



January 31, 2023

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

Re: Business Opportunity Rule ANPR, 16 CFR Part 437, Project No. R511993

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”) request for comments regarding the Business Opportunity Rule (“BOR”), and reincorporates by reference its May 10, 2022 comment regarding the FTC’s consideration of proposing a rulemaking to address deceptive or unfair marketing using earnings claims.<sup>1</sup>

Pursuant to the FTC’s solicitation of comments “to inform its consideration of whether the Rule should be extended to include business opportunities and other money-making opportunity programs not currently covered by the Rule,” TINA.org has focused its comments on the need to include the direct selling industry, and multilevel marketing companies (“MLMs”) in particular, in the BOR. 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 the BOR and discusses the exclusion of MLMs from this 2012 rule. The Comment then highlights the informational asymmetry that exists between MLM companies and recruits before exploring the near-universal use of deceptive earnings claims in the direct selling industry. Next, the Comment discusses the need for MLMs to provide accurate earnings data to potential recruits, arguing that the harms caused by misleading recruitment tactics, including false and misleading income disclosure statements, is pervasive and significant. The Comment further addresses the injuries suffered by distributors that are lured into MLMs as a result of misinformation and high pressure recruitment tactics. The Comment then explains the inadequacies of targeted law enforcement actions before turning to why direct selling self-regulation is not a viable substitute for the BOR. Finally, TINA.org argues that the purported poor fit of the BOR does not justify exempting MLMs from disclosure provisions and other requirements of the BOR before concluding its Comment by urging the Commission to extend the BOR to include MLMs.

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<sup>1</sup> Business Opportunity Rule, 87 Fed. Reg. 72428 (proposed Nov. 25, 2022) (to be codified 16 C.F.R. pt. 437), <https://www.govinfo.gov/content/pkg/FR-2022-11-25/pdf/2022-25587.pdf>.

## INTRODUCTION

Every year millions of Americans, mostly women,<sup>2</sup> many of them in precarious financial situations, pay to become sellers for multilevel marketing companies, enticed by tales and images of lavish income, or by the prospect of at least making a living while working on one's own schedule. Few of them will make a living, much less realize fabulous riches; about half will actually *lose* money,<sup>3</sup> as they struggle to recoup their initial investment through further spending on inventory, training and marketing, leading to loss of savings, debt accumulation and – not infrequently – bankruptcy.

While deceptive earnings claims made by MLMs clearly violate laws against unfair and deceptive conduct, MLMs remain largely unregulated. The lack of regulation is a consequence of the Commission's decision – under heavy lobbying pressure from the direct selling industry – to largely exempt MLMs from the Business Opportunity Rule (BOR),<sup>4</sup> which, among other protections, prohibits deceptive earnings claims by sellers of “business opportunities” and requires sellers to furnish specified written disclosures to potential buyers – and allow them time to review the disclosures – before entering business with them. In cases where the seller makes any earnings claims, the mandated disclosures must include specified earnings information.<sup>5</sup>

As has only become clearer in the intervening years, all the reasons necessitating a rule to protect entrants into business opportunities from unfair and deceptive recruiting practices apply at least as urgently to MLM recruitment. A “serious informational imbalance”<sup>6</sup> exists: prospective distributors, who often lack business sophistication, cannot obtain information about typical earnings, expenses or workload except from the MLMs themselves.<sup>7</sup> Misrepresentations, including unfounded “get rich quick” claims<sup>8</sup> and “[u]nsubstantiated and atypical claims of profitability,”<sup>9</sup> abound. Prospective recruits are often manipulatively pressured to enter agreements or incur expenses that they are likely to quickly regret. The potential for serious economic injury is as great for MLM participation as it is for most business opportunities as MLMs afford a strong likelihood

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<sup>2</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).

<sup>3</sup> See Marguerite DeLiema, et al., *AARP Study of Multilevel Marketing: Profiling Participants and Their Experiences in Direct Marketing* (2018), at 8-9 (almost half of MLM participants and former participants surveyed reported net losses), [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); see also Heidi Liu, *The Behavioral Economics of Multilevel Marketing*, 14 Hastings Bus. L.J. 109, 112 (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).

<sup>4</sup> 16 C.F.R. § 437.

<sup>5</sup> 16 C.F.R. § 437.4(a)(4).

<sup>6</sup> Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59614, 59625 (Dec. 21, 1978).

<sup>7</sup> *Cf. id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 59631.

of not just failing to earn money, but of actually losing money. Large populations are affected: more than 7 million Americans distributed for an MLM in 2021;<sup>10</sup> about one in thirteen American adults have participated in an MLM at some point in their lives.<sup>11</sup>

None of the reasons for exempting MLMs from the BOR have withstood the test of time. TINA.org has found that false and unfounded earnings claims – explicit and implied – are not just prevalent, but almost universal. The costs of applying the rule to the direct selling industry is not high, particularly in comparison 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.

Targeted enforcement has proven far from sufficient to curb industry abuses, and has become even less viable since the Supreme Court foreclosed the principal avenue the Commission had relied on to seek monetary relief from offenders.<sup>12</sup> Moreover, a formal rule can make it more feasible to bring legal actions when necessary, as well as providing guidance on its own. Additionally, direct selling self-regulation, which is focused exclusively on health and income claims and is continuously engaged in a game of whack-a-mole with the industry, is no substitute for including MLMs in the BOR. And if – as the Commission concluded in 2012 – the disclosures required under the BOR are not a perfect fit for MLM distributors, that is no reason to abandon millions of financially desperate and unsophisticated people to be victimized by deceptive MLMs. It is a reason to craft a rule that makes more sense for MLMs, as the Commission did for other business opportunities, when it determined that the disclosures required under the Original Franchise Rule were not a good fit.

Now, as the FTC undertakes its review of the BOR, is the time to remedy the information deficit and surfeit of misinformation by which MLMs take advantage of millions of recruits. The Commission should amend the Rule so that it applies to MLMs.<sup>13</sup> Requiring truthful, understandable disclosures about typical earnings and time for prospective new distributors to consider them, while prohibiting misleading earnings claims, is a way of protecting participants that respects the autonomy of all involved. In keeping with the approach of the Original Franchise Rule, it would not dictate or limit anyone’s choices, but would simply afford potential distributors sufficient information to “determine whether a particular offering is in [their] best interest.”<sup>14</sup>

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<sup>10</sup> Direct Selling Association (DSA), *Direct Selling in the United States: 2021 Industry Overview* (2022), [https://www.dsa.org/docs/default-source/industry-fact-sheets/dsa-2021g-ofactsheetv3.pdf?sfvrsn=51c6d6a5\\_3](https://www.dsa.org/docs/default-source/industry-fact-sheets/dsa-2021g-ofactsheetv3.pdf?sfvrsn=51c6d6a5_3).

<sup>11</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>12</sup> *See AMG Cap. Mgmt. LLC v. Fed. Trade Comm’n*, 141 S. Ct. 1341 (2021) (holding that Section 13(b) of the FTC Act does not authorize monetary relief).

<sup>13</sup> Business Opportunity Rule, 71 Fed. Reg. 19053 (notice of proposed rulemaking Apr. 12, 2006) (to be codified 16 C.F.R. pt. 437).

<sup>14</sup> Business Opportunity Rule, 73 Fed. Reg. 16109, 16111 (revised notice of proposed rulemaking March 26, 2008) (to be codified 16 C.F.R. pt. 437).

