

FEDERAL TRADE COMMISSION

16 CFR Part 462

RIN 3084-AB70

Earnings Claim Rule Regarding Multi-Level Marketing (Additional Provisions)

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking; request for public comment.

SUMMARY: As part of the Federal Trade Commission’s (“FTC” or “Commission”) consideration of whether a rule should be issued to prohibit deceptive earnings claims in the multi-level marketing industry, the Commission issues this advance notice of proposed rulemaking to solicit written comment, data, and arguments concerning whether its proposed Earnings Claim Rule regarding Multi-Level Marketing should contain additional prohibitions to further deter deceptive or unfair earnings claims and whether it should address additional unfair or deceptive practices in the multi-level marketing industry, including making misrepresentations concerning benefits and expenses, making deceptive refund claims, and using non-disparagement clauses in contracts with multi-level marketing participants.

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

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Comment Submissions part of the **SUPPLEMENTARY INFORMATION** section below. Write “MLM Earnings Claims ANPR, R111003” on

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

FOR FURTHER INFORMATION CONTACT: Melissa Dickey, (202) 326-2662, mdickey@ftc.gov, Andrew Hudson, (202) 326-2213, ahudson@ftc.gov, or Elsie Kappler, ekappler@ftc.gov, (202) 326-2466, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, Mailstop CC-5201, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

The Commission is publishing this advance notice of proposed rulemaking (“ANPR”) pursuant to section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a, and the provisions of Part 1, Subpart B of the Commission’s Rules of Practice, 16 CFR 1.7-1.20. The Federal Trade Commission Act authorizes 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).

I. Background

In 2006, the Commission issued a notice of proposed rulemaking for the Business Opportunity Rule, seeking comment on, among other things, whether misleading and unsubstantiated earnings claims by pyramid marketing schemes (including those operating as multi-level marketing companies (“MLMs”)) should be regulated by that

rule.¹ Commenters affiliated with MLMs argued that the proposed regulations were unwarranted and unnecessarily burdensome as applied to MLMs.² Ultimately, in 2008 the Commission declined to universally regulate all MLMs under the Business Opportunity Rule,³ concluding that the remedial provisions in the rule were not well-suited to addressing the harm of deceptive earnings claims in the MLM industry.⁴ The Commission committed to “continue to examine the MLM industry and individual companies” and said it would “use the flexibility inherent in [s]ection 5 of the FTC Act to address particular frauds in the MLM industry.”⁵ The Commission did so, filing numerous enforcement actions in Federal court against MLMs that used deceptive earnings claims, obtaining hundreds of millions of dollars in refunds for consumers deceived by such claims.⁶

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

¹ Business Opportunity Rule, notice of proposed rulemaking, 71 FR 19054, 19060-61 (Apr. 12, 2006).

² Business Opportunity Rule, revised notice of proposed rulemaking, 73 FR 16110, 16114-17 (Mar. 26, 2008).

³ *Id.* at 16121; *see also* Business Opportunity Rule, Final Rule, 76 FR 76816, 76823-24 (Dec. 8, 2011) (“[T]he final Rule has been crafted to avoid broadly sweeping in MLMs.”). The rule does not explicitly exempt MLMs from coverage. As with any other enterprise, the determination of whether an MLM is a business opportunity to which the rule applies must be made on a case-by-case basis.

⁴ 73 FR at 16121.

⁵ *Id.*

⁶ *See, e.g., FTC v. AdvoCare Int’l, L.P.*, No. 4:19-cv-0715 (E.D. Tex. filed 2019); FTC Press Release, *Federal Trade Commission Returns More Than \$149 Million To Consumers Harmed by AdvoCare Pyramid Scheme* (May 5, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/federal-trade-commission-returns-more-149-million-consumers-harmed-advocare-pyramid-scheme> (over \$149 million in redress); *FTC v. Herbalife Int’l of Am., Inc.*, No. 2:16-cv-5217 (C.D. Cal. filed 2016); FTC Press Release, *FTC Sends Checks to Nearly 350,000 Victims of Herbalife’s Multi-Level Marketing Scheme*, <https://www.ftc.gov/news-events/news/press-releases/2017/01/ftc-sends-checks-nearly-350000-victims-herbalifes-multi-level-marketing-scheme> (\$200 million in redress); *FTC v. Vemma Nutrition Co.*, No. 15-cv-1578 (D. Ariz. filed 2015); FTC Press Release, *FTC Returns More than \$2.2 Million to Vemma Affiliates Who Lost Money* (Sept. 19, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/09/ftc-returns-more-22-million-vemman-affiliates-who-lost-money> (over \$2.2 million in redress).

