

FEDERAL TRADE COMMISSION

16 CFR Parts 437 and 462

RIN 3084-AB04

RIN 3084-AB70

Deceptive or Unfair Earnings Claims; Earnings Claim Rule Regarding Multi-Level Marketing

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) proposes to promulgate a rule entitled “Earnings Claim Rule Regarding Multi-Level Marketing” (“the proposed rule”), and revise the exemption provisions of the Business Opportunity Rule. The proposed rule would prohibit misleading or unsubstantiated earnings claims in connection with the advertising, marketing, promotion, or offering of any multi-level marketing program (“MLM”), as well as claims that misrepresent the opportunity to become a participant for a multi-level marketing program (“MLM participant”) as an employment opportunity. The proposed rule would require MLM sellers to have substantiation for earnings claims and to provide it to anyone who requests it, in the language in which the earnings claim was made. The proposed rule would also require sellers to maintain records of the substantiation for three years and provide it to the Commission upon request, and would prohibit sellers from providing participants with marketing materials for recruitment that contain deceptive earnings claims. This

rulemaking is needed to protect consumers from the ongoing problem of deceptive and unsubstantiated earnings and job claims in the MLM industry, as well as to give the Commission additional enforcement tools to combat such deceptive conduct and redress injured consumers. The Commission also proposes revisions to the Business Opportunity Rule to add an exemption from that rule for MLM sellers required to comply with the proposed rule.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Comment Submissions part of the **SUPPLEMENTARY**

INFORMATION section below. Write “MLM Earnings Claims NPRM, R111003” on your comment, and file your comment online at <https://www.regulations.gov>. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex B), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Melissa Dickey, (202) 326-2662, mdickey@ftc.gov, Andrew Hudson, (202) 326-2213, ahudson@ftc.gov, Molly Rucki, mrucki@ftc.gov, (202) 326-3774, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, Mailstop CC-5201, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

The Commission invites interested parties to submit data, views, and arguments on the proposed rule and specifically, on the questions set forth in section V of this notice of

proposed rulemaking (“NPRM”). The comment period will remain open until [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. To the extent practicable, all comments will be available on the public record and posted at the docket for this rulemaking on <https://www.regulations.gov>. If interested parties request to present their position orally, the Commission will hold an informal hearing, as specified in section 18(c) of the FTC Act, 15 U.S.C. 57a(c). Any request for an informal hearing must be submitted as a written comment within the comment period and must include 1) a request to make an oral submission, if desired; 2) a statement identifying the person’s interests in the proceeding; and 3) any proposals to add disputed issues of material fact that need to be resolved during the hearing. *See* 16 CFR 1.11(e). Any comment requesting an informal hearing should also include a statement explaining why an informal hearing is warranted and a summary of any anticipated oral or documentary testimony. If the comment identifies disputed issues of material fact, the comment should include evidence supporting such assertions. If the Commission schedules an informal hearing, either on its own initiative or in response to request by an interested party, the FTC will publish a separate document notifying the public pursuant to 16 CFR 1.12(a) (“initial notice of informal hearing”).

I. Background

The Commission published, on March 10, 2022, an advance notice of proposed rulemaking (“2022 ANPR”) pursuant to section 18 of the Federal Trade Commission (“FTC”) Act, 15 U.S.C. 57a, Commission Rules 1.7 through 1.20, 16 CFR 1.7–1.20; and 5 U.S.C. 553.¹ These authorities permit the Commission to promulgate, modify, or repeal

¹ Deceptive or Unfair Earnings Claims, advance notice of proposed rulemaking, 87 FR 13951 (Mar. 11, 2022).

trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

The 2022 ANPR described the Commission’s history of taking law enforcement action against and educating consumers about unfair or deceptive earnings claims in a wide range of contexts, including MLMs, business opportunities, franchise, coaching or mentoring, and other investment opportunities.² The 2022 ANPR asked a series of questions about, among other things, the prevalence of such unfair or deceptive practices and whether and how to proceed with a notice of proposed rulemaking.³ The Commission received comment for 60 days, and it received over 1,575 unique comments, which it has thoroughly considered.

The vast majority of commenters discussed alleged deceptive or unfair practices by MLM sellers,⁴ the harm these practices cause, and the extent, if any, to which the FTC should regulate MLM sellers. Based on the substance of these comments, as well as the Commission’s history of enforcement and other information discussed herein, the Commission has reason to believe that misleading or unsubstantiated earnings claims and misleading employment claims regarding multi-level marketing are prevalent⁵ and that proceeding with this rulemaking is in the public interest.⁶

² *Id.* at 13951-53.

³ *Id.* at 13953-56.

⁴ The proposed rule defines “Seller” as a multi-level marketing program, a participant, an agent of the MLM, or representative of the MLM who offers, advertises, markets, or promotes the MLM.

⁵ *See* 15 U.S.C. 57a(b)(3) (“The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.”).

⁶ In the 2022 ANPR, the Commission also sought comment on additional issues pertaining to deceptive earnings claims, including their prevalence beyond the MLM industry. Today, the Commission is releasing a notice of proposed rulemaking that proposes expanding the Business Opportunity Rule to address deceptive earnings claims in other industries.

The Commission is also issuing a new advance notice of proposed rulemaking (“2025 ANPR”) that seeks comments on whether the Commission should promulgate additional rules relating to MLMs, including provisions to prevent deceptive earnings claims and provisions that define with specificity other unfair or deceptive acts or practices.⁷ The Commission will consider comments made in response to the 2025 ANPR when considering comments made on this NPRM. Additionally, the Commission intends to hold a workshop concerning topics discussed in the 2025 ANPR.

The Commission is still considering whether it should initiate any additional rulemakings concerning the topics described in the 2022 ANPR.

II. The Basis for the Rule

Based on its law enforcement experience and the record developed to date, the Commission has determined that a Rule prohibiting unfair or deceptive earnings claims and employment claims⁸ in the sale of multi-level marketing programs is necessary and in the public interest.

A. Multi-Level Marketing Generally

⁷ See Earnings Claim Rule Regarding Multi-Level Marketing (additional provisions), published elsewhere in this issue of the *Federal Register*. Significant numbers of consumers also submitted testimonials about other harmful interactions with MLMs that, if true, are illegal, such as deceptive product claims, manipulative sales tactics, and allegations that the MLM operated as a pyramid scheme. The Commission is very concerned about such allegations and takes them seriously. However, they fall outside the scope of this rulemaking. The FTC encourages anyone with knowledge of deceptive product claims, illegal pyramid schemes, or other deceptive or unlawful conduct MLMs to submit a complaint at reportfraud.ftc.gov.

⁸ To be clear, the proposed rule would not ban multi-level marketers from making truthful claims that they are offering employment. Rather, it would address only deceptive claims. For example, if the MLM misrepresents in its advertising that the MLM participant position is salary-based, when that is not true, and does not disclose that the position requires a substantial upfront investment, that claim is deceptive and violates the FTC Act, *see FTC v. Equinox Int’l Corp.*, No. 99-cv-0969, 1999 WL 1425373, at *9 (D. Nev. Sept. 14, 1999) (finding that “[s]uch misrepresentations will ... likely constitute an unfair or deceptive practice in violation of the FTC Act,” and issuing a preliminary injunction in part on that basis), and it would violate the proposed rule.

Generally, an MLM distributes products or services through a network of workers,⁹ known as “participants” or “distributors,” who are not treated as employees of the company and do not receive a salary or wage. Instead, these workers usually are treated as independent contractors, who may earn income depending on their own revenues and expenses. Typically, the company does not directly recruit these workers, but relies upon its existing participants to recruit additional participants, which creates multiple levels of participants organized in “downlines.” A participant’s “downline” is the network of his or her recruits, and recruits of those recruits, and so on.¹⁰

According to the Direct Selling Association (DSA), an industry association for MLMs, 14.6 million individuals are MLM participants in the United States, most of whom do not work on a full-time basis.¹¹ According to an AARP study, 7.7% of the United States adult population has participated in at least one MLM.¹² MLM participants come from every community.¹³ The majority of MLM participants are women.¹⁴

⁹ MLMs recruit consumers to join their opportunity, and often deceptive claims are made during this recruitment phase. Many consumers get involved with MLMs because they are seeking income or work, but some may join for other reasons. For purposes of this NPRM, consumers that join an MLM will be referred to as “consumers,” or “participants.”

¹⁰ See FTC, *Business Guidance Concerning Multi-Level Marketing* (updated Apr. 2024), <https://www.ftc.gov/business-guidance/resources/business-guidance-concerning-multi-level-marketing>.

¹¹ DSA, *Direct Selling in the United States: 2022 Industry Overview*, https://www.dsa.org/docs/default-source/industry-fact-sheets/dsa-2022g-ofactsheetv4.pdf?sfvrsn=c51ed2a5_2 (“DSA 2022 Overview”) (stating 6.7 million participants were direct sellers who worked to build businesses and 7.9 million participants were discount buyers who purchased products for their own use but chose not to build a business); see also DSA, *Direct Selling in the United States: 2023 Industry Overview*, <https://www.dsa.org/statistics-insights/overview> (stating there are 6.1 million direct sellers and 6.9 million discount buyers) (“DSA 2023 Overview”); Comment No. 20-1541 (DSA) (“DSA ANPR”) at 2 (most MLM participants work “only on a part-time basis”); see also Comment No. 20-1562 (Coalition for Compliance) (“Coalition ANPR”) at 32 (citing DSA, *Direct Selling in the United States: 2020 Industry Overview*, https://www.dsa.org/docs/default-source/research/dsa-industry-overview-fact-sheetd601b69c41746fcd88eaff000002c0f4.pdf?Status=Temp&sfvrsn=6e75d9a5_2%27).

¹² Marguerite DeLiema, et al., *AARP Study of Multilevel Marketing: Profiling Participants and Their Experiences in Direct Sales* (2018) (“AARP Study”), https://www.aarp.org/content/dam/aarp/aarp_foundation/2018/pdf/AARP%20Foundation%20MLM%20Research%20Study%20Report%2010.8.18.pdf.

¹³ See, e.g., AARP Study at 5 (“There were no significant differences in race or ethnicity between MLM participants and those who never participated in MLM.”).

¹⁴ See, e.g., AARP Study at 4 (60% of MLM participants are women); see also DSA 2023 Overview.

The vast majority of MLM participants will not earn an income commensurate with full-time or part-time employment, and they actually will earn little or no income or lose money.¹⁵ For example, an AARP study found that 47% of MLM participants lose money and 27% break even.¹⁶ A survey of 1,049 MLM participants found that nearly 60% reported earning less than \$500 over the past five years, and that the median income of participants was \$0.67 per hour before deducting business expenses.¹⁷ A DSA study reported that the “[a]verage [gross] revenue per U.S. participant in 2020 was \$2,400.”¹⁸

¹⁵ Amicus Br. of DSA at 4, *FTC v. Neora*, No. 3:20-cv-1979 (N.D. Tex. Sept. 16, 2022), ECF No. 260 (MLMs “offer[] ... the opportunity to earn modest supplemental income to help their families or to otherwise engage in a personally satisfying activity”); see also Joseph Mariano, *Learning and Building on Collective Experience*, DSA News (Sept. 1, 2016), <https://www.directsellingnews.com/learning-and-building-on-collective-experience/> (“[MLMs] must increase [their] efforts to ensure prospective distributors are fully aware . . . that for most, direct selling can [only] provide supplemental income. Most distributors will not realize a replacement income, let alone a lavish lifestyle.”); Casey Bond, *MLMs Are a Nightmare For Women And Everyone They Know*, Huffington Post (Jan. 29, 2021), https://www.huffpost.com/entry/mlm-pyramid-scheme-target-women-financial-freedom_1_5d0bfd60e4b07ae90d9a6a9e (quoting Joseph Mariano, the DSA’s Chief Executive Officer, as saying “[a]nyone who’s saying that you’re going to make a lot of money [from an MLM] is not telling the truth,” and “[y]ou can make a lot of money, but most people don’t”); see also FTC Staff Report on MLM Income Disclosures (“Staff Report”) (September 2024), <https://www.ftc.gov/reports/multi-level-marketing-income-disclosure-statements> (summarizing content of 70 income disclosure statements located by staff in a review of the websites of all MLMs known to staff).

¹⁶ AARP Study at 13; see also Comment No. 20-1563 (Truth in Advertising, Inc.) (“TINA ANPR”) at 3 (“[H]alf or more will actually lose money . . .”) (citing AARP Study and Heidi Liu, *The Behavioral Economics of Multilevel Marketing*, 14 *Hastings Bus. L.J.* 109, 123-24 (2018), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1176&context=hastings_business_law_journal (“The majority of MLM consultants are likely to lose money from their participation.”)); Comment No. 20-1551 (Professor Stacie Bosley) (“Bosley ANPR”) at 7 (describing study of microlending program that found that the program “did reduce material hardship” of participants overall, but for MLM participants in the program “there was no significant reduction in material hardship”); Comment No. 20-747 (Professor Claudia Gross) (“Gross ANPR”) at 2 (citing AARP Study and estimating that 18.4 million U.S. consumers are harmed each year because of MLMs). Notably, one job board has banned MLMs from posting for participant positions on their website “[d]ue to the upfront, ongoing, or hidden costs for job seekers and the high risk of financial loss.” See Indeed, *Policy – Multi-Level Marketing Companies* (April 30, 2021), https://indeed.force.com/employerSupport1/s/article/Policy-Multi-Level-Marketing-Companies?language=en_US.

¹⁷ 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/news/mlm-participants-survey>; see also AARP Study (finding that 47% of MLM participants lose money and 27% break even).

¹⁸ Bosley ANPR Comment at 2 (citing DSA, *Impact of Direct Selling by State* (2020)). This average amount likely overstates the typical earnings of participants, as the statistics are skewed upward by the small share of high earners. *Id.* at 2-3 (citing TINA, *Multilevel Marketing: The Day Job that Doesn’t Pay* (Dec. 18, 2017), <https://truthinadvertising.org/articles/mlm-income-claims-investigation/>; William W. Keep & Peter J. Vander Nat, *Multilevel marketing and pyramid schemes in the United States: An historical analysis*, 6 *J. Hist. Res. in Mktg.* 188 (2014); Liu, *supra* note 16, at 109-137).

Also noteworthy is the Commission staff's recent analysis of publicly available income disclosure statements published by 70 MLMs. That analysis reveals that, in nearly every MLM where the figure could be calculated from the data the MLM self-reported in its disclosure statement, the vast majority of participants made \$1,000 or less annually, before expenses.¹⁹

The entry fee to join an MLM varies from MLM to MLM. The DSA commented that a typical MLM participant “can start for an average of \$82.50,”²⁰ but MLMs often encourage participants to make additional purchases when joining beyond what is technically required.²¹ After joining, MLM participants typically incur many expenses, which may include the cost of inventory, marketing expenses, website fees, costs related

¹⁹ Staff Report at section X & Appendix D; *see also* TINA, *Multilevel Marketing: The Day Job that Doesn't Pay* (Dec. 18, 2017), <https://truthinadvertising.org/articles/mlm-income-claims-investigation/> (“[TINA’s] review of 32 income disclosure statements that TINA.org was able to dig up for current DSA member companies revealed that more than 80 percent of distributors grossed less than \$1,200 annually or less than \$100 per month before expenses. And for about half of these companies, the disclosures indicate that the majority of distributors made no money at all.”); Comment No. 20-1543 (National Consumers League & Consumer Federation of America) (“NCL/CFA ANPR”) at 4-5 & n.5 (citing Jon M. Taylor, *MLM’s Abysmal Numbers*, in *The Case (for and) against Multilevel Marketing* 7-1, Consumer Awareness Institute (2011) (reviewing income disclosure statements of NuSkin and concluding that 99% of all participants lost money).

²⁰ DSA ANPR Comment at 2 (citing DSA 2018 Evolving Marketplace Study, https://www.dsa.org/docs/default-source/research/dsa-ipsos-2020-consumerattitudesinfographic2-27.pdf?sfvrsn=68ddfa5_2 (stating that the DSA 2018 Evolving Marketplace Study found “[a]verage required start-up costs” for MLM participants of \$82.50)). *But see* Comment No. 72-31 (Professor William Keep) (“Keep BOR ANPR”) at 2 (“The initial fee or start-up kit purchase should not be the measure of cost to the new Participant as at that point the Participant is not eligible for earnings. The true costs to Participants are expenses associated with growing purchase volume.”).

²¹ *See, e.g., FTC v. Vemma Nutrition Co.*, No. 15-cv-01578, 2015 WL 11118111, *5 (D. Ariz. Sept. 18, 2015) (“Vemma strongly encourages any person wanting to become an Affiliate to (1) purchase an Affiliate Pack—currently costing \$600 and containing Vemma products, audio and video recordings, printed materials and branded items—upon which eligibility for certain bonuses is contingent, and (2) sign up for \$150 monthly auto-delivery of two cases of product to maintain eligibility for bonuses.”); *Compl., FTC v. Neora, LLC*, No. 3:19-cv-19699 (D.N.J. Nov. 1, 2019), ECF No. 1 (alleging that Neora encouraged participants to buy non-mandatory starter packs, which cost between \$500-\$1,000, “as the best way ‘to get your business moving fast,’” and that 70% of Neora BPs chose to spend \$500 or \$1,000 on such a starter kit).

to attending conferences and trainings, and purchases required to reach higher ranks in the organization.²²

B. Procedural History

In 2006, the Commission issued a notice of proposed rulemaking for the Business Opportunity Rule, seeking comment on, among other things, whether misleading and unsubstantiated earnings claims by pyramid marketing schemes (including those operating as MLMs) should be regulated by that Rule.²³ Commenters affiliated with MLMs argued that the proposed regulations were unwarranted and unnecessarily burdensome as applied to MLMs.²⁴ Ultimately, in 2008 the Commission declined to universally regulate all MLMs under the Business Opportunity Rule.²⁵ The Commission also determined that the remedial provisions in the Rule, such as its particular mandatory disclosure document, were not necessarily well-suited to addressing the harm of deceptive earnings claims in the MLM industry.²⁶ The Commission committed to “continue to examine the MLM industry and individual companies” and said it would “use the flexibility inherent in [s]ection 5 of the FTC Act to address particular frauds in the MLM industry.”²⁷

C. Unfair or Deceptive Practices Involved in the Advertising, Marketing, Promotion, or Offering of Multi-Level Marketing Programs

²² TINA ANPR Comment at 20-21. Some participants borrow money to pay for these expenses. A 2018 survey found that more than 30 percent of participants used a credit card to finance their MLM involvement, almost one in ten took out a personal loan, and about one in five borrowed money from friends and family members. *Id.* at 22 (citing Laryea, *supra* note 17).

²³ Business Opportunity Rule, notice of proposed rulemaking, 71 FR 19054, 1960-1961 (Apr. 12, 2006).

²⁴ Business Opportunity Rule, revised notice of proposed rulemaking, 73 FR 16110, 16114-16 (Mar. 26, 2008).

²⁵ *Id.* at 16120-21. The Rule does not explicitly exempt MLMs from coverage. As with any other enterprise, the determination of whether an MLM is a business opportunity to which the Rule applies must be made on a case-by-case basis. *Id.*; *see also* 16 CFR 437.1(c).

²⁶ 73 FR at 16121.

²⁷ *Id.*

In response to the 2022 ANPR, over 1,400 of the more than 1,575 comments stated that MLM sellers have engaged in a variety of deceptive or unfair practices. Notably, many of those comments claimed that at least some MLM sellers have marketed, offered, or sold the opportunity to become an MLM participant through either a) misleading and unsubstantiated earnings claims; or b) deceptive claims that misrepresent that an MLM is offering an employment opportunity. As set forth herein, the comments are consistent with the Commission’s law enforcement experience and other evidence available to the Commission. Thus, the Commission has determined that it has reason to believe that this conduct is prevalent in the MLM industry.²⁸

1. Deceptive Earnings Claims

It is well-established that false, unsubstantiated, or otherwise misleading earnings claims are a deceptive practice that violates section 5 of the FTC Act. A long line of

²⁸ The Commission’s determination of prevalence is warranted if “it has issued cease and desist orders regarding such acts or practices, or ... any other information available to [it] indicates a widespread pattern of unfair or deceptive acts or practices.” *See* 15 U.S.C. 57a(b)(3). The Commission’s numerous law enforcement actions, the comments, and other evidence detailed herein more than amply meet the standard.

Federal court opinions so hold,²⁹ as do numerous decisions by the Commission that resulted in cease and desist orders prohibiting misleading earnings claims.³⁰

Deceptive earnings claims have long been an issue in the MLM industry. As early as 1974, the Commission has entered cease and desist orders against MLMs for, among other things, making deceptive earnings claims.³¹ In the ensuing five decades, the Commission has repeatedly brought enforcement actions against other MLMs for deceiving consumers with false and unsubstantiated earnings claims,³² and providing the

²⁹ See, e.g., *FTC v. Noland*, 672 F. Supp. 3d 721, 783-86 (D. Ariz. 2023) (final judgment after trial); *FTC v. John Beck Amazing Profits*, 865 F. Supp. 2d 1052, 1074-76 (C.D. Cal. 2012) (summary judgment); *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1225-26 (D. Nev. 2011), *aff'd in relevant part*, 763 F.3d 1094 (9th Cir. 2014) (summary judgment); *FTC v. Holiday Enters.*, No. 1:06-cv-2939, 2008 WL 953358, at *7 (N.D. Ga. Feb. 5, 2008) (summary judgment); *FTC v. Stefanichik*, No. 04-cv-1852, 2007 WL 1058579, at *5-6 (W.D. Wash. Apr. 3, 2007) (summary judgment), *aff'd*, 559 F.3d 924 (9th Cir. 2009); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1268 (S.D. Fla. 2007) (summary judgment); *FTC v. Tashman*, 318 F.3d 1273, 1277-78 (11th Cir. 2003) (vacating judgment and finding defendants liable on appeal); *FTC v. Medicor LLC*, 217 F. Supp. 2d 1048, 1053-54 (C.D. Cal. 2002) (summary judgment); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 527-29 (S.D.N.Y. 2000) (final judgment after trial); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 258 (E.D.N.Y. 1998) (judgment on liability after trial); *FTC v. Wolf*, No. 94-cv-8119, 1996 WL 812940, at *5 (S.D. Fla. Jan. 31, 1996) (summary judgment); *FTC v. Nat'l Bus. Consultants, Inc.*, No. 89-cv-1740, 1990 WL 32967, at *4, *8 (E.D. La. Mar. 20, 1990) (judgment after trial); *FTC v. U.S. Oil & Gas Corp.*, No. 83-cv-1702, 1987 U.S. Dist. LEXIS 16137, at *46-47 (S.D. Fla. July 10, 1987) (summary judgment); *FTC v. Kitco*, 612 F. Supp. 1282, 1292 (D. Minn. 1985) (final judgment after trial).

³⁰ See FTC, *Notice of Penalty Offenses Concerning Money-Making Opportunities*, <https://www.ftc.gov/MMO-notice> (“MMO NPO”) (compiling decisions).

³¹ See *Ger-Ro-Mar, Inc.*, 84 FTC 95, 113-14, 117-119, 123-125, 132-135, 138, 149-150, 160-162 (1974), *aff'd in relevant part*, 518 F.2d 33 (2d Cir. 1975), *modified*, 86 FTC 841 (1975); *Holiday Magic Inc.*, 84 FTC 748, 948, 984, 1032-1034, 1065, 1069 (1974), *modified*, 85 FTC 90 (1975). The Commission’s law enforcement experience, including the issuance of cease and desist orders, by itself is more than enough to establish that the conduct at issue in the proposed rule is prevalent in the MLM industry. See 15 U.S.C. 57a(b)(3).

³² See *FTC v. Noland*, No. 2:20-cv-0047 (D. Ariz. 2020); *FTC v. AdvoCare, Int'l, L.P.*, No. 4:19-cv-715 (E.D. Tex. 2019); *FTC v. Herbalife Int'l of Am., Inc.*, No. 2:16-cv-5217 (C.D. Cal. 2016); *FTC v. Vemma Nutrition Co.*, No. 2:15-cv-01578 (D. Ariz. 2015); *FTC v. Fortune Hi-Tech Mktg., Inc.*, No. 13-cv-578 (N.D. Ill. 2013); *FTC v. Burnlounge, Inc.*, No. 2:07-cv-3654 (C.D. Cal. 2007); *FTC v. Mall Ventures, Inc.* No. 04-cv-463 (C.D. Cal. 2004); *FTC v. NextGen3000.com, Inc.*, No. 03-cv-120 (D. Ariz. 2003); *FTC v. Trek All, Inc.*, No. 02-cv-9270 (C.D. Cal. 2002); *FTC v. Streamline Int'l, Inc.*, No. 01-cv-6885 (S.D. Cal. 2001); *FTC v. Skybiz.com*, No. 01-cv-396 (N.D. Okla. 2001); *FTC v. Netforce Seminars*, No. 2:00-cv-2260 (D. Ariz. 2000); *FTC v. Polk*, No. 99-cv-3679 (D. Md. 1999); *FTC v. Equinox*, No. 99-cv-0969 (D. Nev. 1999); *FTC v. Five-Star Auto Club, Inc.*, No. 99-cv-1693 (S.D.N.Y. 1999); *FTC v. FutureNet, Inc.*, No. 98-cv-1113 (C.D. Cal. 1998); *FTC v. Fortuna All., LLC*, No. 96-cv-799 (W.D. Wash. 1996); *FTC v. World Class Ntwk., Inc.*, No. SACV-97-162 (C.D. Cal. 1997); see also *In re Amway Corp.*, 93 FTC 618 (1979); *In re Koscot Interplanetary, Inc.*, 86 FTC 1106 (1975); but see *FTC v. Neora*, No. 3:20-cv-1979, 2023 WL 8446166, at *28 (N.D. Tex. Sept. 28, 2023) (agreeing with the FTC that “some ... statements by Neora are

means and instrumentalities for others to make deceptive earnings claims about MLM opportunities.³³ Most recently, in 2020 and 2021, FTC staff sent warning letters to thirteen MLMs alleging that they or their participants made deceptive claims about how people can make up the income they lost due to COVID by joining the MLM.³⁴

The evidence submitted in the record also demonstrates that deceptive earnings claims in connection with MLM advertisements are widespread. Consumer advocates offered data and other persuasive evidence that such earnings claims are a pernicious problem.³⁵ For example, they noted that over half the participants in a recent AARP study said that an “MLM company’s representations of financial success were not accurate,”³⁶ and that, in a survey of more than 1,000 individual MLM participants, “more than 22 percent admitted that they had lied about their earnings.”³⁷ The non-profit Truth in

... misleading as to the amount of money typically earned,” but declining to enter an injunction against future violations).

³³ See *FTC v. Noland*, No. 2:20-cv-0047 (D. Ariz. 2020); *FTC v. Vemma Nutrition Co.*, No. 2:15-cv-01578 (D. Ariz. 2015); *FTC v. Fortune Hi-Tech Mktg., Inc.*, No. 13-cv-578 (N.D. Ill. 2013); *FTC v. Mall Ventures, Inc.* No. 04-cv-463 (C.D. Cal. 2004); *FTC v. NextGen3000.com, Inc.*, No. 03-cv-120 (D. Ariz. 2003); *FTC v. Streamline Int’l, Inc.*, No. 01-cv-6885 (S.D. Cal. 2001); *FTC v. Skybiz.com*, No. 01-cv-396 (N.D. Okla. 2001); *FTC v. Netforce Seminars*, No. 2:00-cv-2260 (D. Ariz. 2000); *FTC v. Equinox*, No. 99-cv-0969 (D. Nev. 1999); *FTC v. Five-Star Auto Club, Inc.*, No. 99-cv-1693 (S.D.N.Y.1999); *FTC v. FutureNet, Inc.*, No. 98-cv-1113 (C.D. Cal. 1998).

³⁴ FTC Press Release, *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>; FTC Press Release, *FTC Sends Second Round of Warning Letters to Multi-Level Marketers Regarding Coronavirus Related Health and Earnings Claims* (June 5, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/06/ftc-sends-second-round-warning-letters-multi-level-marketers-regarding-coronavirus-related-health>; FTC Press Release, *With Omicron Variant on the Rise, FTC Orders More Marketers to Stop Falsely Claiming Their Products Can Effectively Prevent or Treat COVID-19* (Jan. 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/omicron-variant-rise-ftc-orders-more-marketers-stop-falsely-claiming-their-products-can-effectively>.

³⁵ NCL/CFA ANPR Comment at 4-5, 7-8; TINA ANPR Comment at 2-8, 11, 13, 15-17; Comment No. 20-1574 (Douglas Brooks) (“Brooks ANPR”) at 8; Comment No. 20-1281 (Professor William Keep) (“Keep ANPR”) at 3-8; Gross ANPR Comment at 2-3.

³⁶ Brooks ANPR Comment at 9-10 (citing AARP Study); see also Comment No. 72-26 (Truth in Advertising, Inc.) (“TINA BOR ANPR”) at 24 (AARP Study found that 40% of recipients felt that the MLM had misled them).

³⁷ TINA ANPR Comment at 15 n.98 (citing Laryea, *supra* note 17 (survey of 1,094 MLM participants involved with at least one company over the past five years)).

Advertising (TINA) offered evidence of “more than 11,000 examples of MLM companies and their distributors using atypical income representations in their marketing material.”³⁸ Additionally, TINA reported that, in 2017, it investigated every DSA member and found that 137 out of 140 (or more than 97%) made misleading and unsubstantiated income claims.³⁹ Between June and November 2023, TINA investigated 100 MLMs⁴⁰ and found “98 percent [of the 100 MLMs] used atypical and unsubstantiated income claims to promote the companies’ business opportunities.”⁴¹ TINA said it found more than 2,000 deceptive earnings claims made by those 100 MLMs.⁴² Since 1993, TINA has sent out 143 warning letters to MLMs concerning deceptive earnings claims, including 139 letters to DSA members,⁴³ and filed 25 complaints with Federal and State regulators and 29 complaints with the self-regulatory agency for the MLM industry, the Direct Selling Self-Regulatory Council (“DSSRC”).⁴⁴ Also, numerous Federal and State enforcement⁴⁵ and private class actions have been filed

³⁸ *Id.* at 11.

³⁹ *Id.* at 15. According to DSA estimates, more than 80% of direct sales in the U.S. are made by DSA members. *Id.* at 15 n.99 (citing DSA, *Frequently Asked Questions*, <https://www.dsa.org/about/faq> (last visited May 8, 2022)); *see also* Brooks ANPR Comment at 8 (“TINA’s findings were entirely consistent with my 30 years of experience in investigating and litigating against MLM companies. MLM companies and their high level distributors typically make outrageous claims concerning the income that prospective distributors will earn. These claims include both specific dollar figures (\$5,000 or \$10,000 per month or more) and ‘lifestyle’ claims like ‘financial freedom.’”).

⁴⁰ The one hundred MLMs included all members of DSA, as of June 1, 2023, and seven additional prominent MLMs.

⁴¹ TINA, *MLM Companies Income Claims* (Feb. 15, 2024), <https://truthinadvertising.org/industries/mlm-companies-income-claims/>.

⁴² *Id.*

⁴³ TINA ANPR Comment at 6 (citing and attaching letters).

⁴⁴ *Id.* For example, in May 2022, TINA sent a letter to the FTC documenting more than 5,500 questionable earnings claims “made by the company to recruit and retain distributors,” including claims of “earning a full-time income, achieving financial freedom, traveling the world, quitting one’s job and providing for one’s family during a pandemic.” *Id.* at 6, 11.

⁴⁵ *See* Amended Compl., *SEC v. Mufareh and Onpassive LLC*, No. 6:23-cv-01539 (M.D. Fla. Nov. 6, 2023) (alleging the MLM “knowingly and recklessly made repeated materially false and misleading statements and omissions concerning, among other things: ... the potential income to be earned”), ECF No. 26; *see also, e.g., State v. LLR, Inc.*, No. 19-2-2325-2 (Wash. Sup. Ct. 2019); *State v. Challenge, Inc.*, 725 P.2d 727

against MLMs that allegedly made deceptive earnings claims.⁴⁶ Deceptive practices, including deceptive earnings claims in the MLM space, also have led to coverage by high profile media outlets, including a four-part docuseries.⁴⁷

Professor Stacie Bosley stated that she had reviewed 34 publicly available MLM income disclosure statements in 2018 as part of her research and concluded that all were misleading.⁴⁸ For example, she found that a) two-thirds excluded participants who earned \$0, which “skew[ed] the representations by showing only the positive revenue participants,” b) “[d]isclosures typically included average statistics (as opposed to

(Ariz. Ct. App. 1986); *State v. Bull Inv. Group, Inc.*, 351 A.2d 879 (Conn. Sup. Ct. 1974); *Commonwealth v. Tolleson*, 321 A.2d 664 (Pa. Commw. Ct. 1974); *REI Indus., Inc. v. State*, 477 S.W.2d 956 (Tex. 1972).

⁴⁶ Brooks ANPR Comment at 11 (citing *Smith v. Lifevantage Corp.*, No. 2:18-cv-00621 (D. Utah 2018)); see also *Penhall v. Young Living Essential Oils*, No. 2:20-cv-617 (D. Utah 2020); *Berry v. LuLaRoe LLC*, No. 5:17-cv-2176 (C.D. Cal. 2017); *In re PFA Ins. Mktg. Litig.*, No. 4:18-cv-3771 (N.D. Cal. 2018); *Wu v. Sunrider Corp.*, No. 2:17-cv-4825 (C.D. Cal. 2017); *Ranieri v. AdvoCare Int'l LP*, No. 3:17-cv-691 (N.D. Tex. 2017); *Yang v. Mkt. Am. Inc.*, No. 2:17-cv-4012 (N.D. Cal. 2017) transferred No. 1:19-cv-502 (M.D.N.C. 2019).

⁴⁷ TINA ANPR Comment at 26-27 (citing articles addressing MLMs); see also, e.g., Jane Marie, *SELLING THE DREAM: THE BILLION DOLLAR INDUSTRY BANKRUPTING AMERICANS* (2024); *Globe Life: Former Agents Say Claims of Unlimited Earnings are Potentially Misleading, Report Incurring Debt Upon Leaving Company That Impacts Future Insurance Job Prospects*, The Capitol Forum, Vol. 12, No. 193 (Apr. 2, 2024); Jaimie Ding, *Multibillion-dollar Santa Monica fitness company faces allegations of exploiting exercise coaches*, L.A. Times (May 22, 2023), <https://www.latimes.com/business/story/2023-05-22/santa-monica-fitness-company-beachbody-lawsuit-exercise-coaches>; *LuLaRich* (Amazon Studios, The Cinemart, Story Force Entertainment 2021); 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>; Episodes of the podcast *The Dream*, Pushkin, <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> (discussing *The Dream*); Last Week Tonight with John Oliver, *Multilevel Marketing*, HBO (Nov. 7, 2016), <https://www.youtube.com/watch?v=s6MwGeOm8iI>; 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/>.

⁴⁸ Bosley ANPR Comment at 4-6 (citing Stacie Bosley, Sarah Greenman, & Samantha Snyder, *Voluntary Disclosure and Earnings Expectations in Multi-level Marketing*, 58 Econ. Inquiry 1643 (Oct. 2020)); see also TINA ANPR Comment at 13, 18-19 (citing Stacie Bosley et al., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 Econ. Inquiry at 1657-8; 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-morequestions-than-answers/>); Comment No. 20-1338 (R. FitzPatrick) at 1-3 (pointing out problems with certain MLM's income disclosure statement).

median), again presenting skewed statistics biased upward by a small share of high earners,” c) the statements “typically did not mention expenses and, when they did, the disclosure provided no expense data that the consumer could use to arrive at a profit distribution,” and d) “[i]t was also common for these disclosures to report annualized earnings calculated from monthly outcomes, even when participants did not sustain that rank or level of earnings throughout the year.”⁴⁹ Commission staff have independently reviewed all of the income disclosure statements staff was able to locate that MLMs make publicly available online, and have identified the same patterns.⁵⁰

Professor Bosley also reviewed MLM websites and videos and found that many contained atypical and misleading claims, such as that multiple participants had already earned over a million dollars and that earnings from the MLM were self-determined.⁵¹

Consumer commenters also submitted powerful testimonials about how they were impacted and injured by false and unsubstantiated earnings claims made by sellers affiliated with more than 60 different MLMs. Consumers asserted that they joined an

⁴⁹ Bosley ANPR Comment at 4-5.

⁵⁰ See *generally* Staff Report.

⁵¹ Bosley ANPR Comment at 5-6.

