

FEDERAL TRADE COMMISSION

16 CFR Part 437

RIN 3084-AB04

Business Opportunity Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) seeks public comment on proposed amendments to the Business Opportunity Rule (“Rule”). The proposed amendments would expand the Rule to cover money-making opportunities, such as business coaching and investment opportunities, and require such opportunities to comply with the prohibitions on material misrepresentations and the Rule’s recordkeeping and substantiation requirements. The amendments would also clarify the scope of the Rule’s provisions relating to earnings claims by adding a definition of “earnings,” and by revising the definition of “earnings claims” and the prohibition on deceptive earnings claims, and would re-title the rule to reflect its revised scope. The changes are necessary to protect consumers from deceptive marketing of money-making opportunities.

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 “Business Opportunity Rule – Rulemaking,

Project No. Project No. R511993” on your comment, and file your comment online at <https://www.regulations.gov>, by following the instructions on the web-based form. 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: Christine M. Todaro, (202) 326-3711, ctodaro@ftc.gov, or Andrew Hudson, (202) 326-2213, ahudson@ftc.gov, Bureau of Consumer Protection, Federal Trade Commission.

SUPPLEMENTARY INFORMATION:

The Commission is publishing this notice of proposed rulemaking (“NPRM”) pursuant to section 18 of the FTC Act, 15 U.S.C. 57a, and part 1, subpart B, of the Commission’s Rules of Practice, 16 CFR 1.7–1.20. This authority permits the Commission to promulgate, modify, and repeal 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 Commission invites interested parties to submit data, views, and arguments on the proposed amendments to the 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 proposes 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 a 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

In 1978, the Commission promulgated a Trade Regulation Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (the "Original Franchise Rule"), to address deceptive and unfair practices in the sale of franchises and business opportunity ventures. 43 FR 59614 (Dec. 21, 1978). That rule covered the sale of both franchises and business opportunities.¹ Business opportunities often do not involve a trademark, and purchasers carrying on the business opportunity may have a substantially more distant relationship to the seller than

¹ A key distinction between the two categories is that franchisees sell goods or services that are associated with the franchisor's trademark, and are subject to significant control by, or receive significant assistance from, the franchisor. Disclosure Requirement and Prohibitions Concerning Business Opportunities: Final Rule, Amendments and Statement of Basis and Purpose, 76 FR 76816, 76816 (Dec. 8, 2011).

franchisees do with their franchisor. Based upon the original rulemaking record, the Commission found that unfair and deceptive practices were widespread in the sale of franchises and business opportunities, causing serious economic harm to consumers, and adopted a rule to prevent unfair and deceptive practices through requiring extensive pre-sale disclosures.²

In 1997, as part of a rule review, the Commission issued an advance notice of proposed rulemaking (“ANPR”) seeking comment on, among other things, whether business opportunities and franchises ought to be separated, and different disclosure requirements imposed on the two different categories.³ Commenters overwhelmingly favored such a separation, and the Commission initiated a rulemaking to establish separate regulations for the sale of business opportunities and franchises.⁴ In 2007, the Commission finalized the Amended Franchise Rule, which did not cover business opportunities.⁵ At the same time, the Commission published a separate “Business Opportunity Rule,” based on the Original Franchise Rule but with provisions relating to franchises removed.⁶ On March 1, 2012, an Amended Business Opportunity Rule (“the Rule”) took effect, which, among other things, expanded the types of covered business opportunities and simplified and streamlined the disclosures sellers must provide to prospective business opportunity purchasers.⁷

² 43 FR 59614, 59625 & 59627–39.

³ 62 FR 9115 (Feb. 28, 1997).

⁴ 64 FR 57296 (Oct. 22, 1999).

⁵ 72 FR 15444 (Mar. 30, 2007).

⁶ 72 FR 15444 (Mar. 30, 2007).

⁷ Disclosure Requirement and Prohibitions Concerning Business Opportunities: Final Rule, Amendments and Statement of Basis and Purpose, 76 FR 76816 (Dec. 8, 2011).

The Rule covers certain defined business opportunities, and regulates the marketing, offering, and sale of such opportunities.⁸ 16 CFR part 437. Under the Rule, sellers of covered opportunities must provide pre-sale disclosures of certain key information, including substantiation for any earnings claims made to prospective purchasers, and must maintain various records for a period of years, including any such substantiation. The Rule also prohibits sellers from making various misrepresentations to prospective purchasers, including as to sales or earnings.

The Commission has repeatedly challenged misleading earnings claims, whether covered by the Rule or not. For example, the FTC has brought cases under section 5 of the FTC Act, 15 U.S.C. 45, against business coaching and work-from-home programs, investment coaching programs, and e-commerce opportunities.⁹ Since the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*, which held that section 13(b) of the FTC Act does not authorize equitable monetary relief, the Rule has enabled the Commission to seek redress and meaningful penalties against sellers who violate it.¹⁰

⁸ Specifically, to be covered, the seller must represent “that the seller or one or more designated persons will: (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices, owned, leased, controlled, or paid for by the purchaser; or (ii) Provide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser’s goods or services; or (iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser’s home.” 16 CFR 437.1(c)(3).

⁹ See Advance Notice of Proposed Rulemaking Concerning Deceptive or Unfair Earnings Claims, 87 FR 13951, 13952 n.16 (Mar. 11, 2022).

¹⁰ *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67 (2021). For decades, section 13(b) had been the basis of most monetary relief obtained by the Commission, resulting in billions of dollars in refunds to affected consumers. See Press Release, Federal Trade Commission, FTC Asks Congress to Pass Legislation Reviving the Agency’s Authority to Return Money to Consumers Harmed by Law Violations and Keep Illegal Conduct from Reoccurring (Apr. 27, 2021), available at <https://www.ftc.gov/news-events/news/press-releases/2021/04/ftc-asks-congress-pass-legislation-reviving-agencys-authority-return-money-consumers-harmed-law>. See, e.g., *FTC v. DK Automation LLC*, No. 1:22-cv-23760 (Nov. 16, 2022) (complaint with Rule violation and other counts led to stipulated judgment for over \$52 million, partially

Despite the Commission’s aggressive enforcement program, deceptive earnings claims continue to proliferate in the marketplace, and many of them may not be covered by the Rule.¹¹ Where deceptive claims do not violate a rule, the *AMG* decision significantly impedes the Commission’s ability to get money back to consumers harmed by the deception.¹²

In February 2022, the Commission issued an advance notice of proposed rulemaking regarding earnings claims (“Earnings Claims ANPR”), seeking comment on whether the Commission should promulgate a new rule addressing the use of deceptive earnings claims.¹³ The Earnings Claims ANPR described the Commission’s history of taking law enforcement action against and educating consumers about deceptive earnings claims,¹⁴ and it asked a series of questions to inform the Commission’s determination about whether and how to address such practices in a rule.¹⁵ The Commission took comment for 60 days, and it received over 1,575 unique comments, which it has thoroughly considered.

On November 17, 2022, in furtherance of its ten-year regulatory review, the Commission issued an advance notice of proposed rulemaking regarding the Business

suspended based on ability to pay); *FTC v. Vision Online, Inc., et al.*, No. 6:23-cv-1041 (M.D. Fla. June 5, 2023) (complaint with Rule violation and other counts, alleging tens of millions of dollars in consumer injury); *FTC v. Automators LLC et al.*, No. 3:23-cv-1444 (S.D. Cal. Aug. 8, 2023) (complaint with Rule violation and other counts, alleging over \$22 million in consumer injury).

¹¹ See, e.g., *FTC v. BINT Operations LLC*, No. 4:21-cv-518 (E.D. Ark. 2021); *FTC v. OTA Franchise Corp.*, No. 8:20-cv-287 (C.D. Cal. 2020); *FTC v. Ragingbull.com, LLC*, No. 1:20-cv-3538 (D. Md. 2020); *FTC v. Moda Latina BZ Inc.*, No. 2:20-cv-10832 (C.D. Cal. 2020); *FTC v. Thrive Learning LLC*, No. 2:17-cv-529 (D. Utah 2017); see also cases cited in Earnings Claims ANPR, 87 FR at 13953 nn. 23–33.

¹² See section III.A, *infra*.

¹³ Advance Notice of Proposed Rulemaking Concerning Deceptive or Unfair Earnings Claims, 87 FR 13951 (Mar. 11, 2022).

¹⁴ Earnings Claims ANPR, 87 FR at 13951–53.

¹⁵ *Id.* at 13955–56.

Opportunity Rule (“Business Opportunity Rule ANPR”), seeking comment on whether the Rule should be modified in any way, and in particular whether it should be expanded to include business opportunities and other money-making opportunity programs not currently covered by the Rule, including business coaching and work-from-home programs, investment coaching programs, and e-commerce opportunities.¹⁶ The Commission took comment for 67 days, and it received more than 30 unique comments, which it has thoroughly considered.¹⁷

This notice of proposed rulemaking (“NPRM”) summarizes the comments received in response to the Business Opportunity Rule ANPR and relevant comments received in response to the Earnings Claims ANPR, and explains why the Commission continues to believe that the Business Opportunity Rule is necessary. It also explains why the Commission is proposing certain amendments to the Rule and seeks additional comment on certain questions. Finally, the NPRM sets forth the Commission’s regulatory analyses under section 22 of the FTC Act, as well as the Regulatory Flexibility and Paperwork Reduction Acts, as well as the proposed regulatory text.

II. Overview of Comments

¹⁶ Business Opportunity Rule, Advance Notice of Proposed Rulemaking, 87 FR 72428 (Nov. 25, 2022).

¹⁷ In the Business Opportunity Rule ANPR, the Commission stated that in addition to comments submitted in response to that ANPR, the Commission “will also consider any comments previously submitted in response to the Advance Notice of Proposed Rulemaking Concerning Deceptive or Unfair Earnings Claims.” Thus, some commenters may not have submitted a comment in response to the Business Opportunity Rule ANPR because they had submitted one in response to the Earnings Claims ANPR. For this reason, as addressed below, the Commission considers all of the comments from both ANPRs.

A. Comments Regarding the Rule’s Existing Requirements

The Commission received comments in response to the Business Opportunity Rule ANPR from a variety of individuals and entities, including consumers, businesses, consumer groups, industry groups, and elected representatives.

None of the commenters argue that the Rule should be repealed. A few commenters propose possible revisions to the manner in which the Rule applies to currently covered entities, but none provided evidence to show how the proposed changes would improve the Rule.¹⁸

B. Comments Regarding Expanding the Rule’s Coverage

The Business Opportunity Rule ANPR specifically asked for comment on whether the Rule should be expanded, including in the manner contemplated in this NPRM.¹⁹ In response, a number of commenters support additional regulation in this area.²⁰ One commenter argues that the Rule’s coverage should be expanded, pointing to FTC reports and enforcement actions, as well as news articles and other sources, to show that a variety of schemes that fall outside the current Rule’s coverage are using deceptive earnings claims that injure and defraud consumers.²¹

¹⁸ See, e.g., Business Opportunity Rule ANPR Comment No. 32 & 37 (D. Brooks) (proposing specific amendments to the Rule, including expanding required disclosures to include the business experience of a covered entity’s officers). Among other things, one commenter suggests that violators face jail time. Business Opportunity Rule ANPR Comment No. 5 (Anonymous). The Commission lacks authority to impose criminal penalties.

¹⁹ Business Opportunity Rule ANPR, 87 FR at 72430–31 (Questions 9 & 13).

²⁰ See, e.g., Business Opportunity Rule ANPR Comment No. 9 (N. Krofta) (“I very much like these amendments to the the rule. [sic] Business need to be regulated better so they can play fairly.”); Business Opportunity Rule ANPR Comment No. 4 (Be Understood Branding) (“[E]xtend the disclosure requirements to MLMs and ANY other business promising lucrative income based on a program or product they sell.”); Business Opportunity Rule ANPR Comment No. 8 (Anonymous) (“[T]his is a good idea. There are too many scams on the Internet.”)

²¹ Business Opportunity Rule ANPR Comment No. 35 (Consumer Federation of America) at 3–8; see also Business Opportunity Rule ANPR Comment No. 4 (Be Understood Branding) (describing deceptive earnings claims for business coaching).

A few commenters argue that additional regulation is unnecessary²² or inappropriate for certain industries.²³ For example, the U.S. Chamber of Commerce (“the Chamber”) suggests that consumers will not be misled about earnings because they can find the truth for themselves online, or because they know someone who has “encounter[ed] these opportunities.”²⁴ But it is neither fair nor consistent with existing law to put the onus on consumers to uncover deception, including by relying on third parties’ assistance in that effort, as the Chamber suggests.²⁵ Even were this otherwise, the Chamber’s comment provides no evidence to support its factual claim. To the contrary, the Commission continues to see and charge numerous entities—often of substantial scale—with making misleading earnings claims to sell goods or services to consumers, resulting in significant consumer harm.²⁶ Multiple comments received in response to both

²² See, e.g., Earnings Claims ANPR Comment No. 1579 (Chamber of Commerce). At least one comment cautioned the Commission to ensure that any changes not overlap with or duplicate the efforts of the rule contemplated in the Earnings Claims ANPR. See, e.g., Business Opportunity Rule ANPR Comment No. 34 (Reps. Hudson, Veasey, & Walburg) (advising FTC to “avoid duplications or overlaps”). As discussed below and in the Commission’s Earnings Claim Rule Regarding Multi-Level Marketing NPRM (“ECR NPRM”) (published elsewhere in this issue of the *Federal Register*), the Commission believes it best to proceed with two complementary rules with distinct coverage. The Commission believes this approach avoids the pitfalls that concern the commenters.

²³ One commenter notes that it is unnecessary to distinguish between so-called “e-commerce” opportunities and other business or money-making opportunities, and argues that internet-based schemes are already covered by the Rule where they meet its definition. Business Opportunity Rule ANPR Comment No. 19 (Computer & Communications Industry Association). The Commission agrees and sees no reason for the Rule to treat internet-based opportunities differently from non-internet-based opportunities. This NPRM does not propose doing so. As discussed below, some commenters argued that certain industries should be excluded from Rule coverage.

²⁴ For example, the Chamber refers to what it calls “the prevalence of well-funded, well-informed consumer advocate groups” but does not identify any, or offer any evidence that such groups’ work prevents consumers from being misled. Earnings Claims ANPR Comment No. 1579 (Chamber of Commerce) at 3; see also Business Opportunity Rule ANPR Comment No. 33 (Chamber of Commerce) (incorporating by reference all arguments from its ECR Comment).

²⁵ “*Caveat emptor* is not the law....” *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1233 (11th Cir. 2014).

²⁶ See, e.g., Complaint, *FTC v. Warrior Trading, Inc.*, No. 3:22-cv-30048 (D. Mass. April 19, 2022) (tens of millions of dollars in alleged injury); Complaint, *FTC v. Raging Bull.com*, No. 1:20-cv-3538 (D. Md. Dec. 7, 2020) (over \$137 million in alleged injury); Complaint, *FTC v. OTA Franchise Corp.*, No. 8:20-cv-

the Business Opportunity Rule ANPR and the Earnings Claims ANPR confirm that false and atypical earnings claims deceive many consumers and cause substantial harm.²⁷

Most of the comments in response to both ANPRs were devoted to the subject of multi-level marketing (MLM) and whether the Commission should issue rule provisions that would specifically regulate the marketing of MLM opportunities, or that would apply the Business Opportunity Rule's existing requirements to the industry.²⁸ Some comments addressed other particular industries (including the gig economy, financial publishers, and institutions of higher education). The Commission has carefully considered these industry-specific comments submitted in response to both ANPRs, and addresses them as follows.

1. Multi-Level Marketing

Hundreds of commenters report the use of deceptive earnings claims and related misrepresentations to promote MLM opportunities, including reporting the serious harm

00287 (C.D. Cal. Feb. 12, 2020) (over \$370 million in alleged injury); Complaint, *FTC v. Zurixx, LLC*, No. 2:19-cv-0713 (D. Utah Sept. 30, 2019) (over \$530 million in alleged injury); Complaint, *FTC v. Nudge, LLC*, No. 2:19-cv-0867 (D. Utah Nov. 5, 2019) (over \$400 million in alleged injury); Order, *FTC v. MOBE Ltd.*, No. 6:18-cv-0862 (M.D. Fla. Dec. 6, 2018) (monetary judgment for over \$318 million).

²⁷ See, e.g., comments cited in ECR NPRM, section II.C.1, published elsewhere in this issue of the *Federal Register*. Empirical evidence demonstrates that the mere availability, somewhere, of pertinent information does not ensure that consumers will consider it, further refuting the Chamber's hypothesis. See, e.g., Mark Egan, Gregor Matvos, and Amit Seru, The Market for Financial Adviser Misconduct, 127 J. Pol. Econ. 233 (2019) (even in the marketplace for financial advice regulated by the SEC, where adviser misconduct such as misrepresentation and fraud must be reported and is publicly available on the internet, consumers continue to patronize advisers with a documented history of serial misconduct); Shaton, Maya, "The Display of Information and Household Investment Behavior," Finance and Economics Discussion Series 2017-043, Federal Reserve Board (2017), available at <https://doi.org/10.17016/FEDS.2017.043> (consumers choose different mutual funds depending on whether 1-month or 12-month performance was prominently displayed, even though the same set of information was available in both cases, demonstrating that consumers' reliance on data in decision-making turns on how readily accessible the data is).

