the DSA's proclaimed "stringent commitment to the highest standards of ethical business practices in direct selling,"<sup>154</sup> in 2017 TINA.org found that every company represented on DSA's Board of Directors was making unsubstantiated income claims, including:<sup>155</sup>

- "EARN UNLIMITED INCOME"<sup>156</sup>
- "[G]uaranteed to bring you financial freedom."<sup>157</sup>
- "Part Time/Full Time Work for AMWAY and Earn Unlimited Income per month."<sup>158</sup>
- "[A]ll expense paid vacations, ... a 6 figure income, ... the home of your dreams, and all that life has to offer."<sup>159</sup>

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<sup>152</sup> Press Release, Statement of the Direct Selling Association (DSA) on Vemma's Settlement Agreement with the Federal Trade Commission (Dec. 19, 2016), [https://www.dsa.org/events/news/individual-press-release/statement-of-the-direct-selling-association-\(dsa\)-on-vemmas-settlement-agreement-with-the-federal-trade-commission](https://www.dsa.org/events/news/individual-press-release/statement-of-the-direct-selling-association-(dsa)-on-vemmas-settlement-agreement-with-the-federal-trade-commission).

<sup>153</sup> Quite to the contrary, a 2017 to 2019 investigation into Team National, Inc., a Florida-based DSA member company that sold discounts for a variety of third-party products and services, found that the company was engaged in a deceptive marketing campaign. TINA.org's Team Nat'l Investigation, <https://truthinadvertising.org/brands/team-national/>. Of particular concern was the fact that during the investigation, Team National's CEO was the Chair of the Direct Selling Education Foundation. *See* Direct Selling Educ. Found. Bd. of Dir. (Apr. 2019), <https://truthinadvertising.org/wp-content/uploads/2021/11/DSEF-Board-of-Directors-as-of-April-2019.png>. The DSA's educational arm is supposed to, among other things, "advance[] understanding of direct selling and promote[] the industry's commitment to ethics, consumer protection and self-regulation." *Industry Leaders Work to Advance Consumer Protection*, Direct Selling Educ. Found., Apr. 7, 2015, <https://dsef.org/industry-leaders-work-to-advance-consumer-protection/>.

<sup>154</sup> Press Release, DSA Board Approves Guidelines to Strengthen DSA Code and Association Policies (June 5, 2017), <https://www.dsa.org/events/news/individual-press-release/dsa-board-approves-guidelines-to-strengthen-dsa-code-and-association-policies>.

<sup>155</sup> *Multilevel Marketing: The Day Job That Doesn't Pay*, Truth In Advertising, Dec. 18, 2017, <https://truthinadvertising.org/articles/mlm-income-claims-investigation/>.

<sup>156</sup> Mary Kay by Donabel P. Virtucio, Independent Senior Sales Director, Facebook (Aug. 21, 2016), <https://truthinadvertising.org/wp-content/uploads/2017/12/Mary-Kay-Facebook-Unlimited-Income.png>.

<sup>157</sup> Avon by Dorothy, Facebook (Sept. 17, 2017), <https://www.truthinadvertising.org/wp-content/uploads/2017/12/Avon-Facebook-Guaranteed-Financial-Freedom.png>.

<sup>158</sup> Sambaru Narzary, Facebook (May 18, 2017), <https://www.truthinadvertising.org/wp-content/uploads/2017/12/Amway-Facebook-Unlimited-Monthly-Income.png>.

<sup>159</sup> Joy Russell Independent Herbalife Distributor, Facebook (Sept. 22, 2017), <https://www.truthinadvertising.org/wp-content/uploads/2017/12/Herbalife-Facebook-6-Figures-Joy.png>.

- “With Team National, I can make more in one week on vacation than I could working a couple of months at my old j-o-b.”<sup>160</sup>

TINA.org’s work exposing false and deceptive advertising within the MLM industry underscores the glaring reality that the DSA Code of Ethics has had no influence on industry behavior. The data indicate quite the contrary: that the established framework within the industry embraces deceptive marketing, and the Code of Ethics amounts to little more than a self-serving document containing meaningless, industry rhetoric.