court orders requiring defendants who violate section 5(a)(1) of the FTC Act to pay refunds to harmed consumers.⁷ As a result, in order to obtain refunds for harmed consumers, the Commission must now rely entirely on section 19 of the FTC Act, 15 U.S.C. 57b, for cases based on section 5(a)(1)'s prohibition on unfair or deceptive acts or practices.⁸ Obtaining refunds under section 19 in such cases is a lengthy process. Absent violation of a trade regulation rule, 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.⁹ The Commission can send refunds to consumers after the conclusion of that litigation, including all appeals. This two-step process takes significant time.¹⁰ 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.¹¹ In addition, section 5(m)(1) of the FTC Act, 15 U.S.C. 45(m)(1), authorizes courts to impose civil penalties

⁷ 141 S. Ct. 1341 (2021).

⁸ The Commission can no longer obtain refunds in cases involving violations of section 5(a)(1)'s prohibition on unfair methods of competition.

⁹ 15 U.S.C. 57b(a)(1).

¹⁰ 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).

¹¹ 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 violations of existing Commission rules relating to unfair or deceptive acts or practices.

Accordingly, on March 10, 2022, the Commission published an advance notice of proposed rulemaking (“2022 ANPR”). The 2022 ANPR described the Commission’s history of taking law enforcement action against MLMs and other enterprises for deceptive earnings claims¹² and the end of the Commission’s ability post-*AMG* to obtain court-ordered refunds under section 13(b). The 2022 ANPR asked a series of questions to inform a potential rule prohibiting deceptive earnings claims, including whether such claims are prevalent.¹³ In response, the Commission received over 1,575 unique comments. The vast majority of commenters raised concerns about deceptive practices in the MLM industry relating to earnings claims and asked the FTC to take steps to regulate these practices.¹⁴

Based on these comments and its recent law enforcement experience, the Commission has determined that deceptive earnings claims are prevalent in the MLM industry and is issuing a notice of proposed rulemaking (“NPRM” or “proposed rule”) that would prohibit misleading and unsubstantiated earnings claims and misrepresenting an MLM opportunity as an employment opportunity.¹⁵ The proposed rule would also

¹² Advance notice of proposed rulemaking, Deceptive or Unfair Earnings Claims, 87 FR 13951, 13951-52 (March 11, 2022); *see also* <https://www.regulations.gov/docket/FTC-2022-0020>. Please note that when discussing comments received in response to the 2022 ANPR, the Commission will identify the comment by a short form of its comment number “No. 20-comment number” and comment’s name. For example, comment number FTC-2022-0020-0425 submitted by T. Tangel will be cited as “No. 20-425 (T. Tangel).”

¹³ *Id.* at 13953-56.

¹⁴ Consumers also submitted compelling testimonials about other harmful interactions with MLMs that, if true, describe illegal activities, such as deceptive product claims, manipulative sales tactics, and allegations that the MLM operated as a pyramid scheme. The Commission is concerned about such allegations. The FTC encourages anyone with knowledge of deceptive product claims, illegal pyramid schemes, or other deceptive or unlawful conduct to submit a report at [ReportFraud.ftc.gov](https://www.ftc.gov/ReportFraud).