²⁸ See, e.g., Business Opportunity Rule ANPR Comment No. 29 (Direct Selling Association) (opposing regulation of the MLM industry); Business Opportunity Rule ANPR Comment No. 26 (Truth in Advertising, Inc.) (supporting regulation of the MLM industry).

such deception caused to themselves, friends, and loved ones.²⁹ Many commenters urge the Commission to regulate MLMs, either under the Business Opportunity Rule or a new rule.³⁰ The Commission previously considered whether to regulate MLMs under the Business Opportunity Rule, but ultimately drafted the Rule to “avoid[] broadly sweeping in MLMs.”³¹ Among other reasons, evidence received at the time suggested that the remedial provisions in the Rule were not well-suited to addressing deceptive earnings claims in the MLM industry.³² At the same time, it is plain that the concerns that motivated the Commission to consider covering MLMs under the Rule over a decade ago have not diminished. As set out in the NPRM for the Earnings Claim Rule Regarding Multi-Level Marketing (“ECR NPRM”), published elsewhere in this issue of the *Federal Register*, the Commission is considering a separate rule regarding the use of deceptive earnings claims in the marketing of MLM opportunities. Accordingly, the proposed revisions to the Rule contained in this NPRM would not apply to MLMs.³³

2. Gig Economy

At least one commenter reports the use of misleading earnings claims in the gig economy.³⁴ The Commission takes such reports seriously. The already widespread and

²⁹ See, e.g., comments cited in ECR NPRM, nn. 34–68, published elsewhere in this issue of the *Federal Register*.

³⁰ See, e.g., Earnings Claims ANPR Comment No. 20-1574 (D. Brooks).

³¹ Final Rule, 76 FR 76816, 76820 (Dec. 8, 2011). The existing 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).

³² Business Opportunity Rule, Revised Notice of Proposed Rulemaking, 73 FR 16110, 16119–21 (Mar. 26, 2008).

³³ The revisions do not alter the application of the Rule’s current provisions to MLMs. MLMs that meet the definition of “business opportunity” would continue to be covered under the Rule’s current provisions. See *n.* 72 and accompanying text, *infra*.

³⁴ See, e.g., Earnings Claims ANPR Comment No. 20-1543 (National Consumers League & Consumer Federation of America) at 6–7.

increasing trend of gig work means that deceptive practices, especially by major market participants, could impact large numbers of consumers nationwide. And the Commission has taken action against companies offering gig opportunities for making misleading claims regarding earnings, including for violating the Business Opportunity Rule.³⁵ Based on the record developed thus far, this NPRM does not propose extending the Rule to explicitly encompass all gig opportunities. Instead, under the NPRM’s approach, some gig enterprises may constitute business or money-making opportunities based on the specific facts of their business model, and some may not.

Nonetheless, the Commission continues to monitor developments in this expanding sector of the economy, and stands ready to take appropriate action—be it enforcement or further rulemaking—as the evidence may warrant.³⁶

3. Financial Publishers

At least one commenter, the Financial Publishers and Media Alliance (FPMA), argues that any change to the scope of regulation should not encompass “financial publishers,” by which it appears to mean businesses that sell investment advice or recommendations, but which are not regulated as brokers or advisors by a different

³⁵ See, e.g., *FTC v. Arise Virtual Solutions, Inc.*, No. 0:24-cv-61152 (S.D. Fla. 2024); *FTC v. Care.com, Inc.*, No. 1:24-cv-987 (W.D. Tex. 2024); *FTC v. Lyft, Inc.*, No. 3:24-cv-7443 (N.D. Cal. 2024); *In the Matter of Amazon.com, Inc.*, No. 1923123 (2021); *FTC v. Uber Technologies, Inc.*, No. 3:17-cv-0261 (N.D. Cal. 2017).

³⁶ Some commenters raise arguments against regulation of “gig” work. For example, the Chamber of Commerce argues that most gig workers have a favorable opinion of their working arrangements. See Earnings claims ANPR Comment No. 20-1579 (Chamber of Commerce) at 2. But the existence of satisfied workers—even many satisfied workers—does not show that there is no deception. *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) (“The FTC [is] not required to show that all consumers were deceived.”); *FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1206 n.8 (10th Cir. 2005) (“[T]he existence of some satisfied customers does not constitute a defense to a § 5 action.”).

Federal agency, such as the Securities and Exchange Commission.³⁷ FPMA argues that deceptive earnings claims are not widely used by “responsible” members of its industry, and that in any event, customers in the space are financially savvy and so will not be misled.³⁸ But recent Commission enforcement actions, including at least one against an FPMA member, demonstrate that actors in this space have been using deceptive earnings claims to market their services in violation of section 5, and that such claims harm consumers.³⁹

The FMPA also argues that a rule regulating earnings claims made by its members would violate the First Amendment.⁴⁰ To be sure, some First Amendment protection extends to commercial speech. It is established law, however, that the “First Amendment does not shield fraud,” and that the government can prohibit deceptive commercial speech.⁴¹

³⁷ See Earnings Claims ANPR Comment No. 20-1546 (FPMA). The FPMA does not offer a concrete definition of “financial publisher.”

³⁸ *Id.* at 9–10. The FPMA comment does not cite any evidence to support this factual claim. Evidence available to the Commission suggests the contrary. See, e.g., Securities and Exchange Commission, Study Regarding Financial Literacy Among Investors as Required by section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Aug. 2012), available at <https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf>; Judy T. Lin et al., *Investors in the United States*, FINRA Investor Education Foundation (2016); Annamaria Lusardi and Olivia S. Mitchell, The Economic Importance of Financial Literacy: Theory and Evidence, 52 J. Econ. Literature 5 (2014).

³⁹ See Complaint, *FTC v. WealthPress Holdings LLC*, No. 3:23-cv-00046 (M.D. Fla. Jan. 12, 2023); Complaint, *FTC v. Warrior Trading, Inc.*, No. 3:22-cv-30048 (D. Mass. April 19, 2022); Complaint, *FTC v. Raging Bull.com, LLC*, No. 1:20-cv-3538 (D. Md. Dec. 7, 2020); Complaint, *FTC v. OTA Franchise Corp.*, No. 8:20-cv-0287 (C.D. Cal. Feb. 12, 2020).

⁴⁰ Earnings Claims ANPR Comment No. 20-1546 (FPMA) at 5–7, 10; see also Earnings Claims ANPR Comment No. 20-1541 (Direct Selling Association) at 16 (asking the Commission to explain why any new regulation does not violate the First Amendment).

⁴¹ *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003); see also *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (1985) (government is free to prevent dissemination of commercial speech that is false, deceptive, or misleading).

4. Institutions of Higher Education

Some commenters report the use of deceptive earnings and deceptive job placement claims by for-profit schools.⁴² The Commission, along with state enforcers, has taken law enforcement action against higher education institutions for such conduct.⁴³ However, this NPRM does not propose to cover all for-profit higher education institutions. Instead, coverage under the Rule would depend on the representations such institutions make regarding their offerings. The Commission notes that many of these institutions are regulated by the Department of Education and may be subject to the Department's Gainful Employment Rule, which imposes earnings-related requirements on eligibility for program funds under Title IV of the Higher Education Act.⁴⁴ The Commission seeks comment on whether the definition of money-making opportunity should exclude any offerings of higher education institutions, such as any educational program participating in the Title IV, Higher Education Act, Federal student aid program, 34 CFR Parts 600 and 668.

III. Modification of the Rule Is Warranted

As set out more fully below, based on the comments, the Commission's history of enforcement, and other evidence, the Commission believes it is appropriate to expand the

⁴² See, e.g., Earnings Claims ANPR Comment No. 20-1345 (Illinois Attorney General's Office, joined by 24 other Attorneys General); Earnings Claims ANPR Comment No. 20-1553 (Veterans Education Success).

⁴³ See, e.g., *FTC v. Career Step, LLC*, No. 1:24-cv-3354 (N.D. Ga. 2024); *FTC v. Sollers, Inc.*, No. 2:23-cv-21250 (D.N.J. 2023); *FTC v. Human Res. Dev. Servs., Inc.*, No. 1:22-cv-1919 (N.D. Ill. 2022); *FTC v. Devry Edu. Grp. Inc.*, No. 2:16-cv-579 (C.D. Cal. 2016); *Massachusetts v. ITT Educational Servs., Inc.*, No. 16-0411 (Mass. Super. Ct. 2016); *Colorado v. Center for Excellence in Higher Education, Inc.*, No. 2014-cv-34530 (Denver City and County Dist. Ct. 2014); *In the Matter of Macmillan, Inc.*, 96 FTC 208 (1980).

⁴⁴ See Financial Value Transparency and Gainful Employment 88 FR 70004 (Oct. 10, 2023); 34 CFR Part 668.

Rule to cover the use of earnings claims in the marketing and sale of certain money-making opportunities not currently covered by the Rule, and to prohibit related deceptive and unfair practices by such entities.

A. The Need for the Rule

In the decade that has passed since the Rule was adopted in its current form, the Commission has encountered many enterprises that use exactly the kind of misleading claims about earnings that the Rule was designed to stop, but that avoid, or attempt to avoid, being covered by the Rule.⁴⁵ As explained in the Business Opportunity Rule ANPR, the Rule does not currently cover many such products and services that are offered to the public with claims that they will assist consumers in building a business or otherwise earning income.⁴⁶ Such operations continue to proliferate, using deceptive tactics—and in particular, deceptive earnings claims—to take consumers’ funds. These operations cause significant financial and other harm to consumers.

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.⁴⁷ 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

⁴⁵ For example, schemes that purport to offer training or coaching in how to earn money in a particular market, such as via e-commerce or by trading in the financial markets, are often structured in a way that does not obviously trigger coverage under the Rule. *See, e.g., FTC v. Traffic and Funnels, LLC et al.*, No. 3:23-cv-1277 (M.D. Tenn. 2023); *FTC v. Lurn, Inc.*, No. 8:23-cv-2622 (D. Md. 2023); *FTC v. OTA Franchise Corp.*, No. 8:20-cv-287 (C.D. Cal. 2020); *FTC v. Ragingbull.com, LLC*, No. 1:20-cv-3538 (D. Md. 2020); *FTC v. Thrive Learning LLC*, No. 2:17-cv-529 (D. Utah 2017).

⁴⁶ 87 FR 72428.

⁴⁷ 593 U.S. 67 (2021).

practices.⁴⁸ 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.⁴⁹ The Commission can send refunds to consumers after the conclusion of that litigation, including all appeals. This two-step process takes significant time.⁵⁰ 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.⁵¹ In 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.

Thus, this NPRM's proposed amendments covering money-making opportunities would allow the Commission to proceed more efficiently and effectively to protect consumers and obtain monetary relief. Because the Commission can seek civil penalties

⁴⁸ The Commission can no longer obtain refunds in cases involving violations of section 5(a)(1)'s prohibition on unfair methods of competition.

⁴⁹ 15 U.S.C. 57b(a)(1).

⁵⁰ 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).

⁵¹ 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.

for rule violations, the proposed modified Rule also should achieve better deterrence against bad actors.

B. Evidentiary Standard

The Commission promulgated the Business Opportunity Rule under section 18 of the FTC Act, which grants the Commission the authority to adopt rules defining unfair or deceptive acts or practices in or affecting commerce.⁵² When amending or repealing the Rule, the Commission must follow the same section 18 procedures governing the adoption of rules,⁵³ and in doing so, engages in a multi-step inquiry.

If an act or practice is deemed unfair or deceptive, the Commission may issue a notice of proposed rulemaking under section 18 where it has “reason to believe” that the act or practice is “prevalent.”⁵⁴ The Commission can find prevalence if it has issued cease and desist orders regarding such acts or practices, or where other information available to it indicates a widespread pattern of unfair or deceptive acts or practices, such as consumer complaints or law enforcement actions by the Commission or other agencies.⁵⁵ Once the Commission finds that an unfair or deceptive act or practice is prevalent, it has wide latitude in fashioning a remedy and need only show a reasonable relation between the unfair or deceptive act or practice and the remedy.⁵⁶

⁵² 15 U.S.C. 57a(a)(1)(B).

⁵³ 15 U.S.C. 57a(d)(2)(B) (“[a] substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection.”).

⁵⁴ 15 U.S.C. 57a(b)(3). Under section 18 of the FTC Act, 15 U.S.C. 57a, before the Commission issues an NPRM proposing specific rule changes, it must issue an ANPR seeking comment on the topics it proposes to address. The Commission previously issued an ANPR seeking comment on the topics addressed by the revisions proposed in this NPRM. Business Opportunity Rule, Advance Notice of Proposed Rulemaking, 87 FR 72428 (Nov. 25, 2022).

⁵⁵ 15 U.S.C. 57a(b)(3)(B).

⁵⁶ *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 988 (D.C. Cir. 1985) (quoting *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612–13 (1946)).

C. Deceptive Earnings Claims Are Prevalent Among Money-Making Opportunities that Are Not Business Opportunities Under the Rule

As set out in detail in the Earnings Claims ANPR⁵⁷ and the Business Opportunity Rule ANPR,⁵⁸ the Commission has brought many cases in Federal court challenging deceptive earnings claims by diverse enterprises that are not covered by the Rule, including “coaching or mentoring programs, work-from-home opportunities, e-commerce opportunities, other investment opportunities,” and others.⁵⁹ And the Commission has brought a number of administrative actions that found deceptive earnings claims to be unfair or deceptive in violation of section 5, culminating in cease and desist orders prohibiting such claims.⁶⁰ This extensive law enforcement experience demonstrates that deceptive earnings claims are prevalent, and the Commission so finds.⁶¹ That finding is further supported by the comments filed in response to the Earnings Claims and Business Opportunity Rule ANPRs, as well as the rulemaking record of the Business Opportunity Rule. *See supra* Section II.

Consequently, the Commission proposes amending the Rule to (a) expand the Rule to cover money-making opportunities such as business coaching and investment opportunities, (b) require such opportunities to comply with the prohibitions on material misrepresentations, and (c) clarify the scope of the Rule’s provisions relating to earnings

⁵⁷ Earnings Claims ANPR, 87 FR at 13952.

⁵⁸ Business Opportunity Rule ANPR, 87 FR at 72430–31 nn. 9–13.

⁵⁹ *Id.* at 72430.

⁶⁰ *See* Notice of Penalty Offense Authority Concerning Money-Making Opportunities, available at <https://www.ftc.gov/MMO-notice>, and cited cases.

⁶¹ Indeed, the cease and desist orders alone are sufficient to support a finding of prevalence. 15 U.S.C. 57a(b)(3)(a).

claims by adding a definition of “earnings” and revising the definition of “earnings claims” and the prohibition on deceptive earnings claims.

The Commission believes that the proposed amendments will reduce consumer harm and enable the Commission to more effectively obtain relief for consumers injured by deceptive or unfair practices. The Commission further notes that honest advertisers experience a competitive disadvantage because of the widespread use of deceptive earnings and related claims by other market participants.⁶² This creates an uneven playing field and undermines competition. The Commission is sensitive to any additional burden or cost that the proposed amended Rule may impose on businesses. However, it believes that this proposal balances the need to level the playing field and provide redress to injured consumers with a relatively small burden or cost on businesses.

The Commission does not propose, at this time, to implement other potential changes about which it requested comment in the Business Opportunity Rule ANPR, including disclosure requirements for businesses not covered by the existing definition of business opportunity.

D. Overview of Proposed Modifications to the Rule

1. Money-Making Opportunities

This NPRM proposes adding a definition of “money-making opportunities” to the Rule, which would cover any business coaching opportunity or investment opportunity

⁶² See Business Opportunity Rule ANPR Comment No. 4 (Be Understood Branding) (small business owner who provides consulting to businesses cites ubiquitous and extravagant earnings representations made on social media regarding supposed “business assistance” programs, noting, “[h]aving worked to build a business, I know most of these offers are lies”).

for which a purchaser makes a required payment, and that is not a multilevel marketing program.

The proposed amendments define “business coaching opportunities” broadly to include any program, plan, or product that is represented to train or teach a person how to establish or operate a business.

The Commission is considering including a definition of “business” for the purposes of “business coaching opportunity.” For example, the Rule could define “business” as a person (including a corporation, partnership, association, or any other entity) that advertises, promotes, sells, or offers for sale goods or services.⁶³ The Commission seeks comment on whether the proposed amendments should include a definition of “business” for purposes of “business coaching opportunity,” why or why not, and, if so, what text should be used to define the term.