Unable (or unwilling) to fulfill its theoretical promise of legal compliance within its own ranks and facing mounting scrutiny from federal and state regulators,<sup>161</sup> TINA.org<sup>162</sup> and the media,<sup>163</sup> the DSA announced at the beginning of 2019 the establishment of a new

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<sup>160</sup> Team Nat’l Website: Brad & Kristin Barton, <https://www.truthinadvertising.org/wp-content/uploads/2017/08/TeamNationalWebsite1BradKristen.png>.

<sup>161</sup> FTC Chairwoman Ramirez stated in October 2016:

False and unsubstantiated earnings claims are deceptive and unlawful under Section 5 of the FTC Act. Unfortunately, however, our law enforcement experience shows that many MLMs continue to misrepresent the amount of money participants are likely to earn. In fact, in all of our cases against multi-level marketers, the FTC has alleged that the defendants made false earnings representations. These misrepresentations cause real harm to consumers, and they need to stop.

Edith Ramirez, Chairwoman, FTC, Keynote Remarks of FTC Chairwoman Ramirez at DSA Business & Policy Conference, at 2 (Oct. 25, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/993473/ramirez\\_-\\_dsa\\_speech\\_10-25-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/993473/ramirez_-_dsa_speech_10-25-16.pdf). Subsequently, Andrew Smith, Director of the FTC’s Bureau of Consumer Protection in April 2020 stated that “MLMs and other companies that distribute their products through networks of distributors are responsible for the product and earnings claims those distributors are making. . . . During this health and economic crisis, we are on the lookout for false income claims for work-at-home opportunities, in addition to spurious health claims that products can treat or prevent COVID-19.” Press Release, Fed. Trade Comm’n, FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus (Apr. 24, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health-earnings-claims-they-or-their>. And FTC Commissioner Noah Phillips stated in October 2020 that “the FTC is fully engaged in this area and is determined to protect hard-working consumers from losing money to illegal pyramid schemes or other business opportunities that make deceptive earnings claims. I caution you to stay on the straight and narrow because now, more than ever, this is a top enforcement priority for me, and I hope the agency.” Noah Phillips, Comm’r, Fed. Trade Comm’n, Keynote Address at DSA Legal & Regulatory Summit: Seller Beware, at 11 (Oct. 15, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1581726/phillips\\_-\\_dsa\\_remarks\\_10-15-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1581726/phillips_-_dsa_remarks_10-15-20.pdf).

<sup>162</sup> See, e.g., *Multilevel Marketing: The Day Job That Doesn’t Pay*, Truth In Advertising, Dec. 18, 2017, <https://truthinadvertising.org/articles/mlm-income-claims-investigation/>; *Illegal Health Claims By DSA Companies Still Litter Internet*, Truth In Advertising, Aug. 28, 2017, <https://truthinadvertising.org/articles/illegal-health-claims-dsa-companies-still-litter-internet/>; *Is the DSA Ignoring Illegal Health Claims?*, Truth In Advertising, Nov. 6, 2016, <https://truthinadvertising.org/articles/dsa-ignoring-illegal-health-claims/>. See also *Consumer Advocates Call For Herbalife Probe*, Truth In Advertising, May 28, 2013, <https://truthinadvertising.org/articles/consumer-advocates-call-for-herbalife-probe/>.