¹⁵ *See* Earnings Claim Rule Regarding Multi-Level Marketing: notice of proposed rulemaking, published elsewhere in this issue of the *Federal Register* (“NPRM”).

require MLM sellers¹⁶ to keep written materials that substantiate the earnings claims they make.¹⁷ The Commission will consider comments made in response to the NPRM when considering comments made on this ANPR. The Commission anticipates that the proposed rule will benefit consumers, and businesses that comply with the law by providing guidance, deterring wrongdoing, and giving the Commission additional enforcement tools to combat deceptive conduct and redress consumers injured by this illegal activity. In particular, the proposed rule will restore to the Commission the means to efficiently obtain refunds for consumers misled by deceptive earnings and job claims through a single Federal court action.¹⁸

At the same time, based on its experience, comments and other records, the Commission is interested in exploring whether other rule provisions might provide additional benefit to consumers by deterring or otherwise preventing deceptive earnings claims or other related deceptive or unfair practices. Accordingly, the Commission is issuing this ANPR (“2025 ANPR”) to request comments from the public as it considers whether to propose additional rule provisions to prevent deceptive earnings claims in the MLM industry, and to define with specificity other prevalent practices in the industry that are unfair or deceptive, including making misrepresentations concerning benefits and expenses, making deceptive refund claims, and using non-disparagement clauses in contracts with multi-level marketing participants. In addition to soliciting comments, the

¹⁶ The proposed Rule defines “Seller” as “a Multi-Level Marketing Program, a participant, an agent of the MLM, or representative of the MLM who offers, advertises, markets, or promotes the MLM.” NPRM at section III.E.

¹⁷ NPRM at section III.F.

¹⁸ NPRM at section II.D.

Commission will consider holding a workshop concerning the topics raised in this 2025 ANPR.

II. Additional Rule Provisions to Deter Deceptive and Unsubstantiated Earnings Claims

As noted in the NPRM, the Commission has reason to believe that deceptive earnings claims are prevalent in the MLM industry.¹⁹ The Commission is interested in exploring whether it should propose additional requirements to deter MLM sellers from engaging in this illegal practice and prevent future harm to consumers²⁰ and honest businesses.

Specifically, the Commission is seeking comment regarding whether the Commission should further propose to require: 1) MLMs to provide earnings data to potential recruits and current MLM participants or to post such data on their websites; 2) any MLM earnings claims to be accompanied by clear and conspicuous information about the earnings MLM participants can generally expect; and 3) a waiting period before a recruit pays any money to the MLM or otherwise joins the MLM.

A. The Need for Additional Regulation

The Commission has made clear since the 1940s that deceptive earnings claims are illegal,²¹ and the Commission has taken action against MLMs that make deceptive earnings claims since the 1970s.²² Despite the Commission's numerous enforcement actions against MLMs to stop this illegal conduct, as described in more detail in the

¹⁹ NPRM at section II.C.

²⁰ For purposes of this ANPR, consumers who join an MLM will be referred to interchangeably as "consumers" or "participants."

²¹ NPRM at section II.C.1.

²² *Id.*

NPRM, the problem continues to be prevalent, causing tremendous harm to consumers.²³ The proposed rule, if adopted as final, would allow the Commission to seek consumer refunds directly through a Federal court action under section 19(a)(1) of the FTC Act, 15 U.S.C. 57b(a)(1). The Rule would thereby provide the Commission with an efficient and effective route to obtain redress for consumers, without undertaking the lengthy, multi-step process required by section 19(a)(2). Given that deceptive earnings claims proliferated in the MLM industry prior to the *AMG* decision, and have continued since, the Commission seeks comment regarding whether additional rule provisions could provide further deterrence or otherwise prevent deception, and thus provide meaningful additional benefits to consumers.

Consumers in the MLM industry face a greater risk of being deceived or of losing more money from deception for several reasons that may be unique to the MLM industry.