## INTEREST OF COMMENTER

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.

TINA.org's website, [www.tina.org](http://www.tina.org), 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>15</sup> pillows and essential oils falsely marketed as able to treat chronic diseases<sup>16</sup> and social media influencers deceptively marketing alcohol brands to minors.<sup>17</sup> The website functions as a clearinghouse: TINA.org receives consumer complaints about suspicious practices, which it 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>18</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>19</sup>

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<sup>15</sup> TINA.org's Mercedes-Benz Investigation, <https://truthinadvertising.org/brands/mercedes-benz/>.

<sup>16</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>17</sup> TINA.org's Diageo Investigation, <https://truthinadvertising.org/brands/diageo/>; TINA.org's Cîroc Investigation, <https://truthinadvertising.org/brands/ciroc/>.

<sup>18</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>19</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 Cap. 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 *amici 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

Since its inception, TINA.org has filed legal actions against hundreds of companies and entities, published more than 1,300 ad alerts, written about 1,000 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 distributors. The advocacy organization makes this information available to the public on its website, which features deceptive and atypical earnings claims by more than 150 MLMs.<sup>20</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, the Direct Selling Association (“DSA”).<sup>21</sup> The nonprofit has

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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).

<sup>20</sup> See TINA.org’s DSA Companies’ Income Claims Investigation, <https://truthinadvertising.org/industries/mlm-income/>; TINA.org’s 2020 FTC MLM Database, <https://truthinadvertising.org/evidence/2020-ftc-mlm-database/>; 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/hempworxincome-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-incomeclaims-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/>; TINA.org’s Resorts360 Investigation, <https://truthinadvertising.org/brands/resorts360/>.

<sup>21</sup> See 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-](https://truthinadvertising.org/wp-content/uploads/2016/06/6_6_16-ltr-from-TINA-to-)

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>22</sup> It has also successfully

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[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>22</sup> See, e.g., 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 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 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-](https://truthinadvertising.org/wp-content/uploads/2018/06/6_14_18-letter-to-FL-AG-re-Team-)

advocated for the FTC to initiate a penalty offense program to curb deceptive earnings claims by MLM companies, among others.<sup>23</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 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>24</sup>

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[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>23</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.

<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).

In short, TINA.org’s data regarding atypical earnings claims pulled from the direct selling industry leave no doubt that this deceptive marketing tactic is widespread within the direct selling industry and significantly impacts millions of consumers.<sup>25</sup>

## REGULATORY BACKGROUND

The Business Opportunity Rule, currently under review, has its origins in a 1978 FTC rule regulating the sale of franchises and business opportunity ventures.<sup>26</sup> This rule, subsequently referred to as the “Original Franchise Rule,”<sup>27</sup> was “promulgated in response to widespread evidence of deceptive and unfair practices” surrounding such sales,<sup>28</sup> including evidence of widespread “misrepresentations and failure to disclose material facts.”<sup>29</sup> Those misrepresentations often included unfounded “‘get rich quick’ claims”<sup>30</sup> and “[u]nsubstantiated and atypical claims of profitability ... [including] deceptively glowing earnings projections or forecasts to prospective franchisees without having information which constituted reasonable basis in fact for making such claims.”<sup>31</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>32</sup> Other prevalent unfair and deceptive franchisor business practices included high pressure sales tactics depriving franchisees of the opportunity to review the complex agreements into which they were entering.<sup>33</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>34</sup> The emphasis on disclosures and preventing misrepresentations was an attempt to mitigate the “serious informational imbalance ... between prospective franchisees and their franchisors,”<sup>35</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>36</sup> and the “low level of business sophistication” of many prospective franchisees.<sup>37</sup>

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<sup>25</sup> See, e.g., TINA.org’s DSA Companies’ Income Claims Investigation, <https://truthinadvertising.org/industries/mlm-income/>; TINA.org’s 2020 FTC MLM Database, <https://truthinadvertising.org/evidence/2020-ftc-mlm-database/>.

<sup>26</sup> Disclosure Requirements, 43 Fed. Reg. 59614.

<sup>27</sup> See Business Opportunity Rule, 76 Fed. Reg. 76815, 76816 (Dec. 8, 2011) (to be codified 16 C.F.R. pt. 437).

<sup>28</sup> Disclosure Requirements, 43 Fed. Reg. 59614.

<sup>29</sup> *Id.* at 59627.

<sup>30</sup> *Id.* at 59625.

<sup>31</sup> *Id.* at 59631.

<sup>32</sup> *Id.* at 59626.

<sup>33</sup> *Id.* at 59627.

<sup>34</sup> *Id.* at 59614.

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

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

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



An extensive review of the Franchise Rule, beginning in 1995,<sup>38</sup> confirmed that disclosure requirements were needed for sales of many different 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>39</sup> Further, the FTC found that “fraud is not only prevalent but persistent” in the business opportunity industry;<sup>40</sup> that sales of some types of business opportunities are “fraught with unfair and deceptive practices, in particular, false or unsubstantiated earnings claims”;<sup>41</sup> and that such practices are “widespread.”<sup>42</sup>

At the same time, the Commission found that franchises and business opportunities are sufficiently different as to make different disclosure requirements appropriate.<sup>43</sup> Because most business opportunities are much less expensive than franchises and involve relatively simple purchase agreements,<sup>44</sup> the Commission decided that some of the disclosures required of franchisors would impose unnecessary costs on business opportunity sellers and buyers.<sup>45</sup> Accordingly, a separate Business Opportunity Rule was proposed in 2006,<sup>46</sup> which broadened the scope of business opportunities covered, but streamlined the disclosures required.<sup>47</sup> The initial proposed version of the BOR explicitly applied to MLMs, among other business opportunities.<sup>48</sup>

However, the MLM 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 resulted in 81 members of Congress writing letters urging the FTC not to apply the BOR to MLMs.<sup>49</sup> Meanwhile, the industry orchestrated a barrage of comments to the FTC opposing regulation of MLMs, to the point that the Commission noted: “The record in this proceeding to date is largely comprised of thousands of letters from ... MLM distributors.”<sup>50</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

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<sup>38</sup> Request for Comments Concerning Trade Regulation Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 60 Fed. Reg. 17656 (Apr. 7, 1995) (to be codified 16 C.F.R. pt. 436).

<sup>39</sup> Business Opportunity Rule, 71 Fed. Reg. at 19057.

<sup>40</sup> Business Opportunity Rule, 73 Fed. Reg. at 16112.

<sup>41</sup> Business Opportunity Rule, 76 Fed. Reg. at 76821.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 76817.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Business Opportunity Rule, 71 Fed. Reg. 19054.

<sup>47</sup> Business Opportunity Rule, 76 Fed. Reg. at 76820.

<sup>48</sup> Business Opportunity Rule, 71 Fed. Reg. at 19080.

<sup>49</sup> Matt Stroud, *How Lobbying Dollars Prop Up Pyramid Schemes*, The Verge, April 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>50</sup> Business Opportunity Rule, 73 Fed. Reg. at 16118.

individual distributors.”<sup>51</sup> Thousands of comments were simply form letters from distributors, solicited by their MLMs.<sup>52</sup>

The industry campaign was successful – in 2008 the proposed rule was amended so that MLMs for the most part were not covered.<sup>53</sup> This version of the rule was finalized in 2012,<sup>54</sup> and remains in effect. The justifications offered for the amendment were largely based on uncritical acceptance of industry comments.