MLM after being told that they would be able to earn substantial income⁵² and improve their lifestyle,⁵³ but most ended up making little to no money or lost money.⁵⁴

⁵² See, e.g., Comment No. 20-57 (K. Eastman) (the MLM recruiter “told us she was making on her smallest check 10k and was able to retire her husband.... [A] week later she was showing... we could easily be making 10k in up to 3 years. So I signed up.... I was full time working this job to only break even each month....”); Comment No. 20-134 (S. Newman) (“I was told I could make more than a million dollars, pay off all my debt, and live my ‘dream life.’ In my time in these companies, I lost more than \$1000....”); Comment No. 20-458 (T. Rigaux) (“[My future upline] assured me that I could ‘easily’ make an extra \$250/month.... I NEVER made \$250 a month. Even when I did multiple parties a month.”); Comment No. 20-559 (C. Steppa) (“I ... was told I could make anywhere from \$300-\$5000 per month depending on how hard I worked. I stayed in the company [] for about 4 months and ended up with about \$3000 of credit card debt.”); Comment No. 20-617 (Anonymous) (“I was ... promised that I would be able to replace my current salary of \$50k/year. I was shown screen shots that my earning potential could be as high as 65k a month.... I lost money in the process.”); Comment No. 20-1056 (J. Gluyas) (“I was told if I worked hard I would make lots of money, I could become an [MLM name] millionaire within a few years. I was also told I could retire my husband and never have to go back to work when my kids were older.... I never made a profit, I basically worked for a year full time for nothing.... I was left broke, unhealthy, and depressed.”); Comment No. 20-1274 (T. Sanford) (“My uncle was encouraged to leave his well paying government job to participate in [MLM name], which he did. He was told that he could make as much money as he was making at his job that he’d been at for decades. This is deceptive because in 2020 the average income for their sales force was a little over \$7,000.”); Comment No. 20-328 (M. Crawford) (“My wife has been involved [in MLM name] for the last 4 years, and has made very little money (less than 30K over the four years, before expenses...).... I’ve heard her spew lies, found in their standard presentation, about improving one’s life via [MLM name], promises of unrealistic investment returns (10% for example), and ‘earning \$1500 to \$2000 extra per month part-time is said to every recruit. I witness all of this daily, as my wife conducts meetings via Zoom.”); see also, e.g., Comment No. 20-42 (Anonymous); Comment No. 20-10 (Anonymous); Comment No. 20-151 (A. Erickson); Comment No. 20-301 (T. Sanford); Comment No. 20-418 (Anonymous); Comment No. 20-1098 (R. Mendoza); Comment No. 20-1412 (J. W.); Comment No. 20-1425 (K. LaPorta); Comment No. 20-1462 (Anonymous); Comment No. 20-1529 (A. Ny).

⁵³ See, e.g., Comment No. 20-27 (S. Johnson) (“Upon graduating high school, my previous guidance counselor, sought me out to join her with her ‘business’ in [MLM name].... She advised me I would be able to quit my full-time (benefits, 401k, paid time off) position to work with her and to start my own business.... I LOST money and could not make a livable wage.”); Comment No. 20-752 (I. De Larkin) (“When I was being recruited, I was told that I could make some ‘extra cash’ or replace my full time income just working in the ‘pockets of time’ throughout my day. My friend, the person who recruited me, said she couldn’t say exact numbers but was making enough to cover her rent.... She also said she ‘worked the business’ 15-20 minutes a day. Once I joined, I was repeatedly told stories about consultants who had ‘retired their husband.’ I was told that I could make enough to quit my job and not miss a moment with my young children. I was told success stories of consultants who were replacing their income in just a few years of starting their business.... Consultants would show their luxury vacations, building their dream homes, going to theme parks during the week with their kids (because they can ‘work from everywhere’ and they have ‘time freedom.’) on social media.... Meanwhile, I was making an average of \$300 a month.... I was losing money and missing time with my kids because I was constantly ‘working my [MLM name] business.’”); Comment No. 20-1082 (Anonymous) (“I have been promised a full income while staying home with my child, building a huge savings, buying a huge house with nice cars, and frequent vacations. I have been told and shown that I could earn \$50,000 each month or even more. I lost money.... I was told by my up lines that I would be able to buy a house on a lake, pay off my mortgage, afford fancy cars and clothes, go on multiple vacations a year, and live a lavish life. I didn’t achieve any of these items.”).

⁵⁴ See, e.g., Comment No. 20-25 (C. Waugh) (“The most I was able to make was \$120 and only from people who felt obligated to buy something from me.... I had gotten myself \$3000 plus in debt with no way

Consumers claimed they were falsely promised that joining an MLM would let them quit their jobs,⁵⁵ stay home with their families,⁵⁶ retire their family members,⁵⁷ earn

to pay it before I called it quits.”); Comment No. 20-189 (P. Waugh) (“My wife had joined [MLM name] with the promise of being able to make back the \$700 investment. She was never able to sell [the company’s products] and we have been left with a pile of debt[.]”); Comment No. 20-196 (C. Spears) (“[F]or the first time in 8 years, [while doing taxes,] I could see on paper that in 2019 I spent close to \$10,000 in my ‘[MLM name] business’ but I had only made \$1296.”); Comment No. 20-473 (Anonymous) (lost \$12,000, not counting products bought for personal use); Comment No. 20-690 (E. Hail) (“I was apart of [MLM name] for 3ish years did everything they ‘claimed’ would make me and income and out of those 3 years I made maybe \$300 but paid out more then \$10,000....”); Comment No. 20-1035 (Anonymous) (“Ultimately, I lost over \$1000 in the few years I was in....”); Comment No. 20-1039 (A. Avila) (MLM participant earned “something like less than \$2 an hour when calculating her profits, even though her upline and [MLM name’s] official statements said that it was ‘full time pay for part-time work’....”); Comment No. 20-1328 (K. Popplestone) (“I worked incredibly hard at my MLM to make a living but I was unsuccessful I lost thousands....”); Comment No. 20-1412 (J. W.) (“Based on my records, I spent over 10K for the duration that I was an active partner for [MLM name].... I made roughly \$300 a month but easily spent 120 hours a month on striving for that deceptively promised outcome of ‘million dollar club’ and ‘free Cadillacs’. That leaves me with \$2 an hour on average.”).

⁵⁵ Comment No. 20-1071 (J. Larson) (“I was recruited into [MLM name] under the false pre-tense that I would be able to quit my current jobs and make a sustainable income doing this. In ‘working the business’ for 3 months I made about \$33.00, not the millions that were promised to me.”); *see also, e.g.*, Comment No. 20-1521 (V. Kukla); Comment No. 20-211 (L. Holland); Comment No. 20-231 (Anonymous); Comment No. 20-310 (S. Frakes); Comment No. 20-686 (A. McNair); Comment No. 20-752 (I. DeLarkin); Comment No. 20-970 (C. Grabowski); Comment No. 20-1312 (Anonymous); Comment No. 20-1328 (K. Popplestone); Comment No. 20-1438 (Anonymous); Comment No. 20-1425 (K. LaPorta); Comment No. 20-1518 (J. Kendall).

⁵⁶ Comment No. 20-595 (K. Titus) (“I was given false income claims... and tricked into spending money to join ([MLM name]) while I was at a vulnerable state as a new mom. I was told how easy it would be to make a full time income, working from home with my baby. It was all a lie and unfortunately I didn’t find out it was a lie until I had paid several hundred dollars to this company to ‘start my business’.”); *see also, e.g.*, Comment No. 20-128 (A. Morris); Comment No. 20-187 (E. Petersen); Comment No. 20-570 (J. Meltzer); Comment No. 20-681 (Anonymous); Comment No. 20-686 (A. McNair); Comment No. 20-1075 (K. Fink).

⁵⁷ Comment No. 20-366 (H. Clark) (“I was told by several reps in these companies that I could retire my husband, travel around the world and be able to buy a house or my husband a truck.”); *see also, e.g.*, Comment No. 20-692 (Anonymous); Comment No. 20-1074 (K. Richards); Comment No. 20-1438 (Anonymous); Comment No. 20-1440 (E. Brohaugh).

six figures,⁵⁸ become debt free or gain financial freedom,⁵⁹ gain free trips and vehicles,⁶⁰ earn full time salaries for part time work,⁶¹ or earn income to cover significant life expenses, such as to pay the grocery bill, help with wedding expenses, or help pay for medical expenses.⁶² Commenters also reported that MLM sellers promoted earnings or lifestyles that were either atypical or false,⁶³ such as claims that they were able to “retire

⁵⁸ Comment No. 20-1380 (M. Harrell) (“I was told that within 6 months to 1 year I can replace my income from my job with my earnings from this business opportunity. Then told that I can make a six figure income within 5 years.”); Comment No. 20-1539 (Anonymous) (“In [MLM name] trainings led by my uplines ... they spoke directly of 4, 5, 6 & 7 figure earnings that are ‘possible with [MLM name]’.”); *see also, e.g.*, Comment No. 20-137 (I. Schrauth); Comment No. 20-166 (D. Bolster); Comment No. 20-387 (T. Bridges).

⁵⁹ *See, e.g.*, Comment No. 20-1144 (Anonymous); Comment No. 20-128 (A. Morris); Comment No. 20-145 (K. Manikam); Comment No. 20-211 (L. Holland); Comment No. 20-465 (K. C.); Comment No. 20-725 (J. Lystad); Comment No. 20-282 (B. Urban); Comment No. 20-1075 (K. Fink); Comment No. 20-1095 (Anonymous); Comment No. 20-1103 (Anonymous); Comment No. 20-1270 (Anonymous); Comment No. 20-1278 (M. Riley); Comment No. 20-1444 (Anonymous); Comment No. 20-1070 (Anonymous).

⁶⁰ Comment No. 20-236 (A. Helms) (commenter “was told I’d be in the Bahamas in a year on a free trip basking in my success,” but she actually lost \$300 and her time and effort); *see also, e.g.*, Comment No. 20-117 (L. Smith); Comment No. 20-174 (A. Guy); Comment No. 20-301 (T. Sanford); Comment No. 20-327 (C. Mattera); Comment No. 20-1270 (Anonymous); Comment No. 20-1412 (J. W.); Comment No. 20-1521 (V. Kukla).

⁶¹ Comment No. 20-307 (L. Kennedy) (“I was told it would allow me to make a full time income while focusing on my studies. Instead, I spent thousands of dollars and hundreds of hours on a pyramid scheme.”); Comment No. 20-1238 (T. DeRosa) (at a seminar for at-risk young adults, a crypto MLM said that “they could break the cycle of poverty, make millions and take care of their families/communities.... The reps claimed they had ‘time freedom’ and could travel the world, only work a few hours per week and ‘escape the 9-5.’”); *see also, e.g.*, Comment No. 20-633 (S. Bolles); Comment No. 20-311 (E. Servidori); Comment No. 20-692 (Anonymous); Comment No. 20-1522 (Anonymous); Comment No. 20-166 (D. Bolster); Comment No. 20-681 (Anonymous).

⁶² Comment No. 20-80 (S. Finch) (consumer was advised that joining MLM would allow her to “raise extra funds for [her] wedding”); Comment No. 20-407 (Anonymous) (“I was told by someone that if I joined the mlm ... that I would earn my shopping money for the[] week.... [I] never made a penny. I never did make my shopping money like she said.”); Comment No. 20-834 (G. Spears) (“I was told ... I could earn extra money to help with bills....”); Comment No. 20-1117 (L. Dunn) (“On numerous occasions i have been approached my MLM reps, claiming that i can pay off all of my medical and all other debt by joining their opportunity.”); Comment No. 20-1239 (Anonymous) (“When I was diagnosed with lymphoma, my aunt offered to get me into [MLM name]. She said it would help me make some extra money to help with my treatments. i worked so hard and spent so much time working my business and lost money.”); *see also, e.g.*, Comment No. 20-231 (Anonymous); Comment No. 20-1449 (Anonymous).

⁶³ Comment No. 20-198 (Anonymous) (“During opportunity meetings, where distributors share their income stories to prospects, it was claimed that some were making \$2000, \$10000, up to \$20000 each month in the business. They say everyone can make it to the top 1% as long as you don’t quit and this business is for everybody.”); Comment No. 20-465 (K. C.) (“I was told that if I worked hard enough, for long enough, that I could become a millionaire and have financial freedom. Does it sound far fetched? Yes. But they make an entire job of convincing you that it’s possible. The company and the reps are always

their husbands” or quit their jobs,⁶⁴ or afford lavish houses, lifestyles, cars and vacations.⁶⁵ In addition, some commenters reported that MLM sellers either misled them about the expenses they would incur in joining the MLM, or they failed to disclose that certain expenses would be required.⁶⁶

Some former MLM participants reported that they were trained by more senior participants in the MLM to make false claims about their lifestyle and potential income to

showing off the top earners with their flashy lifestyles all over social media.... I lost around \$10,000 on products alone.”); *see also, e.g.*, Comment No. 20-23 (G. Smith); Comment No. 20-328 (M. Crawford); Comment No. 20-337 (N. Davison); Comment No. 20-347 (T. Barclay); Comment No. 20-672 (R. Plymail); Comment No. 20-772 (S. Vaughn); Comment No. 20-938 (B. Drier); Comment No. 20-970 (C. Grabowski); Comment No. 20-1055 (C. Piper); Comment No. 20-1278 (M. Riley); Comment No. 20-1550 (A. Orozco); Comment No. 20-1252 (Anonymous); Comment No. 20-1491 (S. Scullen).

⁶⁴ Comment No. 20-23 (G. Smith) (“My uplines always showed off their houses, cars, trips, the organic food they could afford, etc. All because of [MLM name]. My other upline ‘retired’ her husband that worked in the oil fields. The use of that was also really impactful. The emotional pull to be just like her was hard to ignore. It made me feel like I could do that too. Again, if I just worked harder.”); *see also, e.g.*, Comment No. 20-165 (C. Wesselmann); Comment No. 20-696 (A. McHaffie); Comment No. 20-389 (M. Wilson); Comment No. 20-416 (J. Gustin); Comment No. 20-470 (C. Cole); Comment No. 20-473 (Anonymous); Comment No. 20-1024 (J. Mathers); Comment No. 20-1023 (Anonymous); Comment No. 20-1095 (Anonymous).

⁶⁵ Comment No. 20-409 (A. Murphy) (“The particular consultant that recruited me talked about her home, the vacations, the free products, the car she drove. She also always had designer clothes and wore a huge diamond ring. She often spoke about how she was able to stay home with their large blended family (I think 5 or 6 kids) and still contribute to the household. Go on field trips with them, etc.... I never made enough money to be able to do any of this.”); *see also, e.g.*, Comment No. 20-23 (G. Smith); Comment No. 20-42 (Anonymous); Comment No. 20-154 (Anonymous); Comment No. 20-206 (Anonymous); Comment No. 20-391 (J. Newcomb); Comment No. 20-514 (A. S.); Comment No. 20-938 (B. Drier); Comment No. 20-970 (C. Grabowski); Comment No. 20-1095 (Anonymous); Comment No. 20-1035 (Anonymous); Comment No. 20-1098 (R. Mendoza); Comment No. 20-1017 (E. Wharton); Comment No. 20-1380 (M. Harrell); Comment No. 20-1412 (J. W.); Comment No. 20-1529 (A. Ny).

⁶⁶ *See, e.g.*, Comment No. 20-1521 (V. Kukla) (“When I first joined [MLM name], I was told that the only investment I would need to make was \$350, as a one time fee. This was a lie. I later learned that there were annual fees, I needed to buy products and product samples for direct selling purposes, and [MLM name] even made me buy my own pamphlets - they didn’t supply any marketing materials to any sellers for free. I didn’t know any of that when I signed up....”); Comment No. 20-13 (L. Ng) (“In my experience as someone who signed up, and then was trained to sign others up, the monthly website fee was also not disclosed until I was ready to sign the agreement. I was trained to not tell potential recruits this information (actually, to not give them all of the information) because it would overwhelm them and scare them away. And of course it would have because I was being sold an easy \$200/party and the sign up fee was only \$29. If I would have known that I’d spend hours on this ‘job’ and have to pay a monthly fee, I would not have signed up.”); *see also, e.g.*, Comment No. 20-135 (T. Stone); Comment No. 20-273 (K. Squillace); Comment No. 20-438 (Anonymous); Comment No. 20-299 (T. Reid); Comment No. 20-391 (J. Newcomb); Comment No. 20-347 (T. Barclay); Comment No. 20-570 (J. Meltzer); Comment No. 20-781 (Anonymous); Comment No. 20-815 (M. Frank); Comment No. 20-892 (K. Benson); Comment No. 20-1082 (Anonymous).

potential recruits.⁶⁷ As one commenter said, “I was regularly encouraged to share how [MLM name] had helped me to pay off credit card debts, car notes, or bills - to encourage people to join my team. The problem was, I was told to share this even if it was not true. I was frequently bullied and ostracized or insulted if I did not agree to push the narrative that the company was financially taking care of me - when it was[,] in fact, not.”⁶⁸ A few also reported that they were instructed to ignore data about income provided by the MLM that painted a less flattering picture of the income opportunity, saying such documents are “for haters” or that those with low earnings do not work very hard.⁶⁹ Other commenters

⁶⁷ Comment No. 20-243 (Anonymous) (“[E]ven though I wasn’t making money, in fact still losing money, I was told to pretend that I was making money to encourage people to join.”); Comment No. 20-289 (T. Fecteau) (“While I was a representative, we were ‘trained’ to lie to people about how [MLM products] were paying for our lifestyle. When in actuality, I lost money BOTH years I was part of [MLM name].”); Comment No. 20-326 (Anonymous) (“When I was involved in [MLM name], we were trained to attribute anything positive in our lives to our [MLM name] business, even when it wasn’t true. At trainings, we were told to fake it until we made it because faking the great lifestyle will attract people to the business.”); Comment No. 20-330 (Anonymous) (“I was taught to ‘fake it till you make it’ to attribute [MLM name] to anything I bought including diapers and groceries. At times the team was asked to count up our debt and post about how without [MLM name] we wouldn’t be able to pay our bills which wasn’t true on any of the occasions when I was in.... There were always claims of ‘paid for vacations’ from the company which was NEVER the case.”); Comment No. 20-725 (J. Lystad) (“I was taught from the jump how important it was to portray a life of ‘freedom’. Whether that was financial, time or location, we were told to always thank the MLM, even if we obtained said things without any help/association of the MLM.”); Comment No. 20-827 (Anonymous) (“Within my experience in [MLM name] and [MLM name], I have experience with trainings and then conversations about making it look like I am ‘doing better’ than I am.... We were encouraged to ... make it seem like we had made more sales or signed more people than we had.... We were also taught to share ourselves at the gas pump getting gas with [MLM name] money that we had earned. Most of us barely made enough to get a full tank of gas. But, we were told to say that it gave us a full tank and more full tanks for the week.... We were also encouraged to share our grocery hauls, manicures, vacations, debt paid off, etc on social media so that others could see that we are thriving and becoming debt free.”); Comment No. 20-967 (L. Macfarlane) (“I was once talked into joining [MLM name]. Big mistake they kept telling me to pretend to live the lifestyle that I was going to get from them before I had it. It’s called manifesting.... It was all about faking it until you make it.”); *see also, e.g.*, Comment No. 20-23 (G. Smith) (“Even the simple act of buying groceries is said to be because of [MLM name]. The team leaders taught us to use that as a tool to demonstrate to people that income potential[.] It was all a lie though.”).

⁶⁸ Comment No. 20-1314 (L. Wilson).

⁶⁹ *See, e.g.*, Comment No. 20-230 (M. Grimpe) (told to ignore income disclosure statement because it was for “haters”); Comment No. 20-215 (C.R.) (income disclosure showed most made little money; commenter was told “you reap what you sow”); Comment No. 20-458 (T. Rigaux) (income disclosure showed most made little money, but it was “explained away” with claims that “most people joined for the discount” and so weren’t trying to earn the assured \$250/month); Comment No. 20-551 (K. Dossil) (prospects are shown earnings information for a “position that is 3-4 promotions above being a new” participant).

said that when they reported false claims to the MLM’s compliance department, the compliance department took no steps to correct the problem.⁷⁰

Consumer advocates and consumers offered persuasive evidence that many consumers who joined MLMs due to deceptive earnings claims suffered significant harm, ranging from lost time and earnings that they could have obtained from a job⁷¹ to “losses that severely damage[d] their financial and personal well-being,” including going into debt or bankruptcy, college students dropping out of school, and damage to personal relationships.⁷²

In comparison, no commenters offered evidence or other information that rebutted the overwhelming record that deceptive earnings claims are prevalent in the MLM industry.⁷³ Several MLMs and MLM industry groups argued that they were unaware of

⁷⁰ See, e.g., Comment No. 20-53 (T. May); Comment No. 20-320 (Anonymous); cf. Comment No. 20-79 (M. Williams).

⁷¹ See sources cited *supra* notes 52-54; see also TINA ANPR Comment at 3 (“[H]alf or more [MLM participants] will actually *lose* money ..., which in turn leads to a loss of savings, debt accumulation and – not infrequently – bankruptcy.”).

⁷² TINA ANPR Comment at 20, 22-23. For example, one study found that one-third of MLM participants who borrowed money from a friend or family ended up with a damaged relationship. *Id.* (citing Laryea, *supra* note 17); see also, e.g., Comment No. 20-347 (T. Barclay) (“I felt like a failure and suffered from depression....”); Comment No. 20-823 (B. Sherwell) (“I ended up losing many friends [once they realized the claims were untrue].... Not only did my mental health worsen, I became suicidal.”); Comment No. 20-949 (Anonymous) (“Participating in mlms ... hurt my relationships with friends and family.”); Comment No. 20-1144 (“It affected my marriage and caused a distance between myself and my partner. I felt like I alienated myself from all my friends....”).

⁷³ The Coalition of Compliance argued in its comment that the FTC can only regulate MLMs if it concludes that the MLM itself, and not MLM participants, made deceptive earnings claims. Coalition ANPR Comment at 32. The Coalition appears to argue that the Commission must make separate showings of prevalence for MLM participants and for MLMs, even though they are all engaged in the offering and selling of the MLM’s opportunities. The Coalition cites no authority to support this claim, and the Commission is aware of none. In any event, the record is full of evidence that MLMs are making deceptive earnings claims, including the FTC’s enforcement actions against MLMs for making deceptive earnings claims and the reviews of MLM-produced income disclosures by Professor Bosley and Commission staff. To the extent the Coalition’s position is based on its belief that MLMs are not usually liable for the deceptive claims of their participants, the Commission disagrees. See *infra* note 167 (noting that “[i]n most instances, MLM participants act as the agents of their MLMs when they market or offer the MLM opportunity,” and citing cases).

evidence showing that deceptive earnings claims are prevalent,⁷⁴ or stated that “improper earnings claims have diminished in the field.”⁷⁵ But these commenters offered no evidence for the Commission to consider.⁷⁶

The DSA cited to data from the DSSRC, a self-regulatory organization of the Better Business Bureau. The DSA funds the DSSRC. According to the DSA, for the past three years “[t]he DSSRC has reviewed an average of 300,000 URLs per year,” and “[w]ithin those 900,000 URLs, 784 were earnings claims deemed to be potentially deceptive to a reasonable consumer and removed from social media.”⁷⁷ Thus, according to the DSSRC, there are at the least hundreds of deceptive earnings claims being made by MLM sellers online every year. The DSA argues that a rule is not needed because these claims make up “only .0008% of the total URLs reviewed.”⁷⁸ The Commission does not find this argument persuasive. First, it appears that the DSSRC reviewed only public

⁷⁴ Coalition ANPR Comment at 33 (“The Coalition welcomes the FTC’s continued efforts to weed out deceptive claims by bad actors and level the playing field for businesses that are trying to do the right thing. At the same time, the Coalition views these bad actors as the exception and not the rule, and has not seen evidence corroborating that such violations are ‘prevalent’.”); Comment No. 20-1542 (Arbonne International LLC) (“Arbonne ANPR”) at 1 (“Arbonne is not aware of a pattern or practice of deceptive earnings claims that would require a specific rule from the FTC.”).

⁷⁵ Coalition ANPR Comment at 34; *see also* Comment No. 20-1537 (Direct Selling Self-Regulatory Council of BBB National Programs) (“DSSRC ANPR”) at 3 (stating that before the emergence of the DSSRC “there was a proliferation of false and misleading claims being disseminated on social media regarding the amount of income that could be generally expected by typical salesforce members through participating in the direct selling opportunity,” and that it has observed, with the onset of its self-regulatory program, “a diminishment in egregious income claims that convey earnings beyond modest or supplemental income”).

⁷⁶ Other commenters pointed to studies that they claimed show that Americans view direct selling and flexible arrangements positively, and that there is a general degree of satisfaction among workers engaging in flexible work arrangements. DSA ANPR Comment at 2 (citing study showing 79% of Americans “have a favorable opinion of direct selling”); Comment No. 20-1579 (Chamber of Commerce) (“Chamber ANPR” at 2 (citing surveys showing that workers view flexible work arrangements favorably). The statements that many in flexible work arrangements are satisfied with their work or that Americans view direct selling positively, even if true, do not mean that deceptive earnings claims are not prevalent in the MLM industry.

⁷⁷ The DSA also stated that only 1% of the allegations received by the DSA Code Administrator “related to earnings claims.” DSA ANPR Comment at 3.

⁷⁸ *Id.* at 4, 6. The DSSRC finds these purported violations by “work[ing] with a third-party monitoring company that ... provides weekly monitoring results to DSSRC that ... identif[y] potential claim infractions of pertinent FTC rules and regulations” DSSRC ANPR Comment at 3.

social media posts and the websites of MLMs,⁷⁹ while the record shows that earnings claims are made in many other contexts, such as email, social media pages marked “private,” at MLM trainings or events, and in person-to-person communications.⁸⁰ Thus, the information provided by the DSSRC is limited in nature.⁸¹ And its value is even less clear because the DSSRC did not describe its methodology for identifying a deceptive earnings claim.⁸² As detailed above, the evidence demonstrates that many MLM sellers

⁷⁹ *Id.* at 2.

⁸⁰ *See, e.g.*, Comment No. 20-27 (S. Johnson) (earning claim made in private communications); Comment No. 20-42 (Anonymous) (consumer was recruited by private messages from friend); Comment No. 20-57 (K. Eastman) (earnings claim made in meeting between recruiter, the proposed recruit, and her husband); Comment No. 20-80 (S. Finch) (consumer was recruited at party hosted by MLM participant); Comment No. 20-196 (C. Spears) (consumer joined MLM after receiving private message from recruiter); Comment No. 20-198 (Anonymous) (describing earnings claims made in MLM opportunity meetings); Comment No. 20-206 (Anonymous) (alleging earnings claims were made in private chat); Comment No. 20-259 (S. N.) (consumer was approached by MLM recruiter while working as a cashier); Comment No. 20-391 (J. Newcomb) (consumer was approached at a UPS store by MLM recruiter); Comment No. 20-439 (M. Glacken) (reporting that she received messages from MLM recruiters that contained earnings claims); Comment No. 20-604 (K. Kingery) (she received flyers and email from MLM that described purported internship opportunity and potential earnings); Comment No. 20-658 (Anonymous) (reporting that an MLM trained distributors to send “cold messages to 100+ people a day [to get] them to join underneath of them.”); Comment No. 20-669 (B. Clark) (describing a recruitment meeting over Zoom); Comment No. 20-727 (A. Hildenbrandt) (describing that she was told to “cold message people” and describing deceptive earnings claims made in meetings); Comment No. 20-982 (C. Crawford) (describing how friend was made to attend Zoom calls where deceptive earnings claims were made); Comment No. 20-1144 (Anonymous) (describing earnings claims made in private messages after commenter clicked on an Instagram ad and completed a quiz that asked questions “about why I wanted financial freedom and what my ideal life looked like”); Comment No. 20-1238 (T. DeRosa) (earnings claim made at seminar for at-risk youth); Comment No. 20-1491 (S. Scullen) (at initial meeting with recruiter, commenter was shown a copy of a company check for over \$10,000 made out to the recruiter); *see also* Press Release, *doTERRA discontinues health-related product performance earnings claims pursuant to DSSRC Compliance Inquiry*, BBB National Programs (Nov. 15, 2021), <https://bbbprograms.org/media-center/dd/d%C5%8Dtterra-product-earnings-claims#:~:text=McLean%2C%20VA%20%E2%80%93%20November%2015%2C,DSSRC%20deemed%20necessary%20and%20appropriate> (noting that some problematic claims that the DSSRC discovered on Youtube had been designated as “private” and are still shareable); Compl., *FTC v. AdvoCare, Int’l, L.P.*, No. 4:19-cv-715 (E.D. Tex. Oct. 2, 2019), ECF No. 1 (alleging deceptive earnings claims were made at MLM events).

⁸¹ The DSA also did not provide details on how the DSSRC chose URLs to review or how it determined when a claim was “potentially deceptive.” Thus, it is unclear if the DSSRC’s methods were reasonably likely to discover deceptive earnings claims.

⁸² The DSSRC does not argue that deceptive earnings claims are not prevalent, but merely states that it is seeing fewer “egregious” claims on social media. The Commission need not determine with precision how often a practice occurs to find it prevalent. *See Pa. Funeral Dirs. Ass’n, Inc. v. FTC*, 41 F.3d 81, 86-87 (3d Cir. 1994) (rejecting challenge to finding of prevalence, finding even “a limited record” sufficient to justify determination, and rejecting argument that the Commission must show “that the practice occurs in a certain percentage of transactions throughout the country”). Indeed, a finding of prevalence is adequately

make deceptive earnings claims, and that those claims have misled numerous consumers, causing substantial harm.

2. Deceptive Claims that an MLM is Offering an Employment Opportunity

For more than a half century, Commission actions have alleged, and courts have agreed, that it is deceptive and a violation of section 5 of the FTC Act to misrepresent the nature of an employment opportunity.⁸³ As the Commission has said, it is “manifestly unfair and deceptive to cause persons to invest time, energy and money and go through an appointment and interview before learning such basic and threshold information as the nature of the position being offered, especially where the position—door-to-door sales—is one which admittedly most persons do not desire and would not otherwise investigate.”⁸⁴

The record suggests that deceptive claims about what kind of opportunity is offered are a persistent problem in the marketing of MLMs. For example, the Commission filed a Federal court lawsuit against one MLM for allegedly placing job ads that falsely stated or implied “that a salaried position is being offered,” and alleged that the MLM “regularly contact[ed] consumers who, in search of employment, have posted

supported if the Commission “has issued cease and desist orders regarding such acts or practices.” 15 U.S.C. 57a(b)(3).

⁸³ *Encyclopaedia Britannica, Inc.*, 87 FTC 421, 487-88, 531 (1976) (job postings for management training positions were deceptive when, in fact, the position being offered was for door-to-door sales); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011-12 (N.D. Ind. 2000) (use of classified ads found deceptive when ads referred to “Postal Jobs” and were placed in “Help Wanted” Section without disclosing that the job was for a private firm); *see also Equinox*, 1999 WL 1425373, at *9; *Holiday Magic*, 84 FTC at 1032-1034 (holding Holiday Magic engaged in deception by making “[m]isleading use of ‘employment offered’ advertisements for the purpose of attracting distributors with the promise that a job, with guaranteed income, was being offered”); *see also* MMO NPO, *supra* note 30.

⁸⁴ *Encyclopaedia Britannica*, 87 FTC at 487-88, 531.

their resumes on Internet job sites, such as monster.com.”⁸⁵ The Commission alleged that these jobs ads were deceptive as “in numerous if not all instances, no salaried or permanent employee opportunities are available to consumers who respond to [the] advertisements.”⁸⁶ In another FTC action, a Federal court held in a preliminary injunction opinion that an MLM’s advertisements similarly misrepresented the opportunity offered. The court explained that the MLM had “plac[ed] classified advertisements in the help wanted section of the newspaper ... that either a salaried or a commissioned position is being offered” and that “[r]ecruits that respond to the advertisements are scheduled for a job interview,” but that “[i]nstead of being interviewed, recruits are subject to a sales presentation” and pressured to buy \$5,000 worth of products.⁸⁷ The court held that this conduct violated section 5 of the FTC Act by “misrepresent[ing] distributorships as salaried or commissioned positions without disclosing that the ‘positions’ require a financial investment.”⁸⁸

⁸⁵ Compl. ¶¶ 29-33, 60, *FTC v. Trek All., Inc.*, No. 02-cv-9270 (C.D. Cal. Dec. 2, 2002), ECF No. 1 (alleging that defendant Trek “represents, expressly or by implication, that salaried or permanent employment opportunities are available to consumers who respond to Trek advertisements”). In this matter, the court entered a preliminary injunction against the defendants and the matter settled afterwards.

⁸⁶ *Id.* ¶ 61.

⁸⁷ *Equinox*, 1999 WL 1425373, at *3.

⁸⁸ *Id.*; see also *Holiday Magic*, 84 FTC at 1032-1034 (MLM misrepresented that it was offering a job opportunity).

Despite these actions, reports⁸⁹ in recent years and comments submitted during the rulemaking⁹⁰ indicate that at least some MLM sellers continue to misrepresent that

⁸⁹ See, e.g., Bwog Staff, *How I got recruited into a pyramid scheme at a Barnard Career Fair*, Columbia Student News (Oct. 11, 2022), <https://bwog.com/2022/10/how-i-got-recruited-into-a-pyramid-scheme-at-a-barnard-career-fair/>; Sara Merkin, *I accidentally interviewed at a multi-level marketing scheme: here's how to avoid them*, Ladders (July 6, 2021), <https://www.theladders.com/career-advice/i-accidentally-interviewed-at-a-multi-level-marketing-scheme-heres-how-to-avoid-them>; TellThemISaidHi, Reddit, R/scams, Response to post “Primerica Scams” (Dec. 31, 2023), https://www.reddit.com/r/Scams/comments/18vhgff/primerica_scam (describing how company promoted position at a military job fair, got an interview, and discovered at the interview that it was an MLM participant position); Jaysong_stick, Reddit, R/mildlyinfuriating, Post and response, “Got accepted for a job interview, found out they're an MLM company” (May 2024), https://www.reddit.com/r/mildlyinfuriating/comment/s/1cue45a/got_accepted_for_a_job_interview_found_out_theyre/ (commenter said “[a]fter countless cold calls after several job applications, I finally had a company who was interested in setting up an interview with me” but it was an MLM. A comment in response said, “Had the same thing happen. Saw a position for IT. Showed up at the interview and was... confused. They said that the IT position would open shortly, but for now they want to try me in sales... Then he starts saying that I stock the inventory, then resell that to customers and now I'm super [] confused because that's not how a business works at all.” I later learned it was a “pyramid scheme” and a “MLM interview”); Megan Richesin, *Fraudulent Internships and Job Posts*, George Mason University, Costello School of Business (Aug. 22, 2023), <https://business.gmu.edu/news/2022-02/fraudulent-internships-and-job-posts>; *Too Good To Be True? It Probably Is. MLMs and You*, University of Illinois College of Liberal Arts & Science Career Services (Jan. 15, 2021) (archived Jan. 27, 2023 from a page at <https://lascareerservices.web.illinois.edu>); *Why that recruitment ad you're replying to could be an MLM con in disguise*, Talented Ladies Club (Nov. 2, 2021), <https://www.talentedladiesclub.com/articles/why-that-recruitment-ad-youre-replying-to-could-be-an-mlm-con-in-disguise/>; Aman A., *Avoiding LinkedIn Scams* (Oct. 19, 2019), https://www.linkedin.com/pulse/avoiding-linkedin-scams-aman-ahmad-?trk=portfolio_article-card_title.