<sup>163</sup> See, e.g., Michelle Singletary, *Why Multilevel Marketing Won’t Make You Rich*, Wash. Post (Sept. 26, 2018), <https://www.washingtonpost.com/business/2018/09/27/why-that-multilevel-marketing-business-is->

third-party, self-regulatory entity known as the Direct Selling Self-Regulatory Council (“DSSRC”)<sup>164</sup> to be administered by the Council of Better Business Bureaus (“CBBB”).<sup>165</sup> The Association, together with the CBBB, explained that it created the DSSRC to “monitor claims disseminated by the entire United States direct selling industry,” not just DSA members, although the Council is exclusively funded by the

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[probably-not-going-pay-off/](#); Claire Suddath, *Thousands of Women Say LuLaRoe’s Legging Empire Is a Scam*, Bloomberg (Apr. 27, 2018), <https://www.bloomberg.com/news/features/2018-04-27/thousands-of-women-say-lularoe-s-legging-empire-is-a-scam>; Darlena Cunha, *Beware of Selling Yoga Pants on Facebook*, The Atlantic (Apr. 18, 2018), <https://www.theatlantic.com/business/archive/2018/04/multilevel-marketing-yoga-pants-facebook/558296/>; Kiera Butler, *How Multilevel Marketing Companies Got the Autism Community Hooked on Essential Oils*, Mother Jones (Feb. 23, 2018), <https://www.motherjones.com/politics/2018/02/doterra-young-living-multilevel-marketing-companies-got-autism-community-hooked-essential-oils/>; Caroline Thompson, *How to Get a Friend Out of an MLM*, Vice (Oct. 22, 2018), <https://www.vice.com/en/article/43e573/how-to-get-a-friend-out-of-an-mlm-herbalife-amway-youunique->; Susannah Snider, *What to Know Before Getting Involved in an MLM Company*, U.S. News (Oct. 9, 2020), <https://money.usnews.com/money/personal-finance/family-finance/articles/2018-06-12/what-to-know-before-getting-involved-in-an-mlm-company>; Kayleen Schaefer, *Inside the Creepy World of Women Selling You Supplements on Facebook*, Women’s Health (Sept. 20, 2018), <https://www.womenshealthmag.com/life/a22749385/direct-sales-social-media-friendship/>; Lorenz, *supra* note 132; Scott Cohn, *Want to Work at Home? Take a Lesson from this \$3 Billion Pyramid Scam*, CNBC (June 22, 2018), <https://www.cnbc.com/2018/06/21/want-to-work-at-home-take-a-lesson-from-this-3-billion-pyramid-scam.html>. See also Episodes of the podcast “The Dream” by Stitcher, Apple Podcasts, <https://podcasts.apple.com/us/podcast/the-dream/id1435743296>; Katey Rich, *This Podcast Can’t Legally Tell You Amway Is a Pyramid Scheme*, Vanity Fair (Sept. 21, 2018), <https://www.vanityfair.com/style/2018/09/the-dream-podcast-preview>; Shannon Palus, *Why Is Everyone Selling Leggings on Facebook?*, Slate (Dec. 6, 2018), <https://slate.com/business/2018/12/multilevel-marketing-podcast-review-the-dream-facebook.html>; LastWeekTonight, *Multilevel Marketing: Last Week Tonight with John Oliver (HBO)*, YouTube (Nov. 7, 2016), <https://www.youtube.com/watch?v=s6MwGeOm8iI>.

<sup>164</sup> Peter Marinello, executive director of the DSSRC explained the impetus for the creation of the DSSRC as follows:

“There’s this industry consumer advocacy organization called Truth in Advertising – kind a better known as TINA that issued this report in 2017 on product and income claims in the direct selling industry. So I think the report, while it may have overreached somewhat, the real utility of the report was that it really galvanized the thought leaders in this industry and helped them recognize that they had to proactively address some of these issues. You know it was interesting, on the heels of this report from TINA, then acting FTC Chair Maureen Ohlhausen addressed the Direct Selling Association in November 2017 and strongly encouraged the industry to consider . . . effective, third-party self-regulation. And this was definitely a real seminal moment. And, you know, there was some written guidance for the MLM industry that was published by the FTC right on the heels of that report that really helped frame some of these issues that could be addressed in the context of meaningful, independently administered self-regulation. So it was really these sequence of events, which led to the creation of the Direct Selling Self-Regulatory Council or DSSRC as it’s now known.”

