

August 29, 2016

Thomas J. Perrelli
Tel +1 202 639 6004
tperrelli@jenner.com

VIA EMAIL

Janet Ammerman
Federal Trade Commission
Bureau of Consumer Protection
Division of Marketing Practices
600 Pennsylvania Avenue, NW
CC-8528
Washington, DC 20580

Brad Winter
Federal Trade Commission
Bureau of Consumer Protection
Division of Enforcement
600 Pennsylvania Avenue, NW
CC-9528
Washington, DC 20530

Re: Proposal to Serve as Independent Compliance Auditor for Herbalife

Dear Ms. Ammerman and Mr. Winter:

I sincerely appreciate the opportunity to present the experience and qualifications of our team for your consideration in connection with your search for an Independent Compliance Auditor (“ICA”) to assess and report on Herbalife’s compliance with the Stipulated Order for Permanent Injunction and Monetary Judgment (“the Consent Judgment”). Although there are certain aspects of the request for applications that we believe would benefit from further discussion, we have outlined information regarding how we would approach the ICA position and the government’s overall goals, the relevant tasks, and the currently unknown variables. As explained in further detail below, I propose to serve as the ICA, working with a team of attorneys who are experienced in making the assessments and reporting required for the position.

A. Executive Summary

As a threshold matter, the goal of the ICA position – as with any monitorship – is to promote, ensure, and test compliance with the Consent Judgment. To achieve those objectives, we believe that significant engagement with the monitored company is required. While audits of databases and reviews of information that the company submits are important, it is equally critical to understand how the company operates, how its incentives are aligned, how messages (especially compliance-related messages) are communicated to employees, and how change can be implemented effectively in that organization. Our goal in serving as the ICA would be not only to achieve the objectives of the Consent Judgment, but to improve the company’s business practices by working with the company to establish and update policies, procedures, and structures that will promote compliance over the long term. We will report non-compliance when it occurs, but we will also focus on the broader regulatory goal of helping to ensure that the subject company does not simply return to the conduct that led to the Consent Judgment the day after the monitorship lapses.

Our approach to the monitorship would begin, after negotiation of an engagement letter that affirms the independence of the ICA, with the development of a work plan for approval by the FTC and acceptance by the monitored company. In our experience, an effective work plan benefits greatly from both the input of the FTC and any other relevant regulators about the primary (and lesser) issues of concern, and from extensive discussions with, and appropriately tailored document productions from, the company in order to understand the key elements of the company's business model. In our view, the work plan must be flexible: it should lay out the expected tasks (including, among other things, primary methods of evaluation and key categories of documents and interviews) for assessing compliance of each provision, but it should also leave the ICA discretion to take the steps needed to evaluate the company's performance as the ICA learns more about the company's business model and daily operations. That is, while the development of a work plan is important to educating the ICA and setting expectations, it is done at an early stage of the monitorship, when the monitor is almost certainly operating from less information than the company. A work plan that creates a preordained, lockstep path for the ICA is unlikely to achieve the objectives of the Consent Judgment.

We would also use these initial discussions to gain a better understanding of Herbalife's compliance structures. At a most basic level, we will look for the key elements of a compliance program: tone at the top, strong policies and procedures, regular and effective training, monitoring and compliance personnel within the organizations, reporting of potential instances of non-compliance, and focused audits to ensure compliance. At those initial stages, however, and as the monitorship progresses, we will also look for much more. The tone at the top can be spot-on, but it may not penetrate the organization; "tone-in-the-middle" is critical. Strong policies are key, but supervisors need to be held accountable when those policies are violated. Training is important, but there must be a feedback loop from customer complaints, compliance audits, and employee complaints to revise training to address newly identified problems. We would intend to focus on all of these aspects.

With a work plan in place and an understanding of the company's compliance program, our team would execute on the work. Again, our goal will be to improve Herbalife's long-term ability to comply with the Consent Judgment. We would meet regularly with Herbalife to discuss issues that we have identified and to give the company an opportunity to provide a plan and timeframe to address them. We would evaluate both the problem and the solution, and provide our best view to the FTC about whether the issue is significant and whether Herbalife's proposed solution will address it effectively.