- First, unlike those in many other industries, MLM participants are often recruited by members of their community,²⁴ including social or community groups,²⁵ family

²³ *Id.*

²⁴ Marguerite DeLiema, et al., *AARP Study of Multilevel Marketing: Profiling Participants and their Experiences in Direct Sales* (2018) (“AARP Study”) at 7, available at https://www.aarp.org/content/dam/aarp/aarp_foundation/2018/pdf/AARP%20Foundation%20MLM%20Research%20Study%20Report%2010.8.18.pdf (finding that one-third (34%) of the MLM participants were recruited by a friend, 12% were recruited by a coworker, 9% were recruited by a neighbor, and 7% were recruited by a member of their religious organization); Stacie Bosley and Maggie Knorr, *Pyramids, Ponzi and Fraud Prevention: Lessons From a Case Study*, 25 *J. of Fin. Crime* 81, 92 (2018) (“Local recruitment was affected by the presence of particular affinity groups, with membership rates being highest in the most religious counties and in those with larger Hispanic populations. Regional culture appeared to play a significant role, *ceteris paribus*, with highest recruitment in the south and mountain regions and lowest in the north and mid-Atlantic regions.”).

²⁵ AARP Study at 7 (finding that 7% were recruited to an MLM by “someone from my religious organization”); see also Christopher Bradley and Hannah E. Oates, *The Multi-Level Marketing Pandemic*, 89 *Tenn. L. Rev.* 321, 358 (2022) (“Social media driven MLM strategy tends to focus on subsets of the population to utilize preexisting networks, exploit specific belief systems, and increase pressure to

members,²⁶ and other individuals in a position of influence or trust, such as employers.²⁷ As a result, prospective recruits may be less likely to seek external information to verify whether earnings claims made to them are accurate.²⁸

- Second, MLM participants (who are often the primary recruiters for MLMs)²⁹ may unknowingly pass on deceptive information to their recruits. MLM participants often

participate. Promoters focus on religious groups or social organizations, sports teams, and college students.”); Comment No. 20-968 (C. Griffith) (“I have seen mlms prey on vulnerable people in church”); Comment No. 20-328 (M. Crawford) (“My wife has been involved [in an MLM] for the last 4 years, and has made very little money (less than 30K over the four years, before expenses...), ... they have even incorporated prayer and praise dancing, which is something that she does at church, into these meetings to keep her on the hook”); Comment No. 20-366 (H. Clark) (“I’ve been in several MLMs since 2009 to name a few... with [MLM] I met my upline through a church I was visiting she was the pastor’s wife”).

²⁶ AARP Study at 7 (finding that 6% were recruited by family members); *see, e.g.*, Comment No. 20-425 (T. Tangel) (“When I was 22 my Aunt targeted me to join [MLM name] under her, I just graduated from college and was having a hard time finding a job. She pitched it to me as a great opportunity to make money.... Because she was my Aunt and I trusted her I joined[,] despite not having the money to spend on this make-up.... I think I lost a total of \$500 and was only in for a few months.”); Comment No. 20-1393 (Anonymous) (“I was struggling with debilitatingly severe mental health issues and had just begun my journey to recovery seeking help. My aunt and uncle convinced me that I could help myself.... I invested \$500 of my own savings that should have gone to help pay my own bills and medical care....”).

²⁷ Comment No. 20-347 (T. Barclay) (“I joined [MLM Name] in 2016 when my current boss (at the time) pressured me into joining and said they would loan me the money for a \$1,000.00 product pack and take the money from my paychecks because I couldn’t afford it all at once... I didn’t make any money through the company, but later found out she was making money off me (her employee) while I was struggling to pay back my loan for my product pack.”); Comment No. 20-1407 (L. Vaughn) (“I was talked into joining [MLM Name] by a coworker years ago and felt like I couldn’t say no because she was technically my supervisor. I felt manipulated to join because of that pre-existing professional relationship. I made zero dollars in [MLM Name], and instead lost money on startup costs.”); *see also* Comment No. 20-27 (S. Johnson) (recruited by a former school guidance counselor).