In justifying its decision not to regulate MLMs under the BOR, the Commission employed the framework for analysis that would apply when promulgating a new rule.<sup>55</sup> This framework consisted of a “multi-step inquiry”:

Initially, the Commission requires evidence that an existing act or practice is legally unfair or deceptive. The Commission then requires affirmative answers, based upon the preponderance of reliable evidence, to the following four questions:

- (1) Is the act or practice prevalent?
- (2) Does a significant harm exist?
- (3) Would the rule provisions under consideration reduce that harm? and
- (4) Will the benefits of the rule exceed its costs?<sup>56</sup>

At the initial step, 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>57</sup> Nevertheless, relying heavily on industry comments, the Commission concluded that it could not answer the four ensuing questions affirmatively, because:

- (1) and (2) The Commission could not determine “whether such deceptive practices are prevalent.”<sup>58</sup>
- (3) It was not clear to the Commission that the disclosures required under the BOR would reduce harm to consumers, in large part because of difficulties gathering helpful earnings data,<sup>59</sup> due to difficulties in determining whether

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<sup>51</sup> *Id.* at 16113.

<sup>52</sup> *Id.* at 16113 n.35.

<sup>53</sup> Business Opportunity Rule, 73 Fed. Reg. 16109, 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>54</sup> Business Opportunity Rule, 76 Fed. Reg. at 76816.

<sup>55</sup> Business Opportunity Rule, 73 Fed. Reg. at 16117.

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

<sup>57</sup> *Id.* at 16119.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 16119-20. The Commission also pointed to the difficulty, less relevant to this Petition, of establishing criteria to distinguish between legitimate MLMs and pyramid schemes. *Id.* at 16119-21; Business Opportunity Rule, 76 Fed. Reg. at 76822. The Commission also concluded that the BOR requirement of references from current distributors would not be useful for MLMs, because current

products purchased by a distributor were sold at retail, stockpiled in inventory, passed on to downstream marketers or purchased for the distributor's own consumption,<sup>60</sup> and due to distributors' incentive to inflate their sales in order to qualify for higher levels of commissions.<sup>61</sup>

(4) The Commission accepted industry arguments that the disclosures in question would be highly burdensome and costly to the MLM industry, without commensurate benefits to consumers or potential distributors, especially since the entry costs into the MLM business are typically quite low.<sup>62</sup>

Rather than designing disclosures that might be more suitable for MLMs – as it did for business opportunities when it found the requirements of the Original Franchise Rule a poor fit – the FTC chose to dispense with disclosures altogether for MLMs and to rely instead on law enforcement actions targeting particular instances of deceptive and unfair conduct.<sup>63</sup>

Since the current version of the BOR was finalized in 2012, the FTC has brought nine cases against MLMs alleging that they were operating illegal pyramid schemes, in each case also alleging false earnings claims,<sup>64</sup> as well as two cases alleging only false earnings claims.<sup>65</sup> Those cases sought disgorgement and restitution under Section 13(b)<sup>66</sup> of the FTC Act.<sup>67</sup> However, the U.S. Supreme Court held in *AMG Capital Management*<sup>68</sup> that Section 13(b) does not authorize equitable relief, leaving uncertain the path forward for targeted enforcement actions.

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distributors have an incentive to exaggerate the benefits of becoming a distributor in order to recruit more distributors under them. *Id.* at 76823.

<sup>60</sup> Business Opportunity Rule, 73 Fed. Reg. at 16120; Business Opportunity Rule, 76 Fed. Reg. at 76823.

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

<sup>62</sup> Business Opportunity Rule, 73 Fed. Reg. at 16121; Business Opportunity Rule, 76 Fed. Reg. at 76822 (citing industry comments).

<sup>63</sup> Business Opportunity Rule, 76 Fed. Reg. at 76823.

<sup>64</sup> *FTC Pyramid Cases Post-Amway Truth In Advertising*, Sept. 18, 2015 (updated June 2, 2022), <https://www.truthinadvertising.org/ftc-pyramid-cases-by-the-numbers> (listing cases). The FTC has brought a total of 32 such cases, *id.* since its pivotal case against Amway. *In re Amway Corp.*, 93 F.T.C. 618 (1979).

<sup>65</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. 29, 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>66</sup> 15 U.S.C. § 53(b).

<sup>67</sup> *See* Business Opportunity Rule, 71 Fed. Reg. at 19060-61; *see also* Rohit Chopra & Samuel Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 Univ. of Pa. L. Rev. 73, 73 (2021) (“Section 13(b) is the primary means by which the [FTC] brings enforcement actions”).

<sup>68</sup> *AMG Cap. Mgmt. LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341 (2021).

## ARGUMENT

### I. PROSPECTIVE MLM DISTRIBUTORS LACK INFORMATION ABOUT TYPICAL EARNINGS

The conditions motivating the BOR pertain at least as much with respect to MLM recruitment. Prospective distributors are often enlisted through earnings claims lacking any “reasonable basis,”<sup>69</sup> “high pressure tactics”<sup>70</sup> and “failure to disclose material facts.”<sup>71</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>72</sup> and many distributors do not just fail to earn money, but actually lose money.

Most crucially, a “serious informational imbalance”<sup>73</sup> exists: prospective distributors, who often lack business sophistication, cannot obtain information about typical earnings, expenses or workload except from the MLMs themselves,<sup>74</sup> and the majority of MLMs do not disclose this information voluntarily despite the fact that accurate information about typical earnings is indisputably material to people considering selling and recruiting for an MLM. As the FTC has noted, “earnings claims are highly material to consumers in making their investment decisions and typically are the single most decisive factor in such decisions.”<sup>75</sup>

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>76</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>77</sup> Consequently,

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<sup>69</sup> Disclosure Requirements, 43 Fed. Reg. at 59631.

<sup>70</sup> *Id.* at 59627.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 59626.

<sup>73</sup> *Id.* at 59625.

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

<sup>75</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”).

<sup>76</sup> Stacie Bosley et al., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 *Econ. Inquiry* 1643 (2020), <https://onlinelibrary.wiley.com/doi/10.1111/ecin.12840>.

<sup>77</sup> DeLiema et al., *supra* note 11.

when operators “mislead prospective participants about the odds of success, ... those prospects have little other information to use.”<sup>78</sup>

In the absence of disclosure requirements, most MLMs will not disclose earnings information. As of 2017, TINA.org found income disclosure statements available for only 32 of 140 DSA member companies.<sup>79</sup> Of the five largest MLMs, only one provided an income disclosure statement for its U.S.-based distributors.<sup>80</sup> And when MLMs do provide earnings information, it is often not sufficiently “full[] or accurate[] ... to allow for proper adjustment of expectations.”<sup>81</sup> For example, disclosures may be too complicated for prospects to digest; they do not provide information about expected expenses, nor even make clear that there will be expenses; they may emphasize atypical earnings of top distributors; or key information may be omitted or relegated to fine print.<sup>82</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>83</sup> and other unfounded earnings claims, such as “a monthly earning potential of \$1,000,000”;<sup>84</sup> “Unlimited Income Potential”;<sup>85</sup> or “[If] you want to make over \$1 million a year, you can do that.”<sup>86</sup> To make rational decisions about MLM participation, potential distributors must have accurate information about what they can reasonably expect to earn. At present, that information simply is not available to MLM recruits.