Alternatively, the Commission is also considering using the term “new business,” rather than simply “business,” in the definition of business coaching opportunity. “New business” is already defined in the Rule as a business in which the prospective purchaser is not currently engaged, or a new line or type of business. 16 CFR 437.1(j). The Commission is interested in receiving comment on whether to use “new business” instead of “business” in the definition of business coaching opportunity. How would this change alter the coverage of the proposed amended Rule? How would it affect the benefits to consumers or the costs to businesses?

⁶³ This would be consistent with the usage of the term “business” in the existing Rule, which is not limited to formally incorporated enterprises. *See, e.g., FTC v. The Online Entrepreneur, Inc. et al.*, No. 12-cv-2500 (M.D. Fla. 2012) (defendants claimed consumers need only pay a fee and receive training in order to begin profiting—consumers did not need to establish a corporate entity to participate in the proffered business opportunity); *FTC v. Shopper Systems, LLC et al.*, No. 12-cv-23919 (S.D. Fla. 2012) (same).

The Commission is also considering exempting from the definition of money-making opportunity, programs of study offered by institutions of higher education that are eligible for Title IV funds under the Higher Education Act and the Gainful Employment Rule.⁶⁴ For example, “money-making opportunity” could be defined as any business coaching opportunity or investment opportunity for which a purchaser makes a required payment, and that is not a multi-level marketing opportunity or an educational program participating in the Title IV, Higher Education Act, Federal student aid program, 34 CFR Parts 600 and 668.

The Commission is also considering using, instead of the proposed “business coaching opportunity” term, the term “coaching opportunity,” which would be defined as any program, plan, or product that is represented, expressly or by implication, to train or teach a person how to generate or increase earnings.

And the Commission is also considering limiting the definition of business coaching opportunity to reach only those opportunities that are marketed, at least in part, through earnings claims. For example, “money-making opportunity” could be defined as any business coaching opportunity or investment opportunity for which a purchaser makes a required payment, that is not a multilevel marketing program, and that is offered, offered for sale, sold, or traded based wholly or in part on earnings claims.

The Commission is interested in receiving comments on these alternatives, including which alternative is superior and why, and whether any alternative should be modified (such as to expand or limit its scope), and, if so, why and how.

⁶⁴ 88 FR 70004 (Oct. 10, 2023), codified at 34 CFR 600 and 668.

The proposed amendments define “investment opportunity” to mean a plan, program, or product represented as an opportunity to obtain earnings through the buying, selling, or licensing of assets (such as trading stocks or bonds, buying real estate,⁶⁵ intellectual property (such as in invention promotion schemes⁶⁶), or memberships (such as in simple pyramid schemes⁶⁷ and grant scams⁶⁸)). The definition includes offers to make money by direct purchases (such as in real estate investment or cryptocurrency scams⁶⁹) and offers of advice or training in how to make such purchases (such as stock tips⁷⁰ or training in how to profitably flip houses⁷¹).

The proposed definition of money-making opportunity includes an express carve-out for multilevel marketing programs.⁷² This is appropriate to avoid duplicative coverage, as sellers of MLMs would be subject to substantively similar regulation under the proposed Multilevel Marketing Earnings Claims Rule. *See* ECR NPRM, published elsewhere in this issue of the *Federal Register*. As explained in the ECR NPRM, the Commission is considering three 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

⁶⁵ *See, e.g., FTC v. Sanctuary Belize*, No. 1:18-cv-3309 (D. Md. 2018).

⁶⁶ *See, e.g., FTC v. World Patent Mktg.*, No. 17-cv-20848 (S.D. Fla. 2017).

⁶⁷ *See, e.g., FTC v. BINT Operations LLC*, No. 4:21-cv-518 (E.D. Ark. 2021).

⁶⁸ *See, e.g., FTC v. Blue Saguaro Marketing, LLC*, No. 2:16-cv-3406 (D. Ariz. 2016).

⁶⁹ *See, e.g., FTC v. Sanctuary Belize*, No. 1:18-cv-3309 (D. Md. 2018).

⁷⁰ *See, e.g., FTC v. WealthPress Holdings, LLC*, No. 3:23-cv-46 (M.D. Fla. Jan. 12, 2023).

⁷¹ *See, e.g., FTC v. Zurixx LLC*, No. 2:19-cv-713 (D. Utah 2019).

⁷² The existing provisions of the Business Opportunity Rule, however, would continue to apply if the MLM meets the definition of “business opportunity,” unless or until the Earnings Claim Rule Regarding Multi-Level Marketing is finalized. If the proposed Earnings Claim Rule Regarding Multi-Level Marketing is not finalized, sellers of MLMs that are business opportunities would continue to be subject to the Business Opportunity Rule. *See* ECR NPRM, published elsewhere in this issue of the *Federal Register* (proposing to amend Business Opportunity Rule to add an exemption for MLM sellers covered by the Earnings Claims Rule Regarding Multi-Level Marketing).

matters.⁷³ 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.

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 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

⁷³ 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).

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 amendments 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.⁷⁴ Also, alternative A’s definition of MLM includes the clarifying 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.

⁷⁴ The proposed amendments define “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), 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 regulatory text states that “participants” includes individuals who have the right to have others placed into their downline.

Without the clarification, one might think that an MLM could avoid coverage under the proposed MLM ECR 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 MLM ECR 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.

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 finalized as part of the final rule, the 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,⁷⁵ as well as whether the language should be revised to avoid ambiguity, overbreadth, or other concerns, and, if so, how. The Commission invites the public to submit comments on this topic in response to the ECR NPRM (published in this issue of the *Federal Register*). The Commission intends for the definitions to be the same, and so in considering how to define MLM for purposes of the proposed exemption the Commission will consider comments on this topic submitted in response to the ECR

⁷⁵ 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?

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.

The ECR NPRM (published elsewhere in this issue of the *Federal Register*) contains a proposed amendment to § 437.8 of the Business Opportunity Rule that would exempt MLMs subject to the Earnings Claims Rule from all the provisions of the Business Opportunity Rule.⁷⁶

The proposed definition of money-making opportunity covers areas in which deceptive earnings claims are prevalent, while focusing on programs that offer to teach a purchaser how to establish or operate a business or make money through investments. Whether education or gig work would be covered is a fact-specific inquiry, depending on the claims made.⁷⁷ For example, for-profit schools would not find all of their programs broadly swept in—only those programs represented to teach purchasers how to establish or operate a business, or how to make money through investments. As further set out below, the Commission invites comment on whether its proposed definition is appropriate in scope, and if not, how the definition should be revised, including whether the Rule should exempt any industry or business type from coverage under the new definition.

⁷⁶ Specifically, the ECR NPRM proposes revising § 437.8 to add a subsection stating that the provisions of the Rule shall not apply to any seller's activities in connection with multi-level marketing, provided that the seller both constitutes a multi-level marketing program seller as defined in the Earnings Claim Rule Regarding Multi-level Marketing, and must comply with the provisions of that rule requiring sellers to possess and disclose substantiation for their earnings claims, and prohibiting sellers from making a false or misleading earnings claim.

⁷⁷ For example, some offers of gig work are subject to the existing Rule. *See supra* note 35.

2. Earnings and Earnings Claims Definitions

This NPRM proposes adding a definition of “earnings” and modifying the Rule’s existing definition of “earnings claim” to reduce potential confusion or uncertainty regarding the meaning of these terms in the Rule.

The existing Rule uses the term “earnings” in multiple locations but does not define it.⁷⁸ The proposed amendments would clarify these provisions by defining “earnings” as gross or net sales, income, profit, appreciation, or other financial gain. This language is largely taken from the Rule’s current definition of “earnings claim,” which refers to representations regarding the level of sales, or gross or net income or profits.⁷⁹ The proposed amendments would make clear that “appreciation or other financial gain” is included within the definition. The revision should have no impact on sellers of business opportunities, as claims about appreciation are unlikely to be used to market business opportunities. But such claims are used to market investment opportunities; thus the added language is a helpful clarification in that context. Adding a definition of “earnings” also helps to streamline the definitions of “earnings claim” and “investment opportunity,” both of which rely on the concept of earnings.

The proposed amendments would also revise the definition of “earnings claim.” As noted above, the revisions streamline the definition by substituting the term “earnings” for the longer phrase currently used in the Rule (“sales, or gross or net income or profits”). As noted above, this change also clarifies that the term covers representations of appreciation and other financial gain, a point that is likely important in

⁷⁸ See 16 CFR 437.4(a)-(c); 16 CFR 437.6(e)(1).

⁷⁹ 16 CFR 437.6(d).

the context of investment opportunities. The amendments would also revise the examples of claims covered by the definition of earnings claim, among other ways by expressly including testimonials, and would omit the word “specific” to 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 “earn extra money in your spare time” fall within the definition.⁸⁰ With these revisions, the definition of “earnings” and “earnings claim” will parallel those in the proposed Earnings Claim Rule Regarding Multi-Level Marketing.⁸¹ Some existing definitions would be redesignated to accommodate inclusion of the new definitions in alphabetical order. The proposed amendments would not otherwise alter the definitions in the current Rule.

3. The Application of Substantiation, Prohibitions, and Recordkeeping Requirements to Money-Making Opportunities

This NPRM proposes revising, rearranging, and redesignating certain provisions of §§ 437.4, 437.6, and 437.7 to facilitate integration of coverage of money-making opportunities under certain provisions of those sections but not others.

The proposed modifications would obligate sellers of money-making opportunities to abide by the Rule’s substantiation requirements (including the requirement that substantiation be provided upon request to prospective purchasers and the Commission, in the language in which the earnings claim was made). Specifically, the Commission proposes to revise and restructure current § 437.4 so that provisions that

⁸⁰ 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’”).

⁸¹ *See* ECR NPRM, published elsewhere in this issue of the *Federal Register*.

would apply to both sellers of money-making opportunities and sellers of business opportunities would be grouped together and provisions that would apply only to sellers of business opportunities would be grouped together. Provisions would be redesignated so that these two groupings have distinct designations (see proposed § 437.4). For example, proposed § 437.4(a) would apply to sellers of money-making opportunities, as well as sellers of business opportunities. Provisions that reference subsections of current § 437.4 would be revised to reference such subsections as redesignated. For example, current § 437.2's reference to § 437.4(a) would be revised to reference § 437.4(b)(1).

The proposed modifications would obligate sellers of money-making opportunities to abide by the Rule's requirement to retain substantiation, but would not require such sellers to retain the other documents that the Rule currently requires sellers of business opportunities to retain. Specifically, the Commission proposes to revise and restructure current § 437.7 so that the provision that would apply to both sellers of money-making opportunities and sellers of business opportunities would be separated from the provisions that would apply only to sellers of business opportunities, which would be grouped with each other. Provisions would be redesignated so that these two groupings have distinct designations (see proposed § 437.7). For example, proposed § 437.7(a) would apply to sellers of money-making opportunities, as well as sellers of business opportunities.

Consistent with existing prohibitions under the Rule, the proposed modifications would also prohibit money-making opportunity sellers from: 1) making false or misleading earnings claims; 2) disseminating industry financial or performance information unless the seller possesses written substantiation that it reflects the typical

experience of purchasers of the promoted opportunity; 3) misrepresenting how or when payments from the seller to the purchaser will be calculated or distributed;

4) misrepresenting the cost, performance, efficacy, nature, or central characteristics of the opportunity or goods or services offered; 5) misrepresenting the seller's refund or cancellation policies; 6) misrepresenting that any law or regulation prohibits the seller from providing earnings information; and 7) misrepresenting any material aspect of any assistance offered to the prospective purchaser. With the exception of the clarification to the prohibition on deceptive earnings claims, addressed below, no changes are proposed to these existing prohibitions. Specifically, the Commission proposes to revise and restructure current § 437.6 so that provisions that would apply to both sellers of money-making opportunities and sellers of business opportunities would be grouped together, and provisions that would apply only to sellers of business opportunities would be grouped together. Provisions would be redesignated so that these two groupings have distinct designations (see proposed § 437.6). For example, proposed § 437.6(a) would apply to sellers of money-making opportunities, as well as sellers of business opportunities.

The proposed modifications would not require money-making opportunities to comply with the Rule's disclosure obligations, which would remain limited to business opportunities as that term is currently defined in the Rule. The Commission seeks comment on whether § 437.3 should be expanded to cover some or all money-making opportunities. For example, should the Commission replace each instance of the term "business opportunity" with the phrase "business or money-making opportunity"? And

should proposed § 437.4(b)(1) apply to sellers of money-making opportunities as well as sellers of business opportunities?

The proposed modifications would not apply the Rule’s existing requirements for earnings claims made in the general media to money-making opportunities. Alternatively, the Commission is considering applying the requirements of proposed § 437.4(b)(2) to money-making opportunity sellers. The Commission is interested in comment on whether it should apply those requirements to money-making opportunity sellers and how such an amendment would affect the benefits to consumers or the costs to businesses.

4. Clarification of Prohibition on Deceptive Earnings Claims

Proposed § 437.6 would revise the Rule’s prohibition on misrepresenting “the amount of sales, gross or net income, or profits a prospective purchaser may earn or that prior purchasers have earned,”⁸² and instead would prohibit “false or misleading earnings claim[s].”⁸³ This proposed change incorporates the revised definition of earnings claim, and thus should reduce any potential uncertainty about the scope of the prohibition, particularly in the context of investment opportunities.

5. Other Languages

Proposed § 437.5(c) amendments would require money-making opportunity sellers to provide any material information about earnings, including substantiation, in the language in which the earnings claim is made, consistent with the Rule’s current requirement that business opportunity sellers do so. The Commission has recognized that “advertisers are making special efforts to reach foreign language-speaking consumers,”

⁸² 16 CFR 437.6(d).

⁸³ See proposed § 437.6(a)(1). “Earnings claims” is a defined term under the Rule. As described above, this NPRM proposes a revision to clarify that definition.

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).”⁸⁴ While the proposed amendments to the rule do not require money-making opportunity 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.⁸⁵ To ensure that consumers can read and understand all material information, and that language barriers are not used as a means of withholding material information from consumers, the Commission is proposing that money-making opportunity sellers provide material information about earnings in the same language as the earnings claims.

6. Amend Preemption Provision to Include Money-Making Opportunities

The proposed modifications add language to the Rule’s preemption provision (proposed § 437.9) to ensure that the Rule does not preempt State or local regulation of money-making opportunities except to the extent they conflict with the Rule.

7. Revise Reference to Franchise Fee Dollar Amount

The Rule exempts from coverage business opportunities that: 1) satisfy the definitional elements of the term “franchise” under the Franchise Rule; 2) entail a written contract between the seller and the business opportunity buyer; and 3) require the buyer

⁸⁴ See 16 CFR 14.9.

⁸⁵ See e.g., *FTC v. Vision Online, Inc.*, No. 6:23-cv-1041 (M.D. Fla. June 5, 2023) (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. C-4639 (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).

to make a payment that meets the Franchise Rule’s minimum payment requirement. Currently, the Rule identifies the payment threshold with the words: “less than \$615.” However, the Franchise Rule’s required minimum payment amount, set out at 16 CFR 437.8(a)(1), is adjusted periodically for inflation. To avoid future revisions to the Rule due to changes in the Franchise Rule’s dollar amount threshold, the Commission proposes to revise this language to instead state “less than the dollar amount specified in 16 CFR 436.8(a)(1).” *See* proposed § 437.8(a).

8. Re-Title the Rule

The proposed modifications would re-title the Rule to “Business and Money-Making Opportunity Rule” to reflect its scope, as modified.

Although the Commission is seeking comment on whether to amend § 437.3, as well as on the revisions proposed in this NPRM, this NPRM does not propose any amendments to § 437.3, or to § 437.10, but it has set them out in the proposed regulatory text for convenience. The Commission is not proposing any changes to the appendices to Part 437, and to save space has not set them out in the proposed regulatory text.

E. Additional Issues Raised in ANPR

The Business Opportunity Rule ANPR sought comment on several additional issues not addressed in this NPRM. For example, it asked whether the Commission should change the information required in the Rule’s disclosure that sellers of business opportunities must provide to prospective purchasers. It also sought, among other things, comment on whether any of the Rule’s provisions are no longer necessary, and whether any of the Rule’s provisions should be amended to avoid disproportionately affecting certain groups. No comments were submitted on these issues. As to these and the other

topics raised in the Business Opportunity Rule ANPR and not addressed above, the Commission is not proposing changes to the Rule, based on the record.

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 amendments to the Rule 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].⁸⁶ 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>.

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 or unfair marketing of money-making 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

⁸⁶ The Commission elects not to provide a separate, second comment period for rebuttal comments. *See* 16 CFR 1.11(e) (“The Commission may in its discretion provide for a separate rebuttal period following the comment period.”).

genuine, bona fide dispute over material facts that will affect the outcome of the proceeding.⁸⁷

V. Request for Comment

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 “Business Opportunity Rule – Rulemaking, Matter No. R511993” 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.

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 that 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 “Business Opportunity Rule – Rulemaking, Matter No. R511993” 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, please submit your paper comment to the Commission by overnight service.

⁸⁷ In the context of an informal hearing, “disputed” and “material” are given the same meaning as in the standard for summary judgment. *See* Fed. Trade Comm’n, 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> (citing H.R. Rep. No. 93-1107, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 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)).