²⁸ Comment No. 20-1551 (Professor Stacie Bosley) (“Bosley ANPR”) at 11 (“Recruitment within a high-trust social network can serve to reduce skepticism and capitalize on feelings of obligation or allegiance to the group and its members. As the ‘special trust’ substitutes for deliberation, many forgo due diligence when scrutinizing promoted opportunities. ... While these connections may be helpful in building and operating an MLM business, the impact of misrepresentations or other problematic business practices will be especially harmful when they have community or network-level impacts.”); *see also* Bosley & Knorr, *Pyramids*, *supra* note 24 at 81-94 (“Participants recruited within affinity groups are more likely to remain silent, increasing scheme longevity and creating obstacles to investigation and prosecution. Such silence can be attributed to many factors: inexperience, embarrassment, guilt, a desire to resolve problems within the group, a reluctance to believe that intra-group fraud is possible or hope for resolution or redemption.”) (internal cites omitted).

²⁹ *See, e.g.*, Youngevity Annual Report (Form 10-K) (June 25, 2021) (“We rely on non-employee, independent distributors to market and sell our products and to generate our sales.... We rely primarily upon our distributors to attract, train and motivate new distributors”); LifeVantage Annual Report (Form

have limited information available to them concerning what MLM participants typically earn.³⁰ Given the large number of recruits in many MLMs,³¹ it would be functionally impossible for an MLM participant to obtain data on the income and expenses for even a sizeable fraction of the total participant population (e.g., by contacting MLM participants individually for information). Thus, MLM participants typically have to rely on data from the MLM concerning likely or typical earnings. Yet, the record developed to date, including the Commission’s enforcement experience, suggests that the earnings information provided by many MLMs to

10-K) (June 30, 2023) (“[I]ndependent consultants are primarily responsible for their sales to customers and for attracting, enrolling and educating new independent consultants about the benefits of our products and sales compensation plan.”); Mannatech Annual Report (Form 10-K) (March 17, 2023) (“We rely on our non-employee independent associates to market and sell our products to customers to generate growth and to attract new independent associates who are interested in building a business.”); Herbalife Annual Report (Form 10-K) (Feb. 14, 2024) (“[O]ur sales leaders sponsor and coordinate Member recruiting and most meeting and training initiatives.”); Primerica Annual Report (Form 10-K) (Feb. 29, 2024) (“Recruiting is performed by current independent sales representatives.”); Compl. ¶ 21, *FTC v. AdvoCare, Int’l, L.P.*, No. 4:19-cv-715 (E.D. Tex. filed Oct. 2, 2019), ECF No. 1 (“AdvoCare relies on Distributors who reach the Diamond rank to market the AdvoCare business opportunity and train others.”); see also Direct Selling Association, *What is Direct Selling*, <https://www.dsa.org/about/direct-selling> (“Direct selling is unique among retail channels because of the way in which products and services are marketed to customers. Instead of relying on traditional retail outlets or online marketplaces, direct selling companies maintain a salesforce of millions of independent workers.”).

³⁰ Comment No. 20-1563 (Truth in Advertising, Inc.) (“TINA ANPR”) at 12; see also Comment No. 72-30 (Professor William Keep) (“Keep BOR ANPR”) at 3-4; Bosley ANPR Comment at 3 (noting the informational imbalance between consumers and MLMs and stating that “[i]n the ordinary course of business, MLM firms have insight into the earnings and expenses of past and current participants (as well as data on related factors such as the breakdown of earnings and expenses by source/type) that is not generally available to consumers”).

³¹ See, e.g., Herbalife Annual Report (Form 10-K) (Feb. 14, 2024) (as of December 31, 2023, Herbalife had over 2 million participants); Young Living, *25 Benefits of Being A Young Living Brand Partner* (in 2018, Young Living had over six million participants worldwide), available at https://www.youngliving.com/en_EU/company/about/anniversary/25-benefits-of-being-a-young-living-member; Chelsea Hughes, *Amway: Sustainable Success*, Direct Selling News (Nov. 21, 2022) (stating Amway has “over one million [participants] worldwide”), <https://www.directsellingnews.com/amway-sustainable-success/>.

recruits and participants has not been accurate.³² For example, at least some MLMs make income disclosure statements available to participants, but FTC staff’s review of these statements shows that many appear to contain misleading statements and many fail to accurately convey what a typical participant is likely to earn from an MLM.³³ Yet, MLM participants may share such misleading information with their recruits.