## **II. THERE IS A NEED FOR MLMs TO PROVIDE ACCURATE EARNINGS DATA TO POTENTIAL RECRUITS**

The reasons for exempting MLMs from the BOR have not withstood the test of time. To the contrary, requiring MLMs to furnish accurate, transparent earnings data to prospective MLM distributors satisfies every element of the “multi-step inquiry” for promulgating or amending a rule that the Commission identified when deciding not to

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<sup>78</sup> Andrew Stivers et al., *The Alchemy of a Pyramid: Transmutating Business Opportunity Into a Negative Sum Wealth Transfer*, 8 (Dec. 3, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3497682](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3497682).

<sup>79</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>80</sup> Bosley et al., *supra* note 76.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Disclosure Requirements, 43 Fed. Reg. at 59625.

<sup>84</sup> MyDailyChoice, Inc. DBA HempWorx, Direct Selling Self-Regulatory Council Case No. 9-2020, <https://bbbprograms.org/programs/all-programs/dssrc/ccd/case-9-2020-monitoring-inquiry-mydailychoice-inc.-dba-hempworx>.

<sup>85</sup> It Works!, Direct Selling Self-Regulatory Council Case no. 7-2019, <https://bbbprograms.org/programs/all-programs/dssrc/ccd/case-7-2019--monitoring-inquiry--it-works!>.

<sup>86</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).

apply the BOR to MLMs.<sup>87</sup> Elements supporting the inclusion of MLMs in the BOR will be examined in turn.

### **A. Deceptive Earnings Claims and Other Unfair Recruitment Practices are Widespread in the Direct Selling Industry**

In the years since the Commission declared that it was difficult to gauge the prevalence of false or unsubstantiated earnings claims by MLMs, the question has been decisively answered: “The problem of false earnings claims is widespread.”<sup>88</sup> In fact, TINA.org has found that they are nearly universal. In many cases the impact of these claims is compounded by manipulative tactics used to pressure new recruits into hurriedly signing contracts to represent MLMs and to incur expenses that they are likely to quickly regret.

#### **1. Deceptive Earnings Claims are Nearly Universal in the MLM Industry**

Almost all MLMs make deceptive earnings claims. After investigating the marketing of every DSA company on the membership list as of November 2017, TINA.org found that 137 out of 140 – more than 97 percent – were making or had made false or unsubstantiated earnings claims to entice prospective distributors into their MLM network.<sup>89</sup> In a survey of more than 1,000 individual MLM participants, more than 22 percent admitted that they had lied about their earnings.<sup>90</sup>

Grossly inflated earnings claims are 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>91</sup> Typical earnings claims include:

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<sup>87</sup> Business Opportunity Rule, 73 Fed. Reg. at 16117; *see also supra*, Regulatory Background.

<sup>88</sup> Chopra & Levine, *supra* note 67, at 108.

<sup>89</sup> *Multilevel Marketing: The Day Job That Doesn’t Pay*, Truth In Advertising, Dec. 18, 2017, <https://www.truthinadvertising.org/mlm-income-claims-investigation>; *see also* TINA.org’s DSA Companies’ Income Claims Investigation, <https://truthinadvertising.org/industries/mlm-income/>. Links to numerous misleading earnings claims for each of the 137 offending MLMs – over 3000 such claims in all – are available at: TINA.org’s DSA Companies’ Income Claims Databases, <https://www.truthinadvertising.org/mlm-income-claims-database>; *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=Z75TSCBiQOQ> (video compiling numerous misleading earnings claims by MLM representatives).

<sup>90</sup> 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>91</sup> TINA.org’s DSA Companies’ Income Claims Investigation, <https://truthinadvertising.org/industries/mlm-income/>.

- “Full time mommy, part time Pure Romance consultant making full time income!”<sup>92</sup>
- “Unlimited Income Potential”<sup>93</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>94</sup>
- “Not every investment can bring financial freedom. But Paparazzi can!”<sup>95</sup>
- “We give you the means to achieve an extraordinary level of success”<sup>96</sup>
- “Enjoy unlimited earning potential”<sup>97</sup>

Still more extravagant claims are also common:

- “[W]e are one of the only companies in the world that has a monthly earning potential of \$1,000,000”<sup>98</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>99</sup>
- “[T]he possibilities are endless, I have met those who make \$22,000/month”<sup>100</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>101</sup>

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<sup>92</sup> Pure Romance, LLC, Direct Selling Self-Regulatory Council Case No. 20-2020, <https://bbbprograms.org/programs/all-programs/dssrc/ccd/case-20-2020-compliance-pure-romance-llc>.

<sup>93</sup> It Works!, Direct Selling Self-Regulatory Council Case No. 7-2019, <https://bbbprograms.org/programs/all-programs/dssrc/ccd/case-7-2019--monitoring-inquiry--it-works!>

<sup>94</sup> Letter from FTC to Isagenix Int’l 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>95</sup> Paparazzi Accessories, LLC, Direct Selling Self-Regulatory Council Case No. 14-2020, <https://bbbprograms.org/programs/all-programs/dssrc/ccd/case-14-2020-monitoring-inquiry-paparazzi-accessories-llc>.

<sup>96</sup> Aloe Veritas, Inc. Direct Selling Self-Regulatory Council Case No. 5-2019, <https://bbbprograms.org/programs/all-programs/dssrc/ccd/case-number-5-2019>.

<sup>97</sup> Magnolia and Vine, Direct Selling Self-Regulatory Council Case No. 10-2020, <https://bbbprograms.org/programs/all-programs/dssrc/ccd/case-10-2020-monitoring-inquiry-magnolia-and-vine>.

<sup>98</sup> MyDaily Choice, Inc. DBA HempWorx, DSSRC Case No. 9-2020, <https://bbbprograms.org/programs/all-programs/dssrc/ccd/case-9-2020-monitoring-inquiry-mydailychoice-inc.-dba-hempworx>.

<sup>99</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>100</sup> Letter from FTC to Arbonne Int’l (April 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_to_arbonne_international_llc.pdf).

<sup>101</sup> Letter from FTC to Pruvit Ventures, Inc. (April 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).

MLMs and their distributors also often post images of lavish lifestyles,<sup>102</sup> or of large checks or piles of cash.<sup>103</sup>

## 2. Typical Distributor Earnings Come Nowhere Near MLM Claims

The earnings reality is quite different from the marketing hype most MLM companies engage in. The FTC itself warns the public: “Most people who join legitimate MLMs make little or no money. Some of them lose money.”<sup>104</sup> Indeed, even the President of the DSA has acknowledged: “Most distributors will not realize a replacement income, let alone a lavish lifestyle.”<sup>105</sup>

While information about earnings is not available for most MLMs,<sup>106</sup> in 2017, TINA.org was able to obtain income disclosure statements from 32 DSA member companies. According to these MLMs’ own financial statements, 80 percent of the companies’ distributors grossed less than \$100 a month, before expenses. For about half the companies, a majority of distributors earned no money at all.<sup>107</sup>

TINA.org’s findings are in line with those of other independent investigators. In a survey of more than 1,000 consumers, 601 of whom were or had been direct sellers for an MLM,<sup>108</sup> the AARP found that only one-quarter of the distributors made any profit at all during the entire time they worked for the MLM, and only 3 percent made more than \$25,000 total during the entire time.<sup>109</sup> Forty-seven percent actually lost money, after accounting for payments for inventory, marketing and trainings.<sup>110</sup> A 2018 survey of more than 1,000 MLM participants conducted by MagnifyMoney found similarly dismal results: the median participant worked 33 hours per month for 14 months of the past five

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<sup>102</sup> See 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/ccd/dssrc-administrative-closure-10> (references to luxury automobiles).

