



UNITED STATES OF AMERICA
Federal Trade Commission
Washington, D.C. 20580

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Division of Marketing Practices
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March 15, 2024

Peter C. Marinello, VP
Direct Selling Self-Regulatory Council
112 Madison Ave., 3rd Floor
New York, NY 10016

Re: Guidance on Income Disclosure Statements for the Direct Selling Industry

Dear Mr. Marinello:

Staff of the Federal Trade Commission’s Bureau of Consumer Protection (“FTC Staff”) has serious concerns about the Fall 2023 Direct Selling Self-Regulatory Council (“DSSRC”) Guidance on Income Disclosure Statements (“IDS”). As you and I have discussed, FTC Staff recognize that industry guidance in general can be helpful but, in the current form, we believe the IDS Guidance does much more harm than good.

We are concerned that some of the Guidance either is not fully consistent with federal law or fails to address key concepts of FTC law. For example, it is well-settled that a company must have a reasonable basis for earnings claims at the time the claim is made. In its Guidance, the DSSRC advises that MLMs may make claims about “the amount of income that direct selling members can generally expect to earn,” even if they have only “some indication” of participant expenses or “an estimate of mandatory costs.” (See Guidance at 1, 6-7.) In the view of FTC Staff, this advice is not consistent with FTC law. As far as we know, no court or other authority has ever concluded that a reasonable basis exists from “some indication” or an “estimate.”¹ Notably, the Guidance does not address the many concerns that have been raised by the FTC and others about the format and content of IDSs currently in use by many MLMs.²

¹ In another example, we have concerns that the Guidance blesses a focus solely on “mandatory” costs rather than all the actual costs paid by typical participants.

² See, e.g., Complaint ¶¶ 33-35, *FTC v. Advocare*, Case No. 4:19-cv-715 (E.D. Tex. filed 2019) (“...Defendants have used purported income disclosures to further misrepresent the AdvoCare business opportunity. Until at least June 2015, AdvoCare excluded non-earners—more than 70 percent of Distributors—from its income disclosure statement, claiming they were not ‘active.’ By excluding these Distributors, Defendants severely inflated the percentage of Distributors in each purported income range”); Complaint ¶ 23, *FTC v. Herbalife*, Case No. 2:16-cv-5217 (C.D. Cal. filed 2016) (Herbalife’s IDS “does not provide clarity or realistic expectations, but instead obfuscates through a dense maze of

The Guidance also fails to address a fundamental difficulty: namely, how can one use earnings claims to advertise an opportunity that results in the typical participant making little to no money or losing money? The Direct Selling Association (“DSA”) has made statements acknowledging that, at best, most MLM participants make “modest or supplemental income,” and the DSSRC’s Guidance encourages MLMs to say in the IDS that most participants make “modest or supplemental income.” When I posed a question about what that phrase means to Adolfo Franco, DSA Executive Vice President and Chief Operating Officer, at DSA’s September 2023 Legal and Regulatory Seminar, I recall he said: “\$1200 per year.” I then responded by pointing out that such a sum translates to \$100 per month and \$25 per week. I am very skeptical that a potential participant would take away from a claim of “modest or supplemental income” that they would earn only \$25 per week.³ Furthermore, in my exchange with Mr. Franco at the 2023 Regulatory Seminar, we did not dig into the additional question of whether the amount he cited is gross or net. If it is gross, as I suspect, then there’s a further problem with this claim: it does not account for expenses such as costs for product purchases, travel for conferences, tools or services, and training. Taken together, such costs could completely offset the typical participant’s income or leave that participant with a net loss. Any MLM reasonably knows or can discern whether expenses are the same as or greater than likely gross income. Should expenses nullify income for many participants, any projected earnings claim—even an income claim for \$25 per week—is likely to leave a net impression that is deceptive. Further, should an MLM not know or be able to substantiate typical expenses, I also question whether a non-deceptive claim about income can be made.

As I have said before, I have yet to see any business opportunity marketing for any MLM that creates a net impression that most participants earn some \$25 per week. And should expenses erase income for many participants, even that claim would not be truthful.