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 NPRM 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 revisions to the 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 <https://www.ftc.gov/site-information/privacy-policy>.

The Commission invites members of the public to comment on any issues or concerns they believe are relevant or appropriate to the Commission's consideration of proposed amendments to the Rule. The Commission requests that you provide factual data, and in particular, empirical data, upon which your comments are based. In addition to the issues raised above, the Commission solicits public comment on the specific questions identified below. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted.

General Questions

1. Do the proposed revisions to the Rule further the Commission's goal of protecting consumers from deceptive or unfair acts or practices involving earning claims in

the marketing of products, services, or other purported opportunities to obtain earnings? Why or why not?

2. Should the Commission finalize the proposed revised Rule as a final rule? Why or why not? How, if at all, should the Commission change the proposed revised 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 Rule that this NPRM proposes to add or revise. Regarding each provision, please include answers to the following questions, as well as all evidence supporting your answers:
 - a. How prevalent is the act or practice the provision seeks to address?
 - b. What would the proposed revisions' impact (including any benefits and costs), if any, be on consumers and businesses, including existing businesses and those yet to be started, and in particular, small businesses? Are there changes that could be made to lessen any such burdens without significantly reducing the benefits?
 - c. Would the proposed revisions to the 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?

- e. What additional information, tools, or guidance might the Commission provide to assist businesses in meeting extant or proposed requirements efficiently?
4. Are there any unfair or deceptive acts or practices not addressed by the proposed revisions to the Rule that should be?
 5. Are the proposed new and revised definitions clear? Should any changes be made to any of these definitions? Should the scope of any of these definitions be expanded or narrowed, and, if so, why?
 - a. In particular, should any of the alternative proposals by the Commission to defining “money-making opportunity” be adopted, such as:
 - i. Limiting money-making opportunities, business coaching opportunities, and/or investment opportunities to those that make earnings claims;
 - ii. Defining the term “business”;
 - iii. Replacing “business” with “new business” in the definition of business coaching opportunity;
 - iv. Excluding from the definition of “money-making opportunity” any educational program participating in the Title IV, Higher Education Act, Federal student aid program, 34 CFR Parts 600 and 668; and
 - v. Replacing “business coaching opportunity” with “coaching opportunity,” defined as any program, plan, or product that is

represented to train or teach a person how to make or increase earnings.

- b. Should the definitions of “money-making opportunity,” “business coaching opportunity,” or “investment opportunity” be modified in any other way, such as to avoid covering industries in which deceptive earnings claims are not prevalent, or where the burden of complying with the proposed amended Rule would outweigh the benefits to consumers and competition?
- c. Should the Commission exempt from the definition of investment opportunity conduct regulated by another Federal agency, such as the Securities and Exchange Commission or the Commodity Futures Trading Commission, or by an entity duly recognized as a regulatory entity by such an agency, such as the Financial Industry Regulatory Authority⁸⁸ or the National Futures Association?⁸⁹
- d. Should the definition of investment opportunity be narrowed in any way to ensure clarity and appropriate scope? If so, how? Provide all evidence that supports your answer.
- e. 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?

⁸⁸ See 15 U.S.C. 78o-3 (authorizing SEC to recognize “registered securities associations” such as FINRA).

⁸⁹ See 7 U.S.C. 21 (authorizing CFTC to recognize “registered futures associations” such as NFA).

- f. Should the definition of “earnings” or “earnings claim” be altered in any way to ensure clarity and appropriate scope? If so, how? Provide all evidence that supports your answer.
 - g. Are there any circumstances in which the proposed revisions to the definition of “earnings claim” and/or the proposed definition of “earnings” would alter the obligations of business opportunities under the current Rule’s other provisions? If so, would such changes increase the cost or other burden on such business opportunity sellers? If so, explain how, the extent of such increase, and what businesses would be so affected. Provide all evidence that supports your answer.
 - h. If you would alter any of the proposed new or revised definitions, provide alternative rule text.
6. Are any additional definitions needed in the Rule?
7. Are the prohibitions in proposed § 437.6 clear, meaningful, and appropriate? Should the scope of any of the proposed prohibitions be expanded or narrowed and, if so, how and why? Would any of the proposed prohibitions inadvertently discourage truthful advertising to the detriment of consumers?
8. Are the proposed revisions to the Rule adequate and appropriate to address the harm caused to consumers by misleading or unsubstantiated earnings claims in the marketing of money-making opportunities? Why or why not? How can the proposal be improved?
9. Are there any alternatives to the proposed revisions to the 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.

10. How many businesses would meet the definition of “money-making opportunity” under the proposed § 437.1(n)? How many are small businesses? If you propose altering the proposed definition in any way, answer this question for your proposed alternative definition as well. Provide all evidence that supports your answer.
11. The proposed revisions would subject money-making opportunities to some, but not all, of the Rule’s prohibitions on misrepresentations. Specifically, the proposed revisions state that it is a violation of section 5 of the FTC Act for any seller of money-making opportunities to:
 - a. Make a false or misleading earnings claim, explicitly or implicitly;
 - b. Disseminate industry financial, earnings, or performance information unless the seller has written substantiation demonstrating that the information reflects, or does not exceed, the typical or ordinary financial, earnings, or performance experience of purchasers of the opportunity being offered for sale;
 - c. Fail to make available to prospective purchasers, and to the Commission upon request, written substantiation for the seller’s earnings claims;
 - d. Misrepresent how or when commissions, bonuses, incentives, premiums, or other payments from the seller to the purchaser will be calculated or distributed;
 - e. Misrepresent the cost, or the performance, efficacy, nature, or central characteristics of the opportunity or the goods or services offered to a

prospective purchaser;

- f. Misrepresent any term or condition of the seller's refund or cancellation policies;
- g. Misrepresent that any governmental entity, law, or regulation prohibits a seller from furnishing earnings information to a prospective purchaser; or
- h. Misrepresent any material aspect of any assistance offered to a prospective purchaser.

As to each prohibition listed above, please answer each of the following:

- i. Should any money-making opportunities be subject to the prohibition?
- ii. Why or why not?
- iii. If yes, should all money-making opportunities be subject to the prohibition, or only certain types?
- iv. Provide all evidence that supports your answer, and proposed rule text for any changes you propose.

12. The proposed revisions would not subject money-making opportunities to some of the Rule's prohibitions against misrepresentations by business opportunities.

Specifically, the proposed revisions state that it is a violation of section 5 of the FTC Act for any seller of a business opportunity to:

- a. Fail to provide prospective purchasers with a disclosure document as required by § 437.3 of the Rule;
- b. Make an earnings claim and fail to provide prospective purchasers with an earnings claim statement as required by current § 437.4(a)(4) (proposed § 437.4(b)(1)) and supplemental information about the statement as required

- by current § 437.4(d) (proposed § 437.4(b)(3));
- c. Make an earnings claim in the general media without the substantiation and disclosure required by current § 437.4(b) (proposed § 437.4(b)(2));
 - d. Disclaim, or require a prospective purchaser to waive reliance on, any statement made in any document or attachment that is required or permitted to be disclosed under this Rule (proposed § 437.6(b)(1));
 - e. Make any claim or representation, orally, visually, or in writing, that is inconsistent with or contradicts the information required to be disclosed by the disclosure document and earnings claims statement required by §§ 437.3 and 437.4 (proposed § 437.6(b)(2));
 - f. Include in any disclosure document or earnings claim statement any materials or information other than what is explicitly required or permitted by this Rule (proposed § 437.6(b)(3));
 - g. Misrepresent that any governmental entity, law, or regulation prohibits a seller from disclosing to prospective purchasers the identity of other purchasers of the opportunity (proposed § 437.6(b)(4));
 - h. Misrepresent the likelihood that a seller, locator, or lead generator will find locations, outlets, accounts, or customers for the purchaser (proposed § 437.6(b)(5));
 - i. Fail to provide a refund or cancellation when the purchaser has satisfied the terms and conditions disclosed pursuant to § 437.3(a)(4) (proposed § 437.6(b)(6));
 - j. Misrepresent a business opportunity as an employment opportunity

(proposed § 437.6(b)(7));

- k. Misrepresent the terms of any territorial exclusivity or territorial protection offered to a prospective purchaser (proposed § 437.6(b)(8));
- l. Assign to any purchaser a purported exclusive territory that, in fact, encompasses the same or overlapping areas already assigned to another purchaser (proposed § 437.6(b)(9));
- m. Misrepresent that any person, trademark or service mark holder, or governmental entity, directly or indirectly benefits from, sponsors, participates in, endorses, approves, authorizes, or is otherwise associated with the sale of the business opportunity or the goods or services sold through the business opportunity (proposed § 437.6(b)(10));
- n. Misrepresent that any person:
 - (i) Has purchased a business opportunity from the seller or has operated a business opportunity of the type offered by the seller; or
 - (ii) Can provide an independent or reliable report about the business opportunity or the experiences of any current or former purchaser (proposed § 437.6(b)(11)).
- o. Fail to disclose, with respect to any person identified as a purchaser or operator of a business opportunity offered by the seller:
 - (i) Any consideration promised or paid to such person.
Consideration includes, but is not limited to, any payment, forgiveness of debt, or provision of equipment, services, or discounts to the person or to a third party on the person's behalf; or

(ii) Any personal relationship or any past or present business relationship other than as the purchaser or operator of the business opportunity being offered by the seller (proposed § 437.6(b)(12)).

As to each prohibition listed above, please answer each of the following:

- i. Should any money-making opportunities be subject to the prohibition?
- ii. Why or why not?
- iii. If yes, should all money-making opportunities be subject to the prohibition, or only certain types?
- iv. How would such a change alter the proposed revisions' impact (including any benefits and costs), on consumers and businesses, including existing businesses and those yet to be started, and in particular small businesses?
- v. Provide all evidence that supports your answer, and proposed rule text for any changes you propose.

13. The proposed revisions would exempt MLMs from the definition of money-making opportunity. Should this proposed exemption be altered in any way? Why or why not, and if so, how? Provide all evidence that supports your answer. Provide proposed rule text for any changes you propose.

Substantiation Requirements

14. Should money-making opportunity sellers be required to provide substantiation to prospective purchasers and the Commission upon request? (*See* proposed §§ 437.4(a), 437.6(a)(2), and 437.7(a).) 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. Provide proposed rule text for any changes you propose.

15. Should any businesses covered by the proposed definition of “money-making opportunity” but not the definition of “business opportunity” be required to comply with the affirmative disclosure requirements of proposed §§ 437.2, 437.3, and 437.4(b)? If so:

- a. Identify them and explain why they should be required to comply with the disclosure requirements. Provide all evidence that supports your answer.
- b. Provide proposed rule text to achieve such a change.
- c. How would such a change alter the proposed revisions’ impact (including any benefits and costs), on consumers and businesses, including existing businesses and those yet to be started, and in particular small businesses? Provide all evidence that supports your answer.

Recordkeeping Requirements

16. The proposed revisions to the Rule (proposed § 437.7(a)) would extend the recordkeeping requirements of § 437.7 to money-making opportunities. Should they do so? Why or why not?

- a. If yes, are any modifications of the requirements warranted, as to some or all money-making opportunities?
- b. If so, why?
- c. What should be modified?
- d. Provide all evidence that supports your answers to the above.
- e. Provide proposed rule text for any modifications that you propose.

17. How would extending the recordkeeping requirements of proposed § 437.7(a) to money-making opportunities alter the Rule's impact (including any benefits and costs), on consumers and businesses, including existing businesses and those yet to be started, and in particular small businesses? Provide all evidence that supports your answer.
18. Should the proposed revisions to the 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 to the above.
19. The Rule currently requires sellers of business opportunities to retain documents for three years. The proposed revisions would require sellers of money-making opportunities to retain certain documents for three years, as well. Should the three-year record retention period be extended to five years, which is the limitations period applicable to claims for civil penalties under the Rule? Why or why not? Provide all evidence supporting your answer.
20. Under the existing Rule, sellers of business opportunities must provide mandatory disclosures and other information, including substantiation, in the same language in which they conduct the sale or offering. Should sellers of money-making opportunities be required to provide all material information about earnings,

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?

21. This NPRM provides estimates for the number of money-making opportunity sellers, including the number of investment opportunity sellers and business opportunity coaching sellers. If these estimates are materially incorrect, explain how. Provide all evidence supporting your answer.
22. This NPRM provides estimates for the new costs that sellers of money-making opportunities would incur to comply with the proposed revised Rule. If these estimates are materially incorrect, explain how. Provide all evidence supporting your answer. In particular:
 - a. How many investment opportunity sellers would incur new costs to comply with the proposed revised Rule?
 - b. How many business coaching opportunity sellers would incur new costs to comply with the proposed revised Rule?
 - c. What is the nature and extent of any new one-time costs that money-making opportunity sellers would incur to comply with the proposed revised Rule? In particular, what new costs would be incurred for:
 - i. Regulatory familiarization and planning;
 - ii. Training;

- iii. Preparing substantiation documents for distribution and setting up infrastructure to facilitate recordkeeping and distribution of substantiation; and
 - iv. Performing an additional review of existing advertisements.
 - d. What is the nature and extent of any new recurring costs that money-making opportunity sellers would incur to comply with the proposed revised Rule? In particular, what new costs would be incurred for:
 - i. Retaining substantiation documents; and
 - ii. Making substantiation documents available upon request.
- 23. Describe and, to the extent possible, quantify the benefits to consumers and to competition that would be provided if the proposed revised Rule is finalized. Provide all evidence supporting your answer.
- 24. This NPRM provides estimates for the new costs that sellers of money-making opportunities that are small businesses would incur to comply with the proposed revised Rule. If these estimates are materially incorrect, explain how. Provide all evidence supporting your answer. In particular:
 - a. How many money-making opportunity sellers are small businesses?
 - b. On how many money-making opportunity sellers that are small businesses would the proposed revised Rule's requirements impose a significant impact?
 - c. What actual and likely new costs would small businesses that are money-making opportunity sellers incur to comply with the proposed revised rule?

- d. What potential competitive benefits would the proposed revised Rule provide if finalized?

Relationship to Other Rules and Laws

25. Does any portion of the proposed revised Rule duplicate, overlap, or conflict with any Federal, State, or local laws or regulations?
26. To the extent the Commission finalizes an Earnings Claims Rule Regarding Multi-Level Marketing, and it goes into effect, should the Commission exempt MLMs and/or MLM sellers from complying with the revised Business Opportunity Rule? 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.

VI. Preliminary Regulatory Analysis

Section 22 of the FTC Act, 15 U.S.C. 57b-3, requires the Commission to issue a preliminary regulatory analysis when publishing a notice of proposed rulemaking under sections 6 or 18 of the FTC Act, but requires the Commission to prepare such an analysis for a rule amendment proceeding under sections 6 or 18 of the FTC Act only if it: 1) estimates that the amendment will have an annual effect on the national economy of \$100,000,000 or more; 2) estimates that the amendment will cause a substantial change in the cost or price of certain categories of goods or services; or 3) otherwise determines that the amendments will have a significant effect upon covered entities or upon consumers. 15 U.S.C. 57b-3(a)(1).

Although the Commission estimates that the proposed amendments will not have an annual effect on the economy of \$100,000,000 or more, the Commission has

nonetheless determined that it is appropriate to publish the below analysis to inquire into the proposed amendments' annual economic impact. The Commission encourages the submission of comments including empirical data on the number of money-making opportunity sellers that would incur new costs as a result of the proposed amendments, the scope or amount of the costs such sellers would incur, and the benefits the proposed amendments would provide to consumers and competition.

A. Number of Covered Entities

The Commission lacks sufficient reliable empirical data to determine the precise number of entities that would incur new costs as a result of being newly subject to regulation under the proposed amendments.⁹⁰ The Commission provides the below estimates based on the evidence available and relying on assumptions based on its law enforcement experience. The Commission encourages the submission of comments including empirical data on the number of money-making opportunity sellers that would incur new costs as a result of the proposed amendments.

1. Investment Opportunity Sellers

Different sources provide different tallies of entities that could be considered investment opportunity sellers for the purpose of the proposed amendments⁹¹ Many, and

⁹⁰ Entities that are already subject to the same or substantially similar regulation likely already comply with the proposed amendments and would not incur new costs. For example, to the extent any money-making opportunity sellers meet the definition of a business opportunity seller, they are already covered by the existing Rule's requirements; the proposed amendments impose nothing more on them and so impose no new costs.