⁹⁰ See, e.g., Comment No. 20-669 (B. Clark) (“I was on LinkedIn when I saw a job posting for Independent Travel Consultant. The posting talked about getting trained and certified, so I assumed it was legit enough. Plus it was on LinkedIn, so I assumed there was credibility.... [I later] confirmed it was indeed an[] MLM.... I reported the post as a scam to LinkedIn, only to see her post a job again a week or two later.”); Comment No. 20-454 (J. Schnelle) (“I was contacted right out of high school by [MLM name]; they said it was a full time job with above minimum wage wages.”); Comment No. 20-604 (K. Kingery) (describing flyers distributed to commenter and other college students that falsely advertised an MLM opportunity as an internship); Comment No. 20-638 (N. Paves) (consumer looked for job on LinkedIn, and received in response a message from someone saying they had a few openings “to be a recruiter,” but in actuality, the “job” was an opportunity to join an MLM in the messenger’s downline); Comment No. 20-707 (E. Moore) (commenter received an offer from [MLM name] recruiting him for a position that offered “reasonable compensation”; it turned out that the position was to be an MLM participant); Comment No. 20-925 (J. Gobbell) (“[Letters to commenter from an MLM] advertised that it was a lucrative sales job that requires zero experience and offered a high income for young people. In the letter, they were promising that I could earn the equivalent of \$16 an hour. Nowhere in the letter did they mention that my income was dependent on buying their product and that I would be primarily recruiting family and friends and/or selling them knives. I left the interview after learning that. The way the letters were worded, it gave me the impression that they would start paying me once I was hired, but I would receive nothing until I started selling knives.”); Comment No. 20-963 (L. Davis-Bey) (“I was contacted by a company I had not applied to about an entry level position and they would not give me any more information before I came in for an interview. ... We each met with the manager and had a short interview [and] afterwards we were all brought into a large room to hear a presentation and by the end of it, found out the company was [MLM name] and the product they wanted us to sell was [] knives.... We had to buy our starter kit ... and we were told we’d make the money back within the first few presentations. After a few months of awkward

they are offering salaried job opportunities, when, in fact, all that is being offered is the option to pay to become an MLM participant. For example, one consumer commenter said, “I thought I was applying and interviewing for a real job. I spent days doing ‘training’ and ‘interviews,’ being told that my pay would be ‘commission-based.’ By the time I figured out what was going on, that this was an MLM and I was actually expect[ed] to recruit others, I had already let go of leads on other jobs.”⁹¹

Consumer commenters reported that these false employment claims harmed them by causing them to lose money,⁹² as well as opportunities, “a lot of time, [and] possibly employment.”⁹³

3. Means & Instrumentalities

presentations and a conference I had to attend and pay out of pocket for, I somehow ended up with about \$100 after it all.”); Comment No. 20-1256 (L. Zeheb) (“I was looking for work and had [MLM name] reach out to me on Monster claiming they thought they would like to interview me. I was fortunate enough to realize something was wrong when the full time job did not have a base salary. They said it was full time but 100% commissions.”); *see also, e.g.*, Comment No. 20-711 (M. Winchenbach); Comment No. 20-735 (Anonymous); Comment No. 20-1130 (J. Billhardt); Comment No. 20-171 (Anonymous) (“I used to go to job fairs with my MLM company. I did not think about it at the moment but that practice was very deceptive. People were looking to be hired by a company and receive a regular paycheck, however, we were there talking about this business opportunity and that you can do this business full-time or part-time. The reality is that most people earn neither and you do not work for the MLM company.”).

⁹¹ Comment No. 20-1448 (O. Hinkel).

⁹² Comment No. 20-1492 (L. Love) (“When I was in college I saw job posting offering a high hourly wage, when I went to the interview it was an MLM but at the time I didn’t know how predatory they are. I started working and was able to make a sale. They didn’t really explain how it worked and after 2 months I had lost so much borrowed money....”); *see also, e.g.*, Comment No. 20-654 (K. Burless); Comment No. 20-592 (Anonymous).

⁹³ Comment No. 20-1448 (O. Hinkel); *see also* Comment No. 20-1207 (Anonymous) (“When I first graduated from college and was applying to jobs, I scheduled what I thought was an interview at a perfume company. ... The job had advertised a minimum annual salary of \$40k.... I sat in a waiting area until I was finally called back to what I later realized [it was] a recruitment fair for a MLM company.”); Comment No. 20-1307 (Anonymous) (“As a 1099 contractor with resumes up on websites such as monster, linked in and indeed, ... [i]n the past 3 years I have received almost nothing but deceptive pitches from multilevel style companies to the point that I will be deleting my resumes from these searches. I report them over and over and they just come back so it’s clear to me that the resume services can’t control it themselves. These schemes purport to need ‘advertising’ or ‘design’.... During calls with these MLM ‘recruiters,’ it becomes clear that the ‘job’ has little or nothing to do with marketing and graphic design. When I have asked, ‘so it’s sales,’ the pitch only intensifies. It’s a waste of my time and, frankly, a waste of the resources that many contractors use to find new work. It’s a deceptive practice [sic] to advertise or recruit for a position that doesn’t exist or for a position with a pay scale dependent on ‘growing my team.’ I am also now getting phone calls and unsolicited texts from these ‘opportunities.’”).

A person who “passes on a false or misleading representation with knowledge or reason to expect that consumers may possibly be deceived as a result” violates the FTC Act, even if that person has no contact with the consumers who are ultimately injured.⁹⁴ In other words: “One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act.”⁹⁵ In legal terms, the person is directly liable for violating section 5 of the Act when that person provides the “means and instrumentalities” for others to make deceptive claims.⁹⁶

⁹⁴ *Shell Oil Co.*, 128 FTC 749, 764 (1999) (statement of Chairman Pitofsky and Commissioners Anthony and Thompson, citing *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963)); *see also, e.g., Five-Star Auto Club*, 97 F. Supp. 2d at 530-31; *FTC v. Magui Publishers, Inc.*, No. 89-cv-3818, 1991 WL 90895, at *14 (C.D. Cal. Mar. 28, 1991), *aff'd*, 9 F.3d 1551 (9th Cir. 1993); *see also* Concurring Statement of Commissioner Holyoak, *In re Sitejabber*, Matter No. 2323060 (Nov. 6, 2024) https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-sitejabber-statement.pdf (the means and instrumentalities doctrine is appropriate “where the defendant itself engages in deception”, such as when “design[ing], distribut[ing], and deploy[ing]” a product “to mislead consumers about what product ratings signified”); Concurring Statement of Commissioner Ferguson, *In re Sitejabber*, Matter No. 2323060 (Nov. 6, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-sitejabber-concurring-statement.pdf (“[T]he provision of a product or service with potential unlawful uses is not the provision of the means and instrumentalities to violate [s]ection 5 unless (1) the instrumentality in question ‘has no or de minimis legal use’; (2) the provider of the instrumentality had the purpose of facilitating the [s]ection 5 violation; or (3) the provider knows, or has reason to know, that the person to whom the product or service was supplied will use it to violate [s]ection 5.”).

⁹⁵ *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952); *see also Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963) (“Those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of [s]ection 5 of the Federal Trade Commission Act.”); *Noland*, 672 F. Supp. 3d at 786; *ECM Biofilms, Inc.*, 160 FTC 652, 51 (2015); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *Regina Corp.*, 322 F.2d at 768 (defendant’s knowledge that deception was “possible” result is enough).

⁹⁶ *Id.* “Means and instrumentalities” liability is a form of direct liability. *See, e.g., Magui Publishers*, 1991 WL 90895, at *14 (“One who places in the hands of another a means or instrumentality to be used by another to deceive the public in violation of the FTC Act is directly liable for violating the Act.”); *Regina Corp.*, 322 F.2d at 768. “Means and instrumentalities” is distinct from “aiding and abetting” liability and “assisting and facilitating” liability, both of which are secondary forms of liability and not available to the Commission in this rulemaking. *See* Andrew Smith, Multi-party liability, FTC Business Blog (Jan. 29, 2021), <https://www.ftc.gov/business-guidance/blog/2021/01/multi-party-liability> (noting various legal theories used by the Commission to impose liability on companies where their customers, vendors, or business partners were also engaged in misconduct); *see also Magui Publishers*, 9 F.3d at 1551 (distinguishing “aiding and abetting” liability from direct liability created by defendant providing means and instrumentalities of deception).

The Commission has brought enforcement actions against multiple MLMs that provided participants with promotional materials containing misrepresentations about earnings for use in recruiting. In the past twenty-five years alone, the Commission has brought at least ten cases alleging that the MLMs furnished promotional materials to be used in recruiting that contained false or misleading representations.⁹⁷

Based on these law enforcement actions, as well as its knowledge of the industry, the Commission has reason to believe that the practice of MLMs providing others the means and instrumentalities to make deceptive earnings claims is prevalent.

D. The Need for an Earnings Claim Rule Regarding Multi-Level Marketing

The record is clear that deceptive earnings claims cause real and substantial harm to consumers. A new rule prohibiting the use of misleading or unsubstantiated earnings claims and other related conduct in the MLM industry should benefit consumers and businesses that comply with the law by providing guidance, deterring wrongdoing, and giving the Commission additional enforcement tools to combat unfair or deceptive conduct.^{98, 99} Those tools include enabling the Commission to seek court orders requiring wrongdoers to pay civil penalties and provide redress to consumers harmed by deceptive

⁹⁷ See, e.g., *FTC v. Noland*, No. 2:20-cv-0047 (D. Ariz. 2020); see also *FTC v. Vemma Nutrition Co.*, No. 2:15-cv-01578 (D. Ariz. 2015); *FTC v. Fortune Hi-Tech Mktg., Inc.*, No. 13-cv-578 (N.D. Ill. 2013); *FTC v. Mall Ventures, Inc.* No. 04-cv-463 (C.D. Cal. 2004); *FTC v. NextGen3000.com, Inc.*, No. 03-cv-120 (D. Ariz. 2003); *FTC v. Streamline Int'l, Inc.*, No. 01-cv-6885 (S.D. Cal. 2001); *FTC v. Skybiz.com*, No. 01-cv-396 (N.D. Okla. 2001); *FTC v. Netforce Seminars*, No. 2:00-cv-2260 (D. Ariz. 2000); *FTC v. Equinox*, No. 99-cv-0969 (D. Nev. 1999); *FTC v. Five-Star Auto Club, Inc.*, No. 99-cv-1693 (S.D.N.Y. 1999).

⁹⁸ See Gross ANPR Comment at 8 (“MLM companies that currently do not make deceptive earning claims will incur extra costs by complying with an earning claims rule. They will profit, however, in the long run as they will not need to compete with companies who mainly attract distributors through deceptive earning claims.”); DSSRC ANPR Comment at 3 (“DSSRC agrees that the communication of unsupported income representations made by direct selling companies and their salesforce members can cause significant harm to consumers and unfairly advantages bad actors in the marketplace at the expense of honest businesses.”).

⁹⁹ The proposed rule will also provide consumers a means to access the basis of earnings claims as they assess the merits of signing up.

earnings claims or claims that consumers will be obtaining a job with the MLM. In 2021, the Supreme Court ruled in *AMG Capital Management, LLC v. FTC* (“AMG”) that section 13(b) of the FTC Act, 15 U.S.C. 53(b), does not authorize Federal court orders requiring defendants who violate section 5(a)(1) of the FTC Act to pay refunds to harmed consumers.¹⁰⁰ As a result, in order to obtain refunds for harmed consumers, the Commission must now rely entirely on section 19 of the FTC Act, 15 U.S.C. 57b for cases based on section 5(a)(1)’s prohibition on unfair or deceptive acts or practices.¹⁰¹ Absent violation of a trade regulation rule, obtaining refunds under section 19 in such cases is a lengthy process. The Commission must first initiate an administrative proceeding and obtain a final administrative cease and desist order. Once that process (including all appeals) is complete, the Commission then must file a Federal court action seeking court-ordered redress if the Commission can prove that conduct at issue was dishonest or fraudulent.¹⁰² The Commission can send refunds to consumers after the conclusion of that litigation, including all appeals. This two-step process takes significant time.¹⁰³ In contrast, if the conduct at issue violates an existing Commission rule relating to unfair or deceptive acts or practices, section 19 allows the Commission to obtain court-ordered refunds faster through a single direct Federal court action.¹⁰⁴ In

¹⁰⁰ 141 S. Ct. 1341 (2021).

¹⁰¹ The Commission can no longer obtain refunds in cases involving violations of section 5(a)(1)’s prohibition on unfair methods of competition.

¹⁰² 15 U.S.C. 57b(a)(1).

¹⁰³ For example, in *POM Wonderful*, nearly 4 ½ years elapsed between the filing of the administrative complaint and a circuit court decision affirming liability. *POM Wonderful, LLC v. FTC*, No. 13-1060 (DC Cir. 2015) (Administrative complaint filed September 2010, ALJ opinion issued May 2012 finding POM liable, Commission opinion issued January 2013 affirming liability, and D.C. Circuit decision affirming (in pertinent part) issued January 2015).

¹⁰⁴ See 15 U.S.C. 57b (the Commission is entitled to seek “rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages,” among other things, to redress harm caused by violations of FTC rules). This shorter route is also available in the case of violations of certain statutes, such as the Restore Online Shoppers’ Confidence Act, but their coverage is limited. See e.g., 15 U.S.C. 8404.

addition, section 5(m)(1) of the FTC Act, 15 U.S.C. 45(m)(1), authorizes courts to impose civil penalties for violations of existing Commission rules relating to unfair or deceptive acts or practices.

Overall, the proposed rule covering MLM sellers, if finalized, would allow the Commission to more efficiently and effectively protect consumers by allowing the Commission to use section 19(a)(1) of the FTC Act to go directly to Federal court to obtain court orders requiring violators to pay refunds to harmed consumers. The proposed rule, if finalized, will also allow the Commission to request that district courts impose civil penalties for violations. Civil penalties will give the Commission and courts a valuable tool to prevent wrongdoers from profiting off of their Rule violations, and the threat of significant civil penalties will provide effective deterrence and incentivize compliance.¹⁰⁵

E. Alternatives to Regulation

Several MLMs and MLM industry advocates stated in their comments that they supported the FTC's efforts to combat deceptive earnings claims,¹⁰⁶ but argued that alternatives render the rulemaking unnecessary. The Commission has carefully considered all the proposed alternatives and concludes they are inadequate substitutes. None would provide the benefits offered by the proposed rule. The Commission finds that the proposed rule would deter false or unsubstantiated earnings claims and deceptive claims that the MLM is offering a job opportunity, as well as provide an efficient means

¹⁰⁵ In contrast to such tangible benefits of the proposed rule, the costs it would impose are relatively minor. *See infra* section VII.

¹⁰⁶ *See, e.g.*, DSA ANPR Comment at 1.

to provide redress to harmed consumers, and that its benefits justify the minimal burdens it imposes, as set forth in detail below.

1. The Commission's Existing Legal Tools

Several MLMs and MLM industry advocates argued that the Commission's existing authority already provides the Commission with "a more fair and equitable way to stop the offending conduct."¹⁰⁷ These commenters argued that the Commission should focus on seeking Federal court injunctions, issuing warning letters, partnering with State attorneys general, or using its existing authority to first bring an administrative action against a law violator and then file a subsequent action in Federal court to obtain redress.¹⁰⁸ One commenter said these tools "reflect the proper balance between enforcement and fair notice and due process for the business community,"¹⁰⁹ and "first inform a company why its conduct is improper and give[] the company an opportunity to stop, if in fact, their conduct is improper."¹¹⁰

Others commenters disagreed.¹¹¹ Consumer advocates argued that the status quo has been "far from sufficient to curb industry abuses" or deter future wrongdoing.¹¹² The commenters argued that issuing a new rule concerning unfair or deceptive earnings

¹⁰⁷ Comment No. 20-1445 (Utah Direct Selling Coalition) ("Utah DSC ANPR") at 4; *see also* Comment No. 20-1548 (Nu Skin Enterprises, Inc.) at 1. Not all MLMs opposed the rule. For example, one MLM said that the rulemaking will "give market participants sufficient notice about what the law is," and it is a "transparent and participatory process... providing the FTC with information and perspectives it may otherwise not acquire." Comment No. 20-1575 (Integrity Marketing Group, LLC) ("Integrity Mktg ANPR") at 3.

¹⁰⁸ *See* comments cited *supra* note 107.

¹⁰⁹ Utah DSC ANPR Comment at 2.

¹¹⁰ *Id.*; *see also* Integrity Mktg ANPR Comment at 3-4 (arguing that, absent a rule, an enforcement action may violate due process "because there is no clear notice about the type of conduct that the FTC considers off-limits").

¹¹¹ *See, e.g.*, TINA ANPR Comment at 2-4.

¹¹² TINA ANPR Comment at 4, 30-31; *see also, e.g.*, Brooks ANPR Comment at 19 (asserting that it does not appear law enforcement actions against MLMs "have had any substantial deterrent effect. Pyramid-style compensation plans and deceptive earnings claims were common features of the earliest MLM firms and continue to be features of almost every MLM firm operating today").

claims would allow the “FTC to hold direct sellers accountable and would create a safer environment for all consumers.”¹¹³ They stated that the Supreme Court foreclosed the principal avenue the Commission had relied on “to seek monetary relief from offenders and make victims whole,”¹¹⁴ and that a formal earnings claim rule “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.”¹¹⁵ Commenters also noted that a rule prohibiting unfair or deceptive earnings claims may deter future law enforcement violations by making “deceptive earnings representations prohibitively expensive.”¹¹⁶ Consumer advocates noted, however, that the proposed rule’s effectiveness will be increased if it is accompanied by “aggressive enforcement actions” and consumer education.¹¹⁷

Having carefully reviewed the comments, the Commission believes that a Rule is needed to supplement the Commission’s existing authority. As noted above, such a Rule would enable the Commission to efficiently seek court orders requiring violators to provide monetary and other relief to consumers harmed by deceptive earnings claims, as well as allow courts to impose civil penalties against those who violate the Rule. Furthermore, the proposed rule contains a new recordkeeping requirement to aid in the Commission’s enforcement of the Rule and prevent future deceptive conduct.

¹¹³ NCL/CFA ANPR Comment at 5-6.

¹¹⁴ TINA ANPR Comment at 3-4 (citing *AMG*); see also Brooks ANPR Comment at 20-21.

¹¹⁵ TINA ANPR Comment at 4, 31; Comment No. 20-1282 (D. Vaughan) (“Vaughan ANPR”) at 3 (“MLMs[?] ... compliance [programs] ... are gestures that operate on the belief that only a small correction is needed, however, they effectively do nothing to police the issues found in MLM. In large part due to the behaviors created by the system of revenue generation, training and recruitment.”).

¹¹⁶ TINA ANPR Comment at 32.

¹¹⁷ Keep ANPR Comment at 3.

In addition, the Commission does not agree that MLM sellers should be allowed to make deceptive earnings claims until they receive individualized notices from the FTC stating that their conduct violates the law. As noted in section II.C, consumers affected by deceptive earnings claims suffer real harm, including lost money, the lost opportunity to earn money with honest businesses, and a variety of non-financial harms.¹¹⁸ Giving bad actors a free pass to violate the law until they are caught a second time would incentivize wrongdoers and scammers to ignore the law and cause more injury.¹¹⁹ Moreover, it is not credible to suggest that MLM sellers are unaware that it is illegal to make deceptive earnings claims. The industry has been on notice since at least 1974 of this obligation.¹²⁰ Nor can they claim to have no guidance on what kinds of claims deceive consumers, as the Federal courts and the Commission have issued numerous opinions that explain the standard for determining whether a particular earnings claim is deceptive, and illustrate its application in various factual contexts.¹²¹ And the Commission recently sent letters to hundreds of MLMs to ensure they are aware of this authority, and reminding them that deceptive earnings claims are illegal, with a summary of the extensive FTC record illustrating specific forms of money-making claims that the Commission has found to be deceptive.¹²² MLMs have no credible basis to claim that they do not have fair notice of what the law requires.

¹¹⁸ See sources cited *supra* notes 71-72.

¹¹⁹ The Commission disagrees with the suggestion of the commenters that instituting the proposed rule would somehow deny MLM sellers due process. Under the Commission's existing authority, before any MLM seller is found to have violated the new Rule, the Commission or the U.S. Department of Justice must bring a lawsuit against the company in Federal court, in which the MLM seller will enjoy the full panoply of due process rights. 15 U.S.C. 45(m); 15 U.S.C. 53(b).

¹²⁰ *Ger-Ro-Mar*, 84 FTC at 113-14, 117-119, 123-125, 132-135, 138, 149-150, 160-162; *Holiday Magic*, 84 FTC at 948, 984, 1032-1034, 1065, 1069.

¹²¹ See, e.g., cases cited *supra* notes 29-31.

¹²² MMO NPO, *supra* note 30.

2. Industry Self-Regulation

MLM industry members and advocates also argued that the industry’s self-regulatory efforts, including the DSSRC, the Direct Selling Compliance Professional Certification Program (“DSCP-CP”),¹²³ a DSA Compliance Officer Council,¹²⁴ the DSA Ethics requirements,¹²⁵ and the compliance efforts of individual businesses,¹²⁶ obviate the need for an earnings rule.¹²⁷ According to these commenters, “[t]hese self-regulatory initiatives help ensure that responsible direct selling companies understand the relevant law when making earnings claims and help promote a culture of compliance across the industry.”¹²⁸

Commenters particularly highlighted the efforts of the DSSRC.¹²⁹ For example, the Utah Direct Selling Coalition noted that the DSSRC referred 17 cases to the FTC for non-response or non-compliance with inquiries over a three-year period, reviewed an

¹²³ The DSCP-CP was launched for DSA member executives in 2021, and 300 executives have participated to date. According to the DSA, “[a] major aspect of the program is education regarding current laws, regulations and guidance related to earnings claims.” DSA ANPR Comment at 5.

¹²⁴ The DSA launched the program in 2022, with the goal to “increase information sharing regarding compliance best practices and collaboration amongst our member executives about applicable regulations and to ensure good compliance practices in the marketplace.” *Id.* at 5.

¹²⁵ *Id.* at 3 (“[DSA] members are held to strict standards as a condition of DSA membership through our Code of Ethics.”); *see also* DSA Code of Ethics (amended June 24, 2023), https://www.dsa.org/docs/default-source/code-of-ethics/dsa-code-of-ethics-pdf-june-2023-version.pdf?sfvrsn=8903d1a5_2.

¹²⁶ Arbonne ANPR Comment at 1, 4 (“Arbonne spends significant time, effort and resources ensuring that earnings claims are compliant and properly understood by reasonable consumers” and “[b]y joining Arbonne, Independent Consultants agree to comply with local, state and federal laws and abide by the DSA Code of Ethics, DSSRC Earnings Guidance, and Arbonne’s Policies & Procedures.”); DSA ANPR Comment at 6 (“Companies also monitor the marketplace, especially social media, for claims that violate their rules and guidelines. Many companies use web crawlers to flag potential violations of company policies regarding earnings and lifestyle claims and assist them in having such claims immediately removed. For more serious and repeat violators, companies regularly penalize, suspend, and even terminate salesforce members for violations of their policies.”); *see also* Utah DSC ANPR Comment at 2-3; Coalition ANPR Comment at 33.

¹²⁷ DSA ANPR Comment at 1-6; Coalition ANPR Comment at 3, 33-34; Arbonne ANPR Comment at 1, 4-8.

¹²⁸ Coalition ANPR Comment at 34.

¹²⁹ Comment No. 20-1471 (United States Senators Blackburn, Lummis, Braun, and Lee) at 1 (“[S]elf-regulatory bodies like the [DSSRC] can work closely with the FTC to assist in educating companies and sellers about appropriate behaviors.”).

average of 300,000 URLs a year and, in 2021, challenged 378 earnings claims, which were then removed or made the subject of a public case decision.¹³⁰ According to the DSSRC, prior to its creation in 2019, “there was a proliferation of false and misleading claims being disseminated on social media regarding the amount of income that could be generally expected” by typical MLM participants.¹³¹ Since the self-regulatory program began in 2019, in the DSSRC’s opinion, there has been a “diminishment in the number of egregious earnings claims” on social media and MLM websites.¹³² But, as noted in section II.C.1, the DSSRC does not argue that deceptive earnings claims by MLM sellers are no longer prevalent. Further, DSSRC cannot secure redress for injured consumers.

The commenters further claim that “[t]hese mechanisms have proven to be effective,”¹³³ so an earnings claim rule relating to MLMs is not needed.¹³⁴ To the extent the Commission decides to proceed with a rule, the commenters asked that the rule be narrowly tailored to reflect the industry’s commitment to self-regulation,¹³⁵ such as by prioritizing DSSRC referrals and considering whether MLMs are “able to document specific compliance practices and concrete actions taken to protect consumers” before taking action against an MLM.¹³⁶

Other commenters disagreed. With respect to the DSA, they pointed out there is no evidence to date that the DSA’s actions have persuaded the industry as a whole to

¹³⁰ Utah DSC ANPR Comment at 3.

¹³¹ DSSRC ANPR Comment at 3.

¹³² *Id.* at 1, 3.

¹³³ DSA ANPR Comment at 1-6.

¹³⁴ Coalition ANPR Comment at 34.

¹³⁵ *Id.*

¹³⁶ DSA ANPR Comment at 20-21.

change its behavior to conform to legal norms.¹³⁷ TINA, for example, commented that the DSA Code of Ethics is “meaningless, industry rhetoric” as “there is little to no evidence that DSA ever enforced its code of ethics” and no one has ever faced a penalty for violating the Code of Ethics. In 2017, TINA found that 97% of DSA members (and every company on DSA’s board of directors) made misleading earnings claims.¹³⁸ Commenters also noted that if individual companies have already implemented effective compliance programs, then “an income claims rule would not add any significant burden on them.”¹³⁹

With respect to the DSSRC, some commenters noted that the Council lacks any enforcement authority, has no ability to issue any sort of penalties or restrictions, and does not have the ability to expel members from the DSA.¹⁴⁰ In addition, TINA said that the DSSRC operates in secret, which allows law violators to avoid any accountability for their wrongdoing.¹⁴¹ TINA asserted that DSSRC will close an investigation without disclosing the name of the violating party if the party commits to taking down the illegal social media posts within 15 days.¹⁴² TINA stated that more than 80% of DSSRC’s investigations were closed in this manner, which it asserted “allows the vast majority of those that violate the law to hide in the shadows.”¹⁴³ TINA’s Executive Director has stated that this practice “allows deceptive behavior to hide behind the veil of industry

¹³⁷ TINA ANPR Comment at 24-30; Keep ANPR Comment at 6; *see also* Gross ANPR Comment at 9 (citations omitted) (“The first Codes of Ethics were set up in the 1930’s. 90 years later the problems are greater than ever. In the best case, self-regulation can be seen as having mitigated some problems. Nine decades of empirical evidence, however, demonstrate that self-regulation is insufficient.”).

¹³⁸ TINA ANPR Comment at 24-26.

¹³⁹ *Id.* at 3-4 n.12. At least one commenter was skeptical about the effectiveness of any MLM’s compliance program. Vaughan ANPR Comment at 13.

¹⁴⁰ TINA ANPR Comment at 27-29; Keep ANPR Comment at 6.

¹⁴¹ TINA ANPR at 28-29.

¹⁴² *Id.* at 28-29.

¹⁴³ *Id.*

self-regulation, resulting in a loss of public confidence and accountability.”¹⁴⁴ For these reasons, according to commenters, the DSSRC has proven to be entirely ineffective.¹⁴⁵

Having reviewed and considered the comments, the Commission is not persuaded that any existing or past industry self-regulatory effort obviates the need for the proposed rule. It finds that no persuasive evidence or other information has been submitted indicating that self-regulatory activities in the MLM industry have been effective in stopping the ongoing prevalence of deceptive earnings claims.¹⁴⁶ To the contrary, the FTC continues to encounter numerous instances of illegal deceptive claims by MLM sellers, leading to enforcement actions against four DSA members and warning letters to seven DSA members since 2015.¹⁴⁷ In 2017, TINA gathered evidence that 97% of DSA

¹⁴⁴ Bonnie Patten, *Self-Regulation in the Direct Selling Industry: Can it Ever Be More Than Symbolic?*, 22 UC Davis Bus. L.J. 273, 276 (April 2022); see also TINA ANPR Comment at 28-30.

¹⁴⁵ TINA ANPR Comment at 28-29 (noting that “[o]f the 50 companies reported in Case Decisions published as of October 2021, all of them that remained in business as a direct selling company [and] continued to engage in deceptive marketing after their DSSRC case was closed”) (citing TINA.org’s DSSRC Database, <https://truthinadvertising.org/evidence/dssrc-database/>); 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/>).

¹⁴⁶ The Commission notes that two MLMs who argued that their compliance efforts were effective in combatting deceptive earning claims recently received warning letters from FTC staff. Compare Arbonne ANPR Comment at 1, 4-8, with Letter from FTC Staff to Arbonne International, LLC (Apr. 24, 2020), https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_arbonne_international_llc.pdf (FTC staff sent warning letter to Arbonne after reviewing “social media posts made by Arbonne International, LLC business opportunity participants or representatives that unlawfully... misrepresent that consumers who become Arbonne business opportunity participants are likely to earn substantial income.”); compare Comment No. 20-1552 (Family First Life, LLC) (“FFL ANPR”) at 4-5 (noting that its efforts exceed industry standards) with FTC Staff Letter to Family First Life, LLC (Dec. 27, 2021), <https://www.ftc.gov/legal-library/browse/warning-letters/letter-family-first-life-llc> (FTC staff determined that Family First Life “is unlawfully misrepresenting that consumers who become Family First Life business opportunity partners are likely to earn substantial income”). However, even if some MLMs were to adopt sufficiently robust compliance programs, the actions of a few businesses do not negate the need for regulations across the entire industry.

¹⁴⁷ See *FTC v. AdvoCare, Int’l, L.P.*, No. 4:19-cv-715 (E.D. Tex. 2019); *FTC v. Herbalife Int’l of Am., Inc.*, No. 2:16-cv-5217 (C.D. Cal. 2016); *FTC v. Vemma Nutrition Co.*, No. 2:15-cv-01578 (D. Ariz. 2015); *FTC v. Neora, LLC*, No. 3:19-cv-19699, (D.N.J. 2019), transferred No. 3:20-cv-1979 (N.D. Tex.); FTC Press Release, *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> (warning letters to Modere and Arbonne); FTC Press Release, *FTC Sends*

members (and every company on DSA’s board of directors) had made misleading earnings claims.¹⁴⁸ And in 2024, TINA investigated 100 MLMs, including 97 DSA members, and gathered evidence that 98% were making misleading earnings misrepresentations in 2023.¹⁴⁹

With respect to the DSSRC, the Commission generally supports industry self-regulation. As is true in all areas, however, self-regulation is a complement to, not a replacement for, law enforcement. As is true for all self-regulatory entities, the DSSRC lacks the authority to take enforcement action against wrongdoers, and it cannot provide redress to consumers injured by deceptive earnings claims.¹⁵⁰

Second Round of Warning Letters to Multi-Level Marketers Regarding Coronavirus Related Health and Earnings Claims (June 5, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/06/ftc-sends-second-round-warning-letters-multi-level-marketers-regarding-coronavirus-related-health> (warning letters to Youngevity, Melaleuca, The Juice Plus+ Company, and Isagenix); FTC Press Release, *With Omicron Variant on the Rise, FTC Orders More Marketers to Stop Falsely Claiming Their Products Can Effectively Prevent or Treat COVID-1* (Jan. 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/omicron-variant-rise-ftc-orders-more-marketers-stop-falsely-claiming-their-products-can-effectively> (warning letter to Enagic USA). In one of the four cases, the court agreed with the FTC that “some ... statements by Neora are ... misleading as to the amount of money typically earned,” but declined to enter an injunction against future violations. *Neora*, 2023 WL 8446166, at *28-29.

¹⁴⁸ TINA ANPR Comment at 15-16, 24-26; see also TINA, *Multilevel Marketing: The Day Job That Doesn’t Pay* (Dec. 18, 2017), <https://truthinadvertising.org/articles/mlm-income-claims-investigation/>.

¹⁴⁹ TINA, *MLM Companies Income Claims* (Feb. 15, 2024), <https://truthinadvertising.org/industries/mlm-companies-income-claims/> (collecting more than 2,000 examples of deceptive earnings claims by the 100 MLMs and their participants from 2018 to February 2024).

¹⁵⁰ While it can publicize the names of violating MLMs or refer violators to the FTC, at least until 2024, if the MLM removed the deceptive claim within a certain limited period of time, the DSSRC did not disclose the name of the violating MLM to the public; instead, the matter was administratively closed. DSSRC, *2020 Year End Activity Report* at 5 (2021), https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc_activityreport_1-25-202117f78cd9-43ed-4442-8b42-6649d1bb9f9a.pdf. The DSSRC has said it is interested in making its administrative closures more transparent. In 2024, the DSSRC committed to “make a concerted effort to increase the transparency of its reporting of administratively closed cases.” See DSSRC, *2023 Activity Report* (2024), https://assets.bbbprograms.org/docs/default-source/dssrc/dssrc_yearendactivityreport_2023_digital_report.pdf?sfvrsn=9a6ceb83_4. In its 2023 report, the DSSRC did list all MLMs that were the subject of 2023 DSSRC Administratively Resolved Inquiry Summaries. See *id.* But it did not describe the conduct that each engaged in or identify whether the company took any steps to correct the claim beyond acting to take the claim down from social media, such as investigating whether any consumer harm resulted from the claim. Moreover, the DSSRC has not announced what its procedures regarding administrative closures will be moving forward. For example, to date, the DSSRC’s policies and procedures remain unchanged. See DSSRC, *Policies and Procedures for the Direct Selling Self-Regulatory Council* (2022), <https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/procedures/dssrc-procedures.pdf>. And,

The Commission further notes that the DSSRC’s work addresses public social media posts and MLM websites.¹⁵¹ The rulemaking record, however, shows that deceptive earnings claims occur in a wide variety of circumstances, such as face-to-face meetings, phone calls, private social media chats, and company meetings or conventions. While the DSSRC may sometimes succeed in getting some deceptive earnings claims taken down from social media, its work is not a substitute for the law enforcement tools a rule would provide the Commission to protect consumers seeking honest ways to earn real money.

As a result, the Commission believes that a rule prohibiting unfair or deceptive earnings claims in the MLM industry and claims that misrepresent an MLM as an employment opportunity is still needed to deter wrongdoers and protect consumers who have been injured by misleading earnings claims.

3. Education

MLM industry advocates, including the DSSRC, argued that, instead of a rule, the Commission should implement “additional educational initiatives” to bring “greater understanding to both the consequences of disseminating inaccurate earnings claims, as well as the techniques that companies may avail themselves of when communicating appropriate income claims.”¹⁵²

as of October 31, 2024, the DSSRC is continuing its past practice of administratively closing certain matters without identifying the MLM at issue. *See* DSSRC, *DSSRC Administrative Closure #336* (Oct. 31, 2024), <https://bbbprograms.org/programs/all-programs/dssrc/ccd/dssrc-administrative-closure-336>.

¹⁵¹ DSSRC ANPR Comment at 2-3.

¹⁵² *Id.* at 7; *see also* DSA ANPR Comment at 21.

While consumer advocates generally agreed that the Commission should continue to issue new consumer and business education,¹⁵³ they did not agree that education is an effective alternative to regulation.¹⁵⁴

The Commission agrees that business and consumer education is valuable in preventing wrongful conduct and protecting consumers. It believes such work is a vital part of its consumer protection mission. Business and consumer education, however, does not replace the need for effective law enforcement tools, including the ability to enjoin bad actors from future law violations and the ability to provide redress to consumers injured by deceptive earnings claims and claims that misrepresent an MLM as an employment opportunity.

III. Overview of the Proposed Rule

This section describes and explains each provision of the proposed rule. As noted in section V, the Commission seeks comment on the benefits and cost of each provision of the proposed rule, as well as any alternatives.

A. Definition of Multi-Level Marketing Program

The Commission intends for the proposed rule to cover all MLM sellers, including all MLMs, regardless of the particular structure they employ.¹⁵⁵ To that end,

¹⁵³ NCL/CFA ANPR Comment at 9; Keep ANPR Comment at 3 (“Consumers need clear guidance and real illustrative examples across multiple enforcement actions.”); Brooks ANPR Comment at 24 (“A person’s exposure to MLM recruitment efforts may begin as soon as they enter the work force, if not earlier. Some MLMs target college students (e.g., Veema). Therefore, educational materials should be provided for use in high schools, perhaps as part of a financial literacy program.”); *but see* Gross ANPR Comment at 3 (the ability to do effective consumer education is “limited as the industry data (and income claims) are highly skewed and deceptive”).

¹⁵⁴ Brooks ANPR Comment at 24; Keep ANPR Comment at 2 (“Consumer education will always be an ongoing challenge with each generation of new consumers entering with their own perspective and preferred communication media.”); Gross ANPR Comment at 3.

¹⁵⁵ The Commission does not intend to regulate simple pyramids under the proposed rule—that is, pyramid schemes that lack any product or service. The Commission intends to address such schemes under the proposed new provisions of the Business Opportunity Rule, as described in the Business Opportunity Rule NPRM published elsewhere in this issue of the *Federal Register*.

the Commission proposes to define an MLM in a way that captures the key feature of MLMs that differentiates them from most other business models that involve commission-based sales work: their multi-level structure, or the right to receive compensation based on the efforts of other participants, and in particular those whom one has not directly recruited.

The Commission is considering three alternative approaches to defining an MLM. The three alternatives vary in phrasing but all are intended to achieve the same scope of coverage. These alternatives were developed by staff based on definitions used in past orders in MLM matters.¹⁵⁶ They each attempt to ensure coverage of all money-making opportunities that offer the opportunity to earn recruitment-related compensation and that are multi-level in nature, rather than broadly covering all opportunities offering recruitment-related compensation. Alternative A includes definitions for “MLM” and “downline” that the Commission intends for commenters to consider together. Alternative B provides proposed alternative language for these two definitions, and alternative C proposes an alternative definition for the term “MLM” that would not include the term “downline.” The Commission welcomes comments on the three alternatives set forth in the proposed regulatory text, to assist the Commission in selecting the wording that best achieves the desired scope of coverage, while minimizing ambiguity, coverage gaps, or other issues.