BBB Nat’l Programs The Accountability Studio, *With Great Power Comes Great Responsibility*, at 13:47 (Apr. 21, 2021), <https://bbbprograms.org/media-center/podcast-details/great-power-great-responsibility>.

<sup>165</sup> Press Release, Direct Selling Association Establishes Third-Party Self-Regulatory Program to be Administered by the Council of Better Business Bureaus (Jan. 9, 2019), <https://www.dsa.org/events/news/individual-press-release/direct-selling-association-establishes-third-party-self-regulatory-program-to-be-administered-by-the-council-of-better-business-bureaus>.

DSA.<sup>166</sup> Limited in scope and resources,<sup>167</sup> the DSSRC was created only to examine “income claims (including lifestyle representations) and product claims (including services) made by direct selling companies and their salesforce.”<sup>168</sup>

Because of the overwhelming failure of the DSA to enforce adherence to the law by member companies, the industry environment into which the DSSRC entered was one in which direct selling companies were collectively using deceptive marketing to pursue their own self-interest at the expense of consumers and the public good.<sup>169</sup> As such, it appears that, much like the DSA Code of Ethics, the Council was created to shield the industry from further scrutiny rather than to increase accountability or protect consumers from deception. Fundamentally, there is no reason to believe that the creation of the DSSRC was motivated by any wider consideration than the DSA’s own self-interest in deflecting current criticism of the industry and arguing against any further regulatory oversight by the FTC.

In the 30-month period between April 1, 2019 and October 31, 2021, the DSSRC closed more than 250 cases, persuaded the subjects of its investigations to remove hundreds of deceptive marketing claims from the internet,<sup>170</sup> and, with the emergence of the COVID-19 pandemic, was able to shift resources to increase its monitoring of deceptive coronavirus claims.<sup>171</sup> The speed of action, elimination of deceptive claims, and flexibility in addressing changing market circumstances exemplify the benefits of this new self-regulatory body. However, these positive results have been severely tarnished by a flawed process and an industry that is not committed to self-regulation.

As of October 2021, 80 percent of DSSRC investigations ended in what it terms “Administrative Closures,” which neither disclose the name of the culpable company nor

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<sup>166</sup> Direct Selling Self-Regulatory Council, *Program Activity Report for The Direct Selling Self-Regulatory Council: January 2019-October 2019*, at 3 (2019), [https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/bbb-np-report\\_dssrc-activities-report.pdf?sfvrsn=18c33082\\_2](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/bbb-np-report_dssrc-activities-report.pdf?sfvrsn=18c33082_2).

<sup>167</sup> It is currently staffed by a three-person team: the Director/Vice President, a Senior Staff Attorney, and an Advertising Review Specialist. The Direct Selling Self-Regulatory Council, [https://www.dsa.org/docs/default-source/default/2022-dssrc-one-pager.pdf?sfvrsn=adecd8a5\\_2%20](https://www.dsa.org/docs/default-source/default/2022-dssrc-one-pager.pdf?sfvrsn=adecd8a5_2%20).

<sup>168</sup> See Policies and Procedures for BBB National Programs, Inc.’s Direct Selling Self-Regulatory Council, <https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/procedures/dssrc-procedures.pdf>.

<sup>169</sup> Rohit Chopra et al., *The Case for Resurrecting the FTC Act’s Penalty Offense Authority*, 170 Univ. of Pa. L. Rev. at 111 (stating that income misrepresentations are “one of the most problematic yet ubiquitous features of [the MLM] industry . . .”); see also *DSA Award Winners Are Ethics Code Violators*, Truth In Advertising, June 7, 2016, <https://truthinadvertising.org/articles/dsa-award-winners-ethics-code-violators/>.

<sup>170</sup> DSSRC Case Decisions and Administrative Closures, BBB National Programs, <https://bbbprograms.org/programs/all-programs/dssrc/dssrc-cases-and-closures> (last visited May 8, 2022).