Our approach means that, while our reports will generally address all of the relevant topics in each reporting period, each report may focus on different subsets of the Consent Judgment's obligations. Those specific areas of focus will sometimes be selected at random, varying so that each key requirement receives a deep dive over the life of the Consent Judgment, but they will often be selected because there appears to be a problem that needs further scrutiny. Indeed, our reports should not simply provide a rote "compliant" or "non-compliant" bottom-line judgment, but will provide context about each problem, its causes, how it can be addressed, and whether it is likely to be improved based on the company's plan or by other recommended approaches. Questions of enforcement when there is non-

compliance should be, in our view, the province of the FTC. Our job would be to provide the FTC with the key context and necessary information for its decisions.

Ultimately, as the Consent Judgment progresses, we would seek to “raise the bar” with each passing year. Early in the implementation of a consent judgment, regulated companies often have the best of intentions, but may not yet know how to effectively facilitate compliance. In later years, the situation should be much different. Thus, rather than following the same script in each year of the Consent Judgment, which can result in a loss of effectiveness in later years, our approach would promote improved compliance as the consent decree continues, ultimately leaving the company well-positioned to continue its compliance in the future.

B. & C. Personnel and Qualifications

The request for applications requests detail about the planned team. At this point, we do not feel in a position to provide a comprehensive structure of how the team would interact. We provide here the core team members and their experience, combining Parts B. and C. of the request for application. We would welcome the opportunity to discuss these team members and other staffing needs for the monitorship.

As noted above, I would serve as the ICA. I have substantial prior experience both in developing monitorships when I was with the United States Department of Justice (“DOJ”) and, since leaving government service, in serving as a monitor.

From 2009 to 2012, I served as the U.S. Associate Attorney General, the third-ranking official at the Department of Justice. In that role, I was the lead negotiator for the National Mortgage Settlement (“NMS”), the \$25 billion settlement with the five largest mortgage servicers. The NMS created a first-of-its kind monitorship over the five institutions.

Currently, I serve in a monitorship capacity (with varying titles) over three separate entities: Citigroup Inc. (“Citi”) and two online for-profit educational institutions, Bridgepoint Education and EDMC. The Citi monitorship involves implementation of the consumer relief provisions of a multi-billion settlement between state AGs/DOJ and Citi. In that role, our team evaluates whether Citi has met its commitments to providing relief, such as principal reduction and refinancings, to borrowers. The Bridgepoint and EDMC monitorships focus on compliance with consumer protection and advertising obligations under the state versions of the FTC Act. In that role, among other things, our team listens to the interactions between prospective students and admissions personnel, providing ongoing review and feedback to change marketing practices in the online education industry. The EDMC monitorship also includes more quantitative provisions, including ensuring that EDMC’s implementation of regulations regarding the calculation of job placement statistics complies with its settlement agreements.

Finally, I have substantial experience working with companies on compliance issues, identifying what went wrong, and creating plans to fix past problems that ensure that such problems will not recur. Among other things, I served as one of the team leaders conducting an investigation and producing an internal report to the board of directors for General Motors Company (GM) regarding events that led up to certain recalls stemming from faulty ignition switches.

Jenner & Block's team on this matter would consist largely of individuals with significant experience serving in government and in private practice as part of a monitorship team:

Brian Hauck is a Partner in Jenner & Block's Government Controversies and Public Policy Litigation Practice. Mr. Hauck currently plays a lead role in the EDMC monitorship, which is in its first year and will complete its first report in the fall. Mr. Hauck re-joined the firm in 2015 after serving for five years in leadership roles at the U.S. Department of Justice, as Deputy Assistant Attorney General in the DOJ's Civil Division from 2012 to 2014, and as chief of staff and senior counsel to the U.S. Associate Attorney General from 2009 to 2012. In those positions he both designed monitorships for settlements and designed audits of private entities.

Jessica R. Hertz is a Partner in the Government Controversies and Public Policy Litigation Practice. Ms. Hertz joined the firm after five years in senior positions in the Executive Branch. Ms. Hertz currently plays a lead role in the Citi monitorship, and also counsels clients on a wide variety of compliance matters. Prior to coming to Jenner & Block, she served as principal deputy counsel to Vice President Joseph R. Biden for nearly two years; prior to that, she served variously as counsel to the U.S. Deputy Attorney General, Special Assistant U.S. Attorney in the Eastern District of Virginia, and in the U.S. Office of Management and Budget where she specialized on regulatory policy and compliance issues.