- Third, most MLM participants make minimal earnings, while also incurring significant expenses.³⁴ Thus the harm experienced by individual participants can be substantial.³⁵

³² See, e.g., NPRM section II.C.1; *FTC v. Noland*, 672 F. Supp. 3d 721, 783-86 (D. Ariz. 2023) (MLM made deceptive earnings claims and provided participants with the means and instrumentalities to make deceptive claims); *FTC v. Vemma Nutrition Co.*, No. 15-cv-01578, 2015 WL 11118111, at *7 (D. Ariz. Sept. 18, 2015) (holding that Vemma made deceptive earnings claims and “provide[d] the ‘means and instrumentalities’ for Affiliates to deceive consumers by providing them with promotional, recruiting and training materials containing false or misleading income representations”); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 527 (S.D.N.Y. 2000) (same).

³³ See FTC Staff Report on MLM Income Disclosures (“Staff Report”) (September 2024), <https://www.ftc.gov/reports/multi-level-marketing-income-disclosure-statements>. Staff reviewed the websites of all MLMs of which staff is aware and found that 70 MLMs posted income disclosure statements on their websites. As explained in the Staff Report, most of those disclosure statements skewed the figures presented in one or more ways to emphasize high earnings amounts that are not typical—for example, by omitting non-earners from the data or breaking high earners into numerous (small) cohorts so that most of the space in the table or other graphic is filled with high dollar amounts. At least 67 of the 70 also present “income” or “earnings” figures that do not account for any expenses, and 64 of these do not prominently disclose this material omission. Such practices, and others described in the Staff Report, contribute to an impression that participants will or are likely to make substantial earnings, but that is not true. Staff Report at 2 (“Most people who join MLMs make little or no money, and some lose money.”); *id.* at 23-26 (in nearly every MLM where the figure could be calculated, the vast majority of participants made \$1,000 or less annually, before expenses).

³⁴ NPRM at section II.A.

³⁵ See NPRM at section II.A & II.C.1.

- Fourth, MLM participants typically earn commissions based on sales or recruiting,³⁶ and often, MLM participants conduct recruiting via private meetings and private chats, where they cannot easily be observed by regulators and consumer advocates.³⁷
- Finally, some MLM sellers have targeted particular communities with deceptive earnings claims,³⁸ including individuals whose circumstances may make them more

³⁶ *Holiday Magic*, 84 FTC 748, 948, 984, 1032-1034, 1065, 1069 (1974), subsequently modified at 85 FTC 90 (1975) (noting that particular compensation structure of this MLM incentivized deceptive earnings claims).

³⁷ See, e.g., Comment No. 20-57 (K. Eastman) (earnings claim made in meeting between recruiter, the proposed recruit, and her husband); Comment No. 20-42 (Anonymous) (consumer was recruited by private messages from friend); Comment No. 20-80 (S. Finch) (consumer was recruited at party hosted by MLM participant); Comment No. 20-196 (C. Spears) (consumer was recruited by private social media message); Comment No. 20-638 (N. Paves) (consumer received a message on LinkedIn about openings with an MLM).

The Commission examined direct selling in the door-to-door sales context and found similar circumstances among in-home sales, including the use of salesmen who worked on a straight commission basis and who often worked unsupervised by their employers. The Commission found that these factors “facilitated” the use of misrepresentations and other illegal practices to make sales. Cooling Off Rule, Statement of Basis and Purpose, 37 FR 22934, 22944 (Oct. 26, 1972).