Also, we know from our law enforcement and other work that even in circumstances where many participants make modest or supplemental net income (however perceived), significant numbers, if not the vast majority of the remaining participants, lose money or make

verbiage and numbers”); *FTC v. Vemma Nutrition Co.*, No. CV-15-01578-PHX-JJT, 2015 WL 11118111, at *7 (D. Ariz. Sept. 18, 2015) (the income disclosure document at issue “is both misleading and difficult for a reasonable consumer to understand, and it does not suffice as a means to inform consumers of their likely income”); *see also, e.g.*, Advance Notice of Proposed Rulemaking Regarding Deceptive or Unfair Earnings Claims, Comment No. 20-1551 (Professor Stacie Bosley) at 3-6, 19-20; William Keep, Do MLM Earnings Statements Constitute Deceptive Advertising?, Truth In Advertising, Feb. 29, 2016, <https://truthinadvertising.org/blog/mlm-earnings-statements-constitute-deceptive-advertising/>; Bonnie Patten, Jeunesse Income Disclosure Raises More Questions than Answers, Truth In Advertising, Nov. 10, 2015, <https://truthinadvertising.org/blog/jeunesse-income-disclosure-raises-more-questions-than-answers/>.

³ Even if we assume most MLM participants make \$2400 a year—twice as much as Mr. Franco recognized most MLM participants earn—we’re only talking about \$50 per week or \$200 per month, which still is not an amount I would consider “modest” or “supplemental.” Of course, what consumers understand such terms to mean no doubt depends on context giving rise to a net impression of any advertising. I want to be clear that an earnings claim for any of these amounts would still be material to consumers, like all earnings claims. The characterization as “modest” or “supplemental” is what raises concerns, as does the fact that this characterization fails to take into account expenses of participants.

nothing.⁴ If this—or something similar—is the factual backdrop for any particular MLM, in my view an IDS that highlights the earnings of the small percentage of MLM participants who make significant income is deceptive.

Based on the questions I received at DSA’s September 2023 Regulatory Seminar, which took place before DSSRC issued its IDS Guidance, it remains clear that some MLMs and participants want to make earnings claims touting substantial income. As I said, while it is theoretically possible to make truthful, non-deceptive claims about substantial earnings, doing so requires at a minimum a clear, prominent, and unavoidable presentation of the *typical* participant’s revenue minus expenses—all of which must be substantiated.

The concerns I have mentioned here represent only a few of the multiple thorny issues that the DSSRC’s Guidance on IDSs simply fails to address. FTC Staff is concerned that the DSSRC’s Guidance will encourage deceptive conduct and facilitate deceptive earnings claims and will result in consumer harm. In our view, an MLM that wishes to follow the FTC Act should not rely on this Guidance.

In the interests of transparency, we are posting this letter on the FTC’s website as a staff advisory opinion.

Please do not hesitate to reach out to me with any questions.

Respectfully,

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⁴ In many of the FTC’s cases we have found that most participants of particular MLMs lose money. *FTC v. Neora*, No. 3:20-cv-1979, 2023 WL 8446166, at *22 (N.D. Tex. Sept. 28, 2023) (citing a statistic that “96% of Neora BPs lose money”); *FTC v. Noland*, No. CV-20-47, 2023 WL 3372517, at *25, 31, 44, 47-48 (D. Ariz. May 11, 2023) (holding that “affiliates often lost money,” less than 6% of affiliates “received more money from SBH than they paid to SBH” and “even the affiliates who were able to eke out a small profit from retail sales generated miniscule net earnings that were often less than could be earned at minimum-wage job”); Complaint ¶ 39, *FTC v. Advocare*, Case No. 4:19-cv-715 (E.D. Tex. filed 2019) (alleging that, in 2016, 72.3 percent of Distributors did not earn any compensation from Advocare); Complaint ¶¶ 20, 67, *FTC v. Herbalife*, Case No. 2:16-cv- 5217 (C.D. Cal. filed 2016) (“Fifty-seven percent of Nutrition Club owners reported that their clubs made no profit or lost money” and “[t]he overwhelming majority of Distributors who attempt to retail the product make little or no net income, or even lose money from retailing the product”). And that certainly may be true for other MLMs. See Marguerite DeLiema, et al, *AARP Study of Multilevel Marketing: Profiling Participants and their Experiences in Direct Sales* (2018), available at https://www.aarp.org/content/dam/aarp/aarp_foundation/2018/pdf/AARP%20Foundation%20MLM%20Research%20Study%20Report%2010.8.18.pdf (finding that 47% of MLM participants lose money and 27% break even).