Mary Ellen Callahan is a Partner and Chair of Jenner & Block's Privacy & Information Governance Practice. Ms. Callahan served as Chief Privacy Officer of the U.S. Department of Homeland Security from 2009 until August 2012. She has extensive FTC experience on consumer protection investigations and related compliance requirements related to FTC enforcement actions. She has served as counsel in more than 60 FTC investigations.

Emily M. Loeb is a Special Counsel in the Government Controversies and Public Policy Litigation and White Collar Defense and Investigations practices. She currently has a lead role in the Citi monitorship. She is a veteran of both the Office of White House Counsel and U.S. Department of Justice's Civil Rights Division, and she has managed responses to congressional oversight and inspector general investigations, overseen legislative and policy initiatives, and managed the confirmation processes for high-ranking Executive Branch officials. Ms. Loeb has also served as a Special Assistant U.S. Attorney in the Eastern District of Virginia.

We recognize that the size and scope of the monitorship may warrant more or fewer senior personnel. The attorneys identified above all have the ability to dedicate a significant part of their

work to this matter with me. We would also draw on the extraordinarily talented associates at Jenner & Block, most likely out of the firm's Washington, DC and Los Angeles offices.

Our initial assessment suggests that the retention of an accounting or data analytics firm will be beneficial. This is often the appropriate structure when a monitorship requires both quantitative analysis, such as Herbalife's accurate calculation of certain data, and a focus on how to ensure compliance and institute a compliance culture within the organization, such as Herbalife's adequate monitoring of other elements. In these contexts, we believe that monitorships benefit from lawyers or law firms performing the bulk of the work, assisted by an accounting or data analytics firm to handle quantitative aspects. That said, if the data analysis is sufficiently straightforward, an accounting firm may not be necessary. Indeed, the Jenner & Block team proposed above is currently performing monitorships in which it is handling the data analysis without the assistance of an outside firm. While we do not expect that to be the case with the ICA in this matter, and we have identified a consulting firm with excellent credentials to perform the data analysis should that prove appropriate,¹ we would review the issue anew as we formalize a work plan.

D. Prior Experience and References

We are happy to provide references if the FTC believes that we are a serious candidate. Our work as the monitor for the Citi settlement is available at our website: <http://www.citigroupmonitorship.com>. Given the nature of that monitorship, the Citi reports, to date, have been limited in scope. We can provide the relevant contact people with Citi, the Department of Justice, and the state attorneys general.

With respect to the Bridgepoint monitorship, we have completed two annual reports, which are detailed and substantial. Those reports are confidential and submitted to the Iowa Attorney General's Office on an annual basis. We can provide contact people at Bridgepoint and the Office of the Iowa Attorney General.

The first report of the EDMC monitorship will not be completed until fall of this year, at which point it will be submitted to the various Attorney General's Offices. We can provide contact people at EDMC and within the state attorney general community.

To the extent that the FTC desires other references from our team's work in the government or with respect to client matters apart from monitorships, we would be happy to provide them.

¹ The firm we have identified is one that we have worked with on another monitorship, and we have confidence in their abilities. They have identified a potential conflict that we would discuss with the FTC before engaging them. Having worked with several different accounting, consulting, and auditing firms on monitorship matters, we are confident that we can work with the FTC to find an acceptable one.

E. Proposed Activities

As noted above, we believe that many of the questions asked by the FTC will be answered most effectively as part of the development of the work plan. We have attempted to provide, in the executive summary above, how we would approach the ICA position. A few specifics, however, may be helpful.

- Sources of Information. Any monitor relies heavily on the monitored party to provide information in response to requests for documents and data; however, there must be ways to test and evaluate whether the information being provided is accurate and complete. Part of that testing process must come through interviews of employees and agents, including former employees and whistleblowers. We have also found that complaints provided to state and federal authorities, as well as complaints/hotlines maintained by a monitored company, can also identify important issues for follow-up.

In the context of for-profit colleges, we have found listening to the actual marketing interactions to be invaluable, and we have also used mystery-shopping techniques and testers to evaluate compliance. These techniques may be helpful under this Consent Judgment and we would consider retaining an established firm in this area.