³⁸ Claes Bäckman and Tobin Hanspal, *Participation and Losses in Multi-Level Marketing: Evidence from an FTC Settlement*, 5 Fin. Plan. Rev. 1137, at 16 (2022) (finding “that MLM participation is higher in middle-income and more unequal areas, in areas with relative female labor force non-participation, in Hispanic, and less financially developed areas”); Bosley & Knorr, *Pyramids*, *supra* note 24 at 84. (MLMs “find[] an audience in those who are underemployed or in need of an additional income source” (citations omitted)); see also Comment No. 20-1574 (D. Brooks) (“Brooks ANPR”) at 12-13 (“In my experience, MLM recruitment is opportunistic and focuses on groups that are most susceptible to the typical MLM promises of working at home, flexible hours, being your own boss and unlimited earnings potential[,] ... includ[ing] stay-at-home mothers, undocumented immigrants, students and individuals residing in economically depressed areas. Many MLM firms target immigrant or minority communities.”); TINA ANPR Comment at 14 (“A 2019 study found, for example, that greater numerical literacy and understanding of the concept of ‘expected value’ were correlated with reduced interest in MLM participation, while an AARP survey found that factors positively correlated with joining an MLM included single parenthood, low household income, and a recent bankruptcy filing, layoff or other negative life event, which supports the assertion that ‘[o]ften, the poor and less formally educated are targeted by multilevel marketing,’” citing Stacie Bosley, Sarah Greenman & Samantha Snyder, *Voluntary Disclosure and Earnings Expectations in Multi-level Marketing*, 58 Econ. Inquiry 1643, 1646 (Oct. 2020); the AARP Study; and quoting Casey Bond, *MLMs Are A Nightmare For Women And Everyone They Know*, HuffPost (June 27, 2019, updated Jan. 29, 2021), https://www.huffpost.com/entry/mlm-pyramid-scheme-target-women-financialfreedom_1_5d0bfd60e4b07ae90d9a6a9e).

susceptible to deceptive earnings claims, such as individuals in financial distress.³⁹

MLMs and their agents have also directed deceptive earnings claims at individuals

³⁹ AARP Study at 7 (finding that 9% of survey respondents reported losing a job in the six months before joining an MLM and 14% had a significant amount of debt); Bosley & Knorr, *Pyramids*, *supra* note 24 at 87 (finding that “local economic conditions did impact membership [in an MLM]. A higher unemployment rate range between 2002 and 2012 is associated with stronger recruitment. The number of years in contraction (i.e. number of year-to-year increases in unemployment rate) is also positively associated with membership, though only modestly significant when income is excluded. This suggests that while the appeal might be greater when individuals are seeking alternative or supplemental sources of labor income, recruitment may be less successful in the most depressed regions as participation does require initial and, typically, ongoing financial investments.”); *see also* Comment No. 20-19 (Anonymous) (“When the pandemic started in 2020, I was really struggling to make ends meet. I was approached by [MLM Name] rep who promised me that not only would I make thousands of dollars but also that the[] products would help my disabled children.”); Comment No. 20-236 (A. Helms) (“My family was targeted by an MLM at the beginning of the pandemic. My husband had just had a life altering accident at work and I was a house wife at the time so I was searching for anyway to ‘help’. I was told I’d be in the Bahamas in a year on a free trip basking in my success”); Comment No. 20-342 (Anonymous) (former MLM participant said she “saw the light” when her upline learned she was running a cloth diaper bank for low income families and “started pushing me to recruit those parents to my team. These women didn’t have the money to buy diapers for their babies, yet I was supposed to make them buy a starter kit and join my team.”); Comment No. 20-968 (C. Griffith) (“I have seen mlms prey on vulnerable people in church and have even had 3 different mlm reps ask to come to women’s homeless shelter where I worked to ‘teach them how to open a business.’ Poor and vulnerable single moms are encouraged to ‘invest’ their last \$150 to provide for their children for the future.”); Comment No. 20-1183 (C. MB) (“At a time when my father had gotten sick and lost his job, and so was vulnerable both because of his health and our family’s finances, [MLM Name] recruited him, telling him that he could make a real living and that the products would help us all get healthy. The time that my dad spent trying to work his ‘business’ drove our family into deep, deep debt. ... All the time and money they scammed him out of could have been spent hunting for legitimate jobs and paying our bills.”).

dealing with medical conditions,⁴⁰ young adults,⁴¹ older adults,⁴² Spanish speakers,⁴³ stay at home moms,⁴⁴ military families,⁴⁵ and others.⁴⁶