¹⁵⁶ See, e.g., Stipulated Order for Permanent Injunction and Monetary Judgment against Defendants AdvoCare International, L.P. and Brian Connolly at 3, *FTC v. AdvoCare, Int'l, L.P.*, No. 4:19-cv-715 (E.D. Tex. 2019), ECF No. 15 (defining MLM); Stipulated Order for Permanent Injunction and Monetary Judgment Against Vemma Nutrition Company, Vemma International Holdings, Inc., and Benson K. Boreyko at 5-6, *FTC v. Vemma Nutrition Co.*, No. 15-cv-1578 (D. Ariz. 2016), ECF No. 273 (same).

Alternative A would define a multi-level marketing program, or MLM, to mean any plan, program, or business that sells products, services, or other property and offers participants the right to both i) recruit others into the plan, program, or business, and ii) receive payment or other compensation that is based, in whole or in part, upon purchases, sales, or any other activities of participants in the participant’s downline whom the participant did not recruit. It would also state that a person is deemed to be recruited by at most one other participant, for purposes of the definition of MLM. Alternative A would define downline to mean the collection of persons under a participant in the MLM’s organizational hierarchy or structure used for determining compensation, and would go on to state that this may include participants or other individuals whom a participant has personally recruited (“first level”), any participants and other individuals recruited by those in the first level (“second level”), any participants and other individuals recruited by those in the second level (“third level”), and so forth, however denominated. Finally, the proposed rule would define participant to mean a person who has the right to both recruit others into the MLM or have others placed in the person’s downline and receive payment or other compensation that is based, in whole or in part, upon purchases, sales, recruiting, or any other activities of the person’s downline.

Note that the compensation element is phrased in an inclusive manner, so that it is met by the (very common) structure in which compensation is or can be affected by both the activities of one’s immediate downline and the activities of non-directly recruited downline participants.¹⁵⁷ Also, alternative A’s definition of MLM includes the clarifying

¹⁵⁷ The proposed rule defines “participant” broadly to ensure that it reaches all MLMs regardless of how they are structured. For example, some MLM compensation plans give MLMs the option to place individuals in a participant’s downline. *See, e.g.,* Policies and Procedures of Nuskin United States (2018),

statement that a person is deemed to be recruited by at most one other participant. This clarifies that the definition includes business structures that have multiple levels, regardless of who participates in recruiting new members. For example, suppose that Alex recruits Bailey, who in turn recruits Casey, and Alex may receive compensation based on both Bailey and Casey's activities, and Bailey may receive compensation based on Casey's activities. Because Alex did not recruit Casey and could receive compensation based on Casey's activities, the structure meets the definition of an MLM. Without the clarification, one might think that an MLM could avoid coverage under the proposed rule if every upline participant who might be eligible for compensation (here, Alex and Bailey) based on the activities of a new participant (Casey) communicates with the new participant during their recruitment. In that scenario, the MLM could argue that the upline participants (Alex and Bailey) jointly "recruited" the new participant (Casey), and thus any compensation based on the new participant's activities is not compensation based on the activities of a participant whom the upline participants (Alex and Bailey) did not recruit, and therefore the entity does not meet the definition of MLM. The clarification is intended to foreclose such an interpretation. It ensures that, for purposes of the proposed rule, if Casey was recruited by Bailey, Casey was not recruited by Alex. Because only one participant can be Casey's recruiter, if more than one participant (other than Casey) may earn compensation based on Casey's activities, the structure is an MLM.

https://www.nuskin.com/content/dam/office/n_america/US/en/business_materials/Policies_Proced_US.pdf (explaining that "[w]hen the Company receives inquiries from individuals concerning the Company's Products or business opportunity, the Company refers these individuals to Distributors according to its discretion" and that the referred individuals are placed in the distributor's downline). Thus, the proposed rule text states that "participants" includes individuals who have the right to have others placed into their downline.

Alternative B involves a broader initial definition with a carve-out for structures in which compensation for others' efforts is limited to those a participant directly recruited. Alternative B would define MLM to mean any plan, program, or business that sells products, services, or other property and offers participants the right to both recruit others into the plan, program, or business or have others placed in the participant's downline, and receive payment or other compensation that is based, in whole or in part, upon purchases, sales, or any other activities of people in the participant's downline. The definition would also explicitly state that it does not include any plan, program, or business in which participant compensation is only based on the participant's purchases, sales, or any other activities and the purchases, sales, or any other activities of people the participant directly recruits. And, like alternative A, alternative B's definition of MLM would also state that for purposes of the definition of MLM, a person is deemed to be recruited by at most one other participant. Alternative B would define downline to mean the collection of persons a participant recruits or that are otherwise placed under them in the MLM's organizational hierarchy, including the collection of persons the recruited individuals recruit, and so on.

Alternative B is intended to be logically identical to alternative A, but instead of expressly identifying compensation from non-direct recruits as a necessary element (as alternative A does), it identifies compensation based on the activities of recruits, generally, as the necessary element, and then carves out from coverage all such opportunities in which recruitment-related compensation is based solely on the activities of those a participant directly recruits (i.e., no compensation is based on the activities of indirect recruits, such as the recruits of recruits).

Finally, alternative C would define MLM to mean any plan, program, or business that sells products, services, or other property and offers participants the right to both recruit new participants, and receive payment or other compensation that is based, in whole or in part, upon purchases, sales, or any other activities of any other participant recruited by any other participant. Like alternatives A and B, alternative C would also note that, for the purpose of the definition of MLM, a person is deemed to be recruited by at most one other participant. Alternative C does not use the term downline. If alternative C is chosen, the proposed rule would not include a definition of downline or participant.

Alternative C is intended to be logically identical to alternative A but is phrased differently. Specifically, where alternative A refers to compensation based on the activities of a participant “whom the participant did not recruit,” alternative C spells out what this would mean in practice—that the compensation is based on the activities of a participant recruited by yet a third participant: “any other participant recruited by any other participant.” For example, if Alex recruits Bailey, and Bailey recruits Casey, and Casey’s activities affect Alex’s compensation, Casey is “any other participant” and was recruited by Bailey, who is the final “any other participant” referenced in the definition text.

The Commission is interested in comment on how “MLM” should be defined, including whether the Commission should adopt one of the three alternatives proposed herein, and if so, whether and how the language could be improved. In particular, the Commission is interested in comment on whether the language of alternatives A, B, and C creates any gaps in coverage, and if so whether and how the language could be revised

to close them,¹⁵⁸ as well as whether the language should be revised to avoid ambiguity, overbreadth, or other concerns, and if so how.

The Commission, in the Business Opportunity Rule NPRM (published elsewhere in this issue of the *Federal Register*) is proposing the same three alternatives for use in the Business Opportunity Rule. The Commission intends for the definition in this Rule to be the same as that used in the Business Opportunity Rule, and so in considering how to define MLM the Commission will consider comments on this topic submitted in response to the Business Opportunity Rule NPRM, as well as comments submitted in response to this NPRM. A comment regarding these definition alternatives does not need to be submitted in both rulemakings.

B. Definition of Earnings and Earnings Claims

The proposed rule defines “Earnings” to mean “gross or net sales, income, profits, appreciation, or other financial gain.” The proposed rule’s definition of “Earnings Claim” borrows heavily from the definition of “earnings claim” in the Business Opportunity Rule. In that Rule, “Earnings Claim” is defined to mean a representation that conveys “a specific level or range of actual or potential sales” or earnings.¹⁵⁹ The definition in the proposed rule contains minor modifications and is drafted more directly and broadly to

¹⁵⁸ For example, does alternative C cover businesses that systematically assign new recruits to the downline of a participant who did not recruit them? For example, if Alex recruits Bailey, and Casey recruits Dylan, and Dylan is placed into Alex’s downline, and Bailey is placed into Casey’s downline. If this would be a gap in coverage, should it be closed, and if so, how?

¹⁵⁹ The Business Opportunity Rule defines earnings claim to mean any oral, written, or visual representation to a prospective purchaser that conveys, expressly or by implication, a specific level or range of actual or potential sales, or gross or net income or profits. It then goes on to provide that earnings claims include, but are not limited to, any chart, table, or mathematical calculation that demonstrates possible results based upon a combination of variables, and any statements from which a prospective purchaser can reasonably infer that he or she will earn a minimum level of income (e.g., “earn enough to buy a Porsche,” “earn a six-figure income,” or “earn your investment back within one year”). 16 CFR 437.1(f). Note that the Business Opportunity Rule NPRM, published elsewhere in this issue of the *Federal Register*, proposes modifications that would parallel the definition in the proposed rule.

capture the wide variety of representations made to prospective MLM participants regarding the potential for financial gain.

Similar to the Business Opportunity Rule, the proposed definition of “Earnings Claim” includes several examples to illustrate the range of representations covered: 1) Charts, tables, or calculations that purport to demonstrate possible results, such as an MLM-produced income disclosure that lists dollar amount ranges or average incomes by rank,¹⁶⁰ or a depiction of hypothetical purchases and calculations of the amounts a participant could earn; 2) Statements or images that imply that participants will earn at least a certain amount or level of earnings, or achieve a material lifestyle change, such as “quit your job,” obtain “financial freedom,” or gain supplemental income to go on a vacation or pay some bills;¹⁶¹ 3) Testimonials or other statements about how much a specific person has earned, including social media posts by MLM participants that make claims about how much money they earned in a given time period or about how they were able to pay for personal expenses, such as a vacation or groceries, thanks to the income they earned from the MLM.¹⁶²

¹⁶⁰ The Staff Report on MLM Income Disclosures discusses various practices—seemingly widespread in MLM-produced income disclosures—that are likely to cause those documents to convey inaccurate, inflated impressions of participants’ likely earnings. Regardless, such representations about income are “earnings claims” under the proposed rule.

¹⁶¹ See Comment No. 20-366 (H. Clark) (“I was told by several reps in these companies that I could retire my husband, travel around the world and be able to buy a house or my husband a truck.”); *see also, e.g.*, Comment No. 20-187 (E. Petersen); Comment No. 20-692 (Anonymous); Comment No. 20-1438 (Anonymous); Comment No. 20-1440 (E. Brohaugh).

¹⁶² Comment No. 20-23 (G. Smith) (“My uplines always showed off their houses, cars, trips, the organic food they could afford, etc. All because of [MLM name].”); Comment No. 20-416 (J. Gustin) (describing MLM participants posting on social media “images from their bank of the deposit they received from their MLM,” and “credit[ing] this payment for covering many of the representative’s expenses”); Comment No. 20-470 (C. Cloe) (“Lifestyle claims being posted were about paying off debts, quitting jobs and retiring husbands. Big houses. Nice cars. Clothing, jewelry etc.”); Comment No. 20-326 (Anonymous) (providing images of social media posts by participants in an MLM, depicting “huge purchases like homes or cars, but also everyday expenses such as coffee, lunch, or self care services such as hair and nails, often using the hashtag #thanks[MLM name]”); *see also* sources cited *supra* notes 52 & 63-65.

The proposed rule’s definition implements minor changes to the language used in the existing Business Opportunity Rule’s definition. These changes help clarify the scope of the term “earnings claim.” The changes include: omitting “to prospective purchasers” (such a limitation is unnecessary), changing “statements” to “statements or images,” updating the examples of implied earnings claims, and explicitly spelling out that earnings claims include representations that imply that participants will “achieve a material lifestyle change,” as well as testimonials. The proposed rule also uses the defined term, “earnings,” where the Business Opportunity Rule (which does not define that term separately) describes the concept in the text of the definition of “earnings claim.” Finally, where the Business Opportunity Rule refers to “a specific level or range” of earnings, the proposed rule uses “a level or range” of earnings. This change does not alter the meaning of the provision, but should help clarify its broad scope. For example, omitting the word “specific” should make clearer that a “level” of earnings can be as general as “more than the cost of the product or service,” and that claims as general as “make money” fall within the definition.¹⁶³

C. Definition of Person

The proposed rule defines “Person” as “any individual, group, association, limited or general partnership, corporation, or other business entity.” This definition is identical

¹⁶³ Generalized representations of earnings of this type, if misleading, violate section 5 of the FTC Act. *See e.g., FTC v. World Patent Mktg.*, No. 17-cv-20848, 2017 WL 3508639, *11-12 (S.D. Fla. Aug. 16, 2017) (misleading representations included “purchase ... is likely to result in financial gain”); *Universal Credit Acceptance Corp.*, 82 FTC 570, 631 (1973) (misleading representations included “representations of ‘profitable earnings’”).

to the one in the Business Opportunity Rule¹⁶⁴ and is appropriate to ensure the proposed rule will cover all relevant actors.¹⁶⁵

D. Definition of Material

The proposed rule defines “material” as “likely to affect a person’s choice of, or conduct regarding, goods or services.” This definition is identical to the one in the Business Opportunity Rule and is appropriate to provide clarity.¹⁶⁶

E. Definition of Seller

The proposed rule is necessarily different from the Business Opportunity Rule and defines “Seller” as “a Multi-Level Marketing Program, a participant, an agent of the MLM, or representative of the MLM who offers, advertises, markets, or promotes the MLM.”¹⁶⁷

F. Substantiation

The proposed rule would require all MLM sellers—whether they are the MLM itself or an individual participant—to have written substantiation for any earnings claims

¹⁶⁴ See 16 CFR 437.1(k).

¹⁶⁵ For example, if the definition did not include corporations, entities that would otherwise meet the definition of MLM might argue they are not covered if all individuals engaging in the MLM opportunity do so through corporate entities, such as a personal LLC.

¹⁶⁶ See 16 CFR 437.1(i).

¹⁶⁷ The Commission notes that it does not, by means of the language of this definition, intend to signal that MLM participants are not agents of their MLMs. Whether one person acts as the agent of another is a fact-based inquiry under the well-settled principles of agency law. In most instances, MLM participants act as the agents of their MLMs when they market or offer the MLM opportunity. See, e.g., *FTC v. Skybiz.com, Inc.*, No. 01-cv-396, 2001 WL 1673645, at *9 (N.D. Okla. Aug. 31, 2001), *aff’d*, 57 F. App’x 374 (10th Cir. 2003); *Equinox*, 1999 WL 1425373, at *9; *Five-Star Auto Club*, 97 F. Supp. 2d at 527; see also *Goodman v. FTC*, 244 F.2d 584, 590-93 (9th Cir. 1957) (holding that it is irrelevant for purposes of section 5 agency analysis whether salespeople were designated as employees or independent contractors); *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 319-20 (S.D.N.Y. 2008) (same); but see *Neora*, 2023 WL 8446166, at *25-26 (concluding that MLM participants were not agents of the MLM when making deceptive earnings or health claims).

they make in connection with offering the opportunity,¹⁶⁸ and to make such documents available upon request.¹⁶⁹

Numerous decisions by the Commission and the courts have firmly established that section 5 of the FTC Act requires marketers to have substantiation for material claims made in the course of marketing or selling goods or services.¹⁷⁰ That includes earnings claims.¹⁷¹

A speaker has substantiation for a claim if they have a reasonable basis supporting the claim.¹⁷² That means that the facts known to the speaker must reasonably support the representation as it is likely to be understood by a reasonable consumer to whom the representation is directed.¹⁷³ The kind of evidence needed depends on the claim. In almost every circumstance, anecdotal information or data about a small number of participants will not be sufficient to show a reasonable basis.¹⁷⁴ Because section 5 already requires MLM sellers to possess substantiation, law-abiding MLM sellers that use

¹⁶⁸ This provision is very similar to the requirement contained in the Business Opportunity Rule. Notably, every commenter to address the issue favored including a substantiation requirement in the proposed rule. *See* Brooks ANPR Comment at 22; NCL/CFA ANPR Comment at 8. Notably, the DSA agrees that “direct sellers should have a reasonable basis and substantiation for all earnings claims made as articulated in the current [Business Opportunity Rule].” Comment No. 72-29 (DSA) (“DSA BOR ANPR”) at 7.

¹⁶⁹ As noted in section III.J, in proposed § 462.6, the substantiation must be available in the language in which the claim was made.

¹⁷⁰ *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 8 (1st Cir. 2010); *John Beck Amazing Profits*, 865 F. Supp. 2d at 1067 (advertiser needs “some recognizable substantiation for the representation prior to making it”) (quoting *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 298 (D. Mass. 2008)); *FTC v. Johnson*, 96 F. Supp. 3d 1110, 1120 (D. Nev. 2015).

¹⁷¹ *See, e.g., Grant Connect*, 827 F. Supp. 2d at 1214, 1226 (“Examples of deceptive conduct violative of the Act include unsubstantiated claims that consumers can make a lot of money using the defendant’s product...”); *see also, e.g., FTC v. Digital Altitude, LLC*, No. 2:18-cv-0729, 2018 WL 1942392 at *7-10 (C.D. Cal. Mar. 9, 2018); *John Beck Amazing Profits*, 865 F. Supp. 2d at 1067, 1071-72; *Holiday Enters.*, 2008 WL 953358, at *6-7; *Von Schrader Mfg. Co.*, 33 FTC 58, 64 (1941).

¹⁷² FTC Policy Statement Regarding Advertising Substantiation, appended to *Thompson Med. Co.*, 104 FTC 648, 839 (1984) (“Substantiation Policy Statement”).

¹⁷³ *See* Franchise Rule, Statement of Basis and Purpose, 43 FR 59614, 59750 (Dec. 21, 1978); *see also id.* at 59686-90; Substantiation Policy Statement.

¹⁷⁴ *Von Schrader Mfg.*, 33 FTC at 64 (claims about average earnings were unsubstantiated when the company only had limited earnings information from “a limited number of purchasers”); *see also* Franchise Rule, Statement of Basis and Purpose, 43 FR 59614, 59750 (Dec. 21, 1978).

earnings claims should already have such documents in their possession at the time the claim is made.

Some consumer advocates asked the Commission to require MLMs to possess two years of data or specific data about expenses before making an earnings claim.¹⁷⁵ Another commenter asked the Commission to provide “a clear example of what substantiation would look like.”¹⁷⁶ The Commission declines to do so, as what constitutes a reasonable basis is fact-specific and depends on the claim that is being made and the surrounding circumstances.¹⁷⁷

The proposed rule would require sellers who make earnings claims to provide written substantiation for the claims upon request.¹⁷⁸ The Business Opportunity Rule and Franchise Rule contain a similar provision, which requires sellers to provide “prospective purchasers” (or “prospective franchisees”) copies of substantiation for earnings claims, upon request.¹⁷⁹ Such a provision permits consumers to make a better-informed decision and would have a preventative effect that would reduce deception. If consumers have

¹⁷⁵ NCL/CFA ANPR Comment at 8 (a reasonable basis must include “a minimum of two years of anonymized data”); Brooks ANPR Comment at 25 (a reasonable basis must include “a. Expenses incurred by the distributor in purchasing products, sales aids and fees and services directly from the MLM company. b. Payments made by the MLM company directly to the distributor however characterized (commissions, bonuses, retail profits, etc.). c. Business expenses incurred by the distributor other than and in addition to payments made directly to the MLM company (e.g., advertising and marketing, sales leads, travel to meetings, etc.). d. Payments received by the MLM distributor other than those paid directly by the MLM company (i.e., retail sales). e. The number of hours spent by the distributor on the MLM business. f. The attrition rates of distributors at each level of the MLM compensation plan.”). At least one commenter, however, argued it would be “difficult if not impossible” for MLMs to “accurately determine and quantify ... [all] expenses generally required” because such expenses “vary considerably” from person to person. DSA ANPR Comment at 20. Other commenters disagreed. *See, e.g.*, Brooks ANPR Comment at 30-31. ¹⁷⁶ Comment No. 20-1545 (Thompson Burton PLLC) (“Thompson Burton ANPR”) at 2.

¹⁷⁷ *See, e.g.*, Substantiation Policy Statement (what constitutes a “reasonable basis depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim”). The Commission notes, however, that any substantiation provided to consumers should not be deceptive or misleading in violation of section 5 of the FTC Act.

¹⁷⁸ One group of consumer advocates asked that MLMs be required to provide this data to the FTC every year. NCL/CFA ANPR Comment at 8. Based on the record submitted to date, the Commission does not conclude that such a requirement is necessary for effective law enforcement.

¹⁷⁹ *See* 16 CFR 436.9(d), 437.6(f).

access to substantiation, there is a greater possibility that false or unsubstantiated earnings claims will be uncovered, and accurate claims will enhance transparency and informed decision-making. This increases MLMs' and participants' incentive to ensure that earnings claims have a reasonable basis, leading to fewer unsubstantiated earnings claims being made in the marketplace.¹⁸⁰

The Commission is considering a provision in the proposed rule that would make clear that the substantiation should be made available to anyone who is interested in joining the opportunity, regardless of whether the MLM has classified them as an "actual or potential recruit" or "actual or potential participant." With the rise of social media, one need not have formally started the recruitment process to encounter an earnings claim about MLMs. Indeed, MLMs and their participants spread earnings claims broadly, across social media, in personal conversations, and on job boards.¹⁸¹ In this context, anyone who views the earnings claims could consider joining the MLM. Such an individual should not have to take steps to formally start the recruiting process before inquiring about the basis for the earnings claim. For example, consumers should be able to test the veracity of earnings claims without first being required to fill out paperwork for recruits, attend a recruiting meeting, sit through a pitch about why the MLM is a good opportunity, or turn over sensitive personal information. The Commission is interested in

¹⁸⁰ As the Commission stated in the Business Opportunity Rule's Statement of Basis and Purpose, "Requiring that a prospective purchaser can obtain and review, or have his or her own advisor review, substantiation for earnings claims increases the likelihood that sellers will make claims only for which they have a reasonable basis." 76 FR 76816, 76847 (Dec. 8, 2011).

¹⁸¹ *See, e.g.*, Comment No. 20-57 (K. Eastman) (earnings claim made in meeting between recruiter, the proposed recruit, and her husband); Comment No. 20-42 (Anonymous) (consumer was recruited by private messages from friend); Comment No. 20-213 (A. Danielson) (consumer recounted seeing MLM participant opportunities promoted on job boards as a work from home job); Comment No. 20-259 (S. N.) (consumer was recruited by MLM participant while working as a cashier); Comment No. 20-604 (K. Kingery) (consumer received fliers and email promoting MLM opportunity); Comment No. 20-638 (N. Paves) (consumer received a message on LinkedIn about openings with an MLM).

comment on how to ensure that substantiation is made available to all who are interested in joining the MLM, without first being required to take any such additional steps. The proposed rule would require that substantiation be made available to anyone. Should the Rule contain such a provision?

Additionally, the Commission is interested in knowing if the obligation to provide substantiation should be limited to any particular time period. The proposed rule currently would require MLM sellers to provide substantiation for an earnings claim during the six months after the earnings claim is made available to the public. Should the proposed rule exclude the six-month time limit? Why or why not? If the provision should include a time limit, is six months appropriate or, for example, should it be replaced with some longer period of time, such as “one year”? If the proposed rule provision included such a time limitation, should that provision provide additional information about the scope of the term “the date the claim is made”? Written earnings claims may be disseminated long after they are initially published, such as when consumers view social media posts that were initially published days, weeks, or even years earlier. Should the proposed rule state that “the date the claim is made” refers to the date on which a particular claim is provided to an individual or the date on which the claim is available for viewing, such as on a website page or social media?

Alternatively, consistent with the Business Opportunity and Franchise Rules,¹⁸² should the Rule require that substantiation be made available to “any actual or potential recruit,” or “any actual or prospective participant”?¹⁸³

¹⁸² See 16 CFR 436.9(d) (substantiation must be made available to “prospective purchasers”); 16 CFR 437.4(a)(3) (same).

¹⁸³ Consistent with the Business Opportunity Rule, this alternative does not include a time period because implicit in its language is that the requirement applies while the requestor is an “actual or potential recruit.”

G. Prohibited Misrepresentations

Separate from the requirement that earnings claims be substantiated, the proposed rule would prohibit MLM sellers from making certain specific misrepresentations in the course of marketing MLM opportunities: false or misleading earnings claims; misrepresentations that would alter or dispel the meaning of any truthful information about earnings; and misrepresentations that the opportunity to be an MLM participant is an employment opportunity. The first prohibition is also at the core of other Commission rules.¹⁸⁴ The other two, which flow directly from the first, similarly are already illegal under section 5 of the FTC Act.

1. False or Misleading Earnings Claims

The proposed rule would prohibit false or misleading earnings claims, whether express or implied. The proposed rule's provisions are drafted in a manner consistent with other rules, and they are intended to capture the wide variety of ways MLM sellers may engage in deceptive acts or practices concerning earnings.

The deceptive earnings claims prohibited by proposed § 462.3 are already prohibited by section 5 of the FTC Act, and thus this provision imposes no new requirements on covered entities or persons.¹⁸⁵ As set out in the 2022 ANPR and referenced in section II.C, numerous decisions by the Commission and the courts have

¹⁸⁴ See, e.g., 16 CFR 310.3(a)(2)(vi) (Telemarketing Sales Rule provision prohibiting misrepresenting “[a]ny material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability”); 16 CFR 437.6(d) (Business Opportunity Rule provision prohibiting “[m]isrepresent[ing] the amount of sales, or gross or net income or profits a prospective purchaser may earn or that prior purchasers have earned”).

¹⁸⁵ See 2022 ANPR, 87 FR at 13951-52 (noting “long line of [F]ederal court opinions holding that the use of false, unsubstantiated, or otherwise misleading earnings claims violates [s]ection 5” and citing cases). As discussed elsewhere, other provisions of the proposed rule relating to earnings claims may impose new burdens, such as the provisions requiring that substantiation of earnings claims be retained for a period of years and made available upon request.

firmly established the key points of law on this topic, including that: a) liability turns on whether the net impression conveyed by representations—not merely their express terms—is misleading;¹⁸⁶ b) claims about earnings, including testimonials from successful participants, will usually imply that the represented earnings are typical, even if that is not expressly stated;¹⁸⁷ c) representations of hypothetical or past profits can imply that

¹⁸⁶ See, e.g., *Vemma*, 2015 WL 11118111, at *6 (in determining whether income claims are deceptive, “[t]he ‘common-sense net impression’ of representations controls”); see also, e.g., *FTC v. RagingBull.com LLC*, No. 20-3538, 2023 WL 2527204, at *5-6 (D. Md. March 15, 2023); *World Patent Mktg.*, 2017 WL 3508639, at *11-12; *John Beck Amazing Profits*, 865 F. Supp. 2d at 1073; *Med. Billers Network*, 543 F. Supp. 2d at 306-07; *Tashman*, 318 F.3d at 1276; *FTC v. Febre*, No. 94-cv-3625, 1996 WL 396117, at *4 (N.D. Ill. Jul. 3, 1996). At least one commenter suggested that a rule on earnings claims should provide greater clarity on the meaning of “net impression” and “typical earnings.” Thompson Burton ANPR Comment at 1-2. But the concepts have been well-developed in the case law—indeed, the commenter concedes that both terms “are informative to a legal mind.” *Id.* The Commission intends to continue issuing appropriate consumer and business guidance, and believes this is the most appropriate course to address the comment’s concern.

¹⁸⁷ See *Five-Star Auto Club*, 97 F. Supp. 2d at 528 (“[I]t would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical [participant.]”); *John Beck Amazing Profits*, 865 F. Supp. 2d at 1073 (ads featuring testimonials created impression that “a typical consumer can easily and quickly earn thousands of dollars per week”); see also, e.g., *Tashman*, 318 F.3d at 1276; *Febre*, 1996 WL 396117, at *2; *Nat’l Dynamics Corp.*, 82 FTC 488, 512, 565 (1973), modified, 85 FTC 1052 (1975); *World Patent Mktg.*, 2017 WL 3508639, at *12; *Macmillan, Inc.*, 96 FTC 208, 301 (1980); *Universal Credit Acceptance Corp.*, 82 FTC 570, 669, 682-83 (1973); *Von Schrader Mfg.*, 33 FTC at 64; FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”), 16 CFR 255.2(b). This legal precedent has in recent years been further confirmed by research. See, e.g., Bosley ANPR Comment at 7-8 (discussing Nobel Prize-winning research by Amos Tversky & Daniel Kahneman on human judgment and decision-making, including their identification of cognitive biases such as availability bias and anchoring). Some commenters argued otherwise but they presented no evidence to support their views. See, e.g., Integrity Mktg. ANPR Comment at 13 (claiming that social media posts with atypical earnings amounts do not mislead consumers about likely earnings). At the same time, some commenters stated that they had been misled in just this way by just such representations. See Comment No. 20-23 (G. Smith) (“My uplines always showed off their houses, cars, trips, the organic food they could afford, etc. All because of [MLM name]. My other upline ‘retired’ her husband that worked in the oil fields. The use of that was also really impactful. The emotional pull to be just like her was hard to ignore. It made me feel like I could do that too.”); Comment No. 20-465 (K. C.) (“I was told that if I worked hard enough, for long enough, that I could become a millionaire and have financial freedom. Does it sound far fetched? Yes. But they make an entire job of convincing you that it’s possible. The company and the reps are always showing off the top earners with their flashy lifestyles all over social media.”); Comment No. 20-165 (C. Wesselmann) (“The person that recruited me told me that she was able to quit her job, become a six figure earner, be debt free by just working from home. When I first resisted another promoter jumped in a group chat and told me she had experienced the same results and was able to ‘retire’ her husband. If I had seen the income disclosure before signing up I would have seen that only .01% become 6 figure earners., and not signed up[.]”); Comment No. 20-198 (Anonymous).

the represented earnings are possible or likely;¹⁸⁸ and d) disclaimers often fail to prevent representations of atypical earnings from conveying a misleading impression, and so are not an easy cure-all.¹⁸⁹ In short, sellers who convey information about earnings must be cognizant of both the express and implied messages about earnings that their statements convey, and ensure that those messages are accurate and not misleading.¹⁹⁰

In the context of deceptive earnings claims, comments identified several key issues that warrant discussion with respect to: a) lifestyle claims; b) intentional deception; c) disclaimers; and d) income disclosures.

Lifestyle Claims. Representations can convey implied earnings claims—and thus be subject to the proposed rule—even if they do not mention specific dollar amounts.¹⁹¹

As the Commission noted in the 2022 ANPR, such claims may include depictions of

¹⁸⁸ See, e.g., *John Beck Amazing Profits*, 865 F. Supp. 2d at 1073 (ads featuring testimonials created impression that “a typical consumer can easily and quickly earn thousands of dollars per week”); see also, e.g., *World Patent Mktg.*, 2017 WL 3508639, at *12; *Macmillan, Inc.*, 96 FTC at 301; *Nat’l Dynamics*, 82 FTC at 511-13, 564, modified, 85 FTC at 1057; *Universal Credit*, 82 FTC at 669, 682-83; *Von Schrader Mfg.*, 33 FTC at 65.

¹⁸⁹ *World Patent Mktg.*, 2017 WL 3508639, at *13-14 (rejecting disclaimer defense as disclaimers “failed to change the net impression created by Defendants’ salespeople who verbally promised financial gain”); see also, e.g., *Vemma*, 2015 WL 11118111, at *7; *John Beck Amazing Profits*, 865 F. Supp. 2d at 1072; *Stefanchik*, 2007 WL 1058579, at *6; *Minuteman Press*, 53 F. Supp. 2d at 262-63.

¹⁹⁰ For example, “Misrepresentations of the benefits or expected profits of a business opportunity constitute unfair or deceptive acts or practices forbidden by [s]ection 5(a)(1).” *FTC v. Inv. Devs., Inc.*, No. 89-cv-642, 1989 WL 62564, at *10 (E.D. La. June 8, 1989). Thus, representations of gross income may be deceptive if they convey the impression that the figures are net income or profits, and net income is in fact materially lower. *Febre*, 1996 WL 396117, at *3-5 (ads featuring earnings claims conveyed the impression that the figures were net of all expenses, and thus were deceptive because that was not true); *Holiday Magic*, 84 FTC at 896, 1032-1034, 1068 (among the many deceptions of respondent is that it misrepresented “[t]hat there are no substantial business or operating expenses for distributors, and that gross income is ‘net income’ or ‘profit’”); see also *Encyclopaedia Britannica*, 87 FTC at 445-50, 486-87, 505, 510, 532 (finding omission of material limitations on the advertised income, including undisclosed expenses, deceptive); *Sw. Sunsites, Inc.*, 105 FTC 7, 99-102 (1985) (claims about potential use of property were deceptive because they implied the property was a good investment but failed to disclose substantial expenses that rendered the proposed uses uneconomical), *aff’d* 785 F.2d 1431 (9th Cir. 1986).

¹⁹¹ *FTC v. Noland*, No. 2:20-cv-0047, 2020 WL 954958, at *12-13 (D. Ariz. Feb. 27, 2020) (holding that in the context of the case, representations of “financial freedom,” while not “quantifiable down to the penny,” nonetheless conveyed a claim of earning “a fabulous level of wealth beyond completely replacing a job income”); see also *Febre*, 1996 WL 396117, at *2 (rejecting argument that express earnings claim had to guarantee a certain level of earning).

luxury goods or exotic travel made possible by the MLM, but they may also include depictions of more mundane purchases, if they convey the impression that they are paid for by earnings from the MLM.¹⁹² Such representations are likely misleading if participants generally do not achieve such results.¹⁹³

Some commenters urged the Commission to ban the use of some or all lifestyle claims in MLM marketing,¹⁹⁴ others suggested a required disclosure,¹⁹⁵ and at least one argued that such claims should essentially be exempted from any proposed rule.¹⁹⁶ The record developed in this proceeding does not establish that all “lifestyle claims,” or even

¹⁹² 2022 ANPR, 87 FR at 13954; *see also* Compl. ¶¶ 33, 36, 39, *FTC v. Herbalife Int’l of Am., Inc.*, No. 2:16-cv-5217 (C.D. Cal. July 15, 2016), ECF No. 1 (alleging that, among other things, Herbalife presentations “often involve images of expensive houses, luxury automobiles, and exotic vacations” and that Herbalife participants were allowed to “be [their] own boss,” “take our 12 grandkids on vacations,” and become “economically independent”); Compl. ¶¶ 22, 23, *FTC v. AdvoCare, Int’l, L.P.*, No. 4:19-cv-715 (E.D. Tex. Oct. 2, 2019), ECF No. 1 (alleging, among other things, that an AdvoCare promotional video said that if consumers wanted “a part-time income . . . a full-time income, [had] a desire to be at home with your family, a desire to travel, or to be able to take your family on trips—whatever reason . . . a year from now you will wish you had started today” and used hashtags such as ‘#beachhouse,’ ‘#dreamcar,’ ‘#louisvuitton,’ and ‘#financialfreedom.’”); Compl. ¶ 33, *FTC v. Vemma Nutrition Co.*, No. 15-cv-01578 (D. Ariz. Aug. 26, 2015), ECF No. 3 (alleging, among other things, that company said “I’d like to lay out a game plan that can give you the opportunity to get profitable fast and be driving a new BMW within the next 90 days”); *see*”); FTC, Franchise Rule Compliance Guide (May 2008), <https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf> (“Financial performance representations also include implied representations that suggest – or from which a prospective franchisee easily can infer – a specific level or range of income, sales, or profits. These include statements such as ‘earn enough money to buy a new Porsche,’ and ‘100% return on investment within the first year of operation.’ Mere puffery does not fall within the ambit of the amended Rule’s definition. Examples of what may be considered puffery, depending on the full context, include such statements as ‘make big money,’ ‘this business is a real cash cow,’ or ‘opportunity of a lifetime.’”).

¹⁹³ FTC, *Business Guidance Concerning Multi-Level Marketing* (updated Apr. 2024), <https://www.ftc.gov/business-guidance/resources/business-guidance-concerning-multi-level-marketing>.

¹⁹⁴ *See, e.g.*, Comment No. 20-1571 (S. Johnson) at 29 (ban all lifestyle claims); Keep ANPR Comment at 2, 10 (similar); *see also* DSSRC ANPR Comment at 9 (some “extraordinary” or “lavish” lifestyle claims “cannot be effectively qualified by a disclosure”).

¹⁹⁵ *See, e.g.*, Bosley ANPR Comment at 24; *see also* Chamber ANPR Comment at 6 (arguing a disclaimer is sufficient to prevent misimpression).

¹⁹⁶ *See* Integrity Mktg. ANPR Comment at 2 (arguing that truthful social media posts about a participant’s lifestyle should be allowed, even if they have no disclaimer). Integrity appears to further argue that such social media posts should not be subject to the proposed rule because they “do not propose any commercial transaction.” *Id.* at 13. The Commission declines to pre-judge an entire category of potential representations in this manner. Posts that truly are not made in connection with the offering of a good or service would not be covered by the proposed rule. *See* proposed rule sections 462.2 and 462.3.

all such claims of a particular type, are *per se* deceptive.¹⁹⁷ Thus a ban runs the risk of being overinclusive and barring “innocent and fair statements.”¹⁹⁸ The Commission has yet to be persuaded that any specific disclosure will consistently prevent atypical claims from conveying a misimpression,¹⁹⁹ and so declines at this time to mandate a particular disclosure for lifestyle claims. And given the copious evidence that lifestyle claims are deceiving consumers,²⁰⁰ the Commission declines to exempt them from the proposed rule.