<sup>171</sup> BBB National Programs Actions in Response to COVID-19 (2022), [https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/bbb-national-programs-work-related-to-covid\\_february20217462a764-a36e-4312-8a93-2819bb4b1a57.pdf](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/bbb-national-programs-work-related-to-covid_february20217462a764-a36e-4312-8a93-2819bb4b1a57.pdf) (“The global coronavirus pandemic has led to an increased focus on NAD and DSSRC monitoring efforts to identify false and misleading claims about a product’s ability to treat or prevent COVID-19. This targeted effort comes as both the FDA and Federal Trade Commission (FTC) are issuing dozens of warning letters to companies making such claims.”).



specifically identify the inappropriate marketing material.<sup>172</sup> As a result, the vast majority of wrongdoers are never subject to any sort of public accountability. According to the DSSRC, it issues these secretive closure decisions “if the direct selling company in its initial response (i.e., within 15 business days from receipt of DSSRC’s opening letter) commits to discontinue or significantly modify the claims at issue.”<sup>173</sup> This glaring design defect in the process permits wrongdoers to remain anonymous regardless of how egregious or pervasive their misconduct may have been. Not surprisingly, this tactic of rewarding fast actors with nondisclosure deals has done nothing to persuade the industry to comply with truth-in-advertising laws.

In addition to problems with transparency, the Council has no ability to issue any sort of penalties or restrictions. It does not even have the power to expel member companies from the DSA if they refuse to adhere to the law or violate its Code of Ethics.<sup>174</sup> Although the DSSRC was created to both signify and facilitate compliance with the law, with no legal or binding force, it can be –and is– ignored by much of the industry.<sup>175</sup>

As it stands, there is no reason to believe that the DSSRC is engaged in anything other than a never-ending game of whack-a-mole with the direct selling industry as deceptive income and product claims remain on the internet despite pledges from companies to comply with the law after being caught (and identified) by the Council.<sup>176</sup> Of the 50 companies reported in Case Decisions published as of October 2021, all of them that remained in business as a direct selling company continued to engage in deceptive marketing after their DSSRC case was closed.<sup>177</sup>

On paper, the DSA created a voluntary self-regulatory program aimed at protecting consumers and distributors from the damaging consequences of deceptive marketing tactics used by the direct selling industry, but it failed to provide the DSSRC with any sanctions to motivate companies to do the right thing, and crafted a process that allows the vast majority of those that violate the law to hide in the shadows. As a result, to date, DSSRC enforcement has been, at a minimum, ineffective. Issues with transparency, accountability and lack of sanctions have hampered the Council’s ability to rein in industry wrongdoers. These problems, combined with the industry’s general lack of

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<sup>172</sup> *DSSRC Case Decisions and Administrative Closures*, BBB National Programs, <https://bbbprograms.org/programs/all-programs/dssrc/dssrc-cases-and-closures> (last visited May 8, 2022).

<sup>173</sup> Activity Report for the Direct Selling Self-Regulatory Council: January 1, 2020 through December 31, 2020, at 5 (2020), [https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc\\_activityreport\\_1-25-202117f78cd9-43ed-4442-8b42-6649d1bb9f9a.pdf](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc_activityreport_1-25-202117f78cd9-43ed-4442-8b42-6649d1bb9f9a.pdf).

<sup>174</sup> See Policies and Procedures for BBB National Programs, Inc.’s Direct Selling Self-Regulatory Council, <https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/procedures/dssrc-procedures.pdf>.

<sup>175</sup> In its first year of operation (2019), two companies rejected the authority of the DSSRC, the next year (2020) it was four companies, and in the first 10 months of 2021, seven companies failed to fully engage with the DSSRC. See *DSSRC Case Decisions and Administrative Closures*, <https://bbbprograms.org/programs/all-programs/dssrc/dssrc-cases-and-closures> (last visited May 8, 2022).