⁹¹ For example, according to the Investment Advisor Association, in 2023, there were 15,396 investment advisers. See Investment Advisor Association, *Industry Snapshot Confirms Record Number of Advisors, Staff Supporting Sector*, <https://investmentadviser.org/industry-snapshots/> (archived by Commission staff on Aug. 22, 2024). And census data reflects that, for 2022, there were 91,831 entities in Portfolio Management and Investment Advice (NAICS 523940). <https://www.naics.com/six-digit->

likely most, of the entities counted by these sources are already subject to other Federal regulations, such as those enforced by the Securities Exchange Commission (“SEC”). Investment opportunity sellers complying with such regulations likely already comply with the proposed amendments.⁹² To identify a more reliable estimate, the Commission reviewed nonpublic consumer reports received by the Commission’s Consumer Sentinel database in 2022 and 2023 relating to investment opportunities. The reports identify approximately 10,000 entities (excluding entities identified by only one report or where the entity was unknown) (“Investment-Related Reports”).⁹³ Based on its law enforcement experience, the Commission assumes that many of these entities are not registered with another Federal regulator and may not be subject to other Federal regulation. However, the figure may overstate the actual number of reported entities that would be subject to the proposed amendments. For example, this count treats different spellings of a company’s name as separate entities, and includes some well-known corporations in industries unrelated to investing that would not, to the Commission’s knowledge, constitute investment opportunity sellers. On the other hand, it is possible that some investment opportunity sellers that are not currently subject to other similar Federal regulation may not appear in the consumers’ reports at all. Therefore, the Commission lacks sufficient reliable data to determine the precise number of entities that would be newly regulated under the proposed amendments. As there is uncertainty in both

naics/?v=2022&code=52. But the NAICS Code likely covers some entities, such as pension fund managers, that may not be engaged in offering investment opportunities to the public, and so would not be subject to the proposed amendments. Thus, the figure is likely an overestimate.

⁹² See e.g., 17 CFR 275.206(4)-1 (prohibiting SEC-registered investment advisors from making false, unsubstantiated, or otherwise misleading claims about performance or earnings), 204-2 (requiring retention of ads and performance information for five years).

⁹³ Staff excluded entities reported only once in part to account for reporting errors, including misspellings.

directions, this analysis relies on the Investment-Related Reports as an approximation for the number of investment opportunity sellers that would face new regulatory requirements under the proposed amendments. The Commission encourages the submission of comments including empirical data on the number of investment opportunity sellers that would incur new costs as a result of the proposed amendments.

2. Business Coaching Opportunities

Different sources provide different tallies of entities that would be considered business coaching opportunity sellers for the purpose of the proposed amendments. One study from the coaching industry reported that there were 17,500 individual “coach practitioners” (meaning they derive a portion of their income from their work as a coach) in North America.⁹⁴ But it is not clear that all of the coach practitioners provide training on how to establish or operate a business. For example, some may be employed by a larger company and may not be making representations to the public about the services they offer except in their capacity as an employee of the larger company, so they would not constitute money-making sellers in their own right. In addition, some for-profit schools might represent that they will teach students how to operate a business, and so could be considered business coaching opportunity sellers.⁹⁵ The Commission lacks data that tracks schools on the basis of whether they make such a representation. However, some schools, such as business or trade schools, may be more likely to make such

⁹⁴ 2016 ICF Global Coaching Study, Executive Summary, https://coachfederation.org/app/uploads/2017/12/2016ICFGlobalCoachingStudy_ExecutiveSummary-2.pdf. This figure is likely an overestimate, as it includes business coaching opportunity sellers that offer their services only in Canada or Mexico.

⁹⁵ Nonprofits, including nonprofit schools, typically fall outside of the Commission’s jurisdiction. *See* 15 U.S.C. 44 & 45(a)(2).

representations than others. Census data reflects 13,758 entities in various instructional categories that may include some business coaching opportunity sellers, although some almost certainly would not constitute such sellers.⁹⁶

For purposes of this analysis, the Commission assumes that approximately half of the 13,758 schools would constitute business coaching opportunities under the proposed amendments, or 6,879. Similarly, the Commission assumes that the number of business coaching opportunity sellers offering the services of the 17,500 “coach practitioners” is half the number of such practitioners, or 8,750. Together, these sum to 15,629. To conservatively adjust for potential overlap between the two data sources, the Commission assumes that 15,000 entities would constitute business coaching opportunities under the proposed amendments. The Commission encourages the submission of comments including empirical data on the number of business coaching opportunity sellers that would incur new costs as a result of the proposed amendments.

3. Total Money-Making Opportunity Sellers

Based on the above estimates, the Commission believes that 25,000 (10,000 investment opportunity sellers + 15,000 business coaching opportunity sellers) is a reasonable upper bound estimate for the number of entities that would be considered money-making opportunity sellers under the proposed amendments. The Commission uses this figure as an approximation for the number of entities that would face such

⁹⁶ Census data reflects that in 2022 there were 711 entities in Business and Secretarial Schools (NAICS 611410), 2,520 entities in Professional and Management Development Training (NAICS 611430), 3,225 entities in Cosmetology and Barber Schools (NAICS 611511), and 7,302 entities in Other Technical and Trade Schools (NAICS 611519). <https://www.naics.com/six-digit-naics/?v=2022&code=61>. These sum to 13,758, but many entities covered by these NAICS Codes likely do not represent that they will teach consumers how to establish or operate a business, and so would not be covered under the proposed amendments. Thus, the figure is likely an overestimate based on this data.

compliance costs as a result of the proposed amendments. The Commission encourages the submission of comments including empirical data on the number of money-making opportunity sellers that would incur new costs as a result of the proposed amendments.

B. Costs of the Proposed Amendments

The proposed amendments would require only those money-making opportunity sellers who make earnings claims to retain substantiation for any earnings claims for three years, and to provide that substantiation upon request to prospective purchasers and the Commission.⁹⁷ These costs are addressed below. Section 5 of the FTC Act already requires money-making opportunity sellers to have substantiation for any earnings claims, so the proposed amendments' requirement that money-making opportunity sellers possess substantiation imposes no new burden, and thus is not addressed below.⁹⁸

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 money-making opportunity sellers will undertake in response to the proposed amendments. The Commission encourages the submission of comments including empirical data on the compliance costs sellers would incur as a result of the proposed amendments.

1. Some Money-Making Opportunity Sellers Would Incur Only Minimal Additional Costs

⁹⁷ The proposed amendments make no changes to the existing obligations of business opportunity sellers, so impose no costs on them.

⁹⁸ Similarly, this analysis does not consider any costs incurred by investment opportunities that are already subject to similar regulations under the authority of other government agencies, as, if finalized, compliance with the proposed amendments would impose no incremental cost to them, over the cost of complying with existing regulations.

The Commission assumes that nearly all newly regulated money-making opportunity sellers would incur some costs to review the proposed amendments,⁹⁹ but many will incur no further burden. First, the proposed amendments would not require money-making opportunity sellers to make earnings claims, and thus would impose no further burden on money-making opportunity sellers that do not do so. Second, some money-making opportunity sellers that make earnings claims may already comply with the proposed amendments' requirements, and thus would not experience any further compliance burden due to the proposed amendments. For example, some money-making opportunity sellers may make earnings claims only on their websites, and may ensure that such claims appear only in conjunction with substantiation that is also publicly posted on the websites. Third, entities that make earnings claims but lack substantiation to do so would not incur any further compliance burden due to the proposed amendments. In the absence of a reasonable basis for earnings claims, compliance with the proposed amendments requires refraining from making earnings claims. Section 5 of the FTC Act already requires this, and thus the proposed amendments would not impose any new costs in these circumstances.¹⁰⁰

For these reasons, and based on its law enforcement experience, the Commission anticipates that most money-making opportunity sellers would not incur new costs due to

⁹⁹ The Commission's enforcement experience demonstrates that at least some entities that would be covered as money-making opportunity sellers have little or no regard for the law's restrictions on unfair or deceptive marketing. It is likely that at least some such actors would not spend any time or effort to comply with the proposed amendments, and so incur no compliance costs at all.

¹⁰⁰ In virtually every case that the Commission has brought against entities that would constitute money-making opportunity sellers under the proposed amendments, the Commission alleged that the entity could not substantiate its earnings claims.

the proposed amendments, other than a small or *de minimis* amount of time to review the new regulatory provisions.

2. One-Time Costs

Some money-making opportunity sellers may experience an increase in costs to comply with the proposed amendments. Some of these costs would likely be incurred only once, to adjust to the new requirements of the proposed amendments. These might include regulatory familiarization and planning, training employees, reviewing existing advertising, preparing substantiation documents for distribution, and setting up infrastructure to facilitate recordkeeping and distribution of substantiation.¹⁰¹ Different sellers may incur different costs. Many sellers may incur only a few of the costs listed above, while others may incur all of them. Accordingly, this analysis provides estimates of the costs of these tasks for both a high and a low-cost scenario.

i. Regulatory Familiarization and Planning

As discussed above, nearly all money-making opportunity sellers are likely to spend at least some time reviewing the proposed amendments to determine whether the amendments impose any new requirements on them, and if so, planning what steps to take to ensure compliance. The proposed amendments are not lengthy, the requirements imposed are not complex, they hew closely to existing law, and would likely be accompanied by compliance business education issued by the Commission. As a result, staff estimate that this cost would be low or *de minimis* for money-making opportunity

¹⁰¹ Compliance with section 5 of the FTC Act already requires sellers to possess substantiation for any earnings claims. *See, e.g.*, Earnings Claims ANPR at 13951–52 (citing cases). Thus this analysis does not include any costs incurred by sellers who currently lack any substantiation documentation to prepare such documentation.

sellers that already comply with the proposed amendments' requirements. The same would be true for those sellers that make no earnings claims or that do not have substantiation to make earnings claims and thus should be refraining from making such claims. For these reasons, and based on its experience, the Commission estimates that most newly regulated money-making opportunity sellers would incur no more than *de minimis* cost to review the proposed amendments and plan compliance. Nonetheless, for the low-cost scenario, the Commission conservatively estimates that on average, newly regulated money-making opportunity sellers would each spend one hour on this task. Some sellers may have this task performed by a compliance officer, and some may use a lawyer. The low-cost scenario assumes that this work would be done by a compliance officer. The 2023 average hourly wage rate for compliance officers was \$38.55.¹⁰² Thus, the estimate for the low-cost scenario is \$38.55 (1 x \$38.55) per seller.

Some sellers, however, might spend more time to determine whether or not they are covered by the proposed amendments, and if so to plan what steps they need to take, if any, to come into compliance with the new requirements. The Commission lacks sufficient empirical data to determine these costs with precision.¹⁰³ Here too, given that the rule is short, not complicated, closely tracks existing law, and is likely to be accompanied by business education issued by the Commission, the Commission estimates that, for the purpose of this analysis, this task would take no more than an

¹⁰² *Occupational Employment and Wages—May 2023*, Bureau of Labor Statistics, U.S. Department of Labor (“BLS”), <https://www.bls.gov/oes/current/oes131041.htm>.

¹⁰³ The Commission, in the ANPR, requested public comment and empirical data on how an expansion of the Rule’s requirements to cover more entities, such as coaching and investment opportunities, would affect the costs the Rule imposes on businesses. 87 FR 72428, 72430–31 (2022). No commenter provided specific details or evidence of likely compliance costs.

average of 5 hours per seller in the high-cost scenario.¹⁰⁴ Because some sellers may have an attorney perform this work, the high-cost scenario conservatively uses the 2023 average hourly wage for attorneys, \$84.84, as the cost of this time.¹⁰⁵ Thus, the estimate for the high-cost scenario is \$424.20 (5 x \$84.84) per seller.

The Commission encourages the submission of comments including empirical data on the regulatory familiarization and planning costs money-making opportunity sellers would incur as a result of the proposed amendments.

ii. Training Employees

Newly regulated money-making opportunity sellers that employ sales representatives or others who interact with potential customers may train those employees on the proposed amendments' requirement that they provide substantiation to prospective purchasers upon request. Some sellers may not incur these costs at all. For example, sellers that interact with prospective purchasers solely through a website or that do not have sales representatives, or that already choose to provide substantiation to prospective purchasers may not incur any of these training costs. Others may choose to advise relevant employees of new requirements via an email or other low-cost means. Accordingly, in the low-cost scenario the Commission assumes that most newly regulated sellers would have no new training costs or very low training costs, while a smaller group of sellers would incur multiple hours of labor costs for training purposes. The

¹⁰⁴ These estimates and later ones contrast with those used in the ECR NPRM, published elsewhere in this issue of the *Federal Register*. The difference is driven by multiple factors, including the vastly different business models, and the vastly different consumer base of participants and prospective buyers. Generally, the Commission observes that money-making opportunity sellers, unlike MLMs, typically do not rely on a large network of participants to market their products and opportunity. Further, owing to the complexity of MLM compensation plans and related income disclosure statements, different types of employees may be involved in various aspects of implementation.

¹⁰⁵ BLS, <https://www.bls.gov/oes/current/oes231011.htm>.

Commission estimates that in this scenario, on average sellers would spend a total of one hour of employee time on training employees. This estimated hour of time may include time spent by a compliance officer to provide training, as well as time spent by telemarketers or other sales representatives to receive it. Average wage rates for these groups are \$38.55 for compliance officers and \$17.64 for telemarketers.¹⁰⁶ As a conservative estimate of the cost of time for this task in the low-cost scenario, the Commission uses the rate for compliance officers.¹⁰⁷ Thus, the estimate for the low-cost scenario is \$38.55 (1 x \$38.55) per seller.

In the high-cost scenario, the Commission assumes that sellers that have sales representatives may spend time developing and delivering a training presentation to their sales representatives. In the Commission's experience, a 10 minute presentation is a reasonable estimate of the time needed to convey the requirement to provide substantiation upon request, which is the only new responsibility a sales representative would need to be made aware of. In the Commission's experience, 2 hours is a reasonable estimate of the amount of time needed to develop a new 10 minute training presentation, and a half-hour (30 minutes) is a reasonable amount of time to spend to add content on this topic to an existing training presentation. Thus, the high-cost scenario assumes that sellers that have sales representatives may spend 2 hours developing a 10-

¹⁰⁶ See *supra* n. 102; BLS, <https://www.bls.gov/oes/current/oes419041.htm>. It is also possible that the training presentations may be delivered by sales representatives' first-line supervisors. The 2023 national average hourly wage rate for first-line supervisors of office and administrative support workers was \$32.99, so this alternative assumption would only reduce compliance costs. BLS, <https://www.bls.gov/oes/current/oes431011.htm>.

¹⁰⁷ Because some of the estimated one hour of time may be spent by telemarketers, sales representatives, or others whose wage rate is lower than \$38.55, the Commission's use of a wage rate of \$38.55 for the full hour likely overestimates the true cost of the hour of time.

minute training presentation for their sales representatives, and an additional half-hour to revise existing training materials used with new staff. As with regulatory familiarization, because at some sellers these tasks may be performed by a an attorney, the high-cost scenario conservatively uses the attorney wage rate for this time. At two and a half hours each, this sums to \$212.10 per seller. FTC staff further assumes each seller has an average of 5 sales representatives,¹⁰⁸ and so would spend 1 hour of time delivering a training to current sales representatives (10 minutes each for 5 representatives receiving the training, and 10 minutes for the presenter providing the training). In the Commission's enforcement experience, money-making opportunity sellers typically interact with consumers online or by telephone. Thus, the Commission uses \$17.64, the 2023 national average hourly wage rate for telemarketers, for the cost of sales representatives' time.¹⁰⁹ For the presenter, the Commission uses the hourly wage rate for attorneys, \$84.84.¹¹⁰ Thus, the Commission estimates that, on average, sellers will incur approximately \$28.84 ($\$17.64 \times 5/6 + \$84.84 \times 1/6$) as a result of a presenter delivering the training to the seller's relevant employees. Thus, under the high-cost scenario, the

¹⁰⁸ The Commission lacks sufficient empirical data to determine this number with precision. The Commission's enforcement experience is likely more heavily weighted towards larger entities, and includes entities that would be considered money-making opportunity sellers under the proposed amendments and that, at the time of the enforcement action, had as many as two dozen or more telemarketing sales representatives. However, according to the most recent data of the Bureau of Labor Statistics, there are only 81,580 telemarketing workers in the country. BLS, <https://www.bls.gov/oes/current/oes419041.htm>. Even if every telemarketer worked for a newly regulated money-making opportunity seller, that would be an average of 3.26 telemarketers per seller ($81,580 \div 25,000$). As a conservative estimate, and to account for the possibility that some sales representatives are not telemarketers, FTC staff assumes that each seller has approximately five sales representatives.

¹⁰⁹ BLS, <https://www.bls.gov/oes/current/oes419041.htm>.

¹¹⁰ See *supra* n. 105. It is also possible that the training presentations may be delivered by sales representatives' first-line supervisors. The 2023 national average hourly wage rate for first-line supervisors of office and administrative support workers was \$32.99, so this alternative assumption would only reduce compliance costs. BLS, <https://www.bls.gov/oes/current/oes431011.htm>.