Intentional Deception. Some commenters suggested that a rule should ban only intentional deception.²⁰¹ The Commission does not agree.²⁰² Consumers injured by deceptive claims are equally injured whether the claims were made intentionally or not. This proposed rule, if finalized, would allow the Commission to seek redress for all such consumers.

Disclaimers. In the 2022 ANPR, the Commission noted that representations of unusually high earnings “often convey the message that the represented earnings *are* typical,” which is deceptive.²⁰³ The Commission further noted that various disclaimers it has encountered, such as “results not typical,” fail to prevent such a misimpression. The

¹⁹⁷ See, e.g., *Neora*, 2023 WL 8446166, at *29 (declining to find liability for “‘more tempered’ descriptions of potential earnings—namely, descriptions like ‘successful business,’ ‘added security,’ and ‘extra income for your kids’ activities,’ rather than specific dollar amounts—accompanied by large, clear disclaimers,” without evidence of how consumers perceived such representations).

¹⁹⁸ Utah DSC ANPR Comment at 4.

¹⁹⁹ As noted in the 2025 ANPR, the Commission is considering whether MLMs should be required to give current or prospective participants objective data about earnings to reduce the incidence of deception.

²⁰⁰ See, e.g., sources cited *supra* notes 52, 63-65, and 67-68 and accompanying text.

²⁰¹ See, e.g., Thompson Burton ANPR Comment at 2.

²⁰² Intent to deceive is not an element of a deception claim under section 5. *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *Kraft, Inc.*, 114 FTC 40, 141 n.33 (1991), *enforced* 970 F.2d 311 (7th Cir. 1992).

²⁰³ 2022 ANPR, 87 FR at 13953 n. 34.

Commission sought comment on whether a disclaimer or disclosure can consistently prevent such a misimpression, and if so, what features it must possess to do so.²⁰⁴

The question is an important one, because whether an earnings representation is likely to mislead consumers turns on the overall “net impression” the representation—including any prominent disclaimers or disclosures—conveys.²⁰⁵ The Commission notes that disclaimers are not always effective in correcting a misleading message conveyed by advertising claims; thus they are not a defense if the net impression is still misleading.²⁰⁶ For example, the Commission tested the communication of advertisements containing testimonials that clearly disclosed either “Results not typical” or the stronger “These testimonials are based on the experiences of a few people and you are not likely to have similar results.” Neither disclosure adequately reduced the communication that the experiences depicted were generally representative.²⁰⁷

At a minimum, disclaimers must be “sufficiently prominent and unambiguous to change the apparent meaning of the claims and leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.”²⁰⁸ In other words, qualifications that clarify potentially misleading statements must be likely to come to the attention of the person who sees the underlying claim; for that reason, small

²⁰⁴ *Id.* at 13953.

²⁰⁵ *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009).

²⁰⁶ *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006); *see also Noland*, 672 F. Supp. 3d at 783 (holding that disclaimers that income was not “guaranteed” or that large dollar figure examples were mere “theoretical examples” did not detract from the net impression of defendants’ advertisements).

²⁰⁷ *See* Endorsements Guides, 16 CFR 255.2(b); Manoj Hastak and Michael Mazis, *Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements* (2004), <https://www.ftc.gov/reports/effects-consumer-testimonials-weight-loss-dietary-supplement-business-opportunity-advertisements>; Manoj Hastak and Michael Mazis, *The Effect of Consumer Testimonials and Disclosures on Ad Communication for a Dietary Supplement* (2003), <https://www.ftc.gov/system/files/documents/reports/effect-consumer-testimonials-disclosures-ad-communication-dietary-supplement-endorsement-booklet/030920consumerreport.pdf>.

²⁰⁸ *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989).

print or its equivalent are unlikely to be effective.²⁰⁹ And no disclosure can cure a false claim—a disclosure “can only qualify or limit a claim to avoid a misleading impression.”²¹⁰ If a disclosure “contradicts a material claim, the disclosure will not be sufficient,” rather, “the claim itself must be modified.”²¹¹

The Commission has carefully reviewed the comments addressing the effectiveness of disclaimers and disclosures in the context of atypical earnings claims. The following discussion summarizes their points.

Several commenters explained, based on their expertise regarding MLMs, why they believe disclaimers are unlikely to be effective in the context of MLM earnings claims.²¹² One opined that for MLM participants, “where the prospect already knows and trusts the recruiter,” a “results not typical” disclaimer “will not be effective” and “it is questionable whether any disclaimer would be sufficient.”²¹³ Another stated that, when

²⁰⁹ *Grant Connect*, 827 F. Supp. 2d at 1214, 1220-1221; FTC Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 FTC 110, 174 (1984) (“Deception Policy Statement”); *see also* *Cyberspace.com*, 453 F.3d at 1200 (fine print disclaimer no defense if net impression is still misleading); *FTC v. Connelly*, No. 6-cv-701, 2006 WL 6267337, at *10 (C.D. Cal. Dec. 20, 2006) (“[D]isclaimers are particularly inadequate when they appear in a different context than the claims they purport to repudiate.”); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 924 n.15 (N.D. Ill. 2006), *aff’d*, 512 F.3d 858 (7th Cir. 2008) (“Defendants’ inconspicuous small-font statement appearing just six times during the 30-minute infomercial that ‘this product is not intended to diagnose, treat, cure or prevent disease’ is wholly inadequate to change the net impression of the pain relief claims made in the infomercial.”); *Vemma*, 2015 WL 11118111, at *7 (“results not typical” disclaimer did not change the net impression of claim, especially since it was often followed by statements such as “I hope you’re not typical,” to weaken the disclaimer).

²¹⁰ Federal Trade Commission, .com Disclosures, How to Make Effective Disclosures in Digital Advertising (“FTC Disclosure Guide”) 5 (March 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>; *see* *FTC v. Direct Marketing Concepts, Inc.*, 624 F.3d 1, 12 n.9 (1st Cir. 2010) (“A statement that studies prove a product cures a certain disease, followed by a disclaimer that the statement is opinion and the product actually does not cure the disease, leaves an overall impression of nonsense, not clarity.”); *see also* Deception Policy Statement, *supra* note 209; *Removatron*, 884 F.2d at 1497 (condemning as ineffective disclaimers that “creat[e] contradictory double meanings”); Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers (Mar. 1, 2000) (“If a claim is false, a disclosure that provides contradictory information is unlikely to cure the deception.”).

²¹¹ FTC Disclosure Guide at 5.

²¹² *See, e.g.*, Keep ANPR Comment at 8; TINA ANPR Comment at 18-19; Brooks ANPR Comment at 29.

²¹³ Brooks ANPR Comment at 29.

MLMs do try to cure atypical earnings claims, the disclosures do not work for a variety of reasons, including because they “can be so complicated that consumers are discouraged from reading them at all”; the statements “cherry-pick which information to disclose”; disclosures “frequently do not include expenses”; and research has found that the statements “can actually increase income expectations by providing concrete numbers for the outliers, i.e., the highest earners in the MLM company.”²¹⁴

Empirical research by Professor Bosley suggests that even detailed information about the overall distribution of earnings among MLM participants will not prevent a significant number of consumers from forming a misimpression about the earnings they are likely to attain in the MLM.²¹⁵ Professor Bosley and others also note that known human cognitive biases may suggest that this is to be expected.²¹⁶ Among other things, Professor Bosley stated that to the extent represented earnings in an MLM are based on the exponential growth of a downline, disclaimers are unlikely to be successful because research demonstrates that humans “underestimate the amount of downline recruitment

²¹⁴ TINA ANPR Comment at 18-19 (citing, in part, Stacie A. Bosley et al., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 *Econ. Inquiry* 1643, 1644 (2019); Stacie Bosley et al., *Income Disclosure and Consumer Judgment in a Multi-level Marketing Experiment*, 57 *J. Consumer Aff.* 92 (Oct. 4, 2022)); *see also* Keep ANPR Comment at 13 (discussing issues with MLM income disclosure statements); Bosley ANPR Comment, *passim* (same).

²¹⁵ Bosley ANPR Comment at 15-16.

²¹⁶ *See id.* at 7-8 (explaining that disclaimers that imply outcomes turn on skill and effort lead to “attribution error and optimism bias,” causing prospects to, wrongly, “attribute lack of success to personal failure and to overestimate their own chances of succeeding,” and explaining that the phenomena of availability bias and anchoring may cause those with repeated exposure to high earnings figures to overestimate their likely earnings, citing the Nobel Prize-winning work of Daniel Kahneman and Amos Tversky); Thompson Burton ANPR Comment at 2 (“The causal [sic] consumer will always place their own personal ego at the forefront thinking they will be the exception. . . . [I]t is rare that one joins anything merely for the idea of being ‘typical.’ One almost certainly has the idea they will be the outlier in any endeavor that is taken on.”).

needed for rewards and the challenges to ongoing recruitment if downlines do expand.”²¹⁷

Taking a contrary view, several commenters argued that atypical claims should be permitted with a well-qualified disclosure.²¹⁸ Some suggested that the Commission simply require disclosure of the generally expected results, an approach they argue the Commission has endorsed in the context of testimonials.²¹⁹ One commenter, the Coalition for Compliance, presented evidence from a survey. The survey exposed consumers to three video advertisements for a fictional MLM, some of which featured such a disclosure, and, after each advertisement, posed the same multiple-choice question asking the consumers to identify the typical earnings of the MLM’s participants, according to the video. The survey, however, did not ask consumers how much they would expect to earn if they joined the MLM. It appears that, at best, the survey

²¹⁷ Bosley ANPR Comment at 9. Concrete examples demonstrate how easily (and how radically) people can underestimate the true nature of exponential growth. *See, e.g.,* Alex Knapp, *The Seduction of the Exponential Curve*, Forbes (Nov. 17, 2011), <https://www.forbes.com/sites/alexknapp/2011/11/17/the-seduction-of-the-exponential-curve> (illustrating perils of exponential growth with legend of the invention of chess, in which a pleased monarch agrees to pay a reward calculated by placing “a single grain of rice ... on the first square of the chessboard. Then two grains on the second square, four grains on the third, and so on. Doubling each time,” only to discover that even getting half-way through the board would bankrupt the kingdom, and noting that by the final square, there would be “over 18 quintillion grains of rice on the board”).

²¹⁸ DSA ANPR Comment at 9-10; FFL ANPR Comment at 13-14; Comment No. 20-1546 (Financial Publishers and Media Alliance) at 12-13; Coalition ANPR Comment at 2, 6-27; DSSRC ANPR Comment at 7-8. One commenter asked the Commission to give a “safe harbor” to “true earnings claims with limited disclosures.” FFL ANPR Comment at 13-14. These commenters asserted that the “body of case law does not provide the evidence legally required to support the need for such a new rule.” DSA ANPR Comment at 10; *see also* Coalition ANPR Comment at 12-14.

²¹⁹ *See* DSSRC ANPR Comment at 7-8 (suggesting any rule should permit atypical earnings claims if accompanied by “the generally expected results”); Coalition ANPR Comment at 7-9 (discussing the FTC’s historic positions on the use of disclosures). The Commission notes that the Coalition for Compliance comment is based in part on a misreading of the outcome in *National Dynamics*. The Coalition claims that in that case, the Commission permitted atypical earnings claims if accompanied by a “results not typical” disclaimer. The final Commission order in that case did not permit such a representation, but instead required that atypical earnings claims be accompanied by substantial disclosures, including of average or median earnings, or the percentage of purchasers making the represented amount. *Nat’l Dynamics Corp.*, 82 FTC at 512-13, 543-44, 568, *modified*, 85 FTC at 1059-61.

establishes only that consumers can read and recall what a disclosure said.²²⁰ It does not show that a disclosure can change the impression about likely earnings created by a true, but atypical, earnings claim.²²¹ Thus, the survey does not resolve the question of whether an atypical disclaimer can effectively correct the misleading impression created by an atypical earnings claim.

The Coalition for Compliance also submitted that the Commission should be guided by its work in the dietary supplement and weight loss context.²²² In that context, the Coalition argues, the Commission has approved the use of disclaimers or disclosures of “qualifying information when the advertised experience is not widely applicable,” such as that a supplement will help only people with certain attributes or conditions, or that the reported outcome was achievable only because of consistent and significant exercise and dieting, in addition to the marketed supplement pill.²²³

After carefully reviewing the submitted comments and relevant case law, the Commission does not think a prohibition on disclaimers or disclosures is appropriate. At

²²⁰ The Commission identifies a number of concerns with the survey. First, it excluded the more than 20% of respondents who answered “not sure” when asked about typical earnings. In so doing, the survey ignored a group of consumers for whom the disclosure appears to have been ineffective. Second, much of the data was gathered by repeatedly asking the same set of participants the same questions after watching each of a series of videos—after the first round, participants had a reason to pay more attention to the information the surveyors were asking for, which is likely to have biased the results. If only the first set of responses are considered, the survey’s reported data shows that the written disclosure was ineffective for nearly a third of consumers and the spoken disclosure was ineffective for nearly twenty percent of consumers. Third, the survey tested a disclosure of “typical” earnings of \$110 per month in the context of representations of \$700 or \$1,200 per month. It is not obvious whether the survey’s results would generalize to other sets of figures, in particular contexts with a much greater disparity between advertised and “typical” earnings amounts. Finally, it is not clear whether the demographics of the surveyed consumers are similar to those of prospective MLM participants.

²²¹ Attachment 1 to Coalition ANPR Comment. The Coalition states in its comment that it also conducted a qualitative survey of ten individuals to test how consumers understand disclosures concerning typical earnings. Coalition ANPR Comment at 15. However, it did not provide any details or evidence regarding how the survey was conducted or its results (e.g., the comment does not describe what disclosures were shown to participants, what questions were posed to the participants, or the participants’ answers). *Id.*

²²² Coalition ANPR Comment at 6-11.

²²³ *Id.* at 9-10.

the same time, the Commission finds merit in Professor Bosley’s opinion, citing Nobel Prize-winning research on human cognitive biases, that showing potential recruits atypical, but true, earnings claims, especially repeatedly, creates a strong risk that a reasonable consumer will form an inaccurately high expectation of their likely earnings, and that it may be difficult to dispel this belief.²²⁴ The Commission is also cognizant, from its law enforcement experience and many comments in the record, that many MLMs are offering inadequate disclosures or are actively taking steps to undermine any disclosures provided.²²⁵ Yet, this important evidence does not preclude the possibility that a disclaimer or disclosure could qualify an atypical earnings claim such that it does not convey a misleading impression.

Accordingly, at this time the Commission does not propose to require the use of specific disclosures or disclaimers to qualify atypical earnings claims.²²⁶ Whether a given representation misleads consumers about earnings in violation of the proposed rule will turn on the net impression that the representation—including any disclaimer or disclosure—conveys to consumers. The Commission will continue to explore this topic in the future.

Income Disclosures. In a related vein, many commenters argued that MLMs should be required to provide potential recruits and current participants with income disclosure statements or other objective data regarding the net income of participants, as well as publicly posting the statements or other objective data on the MLM’s website.²²⁷

²²⁴ Bosley ANPR Comment at 7-11.

²²⁵ See discussion *supra* section II.C.1.

²²⁶ The Commission is interested in exploring whether MLMs should have to provide participants and recruits with objective data concerning the net income commonly earned by MLM participants. The Commission has sought comment on this topic in the 2025 ANPR, published elsewhere in this issue of the *Federal Register*.

²²⁷ See 2025 ANPR, section II.B.

Many commenters also argued that recruits should be required to wait a short period before joining the MLM after receiving the income disclosure statement.²²⁸ One commenter opposed the income disclosure requirement,²²⁹ and another argued that a waiting period is not necessary because of self-regulation, and that it could harm recruits who want to start selling immediately.²³⁰ As discussed in more detail in the 2025 ANPR, published elsewhere in this issue of the *Federal Register*, the Commission will consider a new rulemaking to implement a net income disclosure requirement, waiting period, and other requirements to deter deceptive earnings claims.

2. Misrepresentations to Alter or Contradict Truthful Information About Earnings

The proposed rule would bar unsubstantiated claims or other misrepresentations made to contradict, dispel, or otherwise prevent consumers from benefiting from truthful information about earnings. In the Commission’s experience, some MLM sellers discourage prospects from reviewing or relying on disclosures or other information that might dispel the prospects’ misimpressions about their likely earnings. For example, an MLM seller could truthfully tell a recruit that “the typical participant made \$50 in net income last year,” but then claim falsely or without substantiation that “most of those people joined to buy products and not to pursue the business opportunity.”²³¹ The

²²⁸ See 2025 ANPR, section II.C.

²²⁹ See FFL ANPR Comment at 9-11. The DSA argued that the disclosure required by the Business Opportunity Rule, or a similar requirement, would not work for MLMs, but did not address whether it would oppose any disclosure requirement. DSA BOR ANPR Comment at 6-7.

²³⁰ DSA BOR ANPR Comment at 7-8.

²³¹ See, e.g., Comment No. 20-117 (L. Smith) (“I have seen distributors give a disclaimer about earning potential, but they immediately contradict or downplay it. For example, they’ll say, ‘Results are not typical, but YOU’RE not typical. If you are someone who wants more out of life, you’ll get above average results in this business.’”); Comment No. 20-215 (C. R.) (“When I started ... my upline showed me the income disclosure statement. There was a large percentage of people who weren’t even making \$200 a year, however I was told metaphors and analogies like you reap what you sow, some people don’t run their business like a business, and it just led me to believe it wasn’t an issue.”); Comment No. 20-230 (M.

Commission proposes to prohibit such deceptive claims or misrepresentations to combat this sort of practice and ensure that when truthful information about earnings is available, consumers can rely on it to inform their decision whether to participate in an MLM, free from the confusion caused by additional misleading or false statements. The proposed prohibited misrepresentations already are illegal under section 5 because they go to a material fact in the consumer’s consideration of whether to participate in an MLM—earnings.²³²

3. Misrepresenting an MLM as an Employment Opportunity

The proposed rule would prohibit misrepresenting an MLM as an employment opportunity.²³³ Representations would violate this provision of the proposed rule when they convey—expressly or by implication—that a salaried or commission-based employment offer is available when they are in fact offering an opportunity to become an

Grimpe) (“I never wanted to prey on my family and friends, but I quickly learned that that is exactly what my Upline wanted from me. They wanted me to sell that same false reality and never show the income disclosure statement. Funny thing is I’d never looked at it myself because we were taught that is just for our haters, it means nothing. So, me being the curious person I am...I looked, I cried, and I left.”); Comment No. 20-458 (T. Rigaux) (“I did see the income statement- my upline showed it to me repeatedly. But I was assured that most people joined for the discount, the consultants that actually genuinely try to work the business made really good money! The income statement was also used as proof to show me that I didn’t need to worry about market saturation, because even though I knew multiple consultants, it didn’t matter because they weren’t serious about building a business.”); Comment No. 20-1380 (M. Harrell) (“[MLM name] had brochures and CDs that stated the stats about the earning, but all of the leadership said to ignore it because the stats were for losers.”).

²³² *John Beck Amazing Profits*, 865 F. Supp. 2d at 1067-76 (claims of quick and easy substantial income were material); see also, e.g., *World Patent Mktg.*, 2017 WL 3508639, at *11-12; *Vemma*, 2015 WL 11118111, at *5; *Holiday Enters.*, 2008 WL 953358, at *6-7; *Med. Billers Network*, 543 F. Supp. 2d at 306-08.

²³³ The proposed rule would not prohibit MLMs from making truthful offers of employment as to positions with the MLM, such as warehouse workers paid an hourly wage or executives paid a salary. The Commission is aware that lawsuits have been filed challenging the independent contractor status of certain MLM participants. While the Commission is not taking a position on the merits of these lawsuits, if the participants in a particular MLM are employees of the MLM, then an MLM would not violate the proposed rule by characterizing a posting for that particular participant position as an employment opportunity.

MLM participant.²³⁴ The Commission’s law enforcement experience, as well as the comments and other record evidence, indicate that such claims are a persistent problem in the MLM industry.²³⁵

Such claims are already prohibited by section 5 of the FTC Act,²³⁶ and they cost consumers time, effort, money, and access to other opportunities.²³⁷

H. Means and Instrumentalities

Proposed § 462.4 of the proposed rule would prohibit any person from directly or indirectly providing MLM participants with materials or information to be used in recruiting new participants that contains false, misleading, or unsubstantiated earnings claims. Such conduct, which involves affirmative deceptive conduct that has no legitimate purpose, is already prohibited by section 5 of the FTC Act.²³⁸ For example, an MLM violates this provision if it produces misleading documents or information about earnings, such as a misleading income disclosure or misleading compensation plan, and provides them to one or more of the MLM’s participants. Such an MLM has reason to

²³⁴ The provision, as drafted, is identical to a prohibition regarding deceptive employment opportunity claims in the Business Opportunity Rule. 16 CFR 437.6(m) (stating it is an unfair or deceptive practice to “misrepresent a business opportunity as an employment opportunity”).

²³⁵ See discussion *supra* section II.C.2.

²³⁶ *Encyclopaedia Britannica, Inc.*, 87 FTC at 445-50, 486-88, 505, 510, 531-32 (holding that it was deceptive and a violation of section 5 of the FTC Act to misrepresent a sales position as another type of employment and to misrepresent that a certain amount of income was guaranteed when income depended on sales); see also *Equinox*, 1999 WL 1425373, at *9 (issuing preliminary injunction that held, in part, that company violated section 5 by “misrepresent[ing] distributorships as salaried or commissioned positions without disclosing that the ‘positions’ require a financial investment”).

²³⁷ See discussion *supra* section II.C.

²³⁸ See *Vemma*, 2015 WL 11118111, at *7 (“The FTC has also provided ample evidence that Vemma provides the ‘means and instrumentalities’ for Affiliates to deceive consumers by providing them with promotional, recruiting and training materials containing false or misleading income representations, which is a further violation of the FTC Act.”); *Noland*, 672 F. Supp. 3d at 786 (same); *Five-Star Auto Club*, 97 F. Supp. 2d at 530 (citing *Regina Corp.*, 322 F.2d 765 (same)). “[I]ntention to deceive is not a prerequisite” to such liability. *Regina Corp.*, 322 F.2d at 768; see also *Five-Star Auto Club*, 97 F. Supp. 2d at 506 (finding liability for providing means and instrumentalities, and analyzing knowledge only to assess whether individual defendants could be held liable for equitable monetary relief).

expect that the participants will share the misleading documents or information with consumers in the process of attempting to recruit them.

This provision is appropriate to ensure that MLMs, other MLM sellers, or other persons do not provide false or misleading information about earnings to prospective MLM participants, even when they act indirectly through existing participants or other persons. Persons who participate in deceiving consumers should not be allowed to escape liability by avoiding direct engagement with the deceived consumers, while placing deceptive recruiting materials in the hands of others. As discussed in section II.C, the acts or practices prohibited by this provision are already prohibited by section 5 of the FTC Act.²³⁹

The proposed § 462.4 applies to “any person,” whether acting directly or indirectly. The Commission is considering, in the alternative, whether it should apply only to MLMs, or only to MLMs and persons who act in concert or participation with them. The Commission is proposing the broader “any person” language out of concern that a narrower scope could lead to gaps in coverage. For example, without the broad language, a gap could exist where high-level participants create deceptive recruiting materials for use by participants in their downline. In the Commission’s view, the use of “any person” should not render the provision overly broad because the provision is otherwise limited to the very specific act of providing materials or information to an MLM participant to be used in recruiting. The Commission is interested in receiving comment on each alternative formulation, including what persons and conduct it would

²³⁹ See *supra* note 94 and accompanying text.

cover, whether it could leave gaps in coverage or be overly broad, and how it would affect the provision's costs to businesses or benefits to consumers.²⁴⁰

I. Recordkeeping Requirements

To prevent the deceptive practices described in the proposed rule, the proposed rule would establish minimal recordkeeping requirements.²⁴¹ Specifically, the proposed rule would require MLM sellers that make earnings claims to have written copies of their substantiation for such claims, and to maintain such documents for a period of three years. As noted before, this proposed requirement covers only earnings claims.

The recordkeeping provision (proposed § 462.5) is appropriate to assist the Commission in assessing MLM sellers' compliance with the proposed rule, ensure its effectiveness, and deter Rule violations.²⁴² The Commission is proposing to require that

²⁴⁰ In the Trade Regulation Rule on Impersonation of Government and Business ("Impersonation Rule"), the Commission recently issued a supplemental notice of proposed rulemaking proposing a means and instrumentalities provision that would prohibit "provid[ing] goods or services with knowledge or reason to know that those goods or services will be used to" impersonate someone. The proposal was prompted by comments suggesting that absent a knowledge requirement "the proposed provision runs the risk of imposing strict liability against third parties who supply goods or services with no knowledge that those goods or services would be used in the commission of unlawful impersonations." *See* Impersonation Rule SNPRM, 89 FR 15072, 15074-75 (Mar. 1, 2024). Unlike in the Impersonation Rule context, here there is no legitimate reason to engage in the covered conduct. Commenters on the originally proposed language of the Impersonation Rule, which did not include a knowledge requirement, were concerned that it could have potentially reached sellers whose goods were not inherently deceptive, and who had no reason to know that a buyer would use the goods to affect consumers' choices. Here, the narrowly drafted provision is limited to persons who pass on *inherently deceptive* content, for the purpose of affecting consumers' choice whether to join the MLM. *See, e.g., Noland*, 672 F. Supp. 3d at 786 (holding defendants liable for providing the means and instrumentalities for others to violate the FTC Act because they "gave affiliates the SBH marketing and training materials that were used to spread Defendants' false income claims"). No further knowledge requirement is necessary. With that said, the Commission is interested in receiving comment regarding whether there are any circumstances in which the acts or practices described in proposed § 462.4 would not violate section 5, such as because of a lack of knowledge.

²⁴¹ While only a few commenters addressed this topic, those that did uniformly supported adding a recordkeeping provision to the Rule. NCL/CFA ANPR Comment at 8; Keep ANPR Comment at 10; *see also* Brooks ANPR Comment at 26 (supporting a three year or longer recordkeeping requirement, and stating that such a requirement will not be burdensome as the IRS requires most MLMs to keep most of these records for seven years).

²⁴² Many FTC rules contain similar recordkeeping provisions. *See, e.g.,* 16 CFR 310.5 (Telemarketing Sales Rule); 16 CFR 437.7 (Business Opportunity Rule); 16 CFR 453.6 (Funeral Industry Practices Rule); 16 CFR 301.41 (Fur Products Labeling).

records must be kept for three years. This would match the duration of the recordkeeping provision in the Business Opportunity Rule.²⁴³ The three-year period will commence on the date the earnings claim is made.

J. Other Languages

The proposed rule includes a provision (proposed § 462.6) requiring that, to the extent an earnings claim is made and material information about earnings is provided, including any substantiation provided in accordance with proposed § 462.2, the information must be provided in the same language as the earnings claim. The Commission has recognized that “advertisers are making special efforts to reach foreign language-speaking consumers,” and that any rules that require clear and conspicuous disclosure of certain information must mandate that “the disclosure shall appear in the language of the target audience (ordinarily the language principally used in the advertisement or sales material).”²⁴⁴ While the proposed rule does not require MLM sellers to disclose any particular information about earnings to participants, the Commission has recognized that it violates section 5 of the FTC Act to make a prominent claim in one language, and then hide material information about the claim in disclaimers in a second language.²⁴⁵ To ensure that consumers can read and understand all material information, and that language barriers are not used as a means of withholding material

²⁴³ 16 CFR 437.7. The Commission is interested in receiving comments about whether MLMs and their participants should be required to keep records for five years, instead of three, and the marginal cost to store the records for an additional two years.

²⁴⁴ 16 CFR 14.9.

²⁴⁵ See e.g. Compl., *FTC v. Vision Online, Inc.*, No. 6:23-cv-1041 (M.D. Fla. June 5, 2023), ECF No. 1 (alleging defendants violated the FTC Act by marketing money-making scheme in Spanish to Spanish-speaking audience but providing key documents, including information about the cancellation policy, only in English); c.f. *In the Matter of Cowboy AG LLC*, No. 172 3009, C-4639 (FTC Jan. 24, 2018) (alleging respondent violated the FTC Act by running full-page Spanish-language ads claiming that consumers could buy or lease a vehicle at certain favorable terms that were prominently stated in Spanish in the ads, with material limitations to those terms provided only in fine-print English at the bottom of the ads).

information from consumers, the Commission is proposing that MLM sellers provide material information about earnings in the same language as the earnings claims.²⁴⁶

K. Severability

The proposed rule includes a severability provision (proposed § 462.7(a)) to ensure that, should any aspect of the proposed rule be determined to be invalid, the remaining provisions will continue to be enforceable and protect consumers.²⁴⁷

L. Preemption

The proposed rule includes a preemption provision (proposed § 462.7(b)) that ensures that the proposed rule does not inadvertently impair the application of more protective consumer protection laws.²⁴⁸

M. Revisions to Business Opportunity Rule to Exempt MLMs

At present, some MLMs may be “business opportunities” that are subject to the Business Opportunity Rule. While that Rule does not broadly sweep in all MLMs, neither does it provide an exemption for them.²⁴⁹ Concurrently with this rulemaking, the Commission is proposing to amend the Business Opportunity Rule to expand certain provisions of that rule regarding earnings claims to cover a new business category, “money-making opportunities.” As explained in the Business Opportunity Rule NPRM published elsewhere in this issue of the *Federal Register*, the proposed amendments to that rule would explicitly exclude MLMs from the definition of “money-making

²⁴⁶ The Business Opportunity Rule contains a similar provision. *See* 16 CFR 437.5.

²⁴⁷ This provision is comparable to the severability provision in other FTC rules. *See, e.g.*, 16 CFR 436.11 (Franchise Rule); 16 CFR 437.10 (Business Opportunity Rule).

²⁴⁸ This approach is consistent with other Commission trade regulation rules. *See, e.g.*, 16 CFR 435.3(b)(2) (Mail Order Rule); 16 CFR 437.9 (Business Opportunity Rule).

²⁴⁹ Business Opportunity Rule, revised notice of proposed rulemaking, 73 FR 16110, 16114-16 (Mar. 26, 2008); *see also* FTC, *Business Guidance Concerning Multi-Level Marketing* (updated Apr. 2024), <https://www.ftc.gov/business-guidance/resources/business-guidance-concerning-multi-level-marketing>.

opportunities.” The existing provisions of the Business Opportunity Rule, however, would continue to apply to MLM sellers that meet the definition of “business opportunity.”

Pursuant to 15 U.S.C. 57a(g), the Commission proposes herein to further amend the Business Opportunity Rule to fully exempt from its coverage MLM sellers who would be required to comply with §§ 462.2 and 462.3(a) of this proposed rule, the prohibitions on false and misleading earnings claims and unsubstantiated earnings claims. Specifically, the Commission proposes to amend § 437.8 to exempt MLM sellers subject to proposed §§ 462.2 and 462.3(a) from 16 CFR part 437 (the Business Opportunity Rule). If the proposed rule (i.e., proposed part 462) is not finalized, the Commission would not finalize the revisions to § 437.8 set out in this NPRM, and MLM sellers that are business opportunity sellers would continue to be subject to the Business Opportunity Rule.

IV. Rulemaking Process

As explained in section V of this document, the Commission invites interested parties to submit data, views, and arguments on the proposed rule on deceptive earnings claims by MLMs and, specifically, on the questions set forth in section V. The comment period will remain open until [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].²⁵⁰ To the extent practicable, all comments will be available on the public record and posted at the docket for this rulemaking on <https://www.regulations.gov>.

²⁵⁰ The Commission elects not to provide a separate, second comment period for rebuttal comments. *See* 16 CFR 1.11(d) (“The Commission may in its discretion provide for a separate rebuttal period following the comment period.”).

The Commission may, either on its own initiative or in response to a commenter's request, engage in additional processes, which are described in 16 CFR 1.12 and 1.13. If the Commission on its own initiative decides to conduct an informal hearing, or if a commenter files an adequate request for such a hearing, then a separate notice will issue under 16 CFR 1.12(a).

Based on the comment record and existing prohibitions against deceptive marketing of MLM opportunities under section 5 of the FTC Act and other rules and statutes, the Commission does not here identify any disputed issues of material fact that need to be resolved at an informal hearing. The Commission may still do so later, on its own initiative or in response to a persuasive showing from a commenter, i.e., in response to data or other evidence demonstrating that there is a genuine, bona fide dispute over material facts that will affect the outcome of the proceeding.²⁵¹

V. Request for Comments

Members of the public are invited to comment on any issues or concerns they believe are relevant to the Commission's consideration of the proposed rule. The Commission requests that commenters also submit any relevant factual data upon which their comments are based. In addition to the issues raised above, the Commission solicits public comment on the specific questions identified below. In responding to these questions, include detailed, factual supporting information whenever possible. The

²⁵¹ In the context of an informal hearing, "disputed" and "material" are given the same meaning as in the standard for summary judgment. *See* Federal Trade Commission, Initial notice of informal hearing; final notice of informal hearing; list of Hearing Participants; requests for submissions from Hearing Participants, 88 FR 85525, 85527 (Dec. 8, 2023), <https://www.federalregister.gov/documents/2023/12/08/2023-26946/negative-option-rule> (H.R. REP. No. 93-1107, 93d Cong., 2d Sess., reprinted in [1974] U.S.C.C.A.N. 7702, 7728; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

Commission will consider comments made in response to the 2025 ANPR when considering comments made on this NPRM.

General Questions

1. Does the proposed rule further the Commission's goal of protecting consumers from deceptive or unfair acts or practices involving earning claims in the marketing of MLM opportunities? Why or why not?
2. Should the Commission adopt the proposed rule as a final rule? Why or why not? How, if at all, should the Commission change the proposed rule in promulgating a final rule?
3. Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on each different provision of the proposed rule. Regarding each provision, please include answers to the following questions:
 - a. How prevalent is the act or practice the provision seeks to address?
 - b. What would the provision's impact (including any benefits and costs), if any, be on consumers and businesses, including existing businesses and those yet to be started? Are there changes that could be made to lessen any such burdens without significantly reducing the benefits?
 - c. Would the proposed rule, if promulgated, have a significant economic impact on a substantial number of small entities? If so, how could it be modified to avoid a significant economic impact on a substantial number of small entities?
 - d. What alternative proposals should the Commission consider?
4. Are there any unfair or deceptive acts or practices not addressed by the proposed

rule that should be?

5. Are the proposed definitions clear? Should any changes be made to any definitions? Should the scope of any of the proposed definitions be expanded or narrowed, and, if so, why?
 - a. In particular, how should “MLM” be defined? Should the Commission adopt one of the three alternatives proposed herein? If so, could the language be improved? If so, how?
 - b. For any proposed definition, state whether the definition creates any gaps in coverage, and if so whether and how the language could be revised to close them, as well as whether the language should be revised to avoid ambiguity, overbreadth, or other concerns, and if so how. Provide all evidence supporting any potential ambiguity, coverage gaps, overbreadth, or other concerns you identify.
6. Are any additional definitions needed?
7. Are the proposed prohibitions in proposed sections 462.2 to 462.4 clear, meaningful, and appropriate?
 - a. Should the scope of any of the proposed prohibitions be expanded or narrowed and, if so, how and why?
 - b. Would any of the proposed prohibitions inadvertently discourage truthful advertising or representations to the detriment of consumers?
 - c. In particular, are there any circumstances in which an act or practice would violate the proposed means and instrumentalities provision but not section 5 of the FTC Act? If so, describe such circumstances in detail, and

how the proposed text of the provision could be revised to align with the scope of section 5. Also provide any evidence regarding how often such circumstances arise, and the cost to businesses and benefit to consumers that would be caused by any rule coverage that exceeds that of section 5, either from the text as proposed in this NPRM, or from any revision you propose.

8. Is the proposed rule adequate and appropriate to address the harm caused to consumers by misleading or unsubstantiated earnings or job claims concerning MLMs? Why or why not? How can the proposal be improved?
9. Are there any alternatives to the proposed rule that the Commission should consider? For each, provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.

Means and Instrumentalities

10. Should proposed section 462.4 contain a knowledge requirement? If so, how should such a requirement be crafted? What level of knowledge should be required? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.
11. Should proposed section 462.4 apply to all persons, acting directly or indirectly? Alternatively, should the provision apply only to MLMs, or only to MLMs and persons who act in concert or participation with them? For each, identify the persons and conduct it would cover, whether it could leave gaps in coverage or be

overly broad, and how it would affect the provision's costs to businesses or benefits to consumers. Provide all evidence that supports your answer, including all evidence of any potential gaps or overbreadth, and any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.