<sup>103</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/ccd/dssrc-administrative-closure-6>.

<sup>104</sup> *Multi-Level Marketing Businesses and Pyramid Schemes*, Fed. Trade Comm’n, May 2021, <https://www.consumer.ftc.gov/articles/multi-level-marketing-businesses-and-pyramid-schemes>.

<sup>105</sup> Joseph Mariano, *Learning and Building on Collective Experience*, Direct Selling News, Sept. 1, 2016, <https://www.directsellingnews.com/learning-and-building-on-collective-experience>.

<sup>106</sup> See *supra*, at Pt. I. The fact that in most cases information about distributors’ earnings at a given MLM is known only to the MLM itself would provide a compelling reason, even in the absence of deceptive claims, to require companies to provide that information.

<sup>107</sup> *Multilevel Marketing: The Day Job That Doesn’t Pay*, Truth In Advertising, Dec. 18, 2017, <https://www.truthinadvertising.org/mlm-income-claims-investigation> (citing income disclosure statements, mostly from 2016 and 2015, published at <https://www.truthinadvertising.org/wp-content/uploads/2017/12/Income-Disclosure-Statements.pdf>).

<sup>108</sup> DeLiema, *supra* note 3, at 3.

<sup>109</sup> *Id.* at 8-9.

<sup>110</sup> *Id.* at 9.



years, with median income of \$18.18 a month – about 67 cents an hour before deducting business expenses.<sup>111</sup> Almost 60 percent of participants reported earning a total of less than \$500 over the past five years.<sup>112</sup> And figures for prominent individual companies – in the rare instances where data are available – tell a similar story. For example, the median annual income of the lowest earning 53 percent of Rodan & Fields distributors was \$141 in 2021;<sup>113</sup> the lowest 89 percent of U.S.-based distributors for Young Living earned an average of \$3 in 2022.<sup>114</sup>

The contrast between earnings claims used to recruit distributors and accurate typical earnings of distributors at MLM companies is stark. For example, during the same period in which Team National posted more than 120 testimonials of distributors boasting of the lavish lifestyles they had realized, the company’s earnings disclosure statement revealed that 93 percent of its active distributors averaged earnings of less than \$500 for the year before expenses; and about 86 percent received no income at all.<sup>115</sup> More recently, TINA.org collected more than 5,000 unsubstantiated earnings claims being used for recruitment purposes by Forever Living Products International despite the fact that 89 percent of its distributors earn absolutely nothing.<sup>116</sup>

In sum, there is an industrywide mismatch between the grand, easy earnings advertised by MLMs and the reality of paltry or nonexistent sums earned by most MLM distributors.

### **3. Earnings Data are Often Presented in Misleading Ways**

Even when income disclosure statements are available, they are often inaccurate or presented in ways that obscure the dismal facts about distributor earnings and can easily mislead recruits.<sup>117</sup> Some of the common issues with MLM earnings representations include:

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<sup>111</sup> Laryea, *supra* note 90.

<sup>112</sup> *Id.*

<sup>113</sup> Rodan + Fields 2021 Income Disclosure Statement, <https://www.rodanandfields.com/en-us/assets/us/income-disclosure-statement.pdf>.

<sup>114</sup> Young Living 2022 U.S. Income Disclosure Statement, [https://static.youngliving.com/en-AU/PDFS/IDSONlineVersion\\_PDF\\_US\\_Page3.pdf](https://static.youngliving.com/en-AU/PDFS/IDSONlineVersion_PDF_US_Page3.pdf).

<sup>115</sup> *Multilevel Marketing: The Day Job That Doesn't Pay*, Truth In Advertising, Dec. 18, 2017, <https://truthinadvertising.org/articles/mlm-income-claims-investigation/> (citing Team National, Income Earnings Disclosure 2016, <https://communication.mybigbusiness.com/documents/Income-Earnings-Disclosure-2016.pdf>; TINA.org, Team National Income Claims Database, <https://www.truthinadvertising.org/team-national-income-claims-database>).

<sup>116</sup> Letter from TINA.org to FTC Regarding Deceptive Marketing by Forever Living (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>117</sup> See, e.g., 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/>.

- MLMs’ earnings data reporting gross revenues, obscuring the lack of profit after business expenses.<sup>118</sup> Not only do such numbers fail to account for participation fees and marketing, training and networking costs, they often don’t even factor in the costs of purchasing inventory.<sup>119</sup>
- Further, MLMs commonly mislead by overemphasizing atypical earnings of a few top distributors.<sup>120</sup> For example, the income disclosure statement for Young Living shows that its top rank of distributors averaged earnings of over \$150,000 a month in 2016. But that rank included less than 0.1 percent of the company’s distributors. Meanwhile, 94 percent of the company’s distributors were at the lowest rank; they averaged less than \$1 a month in earnings, before accounting for expenses.<sup>121</sup>
- Also misleading is the typical MLM practice of reporting “average” (i.e., mean) earnings, rather than median earnings.<sup>122</sup> Because the bulk of the total earnings used to calculate the average goes to a select few individuals at the top of the earnings rankings,<sup>123</sup> the typical or median distributor in a company will earn substantially less than the reported average.<sup>124</sup> The salience of the difference is illustrated by LuLaRoe’s 2021 income disclosure statement: distributors’ *average*

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<sup>118</sup> See, e.g., Bosley, *supra* note 76. [on page 15-16 but article starts on 1643 of journal] (“disclosure materials do not provide sufficient information to allow for estimation of likely expenses, nor prompt the consumer to consider expenses”); see also 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-> (MLM participants often discount “the difference between revenue and profit”).

<sup>119</sup> For example, while analysis of the 2018 Opportunity and Earnings Disclosure Summary for essential oils company doTerra shows that only 39 percent of its distributors had any earnings at all, the reality is still worse as the reported earnings were all *before expenses*, not accounting for the costs of buying and promoting the product. Dara Yip, *Multi-level Marketing: The Dark Side of Side Hustling*, PocketSmith, Aug. 23, 2021, <https://www.pocketsmith.com/blog/multi-level-marketing-the-dark-side-of-side-hustling> (noting that even the fact that most distributors saw no revenues at all was obscured by emphasizing the number that did).

<sup>120</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, 96 (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1092188](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092188).

<sup>121</sup> Sara Silverstein et al., *People Who Sell for Multilevel Marketing Companies Look Wildly Successful on Facebook, But the Reality is Much More Complicated*, Insider, Aug. 6, 2019, <https://www.insider.com/mlms-use-social-media-facebook-portray-financial-success-2019-7>. Similarly, according to the 2016 income disclosure statement for It Works!, the highest rank, comprising .03 percent of distributors, averaged a monthly income of almost \$34,000; the lowest rank, comprising 77.6 percent of distributors, averaged \$51 a month. *Id.*

<sup>122</sup> Peter Vander Nat & William Keep, *MLM Income Disclosures: When Average Does Not Equal Typical*, Truth In Advertising, Sept. 9, 2020, <https://www.truthinadvertising.org/mlm-income-disclosures-when-average-does-not-equal-typical>.

<sup>123</sup> See, e.g., Pareja, *supra* note 120, at 96.