Commission estimates that, on average, sellers incur one-time training costs of \$240.94 (\$212.10 + \$28.84) per seller.¹¹¹

The Commission encourages the submission of comments including empirical data on the training costs money-making opportunity sellers would incur as a result of the adoption of the proposed amendments.

iii. Preparing Substantiation Documents for Distribution and Setting up Infrastructure to Facilitate Recordkeeping and Distribution of Substantiation

Some newly regulated money-making opportunity sellers that make earnings claims may choose to change their substantiation materials or the method by which their substantiation materials are stored to ensure retention and ready availability for distribution.¹¹² The amount of time spent on these tasks may vary. Many sellers may already comply with the proposed amendments, and so would not incur these costs at all. For example, many businesses may retain documents for a period of three years or more as a matter of course. And some may already make substantiation for earnings claims available to all viewers of their earnings claims (*e.g.*, by hyperlink in the advertisement featuring the claims). As to sellers that incur costs to prepare substantiation documents for distribution or set up infrastructure for retention or distribution, the Commission lacks

¹¹¹ As noted above, the Commission anticipates releasing business education, which could further reduce these costs. And private third parties might create and license training modules that would provide a more economical alternative for covered sellers than creating and delivering their own training. These are further reasons why the high-cost scenario provides a conservative estimate of compliance costs.

¹¹² For the reasons described above, many sellers will not face these “reformatting” costs. For some sellers, such costs could include translation costs, if the seller makes earnings claims in more than one language and has not already translated their substantiation. These costs are unlikely to be large, as translation is relatively inexpensive (as low as 18 cents per word) and the proposed amendments do not require substantiation to be lengthy. *See* Notice of Agency Information Collection Activities, 88 FR 50865 (Oct. 2, 2023), <https://www.federalregister.gov/documents/2023/08/02/2023-16454/agency-information-collection-activities-proposed-collection-comment-request-extension> (estimating translation cost of 18 cents per word).

sufficient empirical evidence to determine the costs with precision. However, because the proposed amendments do not prescribe any specific format, contents, or retention method for substantiation, sellers are free to adopt the practices that minimize costs. The Commission anticipates that these tasks could require no or only *de minimis* time (e.g., where substantiation already exists in an easily shareable form, and it need only be copied to a new location and a hyperlink added to a single webpage) or considerably more (e.g., where substantiation documents must be gathered from various locations and copied to a single central repository, or where a new webpage or other infrastructure must be built). For purposes of this analysis, the Commission provides estimates for a low-cost scenario in which a clerical worker spends, on average, 1 hour on these tasks, and a high-cost scenario in which a web developer spends, on average, 5 hours on these tasks. This analysis uses \$22.41, the 2023 national average hourly wage rate for “office and administrative support workers, all other,” and \$45.95, the 2023 national average hourly wage rate for web developers, as the estimates for the hourly wage rates for this work.¹¹³ Thus, the Commission provides estimated costs for these tasks of \$22.41 (1 x \$22.41) for the low-cost scenario estimate and \$229.75 (5 x \$45.95) for the high-cost scenario.¹¹⁴

The Commission encourages the submission of comments including empirical data on the costs money-making opportunity sellers would incur as a result of the

¹¹³ BLS, <https://www.bls.gov/oes/current/oes439199.htm> (office and administrative support workers); <https://www.bls.gov/oes/current/oes151254.htm> (web developers).

¹¹⁴ As noted at n.104, *supra*, this estimate contrasts with that used in the ECR NPRM, published elsewhere in this issue of the *Federal Register*. The difference here is driven by the vastly different business models. In the Commission’s law enforcement experience, MLMs typically have extensive data regarding at least some portions of participants’ income and expenses, whereas the types of money-making opportunities that are not already complying with the proposed amendments (and thus might have cognizable costs) likely have little data regarding purchaser earnings.

proposed amendments to prepare substantiation documents for distribution and set up infrastructure to facilitate recordkeeping and distribution of substantiation.

iv. Reviewing Existing Earnings Claims

The representations prohibited by the proposed amendments are unfair or deceptive under section 5 of the FTC Act. Sellers that are compliant and diligent in ensuring their earnings claims are truthful and not misleading would not incur any new costs. Thus, the estimated cost for reviewing existing advertising is \$0 in the low-cost scenario.

Some sellers may view the proposed amendments as increasing the likelihood or cost of an enforcement action for deceptive earnings claims (relative to a *de novo* violation of section 5 of the FTC Act), and so might choose to spend additional time reviewing their existing advertisements with earnings claims to ensure they comply with the law. Thus, the high-cost scenario assumes that sellers spend some additional time on this task. The amount of time spent would likely vary based on the number and variety of advertisements to be reviewed. Based on the Commission's enforcement experience, some sellers use only a few advertisements that include earnings claims, and so may spend as little as 10 minutes on the task. Others may have several advertisements, with some in different media, and so may need to spend a number of hours to review all relevant advertising. The high-cost scenario assumes that the average time spent on this task, across all sellers that incur such costs, is 5 hours per seller. As above, this task may be performed by a compliance officer or by an attorney, but the Commission uses the

attorney wage rate of \$84.84 per hour in the high-cost scenario.¹¹⁵ Accordingly, for those sellers that incur this cost, the high-cost scenario assumes the average total cost would be \$424.40 per seller (\$84.84 per hour x 5 hours).

The Commission encourages the submission of comments including empirical data on the costs money-making opportunity sellers would incur to perform an additional review of existing advertising as a result of the proposed amendments.

v. Total One-Time Costs

As set out above, newly regulated money-making opportunity sellers that make earnings claims may incur one-time costs due to the proposed amendments, as follows:

Table 1: Quantified Per-firm One-Time Costs in 2023 dollars

	Low-Cost Scenario	High-Cost Scenario
Regulatory Familiarization and Planning		
Hours per seller	1	5
Wage rate (compliance officer / lawyer)	\$38.55	\$84.84
<i>Subtotal</i>	<i>\$38.55</i>	<i>\$424.20</i>
Training Employees		
<u>Low-cost scenario</u>		
Average hours for training	1	NA
Wage rate (compliance officer)	\$38.55	NA
<i>Subtotal: training in low-cost scenario</i>	<i>\$38.55</i>	<i>NA</i>
<u>High-cost scenario</u>		
Hours to develop presentation per seller	NA	2.5
Wage rate (lawyer)	NA	\$84.84
<i>Subtotal: developing presentation</i>	<i>NA</i>	<i>\$212.10</i>
Hours to deliver presentation per seller	NA	1/6
Wage rate (attorney)	NA	\$84.84
<i>Subtotal: delivering presentation</i>	<i>NA</i>	<i>\$14.14</i>
Hours to attend presentation per seller	NA	1/6

¹¹⁵ See *supra* n. 105.

# Attendees	NA	5
Wage rate of attendees (telemarketer)	NA	\$17.64
<i>Subtotal: attending presentation</i>	<i>NA</i>	<i>\$14.70</i>
 <i>Subtotal: Training Employees</i>	 \$38.55	 \$240.94
 Preparing Substantiation Documents for Distribution and Setting up Infrastructure to Retain and Distribute Documents		
Hours per seller	1	5
Wage rate (admin. assist.; web developer)	\$22.41	\$45.95
<i>Subtotal</i>	<i>\$22.41</i>	<i>\$251.95</i>
 Reviewing Existing Advertising		
Hours per seller	0	5
Wage rate (compliance officer / lawyer avg)	NA	\$84.84
<i>Subtotal</i>	<i>\$0</i>	<i>\$424.20</i>
 Total Quantified One-Time Costs per seller	 \$99.51	 \$1,319.09

For the reasons discussed above, many sellers likely would not incur these costs. Some sellers may incur only some of the above costs, and not all. The Commission lacks sufficient evidence to determine with precision how many sellers would incur which costs. The Commission encourages the submission of comments including empirical data on the one-time costs money-making opportunity sellers would incur as a result of the proposed amendments.

3. Recurring Costs

FTC staff estimates that some money-making opportunity sellers may incur new recurring costs relating to recordkeeping, distribution, and training. Sellers that already comply with the proposed amendments, including those that do not make earnings claims, would not incur any new recurring costs.

i. Recordkeeping and Distribution

Some money-making opportunity sellers that make earnings claims may incur new recurring costs to retain or distribute substantiation in compliance with the proposed amendments. Money-making opportunity sellers likely would maintain such substantiation records electronically and would likely provide them electronically or make them available online, such as by posting them on the seller's website.¹¹⁶ As noted above, many sellers likely already do this, and others would likely make a one-time investment to modify infrastructure to support such an approach. Once established, such a system would require little, if any time from the seller to maintain. Thus, any recurring costs would mainly be driven by sellers' decisions to update substantiation documentation to reflect new evidence or new claims, which would then require the revised substantiation material to be uploaded into the system. The Commission lacks sufficient evidence to quantify these costs with precision. The low-cost scenario assumes that sellers spend an average of one hour per year maintaining the system and uploading revised substantiation documents to it as necessary. The high-cost scenario assumes that sellers spend an average of two hours per year on this task. Both scenarios use an hourly wage rate of \$45.95, the 2023 national average hourly wage rate for web developers.

Some sellers, instead of or in addition to operating a system like that described above, may choose to respond individually to requests for substantiation. Such interactions would likely take no more than thirty seconds each, but even this *de minimis*

¹¹⁶ This estimate contrasts with that addressing a parallel rule provision in the proposed Earnings Claim Rule Regarding Multi-Level Marketing. See ECR NPRM at section VII.C, published elsewhere in this issue of the *Federal Register*. As noted above, the different estimates are driven by the vastly different business structures at issue.

time burden could impose measurable costs if sufficient numbers of requests are made. The number of such requests is likely to vary significantly from seller to seller. The Commission lacks sufficient evidence to estimate the likely average number of such requests that would be received by sellers that elect to respond individually to substantiation requests. To reflect this, the low-cost scenario assumes that each seller would, on average, spend 1 hour per year responding individually to requests for substantiation, and the high-cost scenario assumes that each seller would, on average, spend 10 hours per year responding individually to requests for substantiation. This work could be performed by a clerk or administrative assistant, so a wage rate of \$22.41 is used.

Accordingly, the estimated cost in the low-cost scenario is \$68.36 ($\45.95×1 (hours to maintain system) + $\$22.41 \times 1$ (hours to respond individually)), and in the high-cost scenario is \$316 ($\49.95×2 (hours to maintain system) + $\$22.41 \times 10$ (hours to respond individually)). The Commission encourages the submission of comments including empirical data on the costs money-making opportunity sellers would incur on a recurring basis to retain and distribute substantiation as a result of the proposed amendments.

ii. Total Recurring Costs

As set out above, newly regulated money-making opportunity sellers that make earnings claims may incur recurring costs due to the proposed amendments, as follows:

Table 2: Recurring Annual Costs Per Seller, 2023 dollars

	Low-Cost Scenario	High-Cost Scenario
Recordkeeping and Distribution		

Hours to maintain system per seller	1	2
Wage rate (database admin.)	\$45.95	\$45.95
<i>Subtotal: maintaining system</i>	<i>\$45.95</i>	<i>\$91.90</i>
Hours to respond to substantiation requests per seller	1	10
Wage rate (admin. assist.)	\$22.41	\$22.41
<i>Subtotal</i>	<i>\$22.41</i>	<i>\$224.10</i>
Total Cost per seller	\$68.36	\$316

For the reasons discussed above, many sellers likely would not incur these costs. Some sellers may incur only some of the above costs, and not all. The Commission lacks sufficient evidence to determine with precision how many sellers would incur which costs.

The Commission encourages the submission of comments including empirical data on the recurring costs money-making opportunity sellers would incur as a result of the proposed amendments.

4. Total Cost of Compliance

As discussed above, based on the Commission's enforcement experience, and the fact that the proposed amendments hew closely to existing law, it anticipates that most newly regulated money-making opportunity sellers would not incur any expenses as a result of the proposed amendments. Of the sellers that might incur new costs, different sellers would likely incur different costs, with some incurring only some of the potential costs described above, and others incurring most or all. As noted above, the Commission lacks sufficient evidence to quantify these costs with precision. Accordingly, the Commission has provided, above, estimates for both low-cost and high-cost scenarios for a variety of potential costs.

As discussed above, based on the Commission's enforcement experience, the Commission anticipates that most newly regulated money-making opportunity sellers would not incur any expenses as a result of the proposed amendments beyond a small or *de minimis* amount of time to review the new provisions. This analysis assumes that half of 25,000 newly regulated money-making opportunities would incur no more than *de minimis* costs, and the remainder would each incur costs falling somewhere on a spectrum between the low-cost and high-cost scenarios provided above. The Commission lacks sufficient evidence to provide a precise estimate of the total of such costs. However, for the purposes of providing a conservative numerical estimate of costs, the Commission has calculated the costs of a scenario in which half of all newly regulated sellers incurred costs as estimated in the high-cost scenario, and the other half incurred costs as estimated in the low-cost scenario. In the first year, in which both one-time and recurring costs would be incurred, total costs would be \$1,635.09 per seller incurring the high-cost estimated costs (\$1,319.09 in one-time costs + \$316 in recurring costs) and \$167.87 per seller incurring the low-cost estimated costs (\$99.51 in one-time costs + \$68.36 in recurring costs), or \$901.48 on average per affected seller. Across all newly regulated sellers this would amount to \$22,537,000 ($25,000 \times 1/2 \times \$1,635.09 + 25,000 \times 1/2 \times \167.87).

Accordingly, the Commission believes that, based on the estimated compliance costs, the proposed amendments to the Rule will not result in annual compliance costs

exceeding \$100,000,000.¹¹⁷ Nonetheless, the Commission invites comments on the above estimates, and in particular comments that provide an empirical basis for revising the estimates.

The total estimated present value of costs of compliance over ten years to newly regulated money-making opportunity sellers, if every such seller incurred such costs, are approximately \$17.79 million for the low-cost scenario and approximately \$103.29 million for the high-cost scenario, using a 2% discount rate for both.¹¹⁸

Table 3 – Total Quantified Costs, 2023 dollars

	Low-Cost Scenario	High-Cost Scenario
Total year 1 costs (one-time costs & recurring costs, if all 25,000 entities incur all costs)	\$ 4,196,750	\$40,877,250
Total annual costs in years 2-10 (recurring costs, per year, if all 25,000 entities incur all recurring costs)	\$1,709,000	\$7,900,000
Present discounted value of costs over 10 years, at 2% discount rate	\$17,790,208.36	\$103,293,058.80
Annualized costs	\$1,980,522.13	\$11,499,257.59

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 approximately \$1.98

¹¹⁷ See 15 U.S.C. 57b-3(a)(1)(A). The Commission is not aware of any industry or government entity that makes extensive use of the money-making opportunities regulated by the proposed amendments, or that such offerings are supplied extensively in any particular geographic region. 15 U.S.C. 57b-3(a)(1)(B). The Commission is not aware of any significant impacts to consumers or businesses not already captured in the estimated monetary costs and benefits. 15 U.S.C. 57b-3(a)(1)(C).

¹¹⁸ *C.f.* U.S. Office of Management and Budget, Circular 4-A, pages 75-77.

million each year. For the high-cost scenario, the equivalent annualized costs are approximately \$11.50 million each year.

C. Benefits of the Proposed Amendments

The Commission anticipates that the proposed amendments would provide important benefits for consumers and competition. Specifically, the proposed amendments would facilitate redress for injured consumers and deter covered entities from using misleading earnings claims, thus leading to a decrease in harm in the first instance. The Commission lacks sufficient evidence to determine the magnitude of these benefits with precision. However, the available evidence suggests they would be substantial, and outweigh the potential costs as estimated above.

1. Redress

The amount of redress returned to consumers in cases involving deceptive earnings claims varies considerably from case to case but is often significant. After *AMG*, the Commission's ability to obtain consumer redress for injuries caused by money-making opportunity sellers' deceptive earnings claims is limited. In order to illustrate the extent to which the proposed amendments might increase the Commission's ability to obtain consumer redress,¹¹⁹ the Commission is providing a comparison of two illustrative cases involving the use of deceptive earnings claims by money-making opportunity sellers, one of which was resolved before and one of which was resolved after the Supreme Court's decision in *AMG*:

¹¹⁹ In some cases, an entity that would be covered as a money-making opportunity seller may be engaged in conduct that violates another rule enforced by the FTC, such as the Telemarketing Sales Rule, that would allow the Commission to obtain at least some consumer redress. Such rules, however, do not cover all the conduct that would be prohibited by the proposed amendments. Thus, the proposed amendments would enable additional consumer redress that is not currently obtainable.