Substantiation Requirements

12. Should MLM sellers be required to provide substantiation for any earnings claim to anyone who requests it? Why or why not? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.
13. Alternatively, should MLM sellers be required to provide substantiation for any earnings claim to the government or to any actual or potential recruit who requests it? Why or why not? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.
14. If the requirement to provide substantiation to requesting consumers should be limited as suggested in Question 13, should the limitation be to requests by "any actual or potential recruit," or "any participant or prospective participant"? Why? Is there a difference between the scope of coverage of the two phrases? If so, explain in detail. Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses, of choosing one formulation over the other.

15. Alternatively, should MLM sellers be required to provide substantiation for any earnings claim to the government or to anyone to whom the seller makes an earnings claim and who requests it? Why or why not? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.
16. The proposed rule would impose a six-month time limit on MLM sellers' obligation to provide substantiation for earnings claims upon request to requestors other than the Commission. Should it include such a time limit? Why or why not? If it should include a time limit, what is the appropriate period of time? Further, as written earnings claims may be disseminated long after they are initially published, should the Commission make clear that the date "the claim is made" refers to any dates that a particular claim is a) provided to an individual to read, or b) available for viewing, such as on a website page or social media? Why or why not? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.
17. The proposed rule would require that, when sellers provide substantiation for an earnings claim, it must be provided in the language in which the earnings claim is made. Should the Rule include this requirement? Why or why not? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.

Recordkeeping Requirements

18. Are the proposed recordkeeping requirements clear, meaningful, and appropriate?
19. Should the scope of any of the proposed recordkeeping requirements be expanded or narrowed, and if so, how and why?
20. Would the specified records be appropriate to verify compliance with the proposed rule? Are any of the specified records unnecessary to verify compliance with the proposed rule? If the records listed are not required to be retained, how would such compliance be verified?
21. Should the proposed rule require retention of any additional records?
 - a. If so, what and why?
 - b. How would such additional record retention requirements impact businesses, and in particular small businesses?
 - c. How would such additional record retention requirements benefit consumers?
 - d. Provide all evidence supporting your answers.
22. Is the three-year record retention period appropriate? Why or why not? If not, what period is appropriate? Provide all evidence supporting your answer.
23. Alternatively, is a five-year record retention period appropriate? Why or why not? Provide all evidence supporting your answer, including the marginal cost to store records for an additional two years.
24. What are the current record retention policies and practices of MLMs with respect to the records specified in proposed § 462.5?
25. What benefits would the proposed rule's recordkeeping requirement provide to consumers and businesses? Please quantify those benefits whenever possible.

26. What costs would MLMs and other MLM sellers incur to comply with the proposed recordkeeping requirements? Please quantify these costs wherever possible.
27. What volume of records would have to be maintained by each covered entity to comply with the proposed rule? What would be the cost to the covered entity to maintain such records?
28. How much do MLM sellers currently pay to retain records?
29. What options for record retention are available to persons who would be covered by the proposed rule, and what do those options cost?
30. Are there other costs associated with complying with the proposed recordkeeping requirements?
31. Should MLM sellers be required to provide all material information about an earnings claim, including substantiation, in the same language that the earnings claim is made? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses. Does this requirement adequately promote the Commission's goal of protecting consumers in every community, including historically underserved communities, from deceptive earnings claims?

Costs and Benefits

32. How many companies offer MLM opportunities in the United States? Provide all evidence that supports your answer.
33. How many MLMs are small businesses for purposes of the Regulatory Flexibility Act? How many MLM participants or other persons to whom the proposed rule

would apply are small businesses for purposes of the Regulatory Flexibility Act?
Provide all evidence that supports your answer.

34. What is the economic impact of MLMs in the United States? Provide all evidence that supports your answer. For example:

- a. How many consumers purchase MLMs' products for their own use (on an annual basis or otherwise)? What is the total dollar value of such purchases (on an annual basis or otherwise)? For dollar-value estimates, please make clear the manner in which purchases are valued (e.g., distributor wholesale cost, suggested retail price, other methods).
- b. How many consumers make such purchases through another person who is an MLM participant? What is the total dollar value of such purchases (on an annual basis or otherwise)? For dollar-value estimates, please make clear the manner in which purchases are valued (e.g., distributor wholesale cost, suggested retail price, other methods).
- c. Of the people who purchase an MLM's product(s) for their own use, through another person who is an MLM participant, how many would not have made such purchase(s) if the MLM participant through whom they purchased had not been an MLM participant (on an annual basis or otherwise)?
 - i. What is the total dollar value of such purchases (on an annual basis or otherwise)?
 - ii. What portion, if any, of this amount does not constitute a loss of consumer surplus? For example, are any such purchases

driven by factors unrelated to the product(s) purchased, e.g., a desire to assist, or avoid giving offense to, an MLM participant with whom one is in a social or familial relationship? If so, what proportion of consumer purchases are driven by such non-product-related factors?

35. How many people in the United States are participants in an MLM? How many people join an MLM each year in the United States? Provide all evidence that supports your answer.
36. Of the people who join an MLM in the United States each year, how many would not have done so but for being misled about their likely earnings? How would this amount change if the proposed rule goes into effect? Provide all evidence that supports your answer.
37. Of the people who join an MLM in the United States but who would not have done so but for being misled about their likely earnings, answer the following questions, and provide all evidence that supports your answers:
 - a. How long do they engage as participants in the MLM? For example, on average, how many months do they engage as participants in the MLM?
 - b. How much time do they spend working as participants in the MLM? For example, on average how much time do they work per week, pursuing the MLM opportunity?
 - c. What are the typical expenses they incur? Please describe all sources of expenses, including those paid to the MLM and to third parties.

- d. What financial returns do such participants realize from their work as an MLM participant? How much gross income do they receive, and what is their net accounting profit/loss (i.e., their net profit/loss from pursuing the MLM business, excluding the value of their time)?
- e. If they had not joined an MLM, how would such people spend the time that they otherwise devote to working as an MLM participant?
 - i. Would they engage in other efforts to generate income?
 - ii. If so, how much income would they realize from such efforts?
 - iii. If so, would the efforts yield greater or less consumer surplus than would have been generated as MLM participants? By how much?
 - iv. Would they instead use the time to pursue other activities, such as caring for children or other family members? How should the value of such efforts be measured?
 - v. What are the potential indirect effects of the proposed rule on individuals who otherwise would have been misled into participating in an MLM that uses deceptive earnings claims? For example, the increase in lifetime earnings that is foregone by a consumer who drops out of college to pursue an MLM opportunity due to deceptive earnings claims, or the returns from starting a new business that are foregone by a consumer who instead uses their assets to invest in an MLM opportunity due to deceptive earnings

claims, and who does not reap sufficient income to recover those assets and so cannot start the new business?

38. What is the extent of the time-savings that the proposed rule would provide to people seeking paying work but who are not interested in an MLM opportunity? As discussed above, MLM opportunities are sometimes misrepresented as employment opportunities, and evidence shows that in response to such misrepresentations, some people spend time pursuing an opportunity they would not have pursued absent the deception, such as by going to an interview, where they learn the opportunity is with an MLM and reject it. Even though they may not have invested any money, such people have lost time due to deception. How much such wasted time would the proposed rule prevent? How should the value of such time be measured, and what is it worth? Provide all evidence that supports your answer.
39. To what extent would the proposed rule avert social and psychological harm, or other types of harm not covered by the above questions? As discussed above, evidence suggests that not only can deceptive MLM earnings claims lead to monetary losses, but, by themselves or in combination with monetary losses, they can also lead to other harms. Describe whether and to what extent the proposed rule would reduce the harm caused by each of the following. Quantify your answers to the extent possible and provide all evidence supporting your answers.
- a. Adverse impact on personal relationships;
 - b. Adverse impact on emotional or psychological health;
 - c. Adverse impact on physical health;

- d. Debt and related consequences such as bankruptcy, lower credit rating, and lifestyle disruption or changes due to loss of tangible assets;
- e. Any other harms not addressed above (please describe).

40. What economic burdens does the proposed rule impose on MLMs or other covered persons, particularly small businesses? Provide all evidence that supports your answer. For example:

- a. For each of the following activities, state whether the proposed rule would require any covered persons to engage in the activity to a greater extent than they do now. If so, identify which covered persons would be required to increase their efforts (e.g., all participants, all MLMs, MLMs that are small businesses, *etc.*), and quantify the extent of such new efforts, including the amount of time, the cost of that time, and any other costs.
 - i. Regulatory familiarization and planning;
 - ii. Training employees;
 - iii. Reviewing company earnings claims;
 - iv. Preparing new substantiation documents;
 - v. Updating participant training and promotional materials;
 - vi. Setting up infrastructure to handle substantiation requests and/or to retain substantiation materials;
 - vii. Responding to requests for substantiation; and
 - viii. Any other activities (if any, please describe in detail).
- b. Would the proposed rule impose any burdens or costs not identified in your response to Question 40(a)? If so, describe such burdens or costs in

detail, including identifying who they would affect and quantifying, to the extent possible, the burden or cost.

41. Are there changes that could be made to lessen any of the costs or burdens you identify in response to Question 40 without significantly reducing the benefits the proposed rule would provide to consumers? If so, describe in detail, and, if relevant, provide alternative proposed rule text. Provide all evidence that supports your response.
42. Are there other reasonable or significant alternatives to the proposed rule that could potentially accomplish the stated purpose of the proposed rule? If so, describe in detail the alternatives and provide all evidence that relates to your response, including any relevant sources of data that reflect the benefits and adverse economic effects of such alternatives.

Relationship To Other Rules and Laws

43. Does any portion of the proposed rule duplicate, overlap, or conflict with any Federal, State, or local laws or regulations?
44. To the extent the Commission revises the Business Opportunity Rule to regulate additional money-making opportunities and this proposed rule is adopted as proposed, should the Commission exempt MLMs and/or other MLM sellers from complying with the revised Business Opportunity Rule?
45. If the Commission promulgates the Rule as proposed, should the Commission exempt MLMs from complying with the Franchise Rule, or the Telemarketing Sales Rule?

46. The Commission invites comments on: 1) Whether the proposed information collection requirements should be altered to reduce burdens without reducing protections to consumers, and if so, what alteration should be made; 2) the accuracy of the agency's burden estimates, including the validity of the methodology and assumptions used; 3) ways to enhance the quality, utility, and clarity of the information to be collected; and 4) ways to minimize the burden of maintaining records and providing the required information to consumers.

VI. Comment Submissions

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write "MLM Earnings Claims NPRM – Rulemaking, Matter No. R111003" on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including the <https://www.regulations.gov> website. The Commission will consider comments made in response to the 2025 ANPR when considering comments made on this NPRM.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we strongly encourage you to submit your comments online. To make sure the Commission considers your online comment, you must file it at <https://www.regulations.gov>, by following the instructions on the web-based form.

If you file your comment on paper, write "MLM Earnings Claims NPRM - Rulemaking, Matter No. R111003" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary,

600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580. If possible, submit your paper comment to the Commission by overnight service.

Because your comment will be placed on the publicly accessible website at <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other State identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information. . . which is privileged or confidential." 15 U.S.C. 46(f); *see* FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, your comment should not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law

and the public interest. Once your comment has been posted publicly at <https://www.regulations.gov>, as legally required by FTC Rule 4.9(b), 16 CFR 4.9(b), we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), 16 CFR 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this Notice and the news release describing it, and visit <https://www.regulations.gov/docket/FTC-2025-00XX> to read a plain-language summary of the proposed rule. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, *see* ftc.gov/policy-notices/privacy-policy.

VII. Preliminary Regulatory Analysis

A. Introduction

The Federal Trade Commission (FTC) has examined the impact of the proposed rule and prepared this preliminary regulatory analysis consistent with the requirements of section 22 of the FTC Act, 15 U.S.C. 57b-3. The preliminary regulatory analysis must contain 1) a concise description of the need for, and objectives of, the proposed rule; 2) a description of reasonable alternatives that would accomplish the proposed rule's stated objectives consistent with applicable law; and 3) for the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits

and any adverse economic effects and any other effects, and of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule.²⁵²

1. Summary of Benefits and Costs

section 22 of the FTC Act, 15 U.S.C. 57b-3, states that the Commission must publish a preliminary regulatory analysis when it publishes a NPRM in a new rulemaking proceeding under section 18 of the FTC Act, 15 U.S.C. 57a. The proposed rule would require that all MLM sellers provide earnings-claim substantiation upon request and retain substantiation materials for three years. As discussed in section II.D, it would also have the effect of increasing the FTC's ability to collect redress from MLM sellers that are found to have violated the rule.

This analysis describes the anticipated impacts of the proposed rule. Where possible, the various benefits and costs are quantified, and the source of any data relied upon is indicated. Where assumptions are required, they are described. Where benefits or costs are expected but the available data is inadequate to estimate them, those benefits or costs are left unquantified. The Commission encourages the public to submit comments that include empirical data and would assist the Commission in further quantifying those benefits and costs.

For the purpose of this analysis, a period of ten years is used for the analytic time horizon because FTC rules are usually reviewed every ten years. Benefits and costs are summarized as the net present value over ten years, as shown in Table 1. Furthermore, for the purpose of this analysis, the Commission assumes that the proposed rule's

²⁵² 15 U.S.C. 57b-3(b)(1).

quantifiable benefits are equal to the increase in consumer redress payments to victims of deceptive MLM earnings claims resulting from the proposed rule's new enforcement tools. As discussed below, additional benefits are expected to follow from the proposed rule; however, they are left unquantified due to a lack of sufficient data.

The proposed rule's quantifiable costs fall on both of the largest groups of MLM sellers: MLMs and their participants. The costs stem from a combination of one-time adjustments and ongoing responsibilities necessitated by the proposed rule's requirements. The majority of costs are projected to come from 1) the one-time cost to participants of becoming familiar with the rule, 2) MLM one-time adjustment costs, and 3) ongoing costs to the MLM of providing substantiation.

Following OMB guidance, quantifiable costs and benefits over the analytic time-horizon are presented in present value terms, using a 2% discount rate.²⁵³ The present value of a cost or benefit realized in the future is obtained by multiplying that cost or benefit's nominal dollar value by the discount rate a number of times equal to the number of years distant from the present day.²⁵⁴ Table 1 presents costs and benefits in present value terms using the 2% discount rate. To capture uncertainty about the impact of the proposed rule, low-end and high-end scenarios are presented for both costs and benefits, producing a range of possible net benefits that could result from the proposed rule. Table 1 summarizes the range of possible outcomes using a "Low Net-Benefits" scenario (combining high costs with low benefits) and a "High Net-Benefits" scenario (combining low costs with high benefits).

²⁵³ See U.S. Office of Management and Budget, Circular 4-A, pages 75-77.

²⁵⁴ The ten years of the analysis window are designated "Year 1" through "Year 10". All costs and benefits accruing during "Year 1" are un-discounted, *i.e.*, treated as if they occurred immediately upon the proposed rule's implementation; those accruing in "Year 2," as if they occurred exactly one year from that date, etc.

Table 1 - Present Value of Net Benefits Over 10 Years

	Low Net-Benefits Scenario	High Net-Benefits Scenario
<i>Benefits</i>		
Redress benefits	\$320,078,200	\$1,148,849,000
Allocative efficiency gains	<i>Unquantified</i>	
Avoided social and psychological harms from deception	<i>Unquantified</i>	
Total Quantified Benefits	\$320,078,200	\$1,148,849,000
<i>Costs</i>		
<i>Company costs</i>		
One-time adjustment costs	\$26,597,340	\$10,358,964
Storing substantiation	\$1,007,846	\$0
Providing substantiation	\$26,408,388	\$13,204,194
<i>Participant costs</i>		
Familiarization costs	\$153,708,962	\$35,186,000
Providing substantiation	\$28,414,341	\$0
Total Quantified Costs	\$236,136,877	\$58,749,158
Net Quantified Benefits	\$83,941,323	\$1,090,099,842

Note: The “Low Net-Benefit Scenario” combines the low-benefits estimate with the high-cost estimate. The “High Net-Benefit Scenario” combines the high-benefits estimate with the low-cost estimate.

At this initial stage, the Commission is unable to quantify all benefits expected to result from the proposed rule. One anticipated but unquantified benefit comes from the allocative efficiencies that arise when, due to the proposed rule, individuals who would have been deceived in the status quo find a more productive use of their time.²⁵⁵ Other unquantified benefits reflect mitigation of social and psychological impacts of participating in an MLM that uses deceptive earnings claims. These benefits are discussed in a later section.

The Commission encourages the public to submit comments and evidence regarding any unquantified benefits or costs likely to result from the proposed rule.

²⁵⁵ We estimate the allocative benefit for a single, representative individual but refrain from estimating the number of individuals who would benefit from the proposed rule because of a lack of sufficient data.

2. Economic Rationale for the Rule

An MLM is a business that supplies products or services through a network of participants who can earn income through selling the products directly to consumers and through the activity (*i.e.*, purchasing, selling, and/or recruiting) of other participants that they recruit into the business. The proposed rule relates to any earning claims that MLM sellers make when promoting the income opportunity.

Though precise figures are hard to obtain, the Commission estimates that 1) millions of Americans participate in MLMs, 2) millions more will join annually over the ten-year window of analysis, and 3) the scale of associated economic activity may be in the tens of billions of dollars annually.

The DSA estimates that 1) 1,100 MLMs operate in the United States; 2) 14.6 million individuals “signed or renewed” a participant agreement in 2022; and 3) collectively, MLM participants generated \$40.5 billion in observed and imputed retail sales during the year.^{256, 257} The DSA does not disclose a methodology for these estimates, making them difficult to verify.

In summary, although multi-level marketing is difficult to measure reliably due to a paucity of publicly available data, its scale in both participants and economic output appears quite substantial. While the figures given here appear to be the most authoritative figures publicly available, the Commission encourages members of the public to include in their comments additional data on the industry’s participant population and economic impact.

²⁵⁶ DSA 2022 Overview, *supra* note 11.

²⁵⁷ Direct Selling Association, *Frequently Asked Questions*, <https://www.dsa.org/about/faq>.

The proposed rule addresses the persistent problem of deceptive earnings claims in the context of the marketing of MLMs. As discussed in section II.C, the Commission’s past investigations of MLMs have uncovered substantial evidence of such deceptive conduct, and evidence in the record also demonstrates widespread deceptive earnings claims in connection with the marketing of MLMs. Outside sources, such as the survey of U.S. adults conducted by AARP in 2018, also provide useful evidence regarding the nature and scope of this nationwide problem.

According to the AARP Study, 1) 91% of those who participate in an MLM do so in the hopes of making money, 2) 54% of MLM participants felt that the earnings representations shown to them had been either “not too accurate” or “not at all accurate,” and 3) 40% of MLM participants felt misled about potential earnings. When it comes to financial outcomes, the survey showed failure to make money was common: 27% of MLM participants reported breaking even and another 47% of MLM participants reported losing money.²⁵⁸

In summary, deceptive earnings claims persist in multi-level marketing in spite of decades of FTC education and enforcement in this area. The proposed rule is designed to address the problem by increasing the FTC’s ability to police and deter misleading claims and to provide redress to consumers injured by such claims. The intent is to reduce the incidence of such claims and to provide consumers with access to the basis for such claims as they assess the merits of signing up, as well as to provide the Commission a means to secure redress when consumers are injured by deception.

3. Alternatives

²⁵⁸ AARP Study.

One alternative to the proposed rule is that the FTC take no new action, *i.e.*, to continue the enforcement status quo of existing FTC tools and limited industry self-policing.

From a net-benefits perspective, the Commission projects that an alternative of maintaining the status quo would leave society substantially worse-off compared with the proposed rule. To demonstrate this, Commission's calculation of net benefits under the proposed rule, in Table 1, is made relative to the status quo; therefore, those figures may be interpreted as the cost of taking a status quo approach instead of implementing the proposed rule.

For perspective on why the policy status quo inadequately deters deceptive MLM earnings claims, see sections II.D and E.

A second alternative, which was suggested by the DSSRC and is discussed in section II.E, is more education.²⁵⁹ That is, in place of the proposed rule, the FTC could instead increase its consumer and business education around deceptive MLM earnings claims. The twin objectives would be 1) to teach MLM sellers how to avoid making deceptive earnings claims, and 2) to teach consumers how to avoid falling for deceptive earnings claims.

The Commission already makes significant efforts to educate MLM sellers about deceptive earnings claims, including offering written business guidance,²⁶⁰ sending Notices of Penalty Offenses concerning Money-Making Opportunities to all known

²⁵⁹ DSSRC ANPR Comment at 7.

²⁶⁰ FTC, *Business Guidance Concerning Multi-Level Marketing* (updated Apr. 2024), <https://www.ftc.gov/business-guidance/resources/business-guidance-concerning-multi-level-marketing>.

MLMs,²⁶¹ and making numerous speeches to the industry on this topic.²⁶² Additionally, the Commission already works to raise consumers’ awareness of the risk of deceptive earnings claims, including in the MLM context. Expanding these efforts would require more of the Commission’s scarce resources. The amount of such costs would depend on the nature of the expanded scope of the effort. However, the Commission expects that an education-only alternative would fail to adequately mitigate consumer harm from deceptive MLM earnings claims, as discussed in section II.E.²⁶³

B. Benefits

The benefits of the proposed rule can be broken into quantified and unquantified benefits. Quantified benefits come from the return of the FTC’s ability to obtain consumer redress when it prevails against an MLM seller using deceptive earnings claims. The Commission has labeled the proposed rule’s quantified benefits “redress benefits” for clarity.

The proposed rule’s unquantified benefits may be grouped into two broad categories: “allocative benefits” and “other benefits.” Allocative benefits comprise changes to the incentives and outcomes for market participants, particularly MLMs and

²⁶¹ Press Release, *FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties* (Oct. 26, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead-big-penalties>.

²⁶² See, e.g., Keynote Speech of FTC Commissioner Noah Joshua Phillips, *Seller Beware*, DSA Legal & Regulatory Summit (Oct. 15, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581726/phillips_-_dsa_remarks_10-15-20.pdf; Remarks of Director Samuel Levine, FTC Bureau of Consumer Protection, DSA Legal & Regulatory Summit (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/direct_selling_association_legal_and_regulatory_seminar_remarks_of_samuel_levine_september_22_2022.pdf.

²⁶³ For example, research suggests that it is difficult to prevent harm from deceptive claims through education alone. See e.g., Scams Against Older Adults Advisory Group, *A Review of Scam Prevention Messaging Research: Takeaways and Recommendations* (April 2024) (summarizing research on scam-prevention messaging and highlighting various difficulties in crafting effective, efficient prevention education or warnings), available at https://consumer.ftc.gov/system/files/consumer_ftc_gov/pdf/A%20Review%20of%20Scam%20Prevention%20Messaging%20Research.pdf.

their participants and potential participants. The Commission has estimated the allocative benefit to a potential participant who is helped by the proposed rule, but it has not estimated the number of such individuals due to the lack of publicly available data. The Commission encourages members of the public to submit comments including empirical data that provides a basis for estimating the likely reduction in the number of deceived MLM participants.

The second category of unquantified benefits, that is “other benefits,” includes anticipated improvements in the lives of potential MLM participants and in the functioning of markets, for which it is difficult to estimate a monetary value.²⁶⁴

1. Benefits from Changes to the FTC’s Ability to Provide Consumer Redress

A primary effect of the proposed rule would be to shorten and make more feasible the FTC’s legal pathway to obtaining consumer redress from MLM sellers that use deceptive earnings claims (see section II.D for a fuller explanation).²⁶⁵

To estimate the amount of redress that would be recovered annually due to the proposed rule, the Commission begins by looking at redress achieved in the five years before the Supreme Court’s *AMG* decision, released on April 22, 2021.²⁶⁶ In the five-year period between April 22, 2016 and April 22, 2021, the FTC settled or otherwise resolved cases it brought against seven MLMs. The two largest settlements were with Herbalife,

²⁶⁴ Gains accrued through violation of section 5 of the FTC Act are not cognizable. Thus, this analysis does not factor in any losses that MLMs or participants face from no longer benefitting from deception. *See, e.g.,* Dale Whittington and Duncan MacRae, Jr., *The Issue of Standing in Cost-Benefit Analysis*, 5 J. Pol. Analysis & Mgmt., 665 (1986).

²⁶⁵ Because revenues procured by MLM sellers through deception are not cognizable in this welfare analysis, redress payments from MLM sellers that used deceptive earnings claims to mislead participants constitute pure net welfare increases. *See infra* section VII.B.2.

²⁶⁶ We assume that the proposed rule would establish approximately the same ability to recover consumer redress as existed prior to the *AMG* decision.

which paid \$200 million in funds for redress in late 2016,²⁶⁷ and with AdvoCare, which paid \$150 million in late 2019.²⁶⁸ In addition, the AdvoCare case generated a further \$100,000 in redress funds from the sale of a house belonging to participants who also settled with the FTC.²⁶⁹ In addition, settlements with Vemma Nutrition Company and related defendants led to roughly \$2,227,000 in redress in 2016.²⁷⁰ The other three MLMs that settled or otherwise resolved their cases with the FTC during this period were: 8 Figure Dream Lifestyle,²⁷¹ Digital Altitude,²⁷² and Mobe.²⁷³ Collectively, these three cases generated a combined redress amount of \$28,873,000.²⁷⁴

²⁶⁷ Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. Herbalife Int'l of America, Inc.*, No. 2:16-cv-5217 (C.D. Cal. 2016), ECF No. 17.

²⁶⁸ Stipulated Order for Permanent Injunction and Monetary Judgment against Defendants AdvoCare International, L.P. and Brian Connolly, *FTC v. AdvoCare, Int'l, L.P.*, No. 4:19-cv-715 (E.D. Tex. 2019), ECF No. 15.

²⁶⁹ Stipulated Order for Permanent Injunction and Monetary Judgment against Defendants Carlton and Lisa Hardman, *FTC v. AdvoCare, Int'l, L.P.*, No. 4:19-cv-715 (E.D. Tex. 2019), ECF No. 16.

²⁷⁰ Stipulated Order for Permanent Injunction and Monetary Judgment against Vemma Nutrition Company, Vemma International Holdings, Inc., and Benson K. Boreyko, *FTC v. Vemma Nutrition Co.*, No. 15-cv-1578 (D. Ariz. 2016), ECF No. 273; Stipulated Order for Permanent Injunction and Monetary Judgment against Individual Defendant Tom Alkazin and Relief Defendant Bethany Alkazin, *FTC v. Vemma Nutrition Co.*, No. 15-cv-1578 (D. Ariz. 2016), ECF No. 274; see also FTC Press Release, *FTC Returns More than \$2.2 Million to Vemma Affiliates Who Lost Money* (Sept. 19, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/09/ftc-returns-more-22-million-vemmas-affiliates-who-lost-money>.

²⁷¹ Stipulated Order for Permanent Injunction and Monetary Judgment Against Defendant OEA LLC, *FTC v. 8 Figure Dream Lifestyle LLC*, No. 8:19-cv-1165 (C.D. Cal. 2020); Amended Order re Application for Entry for Stipulated Order for Permanent Injunction and Monetary Judgment Against Defendants 8 Figure Dream Lifestyles LLC, JL Net Bargains Inc., Kappy Enterprises LLC, Millionaire Mind Enterprises LLC, Spirit Consulting Group Inc., John A. Bain, Alex Dee, Brian M. Kaplan, and Jerrold S. Maurer, *FTC v. 8 Figure Dream Lifestyle LLC*, No. 8:19-cv-1165 (C.D. Cal. 2020); see also Press Release, *FTC Returns \$1.1 Million to Consumers Who Lost Money to Alleged Scammers Selling Bogus Income Opportunities* (Oct. 4, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-returns-11-million-consumers-who-lost-money-alleged-scammers-selling-bogus-income-opportunities>.

²⁷² Press Release, *FTC Sends Nearly \$4.7 Million to Victims of Digital Altitude Business Coaching Scheme* (Feb. 3, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-sends-nearly-47-million-victims-digital-altitude-business-coaching-scheme>.

²⁷³ Press Release, *Federal Trade Commission Returns More Than \$23 Million To Consumers Deceived by Online Business Coaching Scheme MOBE* (April 5, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/04/federal-trade-commission-returns-more-23-million-consumers-deceived-online-business-coaching-scheme>.

²⁷⁴ While the complaints against the latter four companies did not specifically address the MLM structure as a component of the unlawful actions of the companies, the complaints make clear that the companies were MLMs and charge them with making deceptive earnings claims. Consequently, the alleged illegal conduct would have violated the proposed rule.

The historical period of April 22, 2016 to April 22, 2021 constitutes a sample of five observations on annual redress collected by the Commission. The number of observations is very small, and the variation from year to year in redress collected is considerable. To reflect the uncertainty inherent in projections based on such a small amount of data, the Commission utilized a technique called Monte Carlo simulation.²⁷⁵ Monte Carlo simulation is used widely in the analysis of uncertainty and is a recognized method for exploring the range of possible outcomes in regulatory analysis.²⁷⁶ At a general level, the method works by creating a simulated dataset through many repeated random draws from a postulated distribution and then using that simulated dataset to answer questions of interest.

In the present context, Monte Carlo techniques were used to simulate possible consumer redress totals over ten years, based on the redress amounts that were collected in the five years of historical data discussed above. In all, the Commission's Monte Carlo exercise produced a simulated dataset of one million possible 10-year redress totals. Each of the one million 10-year totals was generated as follows. First, the individual annual redress amounts in the ten-year sequence were determined. These were found using ten random draws from the empirical distribution of annual redress amounts in the five-year window. That empirical distribution, starting with April 22, 2016 to April 21, 2017, is: \$202.227 million (Herbalife and Vemma), \$0 (no redress collected in year), \$4.721 million (Digital Altitude), \$173.1 million (AdvoCare and Mobe), and \$1.152 million (8

²⁷⁵ See, e.g., William H. Greene, *ECONOMETRIC ANALYSIS*, at 923-925 (5th Ed. 2003); Peter Kennedy, *A GUIDE TO ECONOMETRICS*, at 24-27 (5th Ed. 2003).

²⁷⁶ See, e.g., Office of Management and Budget, "Circular A-4," at 71 (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf>; Dept. of Health and Human Servs., *Guidelines For Regulatory Impact Analysis*, at 45-47 (2016), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/171981/HHS_RIAGuidance.pdf.

Figure Dream Lifestyle). Each of these five outcomes was given an equal likelihood of being selected in each random draw, meaning 1) all five observed values were equally likely in any given year of the simulated 10-year sequence, and 2) the value drawn in one year was independent of the values drawn in any other year. Second, values drawn for Years 2 through 10 are discounted appropriately, and the present discounted value of the resulting 10-year total was then computed.

A total of one million 10-year sequences were generated in this manner and stored. The Commission then used this simulated distribution of possible 10-year outcomes to project a low and a high redress-benefit scenario for the 10-year window. The “low” redress benefit reported in Table 2 is the 5th percentile outcome from the distribution of one million randomly drawn discounted 10-year totals. Similarly, the “high” redress benefit reported is the 95th percentile outcome from that distribution.

Table 2 reports various key characteristics of the Monte Carlo distribution, including the low-redress (\$320,078,200), and high-redress (\$1,148,849,000) scenarios.

Table 2 - Present Value of Redress Benefits Over 10 Years, Monte Carlo Estimates

Number of simulations	1,000,000
Mean present value of redress	\$697.1 M
Median present value of redress	\$697.1 M
Standard deviation	\$259.0 M
Lowest present value of redress	\$1.1 M
Highest present value of redress	\$1,797.4 M
Low-redress scenario (5th percentile of simulations)	\$320.1 M
High-redress scenario (95th percentile of simulations)	\$1,148.8 M

Naturally, every Commission investigation is unique, and it is not possible to predict with confidence the flow of redress money in advance. The Commission encourages commenters to submit empirical data on the proposed rule’s consumer redress prospects.

2. Allocative Efficiency Gains (Unquantified)

A second anticipated benefit of the proposed rule is a reduction in earnings-claim deception and in the allocative distortions that it causes. The proposed rule is expected to reduce deception via two channels: 1) fewer deceptive claims made by MLMs and participants due to the proposed rule's deterrent effect; and 2) more substantiation materials made available to individuals seeking to evaluate earnings claims.²⁷⁷ As explained below, the reduction in deception is expected to mitigate the misallocation of labor and increase total economic welfare.

This section explains the reasons why the Commission is expecting a reduction in the number of deceived participants and includes a partial estimate of the average benefit to an individual from avoiding deception. The Commission's analysis stops short of estimating the economy-wide allocative benefit, due to the lack of data necessary to predict the average monetary loss from participation and the number of individuals that would be helped by the specific provisions of the proposed rule.

The proposed rule's allocative effect is expected to lead to a net welfare benefit through the more-efficient allocation of labor. Under the status quo, where deceptive earnings claims are prevalent, some MLM participants are misled into providing their labor and other resources at lower compensation than they would receive in a market with accurate information.²⁷⁸ MLM sellers that use deceptive earnings claims are free to exploit this labor even when it could be employed more productively elsewhere.

²⁷⁷ Another potential but unquantified allocative benefit that could occur is a lessened competitive disadvantage for truthful companies.

²⁷⁸ See *supra* section II.C.

Improving the informational environment for workers and thus reducing the inefficient use of their time and talent is a major anticipated benefit of the proposed rule.²⁷⁹

Broadly speaking, the shift of deceived participants from MLMs that used deceptive earnings claims to higher-value alternatives would affect the participants themselves, the MLMs they would have joined, the retail customers they would have served, and the markets (companies and customers) to which participants would shift. In theory, the impact on all these parties must be considered when assessing the proposed rule's full allocative impact. However, two factors in the present context greatly simplify the increase in participant productivity from new employment. The first of these is that, in the context of a welfare analysis like this one, reductions in profit can be ignored if that profit was acquired through deception. The second factor, discussed at greater length below, is that it is reasonable that overall, former MLM participants will devote their time and energy into other work that will be just as, if not more, productive and therefore the overall net change in surplus for retail consumers and non-deceptive companies will be positive. In other words, the Commission assumes that the countervailing increase in consumer surplus and company profits in the product markets to which would-be MLM participants shift their labor will equal or exceed the reduction in consumer surplus in the MLM market they leave behind.

i. Conceptual Issues

In the status quo, deceptive earnings claims made by MLM sellers distort the relative appeal of other opportunities available to workers. Specifically, they lead some

²⁷⁹ A secondary welfare effect, not explored here, is also possible. If the proposed rule leads to a relative scarcity of willing participants, then MLMs that use deceptive earnings claims may respond by increasing rewards overall (*i.e.*, as a share of company revenue), or increasing the rewards that go to participants with few or no recruits, who customarily fare the poorest.

individuals to participate in an MLM opportunity that was promoted using deceptive earnings claims, rather than other opportunities that, in fact, would have provided actual and/or greater compensation for their time and resources. An anticipated benefit of the proposed rule would be to increase overall economic output by diminishing the ability of MLM sellers to use deceptive earnings claims to exploit resources that could be employed more productively elsewhere.

In order to provide a sense of the potential size of this benefit, the Commission's analysis uses available data and other evidence to calculate the average economic gain that a representative individual, who avoids being misled by a deceptive earnings claim, would receive. A reduction in the number of deceived participants, however large, is expected to cause an overall decline in the number of participants and volume of trade in products (or services) distributed by those MLMs. As explained above, the Commission's welfare analysis disregards the loss of profit if that profit was attributable to deception.

A factor that potentially reduces the gross benefit of preventing deception is any attendant reduction in the consumer surplus received by customers who no longer purchase MLM products from deceived participants. However, even if any Rule-induced loss of consumer surplus in the MLM market is factored into welfare calculations, the Commission finds it reasonable to assume that the overall net change in the sum of consumer and producer surplus would be positive. Put differently, the Commission assumes that the total consumer surplus lost in the MLM market on account of the proposed rule would be no greater than the sum of profit and consumer surplus newly generated in the markets to which individuals who would have otherwise fallen victim to the deceptive earnings claims will shift their labor. The Commission's assumption here

might not hold if customers who consume the products of MLMs making deceptive earnings claims tend to derive more consumer surplus from their transactions than customers who consume the products of other businesses that would expand due to the proposed rule. However, MLMs operate in a wide range of markets, as do businesses that may employ workers who would shift their labor away from an MLM. In fact, many of these businesses may supply similar products to similar consumers. Consequently, the Commission finds no reason to conclude that any reallocation of labor caused by the proposed rule would reduce the overall sum of consumer and producer surplus. The Commission encourages the submission of comments including empirical data supporting or contradicting this assumption.

ii. Estimating the Reduction in the Number of Deceived Participants

It is difficult to estimate the number of individuals who, on account of the proposed rule, would avoid being misled into joining MLMs that use deceptive earnings claims. The impact depends on the behavior of approximately 1,100 MLMs and millions of participants who recruit for them in the United States.²⁸⁰ This section explores evidence related to the number of individuals deceived by deceptive earnings claims made by MLM sellers. However, because the Commission is unaware of any empirical or theoretical findings related to the responses of MLMs to requirements like those in the proposed rule, the Commission refrains from providing an estimate for the number of

²⁸⁰ Direct Selling Association, *Frequently Asked Questions*, <https://www.dsa.org/about/faq> (“It is difficult to estimate the number of direct selling companies operating at any given time. This is a result of several factors. First, most states do not require direct selling companies to register as such. Therefore, no exhaustive list exists. Second, as with any business, many direct selling companies do not thrive in the direct selling market and have a relatively short life span. In fact, many companies may even come and go before they could even be ‘counted.’ However, DSA estimates that the sales made by its members account for more than 80 percent of all direct sales in the United States and that there are approximately 1,100 direct selling companies in business in the U.S. in any given year.”).

individuals who would avoid falling victim to those deceptive earnings claims as a result. The Commission encourages the submission of comments including empirical data that could supplement the Commission’s understanding.

iii. How Big is the Problem?