<sup>124</sup> Vander Nat & Keep, *supra* note 122.

gross profit was \$10,933.98, while *median* gross profit was \$1,326.04.<sup>125</sup> In fact, in many cases the median earner will make nothing at all.<sup>126</sup>

- Obscuring the truth even further, company data are often selectively presented in a way that makes it impossible to determine the earnings of most participants, even when average earnings are reported.<sup>127</sup>

In sum, when MLMs provide earnings data, they are often misleading even when not entirely false. To enable prospective distributors to make an informed decision about participating, MLMs must be required to furnish clear information about *typical net* earnings of all distributors.<sup>128</sup>

#### **4. The Impact of Deceptive Earnings Claims is Compounded by Emotionally Manipulative, High-Pressure Recruitment Tactics**

As with franchise purchases, the lack of earnings information – and abundance of misinformation – surrounding decisions to distribute for an MLM is made worse by “high pressure tactics”<sup>129</sup> to enroll (and extract payments from) new distributors before they have a chance to make an informed decision. Many distributors tell of having been pressured to join – in overpowering group settings, via exploitation of preexisting relationships or through recruiters manipulatively inserting themselves into personal networks.<sup>130</sup>

Because the principal way for MLM participants to make money – or recoup the expenses they have incurred – is through commissions on inventory purchases by one’s “downline,” distributors are generally pressured to recruit new distributors so that they can earn bonuses for themselves and their “uplines.”<sup>131</sup> Distributors often receive – and

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<sup>125</sup> 2021 LuLaRoe Income Disclosure Statement, <https://www.lularoe.com/lularoe-income-disclosure-statement>. (Both figures were inflated by excluding all distributors who did not succeed in making any sales.)

<sup>126</sup> For example, while Neora’s income disclosure statement for February 2019-January 2020 reported average annual gross earnings of \$1,054, almost 70 percent of its active participants earned nothing; even among the minority with some earnings, most of the earnings presumably went to a few well-positioned individuals. See Vander Nat & Keep, *supra* note 122.

<sup>127</sup> *Id.*

<sup>128</sup> See 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-tnj.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589560/phillips-mlm-keynote-tnj.pdf). (participants need information about “generally” achieved results; “I do not mean the average or mean of what participants in a specific company earn – I mean what the typical distributor earns, which should factor in expenses rather than reflect gross income”).

<sup>129</sup> *Cf.* Disclosure Requirements, 43 Fed. Reg. at 59627.

<sup>130</sup> See, e.g., Alden Wicker, *Multilevel-Marketing Companies Like LuLaRoe Are Forcing People Into Debt and Psychological Crisis*, Quartz, Aug. 6, 2017, <https://qz.com/1039331/mlms-like-avon-and-lularoe-are-sending-people-into-debt-and-psychological-crisis>; Thompson, *supra* note 118; Silverstein, *supra* note 121.

<sup>131</sup> See, e.g., 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>

act on – the message to recruit by any means necessary,<sup>132</sup> including being encouraged “to lie about their income and investment to make sales and win over recruits.”<sup>133</sup> Pressure from uplines gets participants “to do things they wouldn’t otherwise do, including misleading others.”<sup>134</sup> Indeed, more than 22 percent of MLM participants surveyed “admit[ted] they have lied to friends and family about the money they earned or their total investment.”<sup>135</sup> And nearly one in three Americans in a 2019 survey reported feeling pressured by a family member who is an MLM distributor.<sup>136</sup> By way of example, a Tupperware distributor was told to use her mother’s advanced cancer as a sales pitch to recruit other sellers: “You need to turn it into a party and ask everyone that cares about you and your mom to help you sell Tupperware.”<sup>137</sup> And an Amway distributor was “told to cut out everyone who didn’t ... participate in our ‘downline,’ including family.”<sup>138</sup>

According to a 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.”<sup>139</sup> A business reporter found: “Often, the poor and less formally educated are targeted by multilevel marketing.”<sup>140</sup> A former distributor

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[women-financial-freedom\\_1\\_5d0bfd60e4b07ae90d9a6a9e](#) (“these women are constantly pressured to ... sign up new recruits”).

<sup>132</sup> See, e.g., Kellie Scott, *Talking About the Pressure Put on MLM Reps Could Help End the Feelings of Shame*, ABC Everyday, Feb. 16, 2020, <https://www.abc.net.au/everyday/escaping-the-toxic-positivity-of-mlm/11924864> (distributor of weight loss products was instructed to “go back to people who said they couldn’t afford the program to get them on board ‘by any means necessary,’” such as encouraging them to borrow money “under the pretense that ... they would make their money back”).

<sup>133</sup> Laryea, *supra* note 90.

<sup>134</sup> Silverstein, *supra* note 121 (citing examples, e.g., a distributor who admitted that she “definitely exaggerated what a life-changing opportunity Young Living was” commented, “I wouldn’t have done that had I not had the pressure coming down from the people above me”; a distributor for It Works was advised by higher-ups to “post a picture of as much cash as we could ... on Facebook to talk about how it had been our bonuses this month,” and so she withdrew as much as she could from her family bank account for a picture, falsely claiming it was MLM bonus earnings; under pressure to recruit more distributors, a LuLaRoe distributor posted pictures of her family vacation on social media, falsely claiming that it was paid for by her LuLaRoe earnings); see also Thompson, *supra* note 118 (“hemorrhaging money” from participation fees and inventory she was pressured to buy, a Younique distributor was encouraged “to act like she was flourishing,” and so, she would upload photos of orders that she had made herself, pretending they were from customers).

<sup>135</sup> Laryea, *supra* note 90.

<sup>136</sup> Erika Giovanetti, *MLM Consultants Pressure Friends and Family to Overspend, And It’s Straining Relationships*, Lending Tree, Dec. 16, 2019, <https://www.lendingtree.com/debt-consolidation/survey-mlm-consultants-pressure-spending>.

<sup>137</sup> Bond, *supra* note 131.

<sup>138</sup> 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>.

<sup>139</sup> Silverstein, *supra* note 121. See also Yip, *supra* note 119 (“The typical MLM’s recruitment playbook targets people who are at vulnerable points in their life – maybe they’ve recently lost a job, or had a baby, suffered a bereavement, or have incurred debt”).

<sup>140</sup> Bond, *supra* note 131.

concluded: “These companies have really targeted these low-income ... women ... siphoning what little money we have here away from the families who need it because they’ve been sucked into these scams.”<sup>141</sup> The AARP survey correspondingly 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>142</sup>

In sum, while it is not possible to quantify the prevalence of high pressure and emotionally manipulative recruiting by MLMs, anecdotal evidence from multiple sources suggests that it is pervasive. As such, it is imperative that prospective MLM distributors subjected to such manipulative tactics, often when they are especially emotionally vulnerable, have access to – and time to review – accurate, clear information that can afford them realistic earnings expectations.

### **B. Deceptive Earnings Claims and Lack of Earnings Information Lead to Significant Harms**

The Commission has found: “It is beyond a doubt that where [false or unsubstantiated earnings claims] occur, these practices cause significant consumer harm.”<sup>143</sup> A former FTC Chair similarly told the DSA: “[F]alse earnings representations ... cause real harm to consumers.”<sup>144</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>145</sup>

Not only do most distributors work the business opportunity without realizing any earnings, a large proportion actually suffer losses that damage their financial and personal well-being. Sucked into a cycle of further spending on inventory, participation fees and marketing in seeking to recoup their previous investments,<sup>146</sup> many participants end up in

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<sup>141</sup> Casey Bond, *10 Horror Stories That Prove MLM Companies are Complete Trash*, HuffPost, Oct. 4, 2019, [https://www.huffpost.com/entry/mlm-horror-stories\\_1\\_5d952097e4b0da7f66211f35](https://www.huffpost.com/entry/mlm-horror-stories_1_5d952097e4b0da7f66211f35).