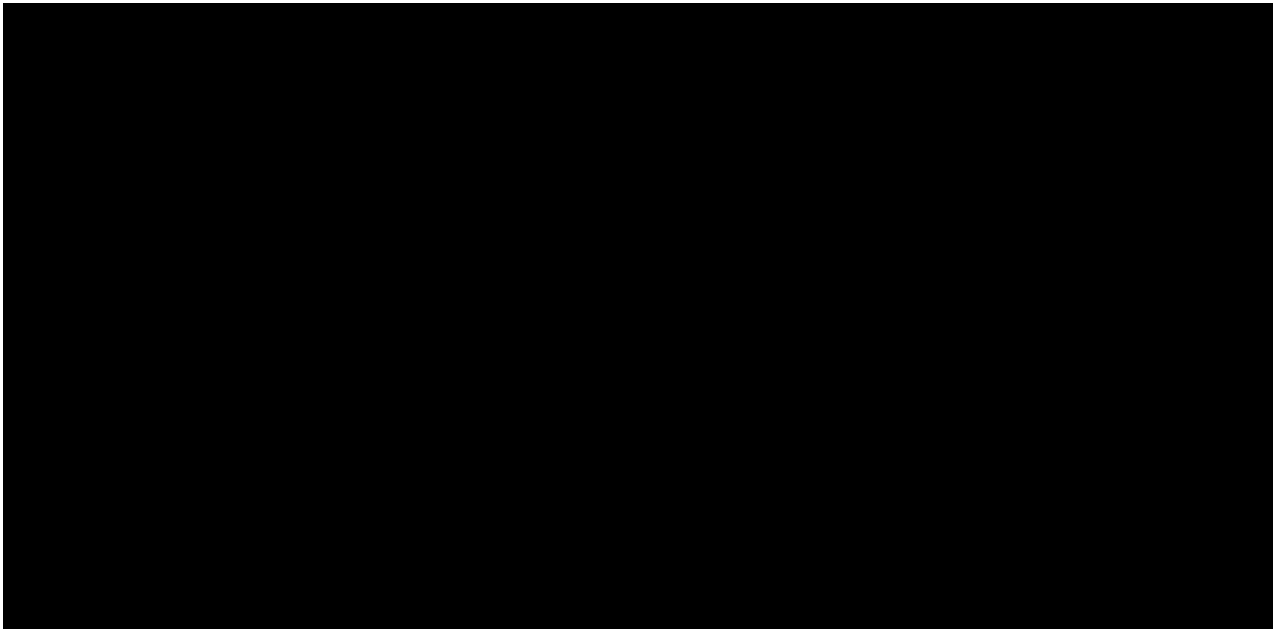
- Communications. In terms of process, we believe that Herbalife should identify a single point of contact for documents, visits, interviews, on-site records reviews, etc. That approach has proven effective, in our experience, though sometimes a team, rather than a single person, needs to serve that role. We would anticipate meeting, whether in person or by phone, weekly with Herbalife and monthly, or at different intervals as requested, with the FTC. We would expect these discussions to be substantive: identifying issues, discussing changes that need to be made, and specifying information or work that needs to be done.
- Reporting. We would seek to meet the FTC's desire for written reports every six months. We note that the process of report-writing is a significant aspect of any monitorship; more frequent reports increases costs and can, in some circumstances, consume resources that would be better used for monitoring itself. That said, we believe the six-month timetable is reasonable; the most difficult deadline will be the first report, as the parties will take some time to develop a working relationship.

F. Potential Conflicts of Interest or Bias

We have performed our standard firm-wide conflicts of interest review and have found no existing conflict that would prevent our firm from engaging in this representation. Jenner & Block has not represented Herbalife. Jenner does have matters before the FTC, but we do not know of any that appear to present a conflict of interest. Jenner was retained by a client that was considering claims against Herbalife and/or whether Herbalife was violating the law, and did a relatively small amount of work in 2014 on that matter.

We do not believe it would present a conflict, but we would be happy to explain the prior work in more detail so that the FTC could evaluate whether any real or perceived conflict issues arise.

G. Estimated Costs



Thank you for your consideration; please do not hesitate to contact me if you would like to discuss our application or any of the issues discussed.

Sincerely,

Thomas J. Perelli/Jett
Thomas J. Perelli