- Before *AMG*: In 2020, sellers of investment advice agreed to settle charges that the sellers had used deceptive earnings claims to obtain \$362 million from consumers in violation of section 5 of the FTC Act.¹²⁰ The settlement ultimately provided benefits to more than 31,000 consumers, including debt relief in excess of \$13.3 million and refunds totaling more than \$5.4 million.¹²¹ The settlement also included a so-called “avalanche clause” under which the full \$362 million would be due to the Commission if it were found that the defendants had misled the Commission about the state of their finances.¹²²
- After *AMG*: In 2023, a marketer of investment advice agreed to settle charges that the marketer had “pocketed more than \$13.6 million personally” by using deceptive earnings claims to induce sales.¹²³ The settlement did not require the marketer to pay anything and provided no redress for consumers.¹²⁴ As explained in a press release, “[d]ue to the Supreme Court’s ruling in *AMG Capital Management v. FTC*, . . . none of the money that [the marketer] earned from the scheme could be sought by

¹²⁰ *FTC v. OTA Franchise Corp.*, No. 8:20-cv-287 (C.D. Cal. 2020); FTC Press Release, *Federal Trade Commission Sending Refunds to More than 31,000 Consumers Allegedly Defrauded by Online Training Academy* (Aug. 16, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/08/federal-trade-commission-sending-refunds-more-31000-consumers-allegedly-defrauded-online-training>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *FTC v. Ragingbull.com, LLC*, No. 1:20-cv-3538 (D. Md. 2020); FTC Press Release, *RagingBull.com Stock Trading “Guru” Kyle Dennis Faces Permanent Injunction as Result of FTC Action* (Sept. 8, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ragingbullcom-stock-trading-guru-kyle-dennis-faces-permanent-injunction-result-ftc-action>.

¹²⁴ *Id.*

the FTC to provide refunds to the consumers who lost money to his scheme.”¹²⁵

These cases suggest that the proposed amendments would increase the Commission’s ability to obtain consumer redress by millions and likely tens of millions of dollars.

2. Deterrence and Avoided Harm

The proposed amendments are anticipated to have some deterrent effect, as covered entities may anticipate that they would lead the Commission to bring more enforcement actions for deceptive earnings claims, and would expose covered entities to civil penalties for violations. The Commission lacks sufficient evidence to estimate the extent of the benefits of such deterrence with precision.¹²⁶ However, given the large scope of harm documented in nonpublic reports submitted to the Commission and alleged in the Commission’s past cases, even a modest deterrent effect could mean millions of dollars in injury averted. For example, the Commission has identified 107,699 consumer reports of investment-related fraud in 2023 alone, causing losses of over \$4.6 billion.¹²⁷ And the consumer injury alleged in the Commission’s past cases is similarly substantial. Several examples follow.

- A 2019 case alleged that a seller of trainings on how to profit from flipping real estate had used deceptive earnings claims to take in over

¹²⁵ *Id.*

¹²⁶ The Commission notes that some entities may not be deterred, but may continue to violate the law and make no effort to comply with the proposed amendments, and thus incur no compliance costs.

¹²⁷ Consumer Sentinel Network Databook 2023 at 8, https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Annual-Data-Book-2023.pdf. Even a 1% reduction in \$4.6 billion of losses would be \$46 million. This is several times the estimated annual cost of the proposed revisions.

\$400 million.¹²⁸ The sellers ultimately agreed to settlements that included judgments totalling more than \$20 million, suspended in part based on one seller’s inability to pay.

- A 2019 case alleged that sellers of another training on how to profit from flipping real estate had used deceptive earnings claims to take in over \$104 million.¹²⁹ The seller ultimately agreed to a settlement that included a judgment for \$104.7 million, suspended in part based on the seller’s inability to pay.
- A 2017 case alleged that a seller of invention promotion services had used deceptive earnings claims to take in over \$25.9 million.¹³⁰ The seller ultimately agreed to a settlement that included a judgment for \$25.9 million, suspended in part based on the seller’s inability to pay.
- A 2017 case alleged that a seller of “automatic money systems” and “secret codes” used deceptive earnings claims to take in \$7 million.¹³¹ The seller ultimately agreed to a settlement that included a judgment for \$7 million.

In addition to the direct financial harm that deterrence could avert, the proposed amendments may also avert other forms of harm, such as psychological and social

¹²⁸ *FTC v. Nudge LLC*, No. 2:19-cv-867 (D. Utah 2019). This case included allegations that some of the deceptive earnings claims violated the Telemarketing Sales Rule.

¹²⁹ *FTC v. Zurixx LLC*, No. 2:19-cv-713 (D. Utah 2019). This case included allegations that some of the deceptive earnings claims violated the Telemarketing Sales Rule.

¹³⁰ *FTC v. World Patent Mktg.*, No. 1:17-cv-20848 (S.D. Fla. 2017).

¹³¹ *FTC v. Montano*, No. 6:17-cv-2203 (M.D. Fla. 2017).

harms.¹³² The Commission lacks sufficient evidence to estimate the value of such averted harm with precision. However, the value of averting even a few instances of bankruptcy, mental illness, or other such non-monetary harms to consumers would be substantial.

Finally, the Commission notes that the proposed amendments may provide a benefit to competition to the extent they deter the use of deceptive earnings claims. When sellers of investment advice or other money-making opportunities are forced to give up dishonest claims and compete fairly, this benefits honest competitors by leveling the playing field. The Commission lacks sufficient evidence to estimate the value of such benefits with precision. However, the magnitude of the figures noted above may provide some sense of the scale of the possible effects.

D. Alternatives to the Proposed Amendments

One potential alternative to the proposed amendments would be to terminate the rulemaking and rely instead on the tools that the Commission currently possesses to combat deceptive earnings claims by money-making opportunity sellers, such as consumer education and enforcement actions brought under sections 5 and 19 of the FTC

¹³² 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>.

Act. While termination of the rulemaking could preserve some Commission resources in the short term, doing so would deprive consumers and competition of the benefits discussed above. The alternative of terminating the rulemaking would not sufficiently accomplish the Commission's objectives.

Another alternative might be to limit the proposed amendments' scope solely to investment opportunities or solely to business coaching opportunities. A narrower rule would have lower overall costs to businesses. However, it would also have lower overall benefits for consumers and competition. Specifically, such a narrower approach would fail to provide the Commission with authority to seek monetary redress for consumers injured by sellers that would not be covered by such a narrower proposal. As noted in the Business Opportunity Rule ANPR, despite the Commission's aggressive enforcement program targeting deceptive earnings claims made by business coaching and work-from-home programs, investment coaching programs, and e-commerce opportunities, such claims continue to proliferate in the marketplace, and many of them are not covered by the Rule.¹³³ The evidence available to the Commission does not suggest that the costs of regulation outweigh the benefits to consumers and competition with respect to either type of money-making opportunity. Thus, the proposed amendments would cover both types of money-making opportunities.

The Commission seeks comment on these and other potential alternatives, including whether the proposed amendments would cause different costs to businesses, or

¹³³ 87 FR at 72429.

benefits to consumers and competition, depending on whether they are applied to sellers of investment opportunities or sellers of business coaching opportunities.

VII. 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 disclosure, reporting, or recordkeeping requirements on ten or more persons. The current Rule contains recordkeeping and disclosure requirements that constitute information collection requirements as defined by the Paperwork Reduction Act (“PRA”). OMB has approved the Rule’s existing information collection requirements through February 28, 2027 (OMB Control No. 3084-0142), and the Commission will seek a modification of that existing clearance for the purpose of the adoption of the proposed information collection requirements.

The proposed amendments encompass changes to the Rule’s recordkeeping requirements. Currently, the Rule requires sellers of business opportunities, and their principals, to retain for at least three years the substantiation upon which the seller relies for each earnings claim made, as well as all contracts, receipts, and other documents required by the Rule. The proposed amendments would extend the three-year recordkeeping requirement to money-making opportunity sellers, but only as to the substantiation documentation upon which they rely in making any earnings claims. The proposed amendments also require money-making opportunity sellers to provide substantiation upon request to prospective purchasers and the Commission. The proposed amendments make no changes to the obligations of business opportunity sellers,

including the obligations of money-making opportunity sellers who already qualify as business opportunity sellers under the Rule's current requirements.

As noted in section VI, the Commission lacks sufficient evidence to determine all money-making opportunity sellers' compliance costs with precision, but the Commission estimates that most money-making opportunity sellers would not incur new burdens relating to the proposed amendments' requirements that covered sellers retain and distribute upon request documents that substantiate their earnings claims. Nonetheless, as a conservative estimate Commission staff has provided conservative "high-cost" and "low-cost" scenarios that estimate the costs that may be incurred, as detailed in section VI. The Commission invites comment and evidence regarding the actual, likely costs of compliance.

For purposes of this Paperwork Reduction Act analysis, the Commission adopts the low-cost scenario estimates of costs (described above in section VI.B), and so estimates that initial one-time costs would be no more than \$99.51 per affected seller, on average, or no more than \$2,487,750 (if all 25,000 newly regulated money-making opportunity sellers incurred such costs). Additionally, the Commission estimates that recurring annual compliance costs would be no more than \$68.36 per affected seller, on average, or no more than \$1,709,000 per year in total (if all 25,000 newly regulated money-making opportunity sellers incurred such costs). The Commission adopts the low-cost scenario because, as noted above, there is considerable uncertainty with respect to the costs, if any, money-making opportunities would incur as the result of the proposed amendments, and for many money-making opportunity sellers' actual costs may be considerably less than the Commission's estimates or may be nonexistent. For example,

to the extent the tasks are performed by clerical staff or other workers with lower wage rates than those used in the low-cost scenario estimate, costs would be lower. Businesses that do not make earnings claims would have likely have low or *de minimis* initial costs and would have no recurring costs.

The Commission 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.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA),¹³⁴ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires agencies to either provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed rule, or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.¹³⁵ The Commission does not expect that, if adopted, the proposed

¹³⁴ 5 U.S.C. 601–612.

¹³⁵ 5 U.S.C. 601–605.

amendments 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 amendments to the Rule would 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 amendments to the 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.¹³⁶ 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,¹³⁷ it incorporates that analysis into its IRFA.¹³⁸ The

¹³⁶ See 5 U.S.C. 603(b).

¹³⁷ See discussion *supra* sections I - III and VI.

¹³⁸ See 5 U.S.C. 605(a) (providing that 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 Rule Will Apply

The proposed amendments apply to money-making opportunity sellers. Based on its law enforcement experience, the Commission believes that many such sellers are small entities.¹³⁹ Determining a precise estimate of the number of small entities that would be affected by the proposed amendments' substantiation and recordkeeping requirements is not readily feasible. Census data related to the number of small businesses in particular industries is not determinative because the relevant industry codes are not limited to industries covered by the proposed amendments. For example, many investment opportunity sellers may be considered part of the Portfolio Management and Investment Advice NAICS industry code, 523940. But that industry code also includes entities, such as those managing portfolio assets of others, that may not fall within the definition of investment opportunity.¹⁴⁰ Similarly, as the Commission noted in section VI.A.2, some business coaching opportunity sellers may fall within one of four different NAICS code categories of instructional entities, but these categories also include entities that would likely not constitute money-making opportunity sellers, such as those that offer to provide training in specific skills, but not in how to establish or operate a business.¹⁴¹ The Commission also noted a study identifying 17,500 individual

¹³⁹ See 13 CFR 121.201 (Small Business Size Regulations).

¹⁴⁰ See <https://www.naics.com/naics-code-description/?v=2022&code=523940>.

¹⁴¹ See <https://www.naics.com/six-digit-naics/?v=2022&code=61>. Money-making opportunities likely fall within additional industries as defined by NAICS, but as with the examples above, such industries likely also include entities outside the scope of the proposed amendments.

“coach practitioners” in North America, but, as noted in section VI.A.2, the number of businesses (small or otherwise) through which these practitioners offer their services is not clear. The Commission therefore especially encourages the submission of comments on the estimated number or nature of small business entities, if any, for which the proposed amendments would have a significant impact.

The Commission notes that mere coverage under the proposed amendments does not necessarily mean covered entities would incur more than the *de minimis* burden of simply reading the proposed amendments, as the requirements that may potentially impose further efforts and resources apply only to those entities making earnings claims. Newly-covered entities that do not make earnings claims should face no additional burden due to the proposed amendments. And many newly-covered entities that do make earnings claims may already comply with the proposed requirements.

B. Projected Reporting, Recordkeeping, and Other Compliance Requirements

As noted in section VI, the Commission lacks sufficient evidence to determine all money-making opportunity sellers’ compliance costs with precision, but estimates that most money-making opportunity sellers would incur only low or *de minimis* new one-time costs relating to reviewing the amendments and would have no new recurring costs thereafter. Nonetheless, the Commission has provided conservative “high-cost” and “low-cost” scenarios that estimate the costs that may be incurred, as detailed in section VI. The Commission invites comment and the submission of empirical data regarding the actual, likely costs of compliance.

For purposes of this IRFA, the Commission adopts the low-cost scenario estimates of costs (described above in section VI.B), and so estimates that initial one-time costs would be no more than \$99.51 per affected seller, on average, or no more than \$2,487,750 in total (if all 25,000 newly regulated money-making opportunity sellers incurred such costs and are small entities). Additionally, the Commission estimates that recurring annual compliance costs would be no more than \$68.36 per affected seller, on average, or no more than \$1,709,000 per year in total (if all 25,000 newly regulated money-making opportunity sellers incurred such costs). The Commission adopts the low-cost scenario because, as noted above, there is uncertainty with respect to the costs, if any, money-making opportunities would incur as the result of the proposed amendments, and for many money-making opportunity sellers the actual costs may be considerably less than the Commission's estimates or may be nonexistent. For example, to the extent the tasks are performed by clerical staff or other workers with lower wage rates than those used in the low-cost scenario estimate, costs would be lower. Businesses that do not make earnings claims would have no recordkeeping or distribution costs.

For these reasons, the proposed amendments are unlikely to impose a significant economic impact on money-making opportunity sellers that are small businesses.

Additionally, any deterrent effect of the proposed amendments could provide competitive benefits to money-making opportunity sellers that do not use deceptive earnings claims, which might help to offset their compliance costs. To the extent the proposed amendments deter competitors from using false or unsubstantiated earnings claims to attract customers, it reduces the attractiveness of such money-making opportunity sellers as alternatives to a seller that does not use deceptive earnings claims.

If truthful sellers are thereby able to obtain more customers, this may increase their profits. Even a small increase in profits could measurably offset the estimated compliance costs. As noted above, the Commission lacks sufficient evidence to quantify the potential competitive benefits of the proposed amendments' deterrent effect, and encourages comments that provide empirical data that would assist the Commission in doing so.

Accordingly, the Commission concludes that the proposed amendments 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 amendments, if adopted, would impose on money-making opportunity sellers that are small businesses.

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

The Commission has not identified any Federal rules that would conflict with the proposed amendments. As discussed in section III, with very limited exceptions, the proposed amendments would simply codify businesses' existing obligations under the FTC Act. In addition, certain money-making opportunity sellers may also be covered by regulations issued by the Securities and Exchange Commission, the Commodity Futures Trading Commission, or like regulatory bodies, or by the Department of Education.¹⁴² Further, to the extent that entities covered by the Rule may market by telephone, some conduct covered by the proposed amendments to the Rule may also be covered by the Telemarketing Sales Rule.¹⁴³

¹⁴² See, e.g., 17 CFR 275.206(4)-1.

¹⁴³ Telemarketing Sales Rule, 16 CFR part 310. See, e.g., 16 CFR 310.3(a)(2)(vi) (prohibiting misrepresenting the earnings potential of an investment opportunity) and 310.2(s) (defining investment opportunity as anything marketed by way of earnings claims).

The Commission has not identified any conflict arising from complying with these rules and the proposed amended 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

The proposed amendments' disclosure and recordkeeping requirements are designed to impose the minimum burden on all affected money-making opportunity sellers, regardless of size. The Commission has taken significant steps to minimize the burden the proposed amendments would impose on large and small businesses. For example, in part for the purpose of burden minimization, the Commission is proposing specific prohibitions, rather than affirmative disclosure requirements, whenever possible. In particular, the Commission is not proposing to require money-making opportunity sellers to provide the detailed disclosure document the Rule requires of business opportunity sellers,¹⁴⁴ and the Commission's proposal does not include any requirements as to the format in which substantiation must be provided or maintained.

The Commission considered several alternatives to the proposed amendments. One potential alternative to the proposed amendments would be to terminate the rulemaking and to rely instead on the 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 very purpose of the rulemaking—to restore the Commission's

¹⁴⁴ See 16 CFR 437.3.

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 amendments could involve narrowing the proposed amendments' scope. For example, the proposed amendments could omit the recordkeeping requirement or the requirement that money-making opportunity sellers provide substantiation to the government or to prospective purchasers. 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 amendments described in section VI.C, by reducing the availability of substantiation for earnings claims. Such changes would be likely to increase the cost and difficulty of enforcing the proposed amendments, which could significantly reduce their deterrent effect. And consumers are not able to make an informed choice about whether to invest in a money-making opportunity if they do not have access to accurate data about their likely earnings. In the Commission's view, the disclosure and recordkeeping requirements of the proposed amendments are the minimum necessary to give consumers the information they need to protect themselves and permit effective enforcement of the remaining provisions in the proposed amendments.

In addition, the Commission has considered narrowing the scope of the proposed amendments, such as exempting small businesses from the recordkeeping and substantiation requirements. This could provide the benefit of reducing compliance costs borne by small businesses with smaller profit margins that might cause them to be impacted disproportionately by the proposed amendments. However, 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. Additionally, many of the entities currently disseminating deceptive earnings claims likely are small entities, so an exemption for such entities would deprive the amendments of much of their intended benefit.