<sup>142</sup> DeLiema et al., *supra* note 11.

<sup>143</sup> Business Opportunity Rule, 73 Fed. Reg. at 16119.

<sup>144</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>145</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>146</sup> See Liu, *supra* note 3, at 112 (“consultants often must purchase a training kit (which, in some cases, could run up to \$500). After training, they are expected to purchase ongoing promotional items (e.g., catalogs and display kits) or pay a subscription fee for their participation.”). See also, Bond, *supra* note 131 (quoting a former Tupperware distributor: “Every month, they would have a sales catalog and you had to buy samples to show at the parties. You also had kits that were always changing. So whenever a product would change, you’d have to buy more so you could have it at the party.”); Stephanie McNeal, *Millennial Women Made LuLaRoe Billions. Then They Paid the Price.*, BuzzFeed News, 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”); *LuLaRoe Distributors in Bankruptcy as Founder Touts Financial Freedom*, Truth In Advertising, Apr. 30, 2019 (updated June 10, 2019), <https://truthinadvertising.org/articles/lularoe-distributors-face->

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.

In the end, close to half of all MLM participants report *losing* money.<sup>147</sup> One survey found that more than 30 percent of participants used credit card debt 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>148</sup> MLM distributors often fail to realize that they are losing money until they find themselves substantially in debt.<sup>149</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; and another 4 percent occurred while marketing for an

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[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); Pareja, *supra* note 120, at 125 n.281 (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); Thompson, *supra* note 118 (“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”); 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”); Abby Vesoulis & Eliana Dockterman, *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”).

<sup>147</sup> DeLiema, *supra* note 3, at 9.

<sup>148</sup> Laryea, *supra* note 90.

<sup>149</sup> See, e.g., Bond, *supra* note 131 (citing examples of a Younique distributor who found herself “way into the red” when she left the MLM after approximately six months; and Tupperware distributor who found: “[I]t looked like I made a lot of money. But I lost a lot of money”); see also McNeal, *supra* note 146 (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 121 (It Works distributor: Despite “being within the top 10 percent at least of the company,” “[b]y the time we figured all the losses, we were at least negative \$1,000 after 18 months”); Vesoulis & Dockterman, *supra* note 146, (Beachbody “coach” thought he had made \$4000-5000 for the year, until he did his taxes and realized, “I’m probably worse off than when I started”).

MLM.<sup>150</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>151</sup>

MLM participation can take a personal toll as well. 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>152</sup> TINA.org has seen numerous consumer complaints from families whose children dropped out of college, sometimes abandoning full scholarships, in order to pursue MLM dreams of wealth that never materialized. Many distributors have reported psychological harm and even physical illness<sup>153</sup> resulting from the stress of being urged to market in ethically questionable ways and blaming themselves for their lack of success.<sup>154</sup>

In sum, when new recruits are misled by MLM earnings claims and rushed into making decisions they would not make if they had more time and were better informed, they often suffer serious harm as a consequence.

### C. Providing Accurate Earnings Information to Potential Distributors Would Likely Reduce Harm

Since earnings expectations are “highly relevant” and “often the single most decisive factor” in deciding whether or not to join an MLM,<sup>155</sup> it stands to reason that potential

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<sup>150</sup> DeLiema, *supra* note 3, at 12. 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*, Pt. I, underscoring the need for greater transparency in recruiting.

<sup>151</sup> *LuLaRoe Distributors in Bankruptcy as Founder Touts Financial Freedom*, Truth In Advertising, April 30, 2019 (updated June 10, 2019), <https://www.truthinadvertising.org/lularoe-distributors-face-bankruptcy-as-founder-touts-financial-freedom>.

<sup>152</sup> Laryea, *supra* note 90. More than 40 percent of married male distributors reported fighting with family and friends about their expenditures of time and money. *Id.*

<sup>153</sup> *See, e.g.*, McNeal, *supra* note 146 (LuLaRoe distributor reported developing self-hate and declining mental and physical health; a former LuLaRoe employee reported seeing many coworkers have nervous breakdowns); Wicker, *supra* note 130 (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>154</sup> *See, e.g.*, Lorenz, *supra* note 138 (MLMs “tend to make you feel like failing is your own fault”); Scott, *supra* note 132 (typical messaging blames downlines’ low earnings on not working hard enough, “leav[ing people ... ashamed]”); 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 130 (participants who admit that they are struggling to make sales are told that they are not trying hard enough).

<sup>155</sup> Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Keynote Remarks of FTC Chairwoman Ramirez at DSA Business & Policy Conference, at 2 (Oct. 25, 2016),

recruits would benefit from more and accurate information about earnings potential; and as noted, the company is the only source for this information.

Many MLM participants come to regret their choices. The 2018 AARP study found that nearly two-thirds of MLM participants (65 percent) would not rejoin the same MLM knowing what they know now, and 62 percent would not now be interested in joining any MLM.<sup>156</sup> Further evidence of dissatisfaction is the fact that most participants do not stay on for long: 26 percent of MLM participants surveyed by AARP reported participating for less than six months; 48 percent for less than a year; and 70 percent for less than two years.<sup>157</sup> Only 15 percent of respondents who had participated in MLMs were still doing so, with only half that number still working for their original company.<sup>158</sup>

It appears that in many cases participants' change of heart is linked in substantial part to gaining a more accurate picture of actual earnings:

- Over half (54 percent) believed that the company's representations of their chances of financial success were "not too accurate" or "not at all accurate"<sup>159</sup>
- Forty percent felt that the company had misled them<sup>160</sup>
- More than a third of those who left MLMs (36 percent) cited earning less than expected as one of their reasons for leaving<sup>161</sup>
- Others cited discrepancies between the realities of MLM participation and what they had been led to expect: "The commission structure mostly benefitted those at the top, not me" (29 percent)<sup>162</sup>
- "The market was saturated" (25 percent)<sup>163</sup>
- "I was forced to spend more money than I wanted to keep my membership active" (16 percent)<sup>164</sup>

In sum, there is substantial evidence that many recruits would make different decisions about MLM participation and spending if they were better informed about the earnings potential. Given the devastating toll that MLMs can have on the finances and lives of participants, it is likely that requiring MLMs to provide prospective participants with accurate earnings information – information which participants cannot obtain elsewhere – and allow them time to review that information would avert substantial harm for many recruits.

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[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>156</sup> DeLiema, *supra* note 3, at 12.

<sup>157</sup> DeLiema, et al., *supra* note 11.

<sup>158</sup> DeLiema, *supra* note 3, at 11.

<sup>159</sup> *Id.* at 10.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 12 Fig. 6. (Respondents could choose more than one reason for leaving.)

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*



### III. TARGETED LAW ENFORCEMENT IS NOT AN ADEQUATE SUBSTITUTE FOR THE BUSINESS OPPORTUNITY 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>165</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>166</sup> Illegal false earnings claims are "widespread" and the problem "persists year after year."<sup>167</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>168</sup>

Law enforcement actions against individual MLM companies simply cannot keep pace<sup>169</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 with respect to the BOR, it is woefully inadequate by itself to protect the public. Nor is it a more cost-efficient alternative to the BOR, given the extensive resources required for a legal action against an MLM for deceptive and unfair practices.<sup>170</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 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>171</sup>

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<sup>165</sup> Business Opportunity Rule, 73 Fed. Reg. at 16119.