<sup>176</sup> See TINA.org’s DSSRC Database, <https://truthinadvertising.org/evidence/dssrc-database/>; see also Laura Smith, *Does Mary Kay Think It’s Above the Law?*, Truth In Advertising (July 26, 2021), <https://truthinadvertising.org/blog/does-mary-kay-think-its-above-the-law/>.

<sup>177</sup> *Id.*

enthusiasm and overall hollow commitment to self-regulation, has meant that DSSRC actions have been largely symbolic as opposed to transformative.

### **Targeted Law Enforcement Is Not an Adequate Substitute for An Earnings Claims Rule**

The FTC's 2008 conclusion that "the consumer harm flowing from deceptive practices in the MLM industry can more effectively be addressed at this time through targeted law enforcement"<sup>178</sup> has not withstood the test of time. On the Agency's watch deceptive earnings claims have become the norm within the direct selling industry.<sup>179</sup> Illegal false earnings claims are "widespread," and the problem "persists year after year."<sup>180</sup> By way of example, after the FTC issued warning letters to 16 MLMs in 2020, ordering them to take down misleading earnings and health claims, a subsequent TINA.org investigation found that every one of the companies continued to post deceptive claims.<sup>181</sup>

Law enforcement actions against individual MLM companies simply cannot keep pace<sup>182</sup> with the nearly ubiquitous illegal deception found in the industry. Even before *AMG*, legal actions against illegal and deceptive MLM practices were so resource-intensive and protracted that nowhere near enough cases could be brought to keep up with the violations. After *AMG*, such actions are even more resource-intensive and protracted, making targeted enforcement actions against individual MLMs still less viable as the principal method of regulating deceptive conduct within the MLM industry. While targeted law enforcement may be an effective complement to a rule clarifying MLMs' obligations not to misrepresent distributors' likely earnings, it is woefully inadequate by itself to protect the public. Nor is it a more cost-efficient alternative to a formal rule, given the extensive resources required for a legal action against an MLM for deceptive and unfair practices.<sup>183</sup> Further, the resurrection of the Agency's penalty-offense authority under Section 5(m)(1)(B) of the FTC Act targeting earnings claims, while a

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<sup>178</sup> Business Opportunity Rule, 73 Fed. Reg. at 16119.

<sup>179</sup> See, e.g., Rohit Chopra et al., *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 Univ. of Pa. L. Rev. at 108 ("[f]or decades, the FTC has been battling firms ... making false claims about the amount of money participants can earn"); TINA.org's DSA Companies' Income Claims Investigation, <https://truthinadvertising.org/industries/mlm-income/>.

<sup>180</sup> Rohit Chopra et al., *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 Univ. of Pa. L. Rev. at 110; see also Truth In Advertising's DSA Companies' Income Claims, <https://truthinadvertising.org/industries/mlm-income/> (almost every MLM continues to make deceptive income claims).

<sup>181</sup> *MLMs Continue to Break the Law Despite FTC Warning*, Truth In Advertising, Dec. 15, 2020 (updated Dec. 23, 2020), <https://truthinadvertising.org/articles/mlms-continue-to-break-the-law-despite-ftc-warning/>; Truth In Advertising's 2020 FTC MLM Database, <https://truthinadvertising.org/evidence/2020-ftc-mlm-database/>.

<sup>182</sup> "The DSA estimates that, in 2016, 20.5 million people were involved in direct selling in the United States. In contrast, the FTC has a headcount of approximately 1,160 people." Maureen Ohlhausen, Acting Chairman, Fed. Trade Comm'n, Opening Remarks for the 2017 DSA Fall Conference, at 4 (Nov. 7, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1271503/2017-11-7\\_dsa\\_posting\\_version.pdf](https://www.ftc.gov/system/files/documents/public_statements/1271503/2017-11-7_dsa_posting_version.pdf).

As "hard-working and dedicated," *id.*, as FTC staff are, they cannot keep up.