The Commission does not have the data to prepare a quantitative analysis of the 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 encourages the public to submit comments on these alternatives and any other potentially reasonable alternatives, including any relevant sources of data that reflect the costs and benefits of such alternatives.

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

Pursuant to Commission Rule 1.18(c)(1)(i)-(ii), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner's 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 public comment period in response to this NPRM. 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.¹⁴⁵

List of Subjects in 16 CFR Part 437

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

Accordingly, the Federal Trade Commission proposes to revise and republish 16 CFR 437.1 through 437.10, as follows:

Part 437 Business and Money-Making Opportunity Rule

Sec.

- | | |
|--------|--|
| 437.1 | Definitions. |
| 437.2 | The obligation to furnish written documents. |
| 437.3 | The disclosure document. |
| 437.4 | Earnings claims. |
| 437.5 | Sales conducted in Spanish or other languages besides English. |
| 437.6 | Other prohibited practices. |
| 437.7 | Record retention. |
| 437.8 | Franchise exemption. |
| 437.9 | Outstanding orders; preemption. |
| 437.10 | Severability. |

¹⁴⁵ See 15 U.S.C. 57a(i)(2)(A); 16 CFR 1.18(c).

Authority: 15 U.S.C. 41–58.

§ 437.1 Definitions.

The following definitions shall apply throughout this part:

Action means a criminal information, indictment, or proceeding; a civil complaint, cross claim, counterclaim, or third party complaint in a judicial action or proceeding; arbitration; or any governmental administrative proceeding, including, but not limited to, an action to obtain or issue a cease and desist order, an assurance of voluntary compliance, and an assurance of discontinuance.

Affiliate means an entity controlled by, controlling, or under common control with a seller.

Business coaching opportunity means any program, plan, or product, including those related to work-at-home opportunities, that is represented, expressly or by implication, to train or teach a participant or purchaser how to establish or operate a business.

Business opportunity means a commercial arrangement in which:

- (1) A seller solicits a prospective purchaser to enter into a new business; and
- (2) The prospective purchaser makes a required payment; and
- (3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:
 - (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices, owned, leased, controlled, or paid for by the purchaser; or

(ii) Provide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser's goods or services; or

(iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home.

Designated person means any person, other than the seller, whose goods or services the seller suggests, recommends, or requires that the purchaser use in establishing or operating a new business.

Disclose or state means to give information in writing that is clear and conspicuous, accurate, concise, and legible.

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 to a prospective purchaser 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 results based upon a combination of variables;

(2) Any statements or images from which a prospective purchaser can reasonably infer that he or she will earn a minimum level of earnings (*e.g.*, “earn extra money in your spare time,” “treat yourself to something nice,” or “get help paying your bills”) or achieve a material lifestyle change (*e.g.*, “retire early,” “spend more time with your family,” or “achieve financial freedom”); and

(3) Any representations by past or current purchasers or others regarding their earnings.

Exclusive territory means a specified geographic or other actual or implied marketing area in which the seller promises not to locate additional purchasers or offer the same or similar goods or services as the purchaser through alternative channels of distribution.

General media means any instrumentality through which a person may communicate with the public, including, but not limited to, television, radio, print, Internet, billboard, Web site, commercial bulk email, and mobile communications.

Investment opportunity means any program, plan, or product that is represented, expressly or by implication, as an opportunity to obtain earnings, including

but not limited to an opportunity to be taught or trained how to obtain earnings, through the buying, selling, or licensing of either of the following:

(1) membership in the program or plan; or

(2) assets, including but not limited to real estate, currencies, precious metals, intellectual property, stocks, bonds, options, futures, or digital assets including but not limited to cryptocurrency.

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

Money-making opportunity means any business coaching opportunity or investment opportunity for which a purchaser makes a required payment, and that is not a multi-level marketing program.

MULTI-LEVEL MARKETING DEFINITION ALTERNATIVE A

Multi-Level Marketing Program or *MLM* (1) 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.

(2) 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*** (1) 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.

(2) 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.

(3) 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*** (1) 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.

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

New business means a business in which the prospective purchaser is not currently engaged, or a new line or type of business.

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 an individual, group, association, limited or general partnership, corporation, or any other business entity.

Prior business means:

(1) A business from which the seller acquired, directly or indirectly, the major portion of the business' assets; or

(2) Any business previously owned or operated by the seller, in whole or in part.

Providing locations, outlets, accounts, or customers means furnishing the prospective purchaser with existing or potential locations, outlets, accounts, or customers; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies; collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in

obtaining his or her own locations, outlets, accounts, or customers, *provided, however*, that advertising and general advice about business development and training shall not be considered as “providing locations, outlets, accounts, or customers.”

Purchaser means a person who buys a business opportunity or money-making opportunity.

Quarterly means as of January 1, April 1, July 1, and October 1.

Required payment means all consideration that the purchaser must pay to the seller or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the business opportunity or money-making opportunity. Such payment may be made directly or indirectly through a third party. A required payment does not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease.

Seller means a person who offers for sale or sells a business opportunity or money-making opportunity.

Signature or signed means a person’s affirmative steps to authenticate his or her identity.

It includes a person’s handwritten signature, as well as an electronic or digital form of signature to the extent that such signature is recognized as a valid signature under applicable federal law or state contract law.

Written or in writing means any document or information in printed form or in any form capable of being downloaded, printed, or otherwise preserved in tangible form and read. It includes: type-set, word processed, or handwritten documents;

information on computer disk or CD-ROM; information sent via email; or information posted on the Internet. It does not include mere oral statements.

§ 437.2 The obligation to furnish written documents.

In connection with the offer for sale, sale, or promotion of a business opportunity, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act (“FTC Act”) for any business opportunity seller to fail to furnish a prospective purchaser with the material information required by §§ 437.3(a) and 437.4(b)(1) of this part in writing at least seven calendar days before the earlier of the time that the prospective purchaser:

- (a) Signs any contract in connection with the business opportunity sale; or
- (b) Makes a payment or provides other consideration to the seller, directly or indirectly through a third party.

§ 437.3 The disclosure document.

In connection with the offer for sale, sale, or promotion of a business opportunity, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act, for any seller to:

- (a) Fail to disclose to a prospective purchaser the following material information in a single written document in the form and using the language set forth in appendix A to this part; or if the offer for sale, sale, or promotion of a business opportunity is conducted in Spanish, in the form and using the language set forth in appendix B to this part; or if the offer for sale, sale, or promotion of a business opportunity is conducted in a language other than English or Spanish, using the form and an accurate translation of the language set forth in appendix A to this part:

(1) **Identifying information.** State the name, business address, and telephone number of the seller, the name of the salesperson offering the opportunity, and the date when the disclosure document is furnished to the prospective purchaser.

(2) **Earnings claims.** If the seller makes an earnings claim, check the “yes” box and attach the earnings statement required by § 437.4. If not, check the “no” box.

(3) **Legal actions.**

(i) If any of the following persons has been the subject of any civil or criminal action for misrepresentation, fraud, securities law violations, or unfair or deceptive practices, including violations of any FTC Rule, within the 10 years immediately preceding the date that the business opportunity is offered, check the “yes” box:

(A) The seller;

(B) Any affiliate or prior business of the seller; or

(C) Any of the seller’s officers, directors, sales managers, or any individual who occupies a position or performs a function similar to an officer, director, or sales manager of the seller.

(ii) If the “yes” box is checked, disclose all such actions in an attachment to the disclosure document. State the full caption of each action (names of the principal parties, case number, full name of court, and filing date). For each action, the seller may also provide a brief accurate statement not to exceed 100 words that describes the action.

(iii) If there are no actions to disclose, check the “no” box.

(4) ***Cancellation or refund policy.*** If the seller offers a refund or the right to cancel the purchase, check the “yes” box. If so, state all material terms and conditions of the refund or cancellation policy in an attachment to the disclosure document. If no refund or cancellation is offered, check the “no” box.

(5) ***References.***

(i) State the name, state, and telephone number of all purchasers who purchased the business opportunity within the last three years. If more than 10 purchasers purchased the business opportunity within the last three years, the seller may limit the disclosure by stating the name, state, and telephone number of at least the 10 purchasers within the past three years who are located nearest to the prospective purchaser’s location. Alternatively, a seller may furnish a prospective buyer with a list disclosing all purchasers nationwide within the last three years. If choosing this option, insert the words “See Attached List” without removing the list headings or the numbers 1 through 10, and attach a list of the references to the disclosure document.

(ii) Clearly and conspicuously, and in immediate conjunction with the list of references, state the following: “If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers.”

(6) ***Receipt.*** Attach a duplicate copy of the disclosure document to be signed and dated by the purchaser. The seller may inform the prospective purchaser how to return the signed receipt (for example, by sending to a street address, email address, or facsimile telephone number).

(b) Fail to update the disclosures required by paragraph (a) of this section at least quarterly to reflect any changes in the required information, including, but not limited to, any changes in the seller's refund or cancellation policy, or the list of references; *provided, however*, that until a seller has 10 purchasers, the list of references must be updated monthly.

§ 437.4 Earnings claims.

(a) In connection with the offer for sale, sale, or promotion of a business opportunity or money-making opportunity, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act, for the seller to:

(1) Make any earnings claim to a prospective purchaser, unless the seller:

(i) Has a reasonable basis for its claim at the time the claim is made;

(ii) Has in its possession written materials that substantiate its claim at the time the claim is made; and

(iii) Makes the written substantiation available upon request to the prospective purchaser and to the Commission.

(2) Disseminate industry financial, earnings, or performance information unless the seller has written substantiation demonstrating that the information reflects, or does not exceed, the typical or ordinary financial, earnings, or performance experience of purchasers of the opportunity being offered for sale.

(b) In connection with the offer for sale, sale, or promotion of a business opportunity, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act, for the seller to:

(1) Make any earnings claim to a prospective purchaser, unless the seller furnishes to the prospective purchaser an earnings claim statement. The earnings claim statement shall be a single written document and shall state the following information:

(i) The title “EARNINGS CLAIM STATEMENT REQUIRED BY LAW” in capital, bold type letters;

(ii) The name of the person making the earnings claim and the date of the earnings claim;

(iii) The earnings claim;

(iv) The beginning and ending dates when the represented earnings were achieved;

(v) The number and percentage of all persons who purchased the business opportunity prior to the ending date in paragraph (b)(1)(iv) of this section who achieved at least the stated level of earnings;

(vi) Any characteristics of the purchasers who achieved at least the represented level of earnings, such as their location, that may differ materially from the characteristics of the prospective purchasers being offered the business opportunity; and

(vii) A statement that written substantiation for the earnings claim will be made available to the prospective purchaser upon request.

(2) Make any earnings claim in the general media, unless the seller states in immediate conjunction with the claim:

(i) The beginning and ending dates when the represented earnings were achieved; and

(ii) The number and percentage of all persons who purchased the business opportunity prior to the ending date in paragraph (b)(2)(i) of this section who achieved at least the stated level of earnings.

(3) Fail to notify any prospective purchaser in writing of any material changes affecting the relevance or reliability of the information contained in an earnings claim statement before the prospective purchaser signs any contract or makes a payment or provides other consideration to the seller, directly or indirectly, through a third party.

§ 437.5 Sales conducted in Spanish or other languages besides English.

(a) If the seller conducts the offer for sale, sale, or promotion of a business opportunity in Spanish, the seller must provide the disclosure document required by § 437.3(a) in the form and language set forth in appendix B to this part, and the disclosures required by §§ 437.3(a) and 437.4 must be made in Spanish.

(b) If the seller conducts the offer for sale, sale, or promotion of a business opportunity in a language other than English or Spanish, the seller must provide the disclosure document required by § 437.3(a) using the form and an accurate translation of the language set forth in appendix A to this part, and the disclosures required by §§ 437.3(a) and 437.4 must be made in that language.

(c) Whenever a money-making opportunity 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.

§ 437.6 Other prohibited practices.

(a) In connection with the offer for sale, sale, or promotion of a business opportunity or money-making opportunity, 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, to:

(1) Make a false or misleading earnings claim;

(2) Fail to make available to prospective purchasers, and to the Commission upon request, written substantiation for the seller's earnings claims;

(3) Misrepresent how or when commissions, bonuses, incentives, premiums, or other payments from the seller to the purchaser will be calculated or distributed;

(4) Misrepresent the cost, or the performance, efficacy, nature, or central characteristics of the opportunity or the goods or services offered to a prospective purchaser;

(5) Misrepresent any term or condition of the seller's refund or cancellation policies;

(6) Misrepresent that any governmental entity, law, or regulation prohibits a seller from furnishing earnings information to a prospective purchaser;

(7) Misrepresent any material aspect of any assistance offered to a prospective purchaser;

(b) In connection with the offer for sale, sale, or promotion of a business opportunity, 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, to:

(1) Disclaim, or require a prospective purchaser to waive reliance on, any statement made in any document or attachment that is required or permitted to be disclosed under this Rule;

(2) Make any claim or representation, orally, visually, or in writing, that is inconsistent with or contradicts the information required to be disclosed by §§ 437.3 (basic disclosure document) and 437.4 (earnings claims document) of this Rule;

(3) Include in any disclosure document or earnings claim statement any materials or information other than what is explicitly required or permitted by this Rule. For the sole purpose of enhancing the prospective purchaser's ability to maneuver through an electronic version of a disclosure document or earnings statement, the seller may include scroll bars and internal links. All other features (*e.g.*, multimedia tools such as audio, video, animation, or pop-up screens) are prohibited;

(4) Misrepresent that any governmental entity, law, or regulation prohibits a seller from disclosing to prospective purchasers the identity of other purchasers of the business opportunity;

(5) Misrepresent the likelihood that a seller, locator, or lead generator will find locations, outlets, accounts, or customers for the purchaser;

(6) Fail to provide a refund or cancellation when the purchaser has satisfied the terms and conditions disclosed pursuant to § 437.3(a)(4);

(7) Misrepresent a business opportunity as an employment opportunity;

(8) Misrepresent the terms of any territorial exclusivity or territorial protection offered to a prospective purchaser;

(9) Assign to any purchaser a purported exclusive territory that, in fact, encompasses the same or overlapping areas already assigned to another purchaser;

(10) Misrepresent that any person, trademark or service mark holder, or governmental entity, directly or indirectly benefits from, sponsors, participates in, endorses, approves, authorizes, or is otherwise associated with the sale of the business opportunity or the goods or services sold through the business opportunity;

(11) Misrepresent that any person:

(i) Has purchased a business opportunity from the seller or has operated a business opportunity of the type offered by the seller; or

(ii) Can provide an independent or reliable report about the business opportunity or the experiences of any current or former purchaser.

(12) Fail to disclose, with respect to any person identified as a purchaser or operator of a business opportunity offered by the seller:

(i) Any consideration promised or paid to such person. Consideration includes, but is not limited to, any payment, forgiveness of debt, or provision of equipment, services, or discounts to the person or to a third party on the person's behalf; or

(ii) Any personal relationship or any past or present business relationship other than as the purchaser or operator of the business opportunity being offered by the seller.

§ 437.7 Record retention.

(a) To prevent the unfair and deceptive acts or practices specified in this Rule, business opportunity and money-making opportunity sellers and their principals must

prepare, retain, and make available for inspection by Commission officials for a period of three years all substantiation upon which the seller relies for each earnings claim from the time each such claim is made.

(b) To prevent the unfair and deceptive acts or practices specified in this Rule, business opportunity sellers and their principals must prepare, retain, and make available for inspection by Commission officials copies of the following documents for a period of three years:

- (1) Each materially different version of all documents required by this Rule;
- (2) Each purchaser's disclosure receipt; and
- (3) Each executed written contract with a purchaser.

§ 437.8 Franchise exemption.

The provisions of this Rule shall not apply to any business opportunity or money-making opportunity that constitutes a "franchise," as defined in the Franchise Rule, 16 CFR part 436; *provided, however*, that the provisions of this Rule shall apply to any such franchise if it is exempted from the provisions of part 436 because, either:

(a) Under § 436.8(a)(1), the total of the required payments or commitments to make a required payment, to the franchisor or an affiliate that are made any time from before to within six months after commencing operation of the franchisee's business is less than the dollar amount specified in 16 CFR 436.8(a)(1), or

(b) Under § 436.8(a)(7), there is no written document describing any material term or aspect of the relationship or arrangement;

§ 437.9 Outstanding orders; preemption.

(a) A business opportunity required by prior FTC or court order to follow the Franchise Rule, 16 CFR part 436, may petition the Commission to amend the order or to stipulate to an amendment of the court order so that the business opportunity may follow the provisions of this part.

(b) The FTC does not intend to preempt the business opportunity sales practices laws of any state or local government, or any state or local government law regulating all or any category of money-making opportunities, except to the extent of any conflict with this part. A law is not in conflict with this Rule if it affords prospective purchasers equal or greater protection, such as registration of disclosure documents or more extensive disclosures. All such disclosures, however, must be made in a separate state disclosure document.

§ 437.10 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.

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

April J. Tabor,

Secretary