That deceptive earnings claims are prevalent in the context of MLM recruiting is well documented. For instance, research by TINA suggests that the use of deceptive earnings claims is widespread. TINA commented that, in a 2017 study, it found examples of misleading or unsubstantiated earnings claims made on behalf of 137 out of 140 DSA-member MLMs.²⁸¹ A follow-up study by TINA published in 2024 reported similar results.²⁸² section II.C of this NPRM contains a more detailed discussion of evidence of the prevalence of deceptive earnings claims and the harm they cause.

The Commission does not anticipate that its proposal would eliminate all deceptive earnings claims in the context of MLM marketing because the proposed rule’s provisions—with the exception of certain substantiation requirements—would largely re-establish the enforcement tools in place prior to the Supreme Court’s decision in *AMG*, and deceptive earnings claims were prevalent even then. At the same time, because the proposed rule would re-establish those tools, the proposed rule will potentially deter a non-trivial fraction of the deceptive marketing acts and practices that would otherwise occur over the next ten years.

The population that is potentially made better off by the proposed rule’s allocative benefit are MLM participants that are misled by deceptive earnings claims under the

²⁸¹ TINA, *DSA Companies Income Claims* (2017), <https://truthinadvertising.org/industries/mlm-income/>.

²⁸² TINA, *MLMs Continue to Recruit with Deceptive Earnings Claims*, (Feb. 26, 2024), <https://truthinadvertising.org/articles/mlms-continue-to-recruit-with-deceptive-earnings-claims/>.

status quo. This number is not known. For an estimate, one can begin with the 2018 AARP Study, and its finding that 40% of MLM participants report feeling deceived about earnings. However, note that the population of participants who self-reported feeling deceived does not include those who never realized they were deceived. The number of such individuals may be significant. The potentially confounding factors of skill, luck, timing, *etc.*, provide alternative ex-post rationalizations for failing to earn money in an MLM opportunity and mean that participants who would not have joined but for the deceptive earnings claims nevertheless may not report being deceived.

The AARP Study's results suggest that the individuals who would potentially derive a benefit from the proposed rule number in the millions. However, to the Commission's knowledge, there exists little research relevant to predicting the extent to which deception would be averted through the proposed rule's multiple impacts, which include: 1) raising the likelihood that those making deceptive earnings claims will face legal consequences; 2) increasing the incentive to use only substantiated claims; and 3) increasing the odds that a prospect gets access to the substantiation behind a claim.²⁸³

Given the available evidence, this analysis leaves the predicted number of instances of deception that will be averted annually unquantified. The Commission encourages the submission of comments including empirical data that would assist the Commission in quantifying this figure. The proposed rule is already predicted to generate

²⁸³ The Commission is aware of a small number of studies on the effect of information interventions in the context of MLM earnings claims: 1) Stacie Bosley, Sarah Greenman, & Samantha Snyder, *Voluntary Disclosure and Earnings Expectations in Multi-level Marketing*, 58 *Econ. Inquiry* 1643-1662 (Oct. 2020); 2) Austin Miller et al., *Income Disclosure and Consumer Judgment in a Multi-Level Marketing Experiment*, 57 *J. Consumer Aff.* 92 (2023); and (3) the Coalition for Compliance survey, described above at section III.F.1. The results of these studies suggest that correcting false impressions about potential earnings may cause significant reductions in the number of individuals deceived. However, these studies analyze the effect of income disclosures and disclaimers, which are not required by the proposed rule.

a positive net benefit by allowing the Commission to obtain consumer redress more easily. This impact is expected regardless of whether the proposed rule will lead to *any* reduction in the number of MLM participants who are misled by deceptive earnings claims. Thus, while the Commission considers it unlikely that the proposed rule would leave the number of MLM participants misled by deceptive earnings claims unchanged, it expects a positive net benefit to the public even if that turned out to be the case.

iv. Estimating the Per-Person Benefit

This section estimates the expected benefit the proposed rule would provide to an individual who, through deceptive earnings claims, would otherwise be deceived into joining an MLM.

For the purpose of this part of the analysis, the Commission distinguishes between two categories of avoided losses. The first category is explicit monetary losses, which is defined as the gross expenses resulting from the participation in an MLM minus the gross revenue resulting from participation in an MLM. The second category is implicit losses, which is equal to the value of time spent participating in the MLM that, but for the deception, the individual could have used for other things.

Due to a lack of data on revenue and expenses of deceived participants, the Commission is unable to estimate explicit losses averted by the proposed rule. For the purpose of this analysis, the Commission describes the potential for such losses but leaves them unquantified. To the extent that such losses *do*, on average, occur, the per-person allocative benefit of the proposed rule would be significantly higher. The Commission estimates implicit losses—*i.e.*, the opportunity cost of misled participants' time—using a framework discussed in the next section.

v. Opportunity Cost Avoided

To estimate a representative individual's opportunity cost, the Commission first estimates the number of hours a participant who has been misled into joining an MLM through deceptive earnings claims (hereinafter, also "deceived participant") will spend, on average, pursuing an MLM opportunity, and then assigns a monetary value to that time.

Any estimate of the average time invested per deceived participant is likely to mask substantial heterogeneity in both duration (*i.e.*, total weeks participated) and intensity (*i.e.*, hours devoted per week). The Commission is unaware of reliable data on the topic, and utilizes an estimate that appears conservative (*i.e.*, low), according to the available evidence.

Specifically, the Commission assumes that, absent the proposed rule, a deceived participant, will spend, on average, 120 hours pursuing an MLM opportunity before realizing that she or he has been misled and quitting. The 120-hour assumption reflects a hypothetical scenario in which a deceived participant works 10 hours per week for 3 months. Ten hours per week falls near the low end of reported ranges for the participant population as a whole. No estimates are available specifically for deceived participants.

In the 2018 AARP Study, 57% of current or former MLM participants reported working ten or more hours "during an average week." The overall average reported by current or former MLM participants was 13.3 hours per week. When respondents were grouped by self-reported profit/loss from MLM participation, every respondent group averaged eleven or more hours per week. In four of these profit/loss groups, participants either lost money or broke even. Respondents in these groups reported average weekly

hours ranging from 11 hours per week (for participants losing \$1-\$4,999) to 21 hours per week (for participants losing \$10,00-\$24,999).²⁸⁴

Data published by the DSA indicates a somewhat lower share of MLM participants working at least 10 hours per week and provides no insight into *average* hours per week—either overall or for participant subgroups. From the DSA’s 2019 *Salesforce Survey*, one can infer only that 1) 12% of participants averaged less than 1 hour per week spent on the business, 2) 46% averaged 1 to 9 hours per week, 3) 32% averaged 10 to 29 hours per week, and 4) 10% averaged 30 hours per week or more.²⁸⁵

Thus, according to the DSA survey, 42% of participants spend at least 10 hours per week on the business, while according to the AARP study, 57% do. Differences in the wording of survey questions and the composition of survey samples may explain the disparity. Based on this data and other evidence compiled through its investigations, the Commission considers 10 hours per week a conservative estimate for the average time spent per week by an MLM participant who is deceived into participating in an MLM by deceptive earnings claims. The Commission encourages the submission of comments that include empirical data on the number of hours that a deceived MLM participant will spend, on average, pursuing an MLM opportunity.

Evidence on the length of time that deceived participants will spend pursuing an MLM opportunity before quitting is similarly scant. The 2018 AARP study indicates that 44% of all MLM participants participated in the MLM for less than 1 year. The DSA’s 2019 *Salesforce Survey* does not report a comparable figure but indicates that 37% of

²⁸⁴ AARP Study at 9.

²⁸⁵ Direct Selling Association, *2019 Salesforce Survey*, Q13: “Thinking about weeks when you spend/spent time on your direct selling business, on average, how many hours per week do/did you spend on your direct selling business?”

former participants had quit within one year of joining. For this analysis, the Commission adopts a conservative figure of three months, which the Commission believes to lie on the low end of the range of plausible values. The Commission encourages the submission of comments that contain empirical data on the length of time that deceived participants will spend, on average, pursuing the MLM opportunity before quitting.

For the purpose of this analysis, the Commission uses the 2023 U.S. average hourly wage rate for retail sales workers, which was \$17.64 per hour, as an estimate of the value of the time lost by deceived MLM participants.²⁸⁶ The Commission chose the wage rates for retail sales workers for three reasons: 1) the retail trade’s similarity to the face-to-face selling described in recruiting materials of some MLM sellers; 2) the possibility of working part-time in the field;²⁸⁷ and 3) the minimal education and experience prerequisites. Although the Commission recognizes that participation in an MLM and retail wage work are not identical pursuits, the Commission believes that the degree of similarity makes retail wages a reasonable substitute for the income foregone when individuals are deceived into participating in an MLM. The Commission encourages the submission of comments that include empirical data on the value of time spent by participants pursuing an MLM opportunity which, but for the deception, the participant could have used for other things.

The Commission also understands that not every would-be MLM participant is likely to view part-time (or full-time) wage labor as the next-best alternative. Some are

²⁸⁶ Bureau of Labor Statistics, May 2023 National Industry-Specific Occupational Employment and Wage Estimates, 41-2031, Retail Salespersons, <https://www.bls.gov/oes/current/oes412031.htm> (mean hourly wage for retail sales workers).

²⁸⁷ See National Retail Federation, *Retail Jobs*, <https://nrf.com/topics/economy/about-retail-jobs> (“29 percent of retail employees are part time”).

likely to prefer working in the gig economy or other small-scale business ventures, or simply to not seek employment.²⁸⁸ The Commission encourages members of the public to submit comments and empirical data on the potential alternative uses to which MLM participants might put their time if not deceived.

Given the uncertainty around how deceived MLM participants might otherwise have spent their time, the Commission assumes that the marginal time committed to MLM participation comes out of the individual's leisure time. In doing so, the Commission relies on a body of research that indicates that U.S. residents value their non-work time at 82% of their hourly earnings.²⁸⁹ Applying that finding to the 2023 average hourly wage for retail sales workers implies a non-work value of time for the population of deceived participants of \$14.46 per hour. The Commission adopts this figure as its best estimate of the average value per hour that deceived MLM participants give up when participating in an MLM. The Commission encourages the submission of comments including empirical data on the average value per hour that deceived participants give up when participating in an MLM.

vi. Financial Losses Avoided

Explicit monetary losses equal a participant's gross revenue from participation (from retail sales, multi-level compensation, and other bonuses or rewards) minus his or her gross expenses (from the cost of product inventory, signup fees, training events, *etc.*). The Commission lacks the data necessary to provide a quantitative estimate of explicit

²⁸⁸ Nevertheless, some evidence suggests that wage labor is the most popular contender for MLM participants' time. In the DSA's *2019 Salesforce Survey*, 63% of MLM participants listed "full-time employment" or "part-time employment" as one option considered before "[they] decided to become involved in direct selling."

²⁸⁹ Daniel Hamermesh, *What's to Know About Time Use?*, 30 J. Econ. Surv. 198 (2016).

losses but is aware of information strongly suggesting that such losses are the norm among deceived participants.

Data on financial outcomes for MLM participants is scarce and unsystematic, but the evidence available suggests that negative or zero accounting profit is not uncommon.²⁹⁰ As mentioned, a 2018 survey by AARP found that 47% of current and former MLM participants report net losses, and that an additional 27% report breaking even. That survey question prompted respondents to factor in the value of their time, so the Commission cannot be sure that responses reflect the concept of accounting profit that the Commission seeks to measure here. However, a finding that a large percentage of deceived MLM participants earned less in revenue than they incurred in expenses related to their participation in the MLM opportunity would be consistent with the Commission's own findings alleged in recent actions against large U.S. MLMs.²⁹¹ The Commission considers it likely that many of the participants who report feeling deceived by an MLM seller's earnings claims experienced net financial losses. Any such losses prevented by the proposed rule, if finalized, would be in addition to the opportunity costs averted by the proposed rule, if finalized, which were discussed in the prior section.

²⁹⁰ See, e.g., AARP Study; 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/news/mlm-participants-survey> (A survey of 1,049 participants found that 60% of all participants reported earning less than \$500 over the past five years, before expenses, and that the median gross earnings of participants was \$0.67 per hour); Staff Report at section X and Appendix D (summarizing contents of 70 MLM income disclosure statements and reporting that of the 27 that provide (expressly or by implication) the percentage of participants who receive no payments from the MLM, that percentage is over 50% in 17 of 27, and 25% or higher in all but two of the 27).

²⁹¹ See, e.g., Compl., *FTC v. AdvoCare Int'l, L.P.*, No. 4:19-cv-00715 (E.D. Tex. 2019), ECF No. 1 ("In 2016, 72.3 percent of Distributors did not earn any compensation from AdvoCare; another 18 percent earned between one cent and \$250; and another 6 percent earned between \$250 and \$1,000. The annual earnings distribution is nearly identical for 2012 through 2015.").

However, in light of the lack of systematic data on revenue and expenses for this group of individuals, the current analysis leaves those losses unquantified. The Commission encourages members of the public to submit comments and data to supplement the Commission’s understanding of the typical accounting losses of deceived participants.

vii. Allocative Benefit Equals the Opportunity Cost Avoided

Accordingly, for the reasons described herein, this analysis leaves participants’ explicit monetary losses unquantified. Thus the quantifiable portion of the proposed rule’s allocative benefit per potential participant is the opportunity cost of participating in an MLM that uses deceptive earnings claims: \$1,735.20 (\$14.46 per hour x 10 hours/week x 12 weeks).

Table 3 – Potential Allocative Benefit per Participant

Hours invested per deceived participant	120
Value of time per hour	\$14.46
Outside value foregone per deceived participant	\$1,735.20
Number of participants affected annually (#)	unquantified
Total annual allocative benefit (\$)	unquantified

3. Avoided Social and Psychological Harms (Unquantified)

Aside from the redress and allocative benefits, a reduction in the number of deceptive earnings claims made by MLM sellers would also result in intangible benefits. The intangible benefits include a reduction in the physical and psychological hardship that may accompany financial losses and business failure and a reduction in the number

of relationships strained or broken by pressure to purchase products or join a deceptive business opportunity.²⁹²

These benefits are impossible to quantify with the available data but nonetheless merit mentioning here because Commission investigations have shown that avoiding deceptive MLM earnings claims can mean avoiding these negative outcomes. The Commission encourages members of the public to submit comments on these and any other unquantified benefits resulting from a decrease in the number of deceptive earnings claims made by MLM sellers; especially, comments including empirical data on the value that should be assigned to those benefits.

C. Compliance Costs

MLMs and MLM participants would possibly incur new expenditures of time and money (“compliance costs”) in order to adjust to, and maintain compliance with, the proposed rule.

One reason MLMs could face such compliance costs is the proposal to require MLM sellers to retain written materials substantiating any earnings claim made, and to provide such documentation upon request. These requirements would, if adopted,

²⁹² Regarding psychological hardship from financial losses, see for example: Encarnación Sarriá et al, *Financial Fraud, Mental Health, and Quality of Life: A Study on the Population of the City of Madrid, Spain*, 16 Int’l J. Env’tl. Res. & Pub. Health (2019); D. Glodstein, S.L. Glodstein, and J. Fonaro, *Fraud trauma syndrome: The victims of the Bernard Madoff scandal*, 2 J. Forensic Stud in Acct. & Bus. (2010); L. Ganzini, B.H. McFarland, and D. Cutler, *Prevalence of Mental Disorders after Catastrophic Financial Loss*, 178 J. Nerv. Ment. Dis., 680 (1990); see also Stacey Wood, *How Does Fraud Impact Emotional Well-being?*, Psychology Today (Jan. 3, 2021), <https://www.psychologytoday.com/us/blog/the-fraud-crisis/202101/how-does-fraud-impact-emotional-well-being>; Marguerite DeLiema, Gary Mottola, and Martha Deevy, *Findings From a Pilot Study to Measure Financial Fraud in the United States: A Collaboration Between the Stanford Center on Longevity and the FINRA Investor Education Foundation* (2017), https://longevity.stanford.edu/financial-fraud-research-center/wp-content/uploads/2017/02/SCL-Fraud-Report-Feb-2017_Draft2.pdf; Applied Research and Consulting LLC, *Non-Traditional Costs of Financial Fraud: Report of Survey Findings*, FINRA Investor Education Foundation Research Report (March 2015), <https://www.finrafoundation.org/sites/finrafoundation/files/non-traditional-costs-financial-fraud.pdf>.

incentivize new outlays and the formulation and implementation of new procedures. The proposed rule's other provisions, which propose requirements echoing requirements already in force under section 5 of the FTC Act, would also possibly induce additional precautionary expenditures by raising the expected financial impact for violating those requirements.

The Commission distinguishes between one-time compliance costs and recurring compliance costs. One-time compliance costs ("one-time costs") stem from tasks that MLMs or participants deem necessary for moving into compliance with the proposed rule. An example of such a task is the creation of a digital repository for the storage of earnings-claims substantiation materials. Once completed, tasks like this would not need to be repeated.

Recurring compliance costs ("recurring costs") are those connected with ongoing responsibilities of compliance. An example of a recurring cost is the time and money spent responding to requests for substantiation. Recurring obligations, such as these, would likely create a continuing source of operational costs for as long as the proposed rule would be in effect.

The Commission provides separate estimates for the compliance costs of MLMs and MLM participants. For MLMs, the following analysis 1) includes a list of compliance tasks, 2) provides an estimate of the number of hours that MLM personnel will, on average, spend on each task, and 3) provides an estimate of the compliance cost burden for each task by multiplying the labor hours spent on each task by the average hourly wage rate of the worker that the Commission predicts will perform these tasks. For purposes of the participants' costs, the analysis takes a similar approach, focusing on

the time cost of a smaller, participant-specific list of compliance tasks. Consistent with the approach taken by the Commission in the benefits section, the estimated value for the participants' time is based on the national average hourly wage for retail trade.

In most cases, costs are projected using low-cost and high-cost scenarios, reflecting the Commission's uncertainty over the nature and expense of the adjustments that companies will undertake in response to the proposed rule. The Commission encourages the submission of comments including empirical data on the compliance costs that MLMs and MLM participants would incur as a result of the proposed rule.

1. Costs Borne by MLMs

The starting point for the assessment of the company-level compliance costs is the assessment of one-time costs that MLMs would incur in adjusting their operations to the proposed requirements.

i. One-Time Costs

The Commission expects MLMs' one-time costs to stem primarily from the adoption of new procedures to 1) provide substantiation materials upon request, including translating materials if needed and 2) the retention of those materials for three years. The Commission estimates that the proposed rule's prohibitions on making deceptive earnings claims and on providing participants with materials or information to be used in recruiting new participants that contain false, misleading, or unsubstantiated earnings claims should entail little to no adjustment on the part of MLMs, because these provisions echo existing law and have long been a subject of attention in the Commission's enforcement efforts.

Estimating this one-time cost involves considerable uncertainty. Given the overlap with current legal requirements, some MLMs may undertake few adjustments or

even none at all. Others may take more substantial steps. The steps involved could span a wide range of corporate activity. The costs imposed could vary significantly across the estimated 1,100 MLMs operating in the U.S., in part because some of these companies are much larger than others. Finally, a mix of occupations may be involved, with the exact composition of this mixture varying from company to company, according to a myriad of factors. Wage rates associated with the occupations involved could span a wide range.

The Commission estimates MLMs' one-time costs using high and low scenarios that envision a specific list of tasks and associated labor hours. The specificity of these estimates reflects the Commission's intention to ensure that all facets of the adjustment process have been considered, and not a prediction that individual MLMs will commit exactly the presumed time to exactly the tasks enumerated. As noted above, the tasks and hours needed will likely vary from firm to firm. Because the estimates are conservative, as explained in the next paragraph, the Commission expects that most MLMs would incur costs within or below the range estimated here.

A wide range of employees may be involved in implementing the one-time adjustments. These occupations may include: 1) training and development specialists; 2) computer programmers; 3) software developers / quality assurance analysts and testers; 4) database administrators and architects; 5) lawyers; and 6) advertising, promotions and marketing managers. The associated 2023 national average wages for these occupations, as reported in the BLS Occupational Employment and Wages data, vary from \$34.60 per

hour for training and development specialists to \$84.84 per hour for lawyers.²⁹³ To simplify the estimation of labor costs, we use the estimated average hourly wage for lawyers (\$84.84 per hour). Assuming a single wage rate for all personnel involved is an extreme simplification, and using the wage rate for the most expensive category of employee is expected to err on the side of overstating companies' actual labor costs, allowing for a conservative estimate of the proposed rule's net benefit.

Table 4 presents high and low scenarios for one-time adjustment costs incurred by MLMs. For the purpose of this analysis, the Commission assumes that all one-time adjustment tasks are undertaken in Year 1 and are not discounted.

²⁹³ Bureau of Labor Statistics, May 2023 National Industry-Specific Occupational Employment and Wage Estimates, 23-1011, Lawyers <https://www.bls.gov/oes/current/oes231011.htm> (mean hourly wage for lawyers); Bureau of Labor Statistics, May 2023 National Industry-Specific Occupational Employment and Wage Estimates, 13-1151, Training and Development Specialists, <https://www.bls.gov/oes/current/oes131151.htm> (mean hourly wage for training development specialists).

Table 4 - Company One-Time Adjustment Costs

	Estimated hours required	
	Low-Cost Scenario	High-Cost Scenario
Regulatory familiarization and planning	10	20
Training employees	35	70
Reviewing company earnings claims	0	25
Preparing substantiation documents for distribution (including any translation costs)	1	40
Updating participant training and promotional materials	40	80
Setting up infrastructure to handle substantiation requests and/or to retain substantiation materials	25	50
Total employee hours	111	285
Assumed hourly wage cost	\$84.84	\$84.84
Total costs per company	\$9,417	\$24,179
Number of companies	1,100	1,100
Total one-time company adjustment costs	\$10,358,964	\$26,597,340

Total industry-wide estimated one-time adjustment costs incurred by MLMs are \$10.4M in the low-cost scenario, and \$26.6M in the high-cost scenario.

ii. Recurring Costs

The Commission predicts that MLMs would likely incur new recurring costs in responding to requests for earnings-claim substantiation and in retaining substantiation materials for the mandated three years.^{294, 295}

²⁹⁴ The Commission does not estimate any recurring expenses related to training new MLM participants in its tally of recurring company costs. While such training may be undertaken, the Commission assumes that MLMs would prepare new training materials once (in Year 1) and then deliver them year after year in an automated fashion to new participants upon signup. The one-time cost of preparing these new training materials is included under MLMs' one-time costs. The time cost of undergoing training is included in regulatory familiarization costs borne by MLM participants, discussed in the next section. The Commission welcomes comments that provide an empirical basis for revising this approach.

²⁹⁵ The Commission assumes that MLMs would not undertake any additional monitoring of earnings claims made by participants beyond their already existing practices. MLMs investigated by the Commission have maintained that they already monitor claims made by participants and discipline participants who make

Estimating the annual cost to MLMs of responding to requests for substantiation involves considerable uncertainty. Some MLMs may believe their current business processes already adequately comply with the proposed rule, and so incur no new recurring costs. For those that do undertake changes in response to the rule, no single approach appears most likely, and different MLMs are likely to adopt different solutions, depending on their particular situations. In addition, any company's approach is likely to evolve over the ten-year window. The Commission has represented this uncertainty in its analysis by specifying a low-cost and a high-cost scenario. Both scenarios assume that MLMs would allocate some employee time per week to maintaining a system for providing substantiation upon request and for keeping an orderly inventory of all substantiation materials for the three-year retention period. Such systems could be automated, non-automated, or some hybrid of the two approaches.

In the low-cost scenario, the Commission estimates that each MLM will devote, on average, half an hour per week of an employee's time to tasks connected with maintaining a system that responds to requests for earnings-claim substantiation and that preserves substantiation materials for the three-year window. The Commission values employee time spent at \$50.39 per hour, the 2023 national average hourly wage for

false or misleading claims; although, to be clear, the Commission does not concede that such monitoring is always effective. Likewise, the DSA claims that such monitoring is already extensive: "Companies also monitor the marketplace, especially social media, for claims that violate their rules and guidelines. Many companies use web crawlers to flag potential violations of company policies regarding earnings and lifestyle claims and assist them in having such claims immediately removed. For more serious and repeat violators, companies regularly penalize, suspend, and even terminate salesforce members for violations of their policies." DSA ANPR Comment at 6; *but see, e.g.*, D. Vaughan ANPR Comment at 13 (questioning the efficacy of MLM monitoring programs).

database administrators.²⁹⁶ In the high-cost scenario, the Commission estimates that each MLM will devote, on average, one hour per week, at the same hourly wage.

The present value of recurring costs for maintaining a system to respond to substantiation requests in the low-cost scenario over ten years amounts to \$13.2M, and in the high-cost scenario over ten years amounts to \$26.4M, both at 2% discounting.

The Commission also expects that MLMs may incur a small amount of recurring capital costs, connected to the cost of server space to digitally store substantiation materials for the mandated three-year retention period. The low-cost scenario assumes that MLMs use existing storage to store substantiation materials. Consequently, in this scenario, costs for digital storage are \$0.

While many MLMs may already have surplus space available for this purpose, the high-cost scenario assumes that every MLM would need additional storage space. As an approximation for this expense, the high-cost scenario assumes that MLMs would rent an additional 1TB of cloud storage, at an estimated cost of \$100 per company per year. The total cost of storing substantiation materials over ten years would amount to a present value of \$1.0M in this scenario.

Combining all 1,100 MLMs' recurring labor and capital expenses for the low-cost scenario yields total recurring costs over ten years of \$13.2M, using a 2% discount rate. Similarly, for the high-cost scenario, the total recurring costs over ten years are \$27.4M.

²⁹⁶ Bureau of Labor Statistics, May 2023 National Industry-Specific Occupational Employment and Wage Estimates, 15-1242 Database Administrators, <https://www.bls.gov/oes/current/oes151242.htm> (mean hourly wage for database administrators).

Table 5 - Present Value of Company Recurring Compliance Costs, Over 10 Years

	Low-Cost Scenario	High-Cost Scenario
Substantiation storage costs		
Annual cost, 1 TB data storage per company	\$0	\$100
Total annual storage costs for all companies	\$0	\$110,000
Present value of storage costs	\$0	\$1,007,846
Responding to requests for substantiation		
Annual hours per company	26	52
Average wage for responding employees	\$50.39	\$50.39
Annual cost per company	\$1,310.14	\$2,620.28
Number of companies	1,100	1,100
Total annual response costs for all companies	\$1,441,154	\$2,882,308
Present value of response costs	\$13,204,194	\$26,408,388
Present Value of Total Recurring Costs	\$13,204,194	\$27,416,234

2. Costs Borne by MLM Participants

The Commission expects that the proposed rule would impose modest time costs on MLM participants. Most of this potential burden would come from the time participants spend familiarizing themselves with the proposed rule’s requirements. The Commission also considers the possibility of an additional burden from responding to requests for substantiation.

i. One-Time Participant Costs of Familiarization

The Commission expects that MLM participants would familiarize themselves with the proposed rule’s requirements through training materials offered by MLMs to new recruits. The Commission assumes that participants would only be required to familiarize themselves with the proposed requirements once during their tenure.

Any training materials produced in response to the proposed rule would likely focus on the proposed rule's requirements to provide substantiation upon request and to retain substantiation materials for three years—and minimally, or not at all, on the proposed rule's prohibitions on deceptive earnings claims and on providing participants with materials or information to be used in recruiting new participants that contain false, misleading, or unsubstantiated earnings claims, which echo existing law and already constitute a focus of MLM participant training.²⁹⁷

It is not clear to the Commission whether, in familiarizing themselves with the proposed requirements, MLM participants would incur any additional time burden, because the proposed rule's substantiation and recordkeeping requirements are narrow, straightforward, and closely tied to existing law. To account for the uncertainty pertaining to costs that MLM participants would incur in familiarizing themselves with the proposed requirements, The Commission has prepared a low-cost and high-cost scenario. The low-cost scenario assumes that the proposed requirements to provide substantiation upon request and retain the written substantiation materials for three years would be conveyed to new participants through the replacement of existing discussions. Therefore, the low-cost scenario assumes that, on net, new participants would not be required to spend additional time familiarizing themselves with the policies, procedures and legal requirements that MLMs choose to present.

²⁹⁷ For example: “Companies engage with independent salesforce members to ensure an understanding about the policies and procedures that govern the contractual relationship between them and the company. For example, companies focus on educating their independent salesforce members on the applicable laws, rules and regulations. These educational efforts are ongoing with salesforce members to ensure any earnings claims made are not false, deceptive, or misleading for consumers, and also serve to protect consumers from harm.” DSA ANPR Comment at 6.

The high-cost scenario assumes each new MLM participant would spend an additional ten minutes familiarizing her- or himself with the proposed rule's substantiation and recordkeeping requirements. MLMs may spend the allotted time explaining the concept of "substantiation"; connecting officially permitted claims with accompanying, company-generated substantiation documents; and/or suggesting protocols for identifying and retaining substantiation materials for three years. In the high-cost scenario, the participants' time is valued at \$14.46 per hour, the same value of time used in the allocative benefits analysis in section VII.B.2.

These low-cost and high-cost assumptions are applied to all participants projected to join MLMs during the ten-year analytic time horizon, estimated at 5,367,647 annually, for ten years.²⁹⁸ These participants are presumed to undergo familiarization in their respective year of entry.

Participants already enrolled in MLMs at the time the proposed rule is implemented are presumed to undergo familiarization in the year of implementation and are treated differently than all other participant cohorts. Because these participants would have already been trained by their respective MLMs at the time the proposed rule is implemented, the proposed rule's substantiation requirements could not be part of their initial training. Thus, a zero-cost familiarization scenario becomes less plausible, and the

²⁹⁸ The Commission estimates annual gross entry of new MLM participants at 5,367,647 per year. This projection is based upon a 2006 estimate published by the DSA in comments submitted in response to the Commission's NPRM for its Business Opportunity Rule. *See* DSA BOR ANPR Comment at 35, *et seq.* The comment estimates total direct selling participants at 13.6M, and states: "DSA estimates that approximately 5 million people are successfully recruited into direct selling each year." *Id.* at 42 & 55. Projecting the same ratio of entrants to base population onto today's population of 14.6M yields an updated estimate of 5,367,647 entrants annually.

Commission assumes a 10-minute familiarization burden for all 14.6M existing MLM participants, under both the low-cost and the high-cost scenarios.²⁹⁹

Overall, then, total participant familiarization costs are as follows. The low-cost scenario—which assumes that existing MLM participants would spend 10 minutes familiarizing themselves with the proposed requirements and new MLM participants would spend no additional time familiarizing themselves with the proposed requirements—yields an aggregate present value of costs over ten years of \$35.2M (discounted at 2%). The high-cost scenario—which assumes that new and existing MLM participants would spend 10 additional minutes familiarizing themselves with the proposed requirements—yields an aggregate present value of costs over ten years of \$153.7M (discounted at 2%).

²⁹⁹ Ten minutes may be a significant overestimate of how long the average participant would need for familiarization. The Commission welcomes comments that provide an empirical basis for revising this assumption.

Table 6 - Present Value of Participant Compliance Costs, Over 10 Years

	Low-Cost Scenario	High-Cost Scenario
Familiarization time, existing participants		
Minutes required per participant	10	10
Hourly wage	\$14.46	\$14.46
Average per-participant cost	\$2.41	\$2.41
Number of total existing participants	14,600,000	14,600,000
Total one-time costs	\$35,186,000	\$35,186,000
Familiarization time, new participants		
Number of annual new participants	5,367,647	5,367,647
Minutes required per participant	0	10
Average per-participant cost	\$0.00	\$2.41
Total per year, new participants	\$0.00	\$12,936,029
Present value over ten years	\$0	\$118,522,962
Present Value of Total Cost	\$35,186,000	\$153,708,962

ii. Recurring Participant Costs Related to Substantiation Requirements

The proposed rule may also impose a second burden on participants by requiring MLM sellers to provide earnings claim substantiation upon request and to retain substantiation materials for three years.

The Commission expects participants' cost of *retaining* substantiation materials to be *de minimis*. These materials may be created by MLMs or by the participants themselves but are unlikely to require significant physical or digital storage space nor any costly procedures for organizing and archiving.

The cost of providing earnings-claim substantiation upon request is likely to vary across MLM participants, because: 1) not all participants engage in recruiting; 2) not all recruiters make earnings claims; 3) some, but not all, MLMs are likely to provide ready-made substantiation materials for recruiters to use; and 4) the frequency with which

prospects request substantiation may vary with the recruiting tactics employed. To reflect uncertainty in this area, the Commission has prepared a low-cost and a high-cost scenario.

In the low-cost scenario, the Commission assumes that providing substantiation upon request imposes *de minimis* costs on participants. Multiple factors suggest the plausibility of *de minimis* costs. First, under existing law, MLM participants are already required to possess substantiation before making an earnings claim (*see* section III.E), and thus would be able to provide that substantiation in digital form to requestors at negligible cost. Second, providing substantiation may simply replace other recruiting methods—for example, by becoming the default technique for providing credibility for income claims. Finally, participants may be able to rely on earnings claims and accompanying substantiation materials provided by their respective MLMs.

In the high-cost scenario, the Commission assumes that participants would spend 30 seconds responding to each request for substantiation that they receive. The Commission estimates the aggregate number of requests by starting from the number of participants recruited each year (estimated at 5,367,647) and assumes that, for each of these, on average, five potential recruits would each make a request for substantiation. Evidence that the Commission has reviewed suggests that only a small fraction of individuals approached by a recruiter elect to join an MLM. The Commission's assumption allows for the possibility that many who decide not to join do so after requesting substantiation for an income claim. The 5:1 ratio implies a total of 26.8 million requests for substantiation per year. At 30 seconds of participant time per request, MLM participants would spend a total of 223,652 hours per year responding to

substantiation requests. Participant time in this scenario is valued at \$14.46 per hour, the same value of time used in previous sections. Collectively, these assumptions bring the total annual cost under our high-cost scenario to \$3.2M. The total present value of costs under the high-cost scenario over ten years amounts to \$28.4M.

Table 7 - Present Value of Participant Costs of Providing Substantiation, Over 10 Years

	Low-Cost Scenario	High-Cost Scenario
Time per substantiation request (seconds)	0	30
Substantiation requests per new recruit	N/A	5
Number of annual new recruits	5,367,647	5,367,647
Annual substantiation requests	N/A	26,838,235
Total participant hours spent on requests	0	223,652
Value of participant-hour (\$)	\$14.46	\$14.46
Total annual cost of requests	\$0	\$3,234,007
Present Value of Total Cost	\$0	\$28,414,341

3. Total Costs (MLMs and Participants)

The total estimated present value of costs of compliance over ten years to MLMs and participants are \$58.7M for the low-cost scenario and \$236.1M for the high-cost scenario, using a 2% discount rate for both.

Table 8 - Present Value of Total Costs, Over 10 Years

	Low-Cost Scenario	High-Cost Scenario
Company costs		
One-time adjustment costs	\$10,358,964	\$26,597,340
Preserving substantiation	\$0	\$1,007,846
Providing substantiation	\$13,204,194	\$26,408,388
Participant costs		
Familiarization costs	\$35,186,000	\$153,708,962
Providing substantiation	\$0	\$28,414,341
Total Quantified Costs	\$58,749,158	\$236,136,877

When considered on an annualized cost basis, using a 2% discount rate, the low-cost scenario’s present value is equivalent to annualized costs of \$6.5M each year. For the high-cost scenario, the equivalent annualized costs are \$26.3M each year.

D. Break-Even Analysis

The Commission has prepared a break-even analysis to assess how high the proposed rule’s compliance costs would have to rise before the overall quantified net impact would turn negative.

The proposed rule’s projected welfare impact is positive even under our “Low Net-Benefits Scenario,” which combines 1) the low-end estimate of redress benefits, 2) the high-end estimate of compliance costs, and 3) zero allocative benefits. Under the Low Net Benefits scenario, the discounted present value of benefits over ten years would exceed the discounted present value of costs over ten years by \$83.9M.