<sup>166</sup> See, e.g., Chopra & Levine, *supra* note 67, 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>167</sup> Chopra & Levine, *supra* note 67, at 110; see also TINA.org's DSA Companies' Income Claims, <https://truthinadvertising.org/industries/mlm-income/> (almost every MLM continues to make deceptive income claims).

<sup>168</sup> *MLMs Continue to Break the Law Despite FTC Warning*, Truth In Advertising, Dec. 15, 2020 (updated Jan. 8, 2021), <https://truthinadvertising.org/articles/mlms-continue-to-break-the-law-despite-ftc-warning/>; TINA.org's 2020 FTC MLM Database, <https://truthinadvertising.org/evidence/2020-ftc-mlm-database/>.

<sup>169</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>170</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).

<sup>171</sup> Chopra & Levine, *supra* note 67.

Including MLMs within the BOR would not only prevent harm by clarifying all MLMs' legal obligations to prospective recruits, 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 a former 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>172</sup>

#### **IV. DIRECT SELLING SELF-REGULATION IS NOT A VIABLE SUBSTITUTE FOR INCLUDING MLMs IN THE BUSINESS OPPORTUNITY RULE**

Over the years, the DSA has used the existence of its Code of Ethics 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>173</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>174</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>175</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:

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<sup>172</sup> Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm’n, Keynote Remarks of FTC Acting Chairwoman Rebecca Kelly Slaughter at the Consumer Federation of America’s Virtual Consumer Assembly, 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 Rohit Chopra, Comm’r, Fed. Trade Comm’n, 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>173</sup> Press Release, Direct Selling Ass’n, 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>174</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>175</sup> Press Release, Direct Selling Ass’n, 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>.

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 ongoing review to ensure Code compliance and adherence to state and federal laws.<sup>176</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>177</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 recruiting, 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

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<sup>176</sup> Press Release, Direct Selling Ass’n, 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>177</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/>.

ranks and facing mounting scrutiny from federal and state regulators,<sup>178</sup> TINA.org<sup>179</sup> and the media,<sup>180</sup> the DSA announced at the beginning of 2019 the establishment of a new

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<sup>178</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, 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). 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>179</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 (updated Sept. 5, 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 (updated Sept. 15, 2017), <https://truthinadvertising.org/articles/dsa-ignoring-illegal-health-claims/>. See also *Consumer Advocates Call For Herbalife Probe*, Truth In Advertising, May 28, 2013 (updated Mar. 19, 2015), <https://truthinadvertising.org/articles/consumer-advocates-call-for-herbalife-probe/>.

<sup>180</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-probably-not-going-pay-off/>; Claire Suddath, *Thousands of Women Say LuLaRoe's Legging Empire Is a Scam*, Bloomberg, Apr. 27, 2018 (updated May 7, 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/>; Thompson, *supra* note 118; Susannah Snider, *What to Know Before Getting Involved in an MLM Company*, U.S. News, Oct. 9, 2020,

third-party, self-regulatory entity known as the Direct Selling Self-Regulatory Council (“DSSRC”)<sup>181</sup> to be administered by the Council of Better Business Bureaus (“CBBB”).<sup>182</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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<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 138; 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>181</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>182</sup> Press Release, Direct Selling Association, 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>183</sup> Limited in scope and resources,<sup>184</sup> the DSSRC was created only to examine “earnings claims (including lifestyle representations) and product claims (including services) communicated by direct selling companies and their salesforce members.”<sup>185</sup> It has no jurisdiction over MLM recruitment tactics generally or income disclosure statements specifically.

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. 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 specifically identify the inappropriate marketing material.<sup>186</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>187</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 the DSA’s Code of Ethics.<sup>188</sup>

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<sup>183</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>184</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=aded8a5\\_2%20](https://www.dsa.org/docs/default-source/default/2022-dssrc-one-pager.pdf?sfvrsn=aded8a5_2%20).

<sup>185</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>186</sup> DSSRC Case Decisions and Administrative Closures, <https://bbbprograms.org/programs/all-programs/dssrc/dssrc-cases-and-closures> (last visited Jan. 31, 2023); Bonnie Patten, *Self-Regulation in the Direct Selling Industry: Can it Ever Be More Than Symbolic?*, UC Davis Bus. L.J. 273, 292 (2022).

<sup>187</sup> Direct Selling Self-Regulatory Council, *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>188</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>.

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>189</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>190</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>191</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 enthusiasm and overall hollow commitment to self-regulation, has meant that DSSRC actions have been largely symbolic as opposed to transformative.

## **V. THE PURPORTED POOR FIT OF THE BUSINESS OPPORTUNITY RULE DOES NOT JUSTIFY EXEMPTING MLMs FROM DISCLOSURE AND OTHER REQUIREMENTS**

The direct selling industry has historically argued that “the Business Opportunity Rule is not the appropriate vehicle” for addressing problematic conduct in the MLM industry.<sup>192</sup> But if some of the disclosures required under the BOR are not a good fit for the MLM industry, that is not reason for the FTC to abandon millions of desperate and financially unsophisticated people to be victimized by deceptive MLM practices. Rather, it is reason to modify the rule so that it is a better fit for MLMs (and other gig economy work), as the FTC did for other business opportunities when it determined that the disclosures required under the Original Franchise Rule were not a good fit.

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<sup>189</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 Jan. 31, 2023).

<sup>190</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>191</sup> TINA.org’s DSSRC Database, <https://truthinadvertising.org/evidence/dssrc-database/>; Bonnie Patten, *Self-Regulation in the Direct Selling Industry: Can it Ever Be More Than Symbolic?*, UC Davis Bus. L.J. 273, 292 (2022).

<sup>192</sup> Business Opportunity Rule, 76 Fed. Reg. at 76823.

If not all the BOR’s disclosure requirements are optimally designed to provide the most useful information about MLMs – or in some cases, about other business opportunities – that is reason to refine the disclosure requirements, not to abandon them. Given the prevalence of deceptive earnings claims and manipulative, high pressure marketing tactics used by MLMs, an imperfect regulation is better than none. Still less is there any reason to exempt MLMs from the requirement of a cooling-off period before new distributors sign contracts or from the prohibition against misleading earnings claims. In the words of a former FTC Chair, “Although these disclosures may not be necessary in all instances, there is no basis to exempt firms from the basic requirement that earnings claims be truthful.”<sup>193</sup>

## CONCLUSION

The FTC erred when it exempted MLMs from the BOR in 2012. Since that time, it has been well documented that deceptive earnings claims and manipulative recruiting tactics are pervasive in the direct selling industry, and that there are no reliable resources for recruits to access in order to obtain honest and accurate earnings information for individual MLM companies. As a result, large numbers of distributors have suffered serious economic and personal harm from their involvement with MLMs, and many report that they would have made different choices if better informed. It is time that the informational imbalance between MLM recruits and companies be remedied – prescribed income disclosure statements along with a cooling-off period are discreet forms of regulation that would cost MLM businesses little in comparison to the consumer harms that could be averted. As such, TINA.org respectfully urges the Commission to amend and modify the Business Opportunity Rule so that it applies to MLMs and the direct selling industry.

Sincerely,



Bonnie Patten  
Laura Smith  
Truth in Advertising, Inc.

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<sup>193</sup> Chopra, *supra* note 172, at 2 n.7.