<sup>183</sup> See, e.g., Complaint for Permanent Injunction and Other Equitable Relief, *Fed. Trade Comm'n v. Neora, LLC*, No. 3:19-cv-19699 (D.N.J. 2019).

valuable arrow in the FTC's quiver, has its own set of limitations, including its inability to permit the Commission to return money to aggrieved consumers.<sup>184</sup>

A formal rule prohibiting atypical earnings claims would not only prevent harm by clarifying all MLMs' legal obligations to prospective recruits (as well as other companies' obligations to their prospective customers), but would enable more effective enforcement by allowing the Commission to not only seek immediate monetary penalties for violations but also to compensate victims ensnared by the deception. As explained by the then FTC Acting Chair, "[R]ules provide clarity about the boundaries of illegal behavior, and in exchange for that clarity companies can face penalties even for first-time rule violations. As a result, rules create strong incentives to comply with the law."<sup>185</sup>

## CONCLUSION

The MLM industry uses deceptive and atypical income claims to market a dream – the dream of acquiring wealth without work.<sup>186</sup> It is a marketing message that continually results in catastrophic losses for countless consumers and staggering affluence for a chosen few top distributors and the companies supporting them. Such deceptive earnings representations are necessary to promote and uphold this inequitable earnings structure that defines every MLM company. Based on compensation plans that form complicated structural hierarchies, which ensure a pervasive inequality between the top distributors, who are displayed and paraded around as examples of what is achievable, and low-level recruits, who will never attain financial freedom, the MLM industry has staked its financial success on the faulty premise that it is their right to deceptively market the business opportunity using atypical income claims.

Because deceptive earnings claims are pervasive in the direct selling industry and reliable earnings information is rarely provided to MLM recruits and low-level distributors, large numbers of consumers, who can ill afford it, suffer serious harm from their involvement with MLM companies. Many participants report that they would have made different choices if better informed, but the direct selling industry will never voluntarily abstain from making deceptive earnings claims as that would run counter to their uncompromising pursuit of profits. MLM companies will only comply with the law when

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<sup>184</sup> Rohit Chopra et al., *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 Univ. of Pa. L. Rev. 71 (2021).

<sup>185</sup> Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm'n, Keynote Remarks of FTC Acting Chairwoman Rebecca Kelly Slaughter, at 2 (May 4, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1589607/keynote-remarks-acting-chairwoman-rebecca-kelly-slaughte-cfa-virtual-consumer-assembly.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589607/keynote-remarks-acting-chairwoman-rebecca-kelly-slaughte-cfa-virtual-consumer-assembly.pdf); see also Statement of Commissioner Rohit Chopra Regarding the Business Opportunity Rule, at 2 (June 14, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591046/statement\\_of\\_commissioner\\_rohit\\_chopra\\_regarding\\_the\\_business\\_opportunity\\_rule.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591046/statement_of_commissioner_rohit_chopra_regarding_the_business_opportunity_rule.pdf). ("[b]y formally codifying ... prohibitions [against false earnings claims] into rules like the Business Opportunity Rule, the Commission can seek restitution and penalties against multilevel marketers ... who cheat workers and entrepreneurs").

<sup>186</sup> Bonnie Patten, *Deceptive Income Claims – How Not to Market Your MLM Business*, Truth In Advertising, Sept. 14, 2020, <https://www.truthinadvertising.org/deceptive-income-claims-how-not-to-market-your-mlm-business>; (highlighting how MLMs advertise the business opportunity with claims of residual income, being able to retire or quit one's job, and part-time work for full-time pay).

the costs of doing so is less than the benefits of noncompliance, and a rule prohibiting deceptive earnings claims may be one way to influence the industry's expected costs by making their deceptive earnings representations prohibitively expensive. As such, TINA.org respectfully urges the Commission to initiate a rulemaking with respect to deceptive or unfair marketing using earnings claims.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'B-Patten', with a stylized flourish at the end.

Bonnie Patten  
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