Under the High Net-Benefits Scenario, which combines the high-end estimate of redress benefits with the low-end estimate of costs (and, again, zero allocative benefits), the present discounted value of benefits over ten years would exceed that of costs by an even more significant margin of \$1.09B.

Table 9 - Present Value of Net Benefits, Over Ten Years

	Low Net-Benefit Scenario	High Net-Benefit Scenario
Redress benefit	\$320,078,200	\$1,148,849,000
Total costs	\$236,136,877	\$58,749,158
Net Benefit	\$83,941,323	\$1,090,099,842

For the break-even analysis, the Commission has considered all four possible combinations of benefit and cost scenarios, and examined how high total compliance costs would have to rise before exceeding the proposed rule’s estimated gross benefits.

The analysis expresses the break-even compliance cost in terms of a multiplier—*i.e.*, the factor by which total compliance costs would need to be multiplied to exactly equal the proposed rule’s projected redress benefits. If actual compliance costs were to exceed projected compliance costs by this factor (and everything else went as projected), then the proposed rule’s overall *net* benefits would be exactly zero. The Commission has calculated this multiplier by dividing total discounted redress benefits over ten years by the total discounted compliance costs over ten years.

Table 10 shows the calculation of these threshold cost multipliers—one for each of the four possible combinations of benefit and cost scenarios. For example, if one assumes high costs combined with low redress benefits (*i.e.*, the “Low Net Benefits” scenario), Table 10 shows that costs could rise as high as 1.36 times the existing estimates before they would drive the proposed rule’s overall net benefits to zero. Alternatively, if one assumes low costs combined with high redress benefits (*i.e.*, the “High Net Benefits” scenario), Table 10 shows that costs could rise as high as 19.56 times the existing estimates before they would drive the proposed rule’s overall net benefits to zero. Multipliers for the two intermediate combinations (low benefit/low cost; high benefit/high cost) are calculated analogously and displayed in the table.

Table 10 – Threshold Cost Multipliers for Combinations of Benefit-Cost Scenarios

	Low Cost (\$58.7M)	High Cost (\$236.1M)
Low Redress Benefit (\$320.1M)	5.45	1.36*
High Redress Benefit (\$1.149B)	19.56**	4.87

* Corresponds to “Low Net Benefits” scenario.

** Corresponds to “High Net Benefits” scenario.

Note again that these estimates assume zero allocative benefit from the proposed rule. Breakeven costs (and thus, cost multipliers) would be higher if any allocative efficiency gain from the proposed rule's deterrence of deceptive acts or practices were factored in.

E. Conclusion: Net Benefits

The Commission has analyzed the incremental benefits and costs of the proposed requirements.

Extrapolating the quantified benefits and costs over the 10-year analytic time horizon and discounting to the present day provides an estimate of the present value of total benefits and costs of the proposed rule. The difference in total benefits and total costs—net benefits—provides one measure of the value of adopting the proposed rule.

Table 11 summarizes the quantitative estimates of the present value of benefits and costs over ten years.

With respect to the proposed rule's gross benefits, the present value of the proposed rule's quantified benefits to consumers over a 10-year period, using a 2% discount rate, is estimated to be \$320.1 million under the low redress-benefit scenario, and \$1.149 billion under the high redress-benefit scenario. The analysis above also identified unquantified benefits expected to result from the proposed rule—specifically, allocative efficiency gains and avoided social and psychological harms from deception.

With respect to the proposed rule's costs, the present value of the proposed rule's quantified costs to MLMs and participants over a 10-year period, using a 2% discount rate, is estimated to be \$236.1 million under the high-cost scenario, and \$58.7 million

under the low-cost scenario. The Commission did not identify any unquantifiable costs that would result from the proposed rule.

Combining the low redress-benefit estimate with the high-cost estimate produces the “Low Net Benefit” scenario, with a net quantified benefit of \$83.9M. Combining the high redress-benefit estimate with the low-cost estimate produces the “High Net Benefit” scenario, with a net quantified benefit of \$1.09B.

Given that the Commission has identified unquantified benefits and has not identified any unquantified costs for the proposed rule, the Commission believes that the adoption of the proposed rule would likely result in benefits to the public that outweigh its costs.

Table 11 - Present Value of Net Benefits Over 10 Years

	Low Net-Benefits Scenario	High Net-Benefits Scenario
<i>Benefits</i>		
Redress benefit	\$320,078,200	\$1,148,849,000
Allocative efficiency gains	<i>Unquantified</i>	
Avoided social and psychological harms from deception	<i>Unquantified</i>	
Total Quantified Benefits	\$320,078,200	\$1,148,849,000
<i>Costs</i>		
<i>Company costs</i>		
One-time adjustment costs	\$26,597,340	\$10,358,964
Storing substantiation	\$1,007,846	\$0
Providing substantiation	\$26,408,388	\$13,204,194
<i>Participant costs</i>		
Familiarization costs	\$153,708,962	\$35,186,000
Providing substantiation	\$28,414,341	\$0
Total Quantified Costs	\$236,136,877	\$58,749,158
Net Quantified Benefits	\$83,941,323	\$1,090,099,842

Note: The “Low Net-Benefit Scenario” combines the low-benefits estimate with the high-cost estimate. The “High Net-Benefit Scenario” combines the high-benefits estimate with the low-cost estimate.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. chapter 35, requires Federal agencies to seek and obtain OMB approval before undertaking a collection of information directed to ten or more persons. Under the PRA, a rule creates a “collection of information” when it imposes identical reporting, recordkeeping, or disclosure requirements on ten or more persons.

Under the proposed rule, MLM sellers would be required to retain for at least three years written materials that substantiate each earnings claim made (“recordkeeping requirement”). The proposed rule also requires MLM sellers to provide substantiation upon request (“substantiation requirement”). Also, if the earnings claim is made in a language other than English, the substantiation must be provided in the language in which the claim was made.

The Commission estimates that there are approximately 1,100 MLMs operating in the United States, and that there are 14.6 million participants.³⁰⁰ For purposes of this analysis, the Commission estimates that 100 percent of MLM sellers make earnings claims and are thus subject to the proposed rule’s recordkeeping requirements.³⁰¹

As noted in section VII.C, considerable uncertainty exists with respect to how many costs, if any, MLMs or MLM participants would incur as the result of the proposed rule, including, as relevant here, certain costs relating to retaining and distributing substantiation documents. The Commission has adopted a conservative “high-cost” and “low-cost” scenario that estimates the costs that may be incurred, and is seeking comments and data to help refine this analysis. As discussed in section VII, it is entirely

³⁰⁰ DSA 2022 Overview, *supra* note 11.

³⁰¹ These estimates are based in part on general knowledge of the MLM industry, FTC staff’s review of income disclosure documents, and public resources, such as independent research and analyses conducted by third parties, such as consumer advocates and professors, and industry advocates.

possible that actual costs would be lower or will not exist at all for many covered entities. For purposes of this analysis, the Commission adopts the low-cost scenario for the costs relevant to the Paperwork Reduction Act. The Commission did not identify any unquantifiable costs that would result from the proposed rule. The Commission invites comment and evidence regarding the actual, likely costs of compliance.

MLM One-Time Costs. Some MLMs may incur one-time adjustment costs in response to the new recordkeeping and substantiation provisions. These one-time costs may include training employees, reviewing company earnings claims, preparing substantiation documents for distribution, including the costs of translating the substantiation, if any, updating participant training and promotional materials, and setting up infrastructure to handle substantiation requests and/or to retain substantiation materials. For purposes of this PRA analysis, the Commission estimates that MLMs would spend approximately 101 hours per MLM during the first year on these tasks,³⁰² resulting in a total burden of 111,100 hours (1,100 MLMs × 101 hours = 111,100 hours). A wide range of employees may be involved in implementing the one-time adjustments. To simplify the estimation of labor costs and provide for the most conservative estimate possible, the Commission conservatively uses the estimated average hourly wage for lawyers (\$84.84 per hour).³⁰³ To the extent these obligations are performed by clerical staff, the labor costs would be significantly less. Based on the estimated burden of

³⁰² Training employees (35 hours in low-cost scenario) + Preparing substantiation documents for distribution (including any translation costs) (1 hour in low-cost scenario) + Updating participant training and promotional materials (40 hours in low-cost scenario) + Setting up infrastructure to handle substantiation requests and/or to retain substantiation materials (25 hours in low-cost scenario) = 101 hours.

³⁰³ Bureau of Labor Statistics, May 2023 National Industry-Specific Occupational Employment and Wage Estimates, 23-1011, Lawyers, <https://www.bls.gov/oes/current/oes231011.htm> (mean hourly wage for lawyers).

111,100 hours and using an hourly rate of \$84.84, the associated labor costs would be \$9,425,724.

MLM Recurring Costs (Recordkeeping Requirement): MLMs may have in place existing recordkeeping systems for the storage of documentation they would retain in the ordinary course of business irrespective of the proposed rule's requirements, and many companies may already have surplus space available for storing substantiation records or may be storing these records already. Thus, many companies may face no additional cost to comply with the proposed rule's record retention requirement. As described in section VII, to the extent MLMs need to obtain additional storage capacity to retain the required records, such costs are likely quite low. For purposes of this PRA analysis, this NPRM assumes that companies do not need to purchase any such additional storage capacity.

MLM Recurring Costs (Substantiation Requirements): Estimating the annual cost to MLMs of responding to requests for substantiation involves considerable uncertainty. No single approach appears most likely, and different MLMs are likely to adopt different solutions, depending on their particular situations. The low-cost scenario assumes that MLMs would allocate a half-hour of employee time per week, or 26 hours per year, to maintaining a system for providing substantiation upon request and for keeping an orderly inventory of all substantiation materials for the three-year retention period. This would result in a total burden of 28,600 hours (1,100 MLMs × 26 hour per year = 28,600 hours). Applying the hourly rate of \$50.39 per hour (the 2023 national

average hourly wage for database administrators),³⁰⁴ an MLM would spend \$1,310.14 annually, and the total estimated annual industry labor costs would be \$1,441,154.

MLM Participant One-Time Cost: The Commission expects that MLM participants would familiarize themselves with the proposed rule's requirements through training materials generally offered by MLMs to new recruits. The Commission assumes that participants would be required to familiarize themselves with the proposed requirements only once during their tenure. It is not clear to the Commission whether, in familiarizing themselves with the proposed requirements, MLM participants would incur any additional time burden, because the proposed rule's recordkeeping and substantiation requirements are narrow, straightforward, and closely tied to existing law. As discussed in section VII, under the low-cost scenario, the proposed requirements to provide substantiation upon request and retain the written substantiation materials for three years would be conveyed to new participants through new discussions in place of existing discussions. Therefore, on net, no additional time is required for new participants to familiarize themselves with the policies, procedures, and legal requirements that MLMs choose to present.

As discussed in section VII, the Commission estimates that current participants would spend an average of 10 minutes each becoming familiar with the proposed rule,³⁰⁵ at a rate of \$14.46 per hour,³⁰⁶ resulting in a cost of \$2.41 for each of the 14.6 million estimated participants, for a total cost of \$35,186,000.

³⁰⁴ Bureau of Labor Statistics, May 2023 National Industry-Specific Occupational Employment and Wage Estimates, 15-1242 Database Administrators, <https://www.bls.gov/oes/current/oes151242.htm> (mean hourly wage for database administrators).

³⁰⁵ For some participants, 10 minutes may be a significant overestimate of how long they would need for familiarization. The Commission welcomes comments that provide an empirical basis for revising this assumption.

³⁰⁶ *See supra* section VII.C.2.i.

MLM Participant Recurring Costs (Recordkeeping): As discussed in section VII, the Commission expects the participants' costs of retaining substantiation materials to be *de minimis*.

MLM Participant Recurring Costs (Substantiation): As discussed in more detail in section VII(C)(2), the cost of providing earnings-claim substantiation upon request is likely to vary across MLM participants. In the low-cost scenario, the Commission assumes that providing substantiation upon request imposes *de minimis* costs on participants.

The FTC invites comments on: 1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; 2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; 3) ways to enhance the quality, utility, and clarity of the information to be collected; and 4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

IX. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA),³⁰⁷ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency either to provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed rule, or to certify that the proposed rule will not have a significant economic impact on a substantial number of

³⁰⁷ 5 U.S.C. 601-612.

small entities.³⁰⁸ The Commission does not expect that, if adopted, this proposed rule would have the threshold economic impact on small entities, although it may apply to a substantial number of small entities.

The Commission hereby certifies that, if adopted, the proposed rule will not have a significant economic impact on a substantial number of small entities, and provides notice of that certification to the Small Business Administration. However, the Commission has determined that it is nonetheless appropriate to publish an IRFA in order to inquire into the economic impact of the proposed rule on small entities.

An IRFA is required to contain the following components: 1) a description of the reasons why action by the agency is being considered; 2) a succinct statement of the objectives of, and legal basis for, the proposed rule; 3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; 4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and 5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.³⁰⁹ Many of these components have already been discussed in the context of the Preliminary Regulatory Analysis and/or the PRA Analysis. Where the Commission has already addressed these components,³¹⁰ it incorporates that analysis into its IRFA.³¹¹ The

³⁰⁸ 5 U.S.C. 601-605.

³⁰⁹ See 5 U.S.C. 603(b).

³¹⁰ See discussion *supra* sections I, II, and VII.

³¹¹ See 5 U.S.C. 605(a) (components of IRFA analysis may be performed as part of another required analysis).

remaining requirements are addressed in this section. The Commission invites public comment on the following IRFA.

A. Description and Estimated Number of Small Entities to Which the Proposed Rule Would Apply

The proposed rule imposes affirmative requirements on MLM sellers who make earnings claims. This includes both MLMs and MLM participants. As discussed in section VII we assume that approximately 1,100 MLMs would be covered by the proposed rule, as well as approximately 14,600,000 individual participants.

For purposes of this IRFA analysis, the Commission assumes that all individual MLM participants are small businesses.^{312, 313}

The Commission is unable to determine with precision how many of the approximately 1,100 MLMs are small businesses. Among other things, the definition of small business varies based on the products the MLM sells. For example, a jewelry retailer (NAICS Code 458310) is a small business if its annual receipts are less than \$20.5 million, while a clothing retailer (NAICS Code 458110) is a small business if its annual receipts are less than \$47 million.³¹⁴ Most MLM companies are privately held; many trade in a variety of goods, and few make their revenue information public. As a result, the Commission is unable to locate consistent and reliable revenue information for all known MLMs. Additionally, some MLMs' operations fall under different NAICS

³¹² Under 5 U.S.C. 601, "small business" is defined very broadly, consistent with the Small Business Act, to include any business "independently owned and operated and which is not dominant in its field of operation" and that meets certain size requirements.

³¹³ The Commission recognizes that some have argued that most MLM participants are more akin to independent contractors, and that they are not businesses. Others have argued that many MLM participants join to get discounts or to make friends, and not to pursue a business opportunity. Without expressing a view on this subject, the Commission encourages the submission of comments as to whether MLM participants should be considered small businesses.

³¹⁴ 13 CFR 121.201.

Codes. For example, some MLMs sell both clothing and jewelry, which bear different NAICS Codes. Thus, the Commission is unable to determine with accuracy which NAICS Code each MLM falls under. At the same time, the Commission’s review of publicly accessible information suggests that many MLMs’ annual receipts substantially exceed any of the potentially applicable annual receipt thresholds.³¹⁵ For purposes of this analysis, the Commission assumes that at least some MLMs are small businesses. The Commission encourages the submission of comments containing empirical data that provides a basis for determining the number of MLMs that constitute small businesses.

B. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed rule would require MLM sellers who make earnings claims to retain substantiation for such claims for three years. The proposed rule would also require MLM sellers who make earnings claims to provide, upon request, written substantiation for such claims in the language the claim was made, to anyone who requests it within six months, and to the Commission. The proposed rule’s other requirements prohibit conduct that is already illegal under section 5 of the FTC Act, and so impose no cognizable cost.

As set out in section VII, the Commission has proposed a high-cost scenario and a low-cost scenario when estimating the costs MLM participants may incur if the proposed rule is finalized. The impact of these costs per MLM participant and per MLM are summarized below. MLM participants may incur costs in three different categories. First,

³¹⁵ For example, per 13 CFR 121.201, entities in the “Food (health) supplement store” category (NAICS code 456191) are small businesses if their annual receipts are \$22.5 million or less. Some well-known MLMs that sell nutritional supplements have much higher sales figures. *See, e.g.*, Herbalife 10-K for 2023 (“Herbalife is a global nutrition company Our products are primarily in the categories of weight management, targeted nutrition, and sports nutrition. . . . Net sales were \$5,062.4 million for the year ended December 31, 2023.”); Nature’s Sunshine 10-K for 2023 (“We are a natural health and wellness company primarily engaged in the manufacturing and direct selling of nutritional and personal care products. . . . Consolidated net sales for the year ended December 31, 2023, were \$445.3 million . . .”).

the Commission estimates that MLM participants may have a one-time cost of up to 10 minutes of training regarding the proposed rule's requirements, and the value of that time is estimated to be \$2.41 per participant, which is *de minimis*. Second, MLM participants may need to spend time responding to requests for substantiation. Given current technology, it is likely that the responses will be sent electronically, via email or text. The Commission estimates that this would take approximately 30 seconds per request, and estimates that the 14,600,000 participants, collectively, might need to respond to up to 26,838,235 requests per year. Thus, an individual participant, on average, would need to respond to between 1 and 2 requests for substantiation a year. So, on average, each participant would spend roughly a minute a year responding to requests for substantiation, which is *de minimis*. Finally, MLM participants may need to retain substantiation for earnings claims. The Commission estimates this cost to be *de minimis*. Thus, MLM participants' estimated average cost to comply with the proposed rule is, at most, 10 minutes in the first year (or the first year they are a participant), and about a minute per year thereafter. These costs do not amount to a significant economic impact.³¹⁶

With respect to the 1,100 MLMs, as noted previously herein, the Commission lacks sufficient evidence to determine with precision the number of MLMs that are small businesses. To the extent that any MLM is a small business, this IRFA addresses the

³¹⁶ The very low burden on MLM participants—an initial 10 minutes followed by one minute per year—may be reduced further if the benefits of the proposed rule are taken into account. To the extent the proposed rule results in consumers, including MLM participants, having more accurate information about likely earnings, such consumers are more likely to avoid spending their time on efforts that are not, in their own view, worth the investment. So, for example, to obtain higher income, a consumer might join a different MLM than they otherwise would have.

costs it would incur in complying with the proposed rule and finds that such costs do not constitute a significant economic impact.³¹⁷

As noted in section VII, some MLMs may not need to undertake any of the adjustments contemplated in the Commission's estimates, for example because they already comply with the proposed rule's requirements, and so may face no, or only *de minimis* costs. To the extent firms would face costs, those costs are likely to vary significantly across MLMs, in part because some are much larger than others. The nature of the various costs such MLMs might incur are set out in detail in section VII. As estimated there, an MLM may spend between 111 hours (costing \$9,417) and 285 hours (costing \$24,179) initially, and between 26 hours (costing \$1,310) and 52 hours (costing \$2,620) per year thereafter, or possibly less. These estimates rely on conservative assumptions, and so are likely overestimates of true costs.

Costs to MLMs that are small businesses would likely be lower than those estimates for an additional reason. Given the nature of the tasks, the time necessary to complete them would likely scale with MLM size. That is, smaller MLMs are likely to spend less time on these tasks, as they will have fewer employees and participants to train, fewer ads to review, less complicated policies or procedures to revise and fewer stakeholders to consult regarding revisions, less data to retain, *etc.* The Commission encourages comments that provide data about the costs that will be incurred by MLMs that are small businesses and whether those costs scale based on the size of the MLM business.

³¹⁷ Any costs to comply with legal requirements already in force under section 5 of the FTC Act—such as refraining from making false or unsubstantiated earnings claims—are not considered here.

The Commission is particularly interested in receiving comments that provide data regarding the volume or scale of sales and profits for MLMs that are small businesses. Evidence available to the Commission suggests that the proposed rule's estimated costs are a fraction of a percent of average MLM revenues, and thus would not impose a significant impact if they scale with MLM revenue volume. According to the DSA, in 2022, an estimated 1,100 MLMs generated "\$40.5 billion in retail sales."³¹⁸ The sales revenue received by MLMs is likely somewhat lower. In a survey instrument asking MLMs to report their estimated retail sales, the DSA invites MLMs to calculate that figure using "the DSA standard formula: Net Sales/Revenue divided by 0.75 = Estimated Retail Sales."³¹⁹ Under this approach, total sales revenue received by MLMs would be \$40.5 billion multiplied by 0.75, or \$30.375 billion. This amounts to an average of over \$27.6 million in sales per MLM (\$30.375 billion ÷ 1,100). For comparison, in the first, most expensive year, the average compliance costs (taking the average of the low and high estimates) would be \$18,763.21,³²⁰ which is less than 0.1% of this \$27.6 million annual revenue figure. And the average estimated ongoing annual costs, \$1,965.21,³²¹ would amount to less than 0.01% of annual revenue. Although some costs likely would not fully scale with size, these figures suggest that compliance costs are not likely to impose a significant economic impact on MLMs that are small businesses.

³¹⁸ DSA 2022 Overview, *supra* note 11. As noted previously, the DSA's methodology at arriving at this number is unclear. For the purposes of this exercise, the \$40.5B figure is assumed to reflect the total quantity of products sold by MLMs, valued at the suggested retail price.

³¹⁹ DSA 2021 Growth & Outlook Survey, Questionnaire (Jan. 15, 2021), <https://www.dsa.org/docs/default-source/research/2021-us-growth-and-outlook-questionnaire.pdf>.

³²⁰ The high estimates of \$24,179 in one-time costs and \$2,620.28 in annual costs sum to \$26,799.28. The low estimates of \$9,417 in one-time costs and \$1,310.14 in annual costs sum to \$10,727.14. The average of these two sums is \$18,763.21.

³²¹ The high estimate is \$2,620.28 and the low estimate is \$1,310.14. The average of these two figures is \$1,965.21.

Even if costs did not scale at all, they would not impose a significant economic impact on much of the small business space. For example, the low-cost estimate for the first year, when costs are highest, is \$10,727.14 (\$9,417 + \$1,310.14)—for MLMs with even \$1 million in revenue, these costs would be less than 1.1% of revenue.³²² Thus, even if compliance costs did not scale down below the low estimate, they still would not impose a significant economic impact on such entities. It is not clear how many MLMs have annual revenue of less than \$1 million. For example, a recently created MLM, New U Life, reportedly garnered “approximately \$60 million in sales” in its first year of operation.³²³

Regardless, because these cost estimates are conservative and because much of the costs are likely to scale with MLM size, the proposed rule is unlikely to impose a significant economic impact on MLMs that are small businesses.

Finally, any deterrent effect of the proposed rule could provide competitive benefits to MLMs that do not use deceptive earnings claims, which might help to offset their compliance costs. To the extent the proposed rule deters competitors from using false or unsubstantiated earnings claims to attract participants, it reduces the attractiveness of such MLMs as alternatives to an MLM that does not use deceptive earnings claims. If truthful MLMs are thereby able to recruit more participants, this may increase their sales and thus their profits. Garnering even a small number of additional participants could measurably offset the estimated compliance costs. As previously noted,

³²² The low-end estimate is appropriate given that costs are likely to scale with size to at least some extent. Even if one uses the high estimate (\$24,179 + \$2,620.28 = \$26,799.28 per company), costs are less than 1% of revenue for MLMs with over approximately \$2.7 million in revenue.

³²³ Courtney Roush, *New U Life: From Local Shop to Global Brand*, Direct Selling News (Oct. 1, 2020) <https://www.directsellingnews.com/2020/10/01/new-u-life-from-local-shop-to-global-brand/>.

the Commission lacks sufficient evidence to quantify the potential competitive benefits to MLMs of the proposed rule's deterrent effect, and encourages comments that provide empirical data that would assist the Commission in doing so.

Accordingly, the Commission concludes that the proposed rule would not impose a significant economic impact on small businesses. The Commission encourages the submission of comments containing empirical data on the compliance costs that the proposed rule, if adopted, would impose on MLM participants and MLMs.

C. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any Federal rules that conflict with the proposed rule. As discussed in section III, with very limited exceptions, the proposed rule simply codifies MLM sellers' existing obligations under the FTC Act with regard to earnings claims. In addition, earnings claims by certain MLM sellers currently may be covered by the Business Opportunity Rule, 16 CFR Part 437.³²⁴ Further, to the extent that MLM sellers may market by telephone, some conduct covered by the proposed rule may also be covered by the Telemarketing Sales Rule, 16 CFR Part 310.

The Commission has not identified any conflict arising from complying with these rules and the proposed rule. The Commission encourages the public to submit comments on any potentially duplicative, overlapping, or conflicting Federal statutes, rules, or policies.

D. Discussion of Significant Alternatives

³²⁴ As noted in section III.L, the Commission intends to exempt MLM sellers from the Business Opportunity Rule if the proposed Earnings Claim Rule Regarding Multi-Level Marketing is finalized and § 462.2 and § 462.3(a) of the Rule are in effect.

The proposed rule's disclosure and recordkeeping requirements are designed to impose the minimum burden on all affected MLMs, regardless of size. The Commission has taken significant steps to minimize the burdens the proposed rule would impose on large and small businesses. The Commission has employed specific prohibitions in place of affirmative disclosures whenever possible. In particular, the Commission is not proposing to require that MLMs provide the detailed disclosure document required in the Business Opportunity Rule.³²⁵ Moreover, because some MLMs covered by the proposed rule may currently be required to comply with the Commission's Business Opportunity Rule,³²⁶ the Commission anticipates that the proposed rule will drastically reduce the compliance costs of such MLMs, while imposing modest ongoing compliance costs on all covered MLM sellers. For example, the proposed rule will reduce uncertainty and compliance costs with respect to whether an MLM is covered by the Business Opportunity Rule. And at least some MLMs will no longer have to incur costs to prepare and provide the detailed Business Opportunity Rule disclosure documents.

The Commission considered several alternatives to the proposed rule, including terminating the rulemaking and pursuing narrower rule alternatives. One potentially reasonable alternative to the proposed rule is to terminate the rulemaking and rely instead on the existing tools that the Commission currently possesses to combat deceptive earnings claims, such as law enforcement and consumer education. Termination of the rulemaking would preserve some Commission resources. But, it would undermine the

³²⁵ See 16 CFR Part 437. The Commission is seeking comment in the 2025 ANPR about whether some or all MLMs should be required to provide a limited disclosure regarding income to participants or potential participants.

³²⁶ For example, in *Digital Income System*, the Commission alleged that the defendants, one of whom was structured as an MLM, violated the Business Opportunity Rule. *FTC v. Digital Income System, Inc.*, No. 1:20-cv-24721 (S.D. Fla. 2020).

very purpose of the rulemaking—namely to restore the Commission’s ability to obtain monetary relief for injured consumers and through the availability of civil penalties, provide deterrence against deceptive earnings claims.

Other potential reasonable alternatives to the proposed rule could involve narrowing the proposed rule’s scope. For example, the proposed rule could omit the recordkeeping requirement or the requirement that sellers provide substantiation to the government or to the public. Such changes could lower the compliance costs borne by small businesses with smaller profit margins. On the other hand, removing these requirements could significantly diminish the benefits to consumers from the proposed rule described in section VII.B.2, by reducing the availability of substantiation for earnings claims. Such changes would be likely to increase the cost and difficulty of enforcing the proposed rule, which could significantly reduce its deterrent effect. Additionally, if consumers do not have access to accurate data about their likely earnings, they are not able to make an informed choice about whether to invest time and money to join an MLM. In the Commission’s view, the disclosure and recordkeeping requirements of the final Rule are the minimum necessary to give consumers the information they need to protect themselves and permit effective enforcement of the Rule.

In addition, the proposed rule could have been subject to further narrowing principles, such as exempting small businesses from the record-keeping and substantiation requirements. This could provide the benefit of avoiding compliance costs borne by small businesses with smaller profit margins that might cause them to be impacted disproportionately by the proposed rule. On the other hand, exempting small businesses might impose more uncertainty and compliance costs for businesses, as it

would require them to determine whether they qualified for the exemption. As described in section VIII, narrowing the scope of the proposed rule in this way could also significantly reduce the consumer benefits from the Rule.

The Commission does not have the data to prepare a quantitative analysis of the other alternatives discussed in this section. The final regulatory analysis may include additional quantification of alternative proposals if the Commission receives data and relevant information in response to the questions for public comment in section V.

In sum, the significant alternatives discussed here would not sufficiently accomplish the Commission's objectives. The Commission seeks comment on these alternatives and any other potentially reasonable alternatives. While there may be other alternatives that could potentially accomplish the stated objectives, the Commission would benefit from additional data to conduct preliminary analyses of projected benefits and adverse economic effects. Therefore, the Commission seeks comment on whether there are other potentially reasonable alternatives, including any relevant sources of data that reflect the costs and benefits of such alternatives.

X. Communications by Outside Parties to the Commissioners or Their Advisors

Pursuant to Commission Rule 1.18(c)(1), 16 CFR 1.18(c)(1), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor shall be subject to the following treatment. Written communications and summaries or transcripts of oral communications shall be placed on the rulemaking record if the communication is received before the end of the comment period. They shall be placed on the public record if the communication is received later. Unless the outside party making an oral

communication is a member of Congress, such communications are permitted only if advance notice is published in the Weekly Calendar and Notice of “Sunshine” Meetings.³²⁷

List of Subjects in 16 CFR Parts 437 and 462

- Advertising
- Business and industry
- Reporting and recordkeeping requirements
- Trade practices

Accordingly, the Federal Trade Commission proposes to amend 16 CFR chapter I to read as follows:

Part 437 Business Opportunity Rule

1. The authority citation of part 437 continues to read as follows:

Authority: 15 U.S.C. 41-58

2. Revise § 437.8 to read as follows:

§ 437.8 Exemptions.

- a. The provisions of this part shall not apply to any business opportunity that constitutes a “franchise,” as defined in the Franchise Rule, part 436 of this chapter; provided, however, that the provisions of this part shall apply to any such franchise if it is exempted from the provisions of part 436 of this chapter because, either:

- (1) Under § 436.8(a)(1) of this chapter, the total of the required payments or commitments to make a required payment, to the franchisor or an

³²⁷ See 15 U.S.C. 57a(i)(2)(A); 16 CFR 1.18(c).

affiliate that are made any time from before to within six months after commencing operation of the franchisee's business is less than \$500, or
(2) Under § 436.8(a)(7) of this chapter, there is no written document describing any material term or aspect of the relationship or arrangement.

- b. The provisions of this part shall not apply to any seller's activities in connection with multi-level marketing, provided that the seller both:
- (1) Constitutes a multi-level marketing program seller as defined in the Earnings Claims Rule Regarding Multi-Level Marketing, part 462 of this chapter; and
 - (2) Must comply with both § 462.2 of this chapter, requiring sellers to possess and disclose substantiation for their earnings claims, and § 462.3(a) of this chapter, prohibiting sellers from making a false or misleading earnings claim.

3. Add part 462, to read as follows:

Part 462 Earnings Claim Rule Regarding Multi-Level Marketing

Sec.

462.1 Definitions.

462.2 Substantiation of Earnings Claims.

462.3 Other Prohibited Practices.

462.4 Providing Means and Instrumentalities.

462.5 Record Retention.

462.6 Earnings Claims in Languages Other than English

462.7 Other Provisions.

Authority: 15 U.S.C. 41-58.

§ 462.1 Definitions.

As used in this part:

DOWNLINE DEFINITION ALTERNATIVE A

Downline means the collection of persons under a participant in the MLM's organizational hierarchy or structure used for determining compensation. This may include the participants or other individuals whom a participant has personally recruited ("first level"), any participants and other individuals recruited by those in the first level ("second level"), any participants and other individuals recruited by those in the second level ("third level"), and so forth, however denominated.

DOWNLINE DEFINITION ALTERNATIVE B

Downline means the collection of persons a participant recruits or that are otherwise placed under them in the MLM's organizational hierarchy, including the collection of persons the recruited individuals recruit, and so on.

Earnings means gross or net sales, income, profit, appreciation, or other financial gain.

Earnings Claim means any oral, written, or visual representation that conveys, expressly or by implication, a level or range of actual or potential earnings.

Earnings claims include, but are not limited to:

- (1) Any chart, table, or mathematical calculation that demonstrates possible earnings based upon a combination of variables;

(2) Any statements or images from which a prospective participant can reasonably infer that he or she will earn a minimum level of earnings or achieve a material lifestyle change; and

(3) Any representations by participants or other persons regarding their earnings.

Material means likely to affect a person's choice of, or conduct regarding, goods or services.

MULTI-LEVEL MARKETING DEFINITION ALTERNATIVE A

Multi-Level Marketing Program or *MLM* means any plan, program, or business that sells products, services, or other property and offers participants the right to both:

- (i) Recruit others into the plan, program, or business, and
- (ii) Receive payment or other compensation that is based, in whole or in part, upon purchases, sales, or any other activities of participants in the participant's downline whom the participant did not recruit.

For the purpose of this definition, a person is deemed to be recruited by at most one other participant.

MULTI-LEVEL MARKETING DEFINITION ALTERNATIVE B

Multi-Level Marketing Program or *MLM* means any plan, program, or business that sells products, services, or other property and offers participants the right to both:

- (i) Recruit others into the plan, program, or business or have others placed in the participant's downline, and

(ii) Receive payment or other compensation that is based, in whole or in part, upon purchases, sales, or any other activities of people in the participant's downline.

For the purpose of this definition, "Multi-Level Marketing Program" does not include any plan, program, or business in which participant compensation is only based on the participant's purchases, sales, or any other activities and the purchases, sales, or any other activities of people the participant directly recruits. For purposes of this definition, a person is deemed to be recruited by at most one other participant.

MULTI-LEVEL MARKETING DEFINITION ALTERNATIVE C

Multi-Level Marketing Program or *MLM* means any plan, program, or business that sells products, services, or other property and offers participants the right to both:

- (i) Recruit new participants, and
- (ii) Receive payment or other compensation that is based, in whole or in part, upon purchases, sales, or any other activities of any other participant recruited by any other participant.

For the purpose of this definition, a person is deemed to be recruited by at most one other participant.

Participant means a person who has the right to both:

- (1) Recruit others into the multi-level marketing program or have others placed in the person's downline and

(2) Receive payment or other compensation that is based, in whole or in part, upon purchases, sales, recruiting, or any other activities of the person's downline.

Person means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

Seller means a multi-level marketing program, a participant, an agent of the MLM, or representative of the MLM who offers, advertises, markets, or promotes the MLM.

§ 462.2 Substantiation of Earnings Claims.

- a. In connection with the advertising, marketing, promotion, or offering of any multi-level marketing program, it is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the FTC Act for a seller, directly or indirectly, to make any earnings claim, unless the seller:
 - (1) Has a reasonable basis for the earnings claim at the time the claim is made; and
 - (2) Has in its possession written materials that substantiate the earnings claim at the time the claim is made.

- b. The seller must make the written substantiation available upon request to both:
 - (1) The Commission, as set forth in § 462.5; and

ALTERNATIVE 1

 - (2) To anyone within six months of the date the claim is made.

ALTERNATIVE 2

 - (2) To any actual or potential recruit.

§ 462.3 Other Prohibited Practices.

In connection with the advertising, marketing, promotion, or offering of any multi-level marketing program, it is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the FTC Act for any seller, directly or indirectly, expressly or by implication, to:

- a. Make a false or misleading earnings claim;
- b. Make any misrepresentation or unsubstantiated claim to alter, contradict, prevent from being conveyed, or dispel the meaning of any truthful information regarding the likelihood of earnings or any amount of earnings;
- c. Misrepresent a multi-level marketing program as an employment opportunity.

§ 462.4 Providing Means and Instrumentalities.

It is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the FTC Act for any person to, directly or indirectly, furnish, provide, or otherwise make available to a participant materials or information to be used in recruiting new participants that contains false, misleading, or unsubstantiated earnings claims.

§ 462.5 Record Retention.

To prevent the unfair or deceptive acts or practices specified in this part, sellers must prepare, retain, and make available for inspection by Commission officials, for a period of three years, copies of all substantiation upon which the seller relied for any earnings claim relating to the multi-level marketing program from the time each such claim is made.

§ 462.6 Earnings Claims in languages other than English.

To prevent the unfair or deceptive acts or practices specified in this part, if a seller makes an earnings claim and provides material information about that earnings claim, including any substantiation, the seller must provide that material information about the earnings claim, including any substantiation, in the language in which the earnings claim is made.

§ 462.7 Other Provisions.

- a. **Severability.** The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.
- b. **Preemption.** The FTC does not intend to preempt any state or local laws except to the extent to the extent of any conflict with this part. A law is not in conflict with this part if it affords participants, prospective participants, or other individuals equal or greater protection, such as specific disclosures or registration of disclosure documents.

By direction of the Commission, Commissioners Holyoak and Ferguson dissenting.

April J. Tabor,
Secretary