⁴⁰ Comment No. 20-05 (L. Breitenfield) (“I was in a Facebook group for people to gain support and share advice for following a ketogenic diet to support weight loss and overall health. ... There were a few different MLM organizations that targeted myself and others in the group. When I would post about a problem or looking for encouragement, they would comment and message being supportive at first, and then they’d pitch their product or try to recruit me to join their team.”); Comment No. 20-42 (Anonymous) (“Another training taught us to avoid logic and focus on emotion. To post emotional, heart-wrenching stories that would cause people to join us - especially with before and after pictures of people losing weight. They said to send private messages about how [MLM Name] products fixed heart disease, diabetes, mental illness and a bunch of other diseases. They said to send these privately because it was not compliant to put them on our public facebook or instagram.”); Comment No. 20-186 (L. Foster) (“I had a friend of a friend reach out to me and suggest that perhaps her shakes could help me through [the IVF] process. I was already in a weak state of mind as IVF is an extremely emotional roller coaster. I of course, signed up and wasted my money. It makes me sad that someone who is already in an emotional state is being targeted. People do not think clear in these situations and these MLMs are trained to go after that.”); *see also, e.g.*, Comment No. 20-213 (A. Danielson); Comment No. 20-235 (A. Workman); Comment No. 20-617 (Anonymous); Comment No. 20-635 (K. Day); Comment No. 20-660 (M. Cornish).

⁴¹ Compl. ¶ 19, *FTC v. Vemma Nutrition Co.*, No. 2:15-cv-01578 (D. Ariz. filed Aug. 26, 2015), ECF No. 3 (alleging that Vemma’s recruiting materials target young adults and college students); *see also, e.g.*, Comment No. 20-1543 (National Consumers League & Consumer Federation of America) (“NCL/CFA ANPR”) at 5 (“Direct selling advertisements targeting students litter college campuses. Student loan debt and lack of entrepreneurial experience make students an especially vulnerable target for MLMs”); AARP Study at 7 (12% of survey respondents were in school when they joined an MLM, and 9% reported that they had graduated high school or college in the six months prior to joining the MLM); Comment No. 20-819 (Anonymous) (“[In high school, a friend] was buying and recruiting for [MLM Name]. She was only 16 years old at the time and attempted to recruit me and others around us. I firmly believe these companies appeal to younger vulnerable people as they do not have the life experience and are more easily manipulated than others.”); Comment No. 20-1172 (A. Contarino) (“I work with young people in a federally funded program called Upward Bound that serves high school students from low-income households where neither parent has a bachelor’s degree. Several of my students have been actively targeted and recruited by an MLM... My students are targeted through Instagram where lifestyle and income claims are made by other young adults who recruiting. I have seen my current students post on Instagram pictures of themselves in front of expensive cars that they do not own, and claim that [MLM Name] made it possible.”); Comment No. 20-76 (Anonymous); Comment No. 20-707 (E. Moore).

⁴² Compl., *FTC v. 8 Figure Dream Lifestyle LLC*, No. 8:19-cv-1165 (C.D. Cal. 2020), ECF No. 1 (alleging that “[t]he 8 Figure Dream Lifestyle Defendants have marketed their scheme broadly, but they have also directly targeted older consumers who may need extra money for living expenses or retirement”); Compl., *FTC v. Mobe Ltd.*, No. 6:18-cv-862 (filed M.D. Fla. 2018), ECF No. 1 (alleging “Defendants created and promoted a system called the ‘Ultimate Retirement Breakthrough,’ which is yet another re-branded version of the MOBE 21-Step System that markets MOBE memberships to older adults and retirees”); *see also* Christopher Opie, *Sold: Multi-Level Marketing Organizations and Elder Financial Exploitation*, 30(2) *Elder Law J.* 451, 461 (2023) (noting that “[e]ighteen percent of current MLM participants are between fifty-five and sixty-five, and ten percent of MLM participants are older than sixty-five” and “MLMs targeting senior citizens advertise health restoration, the potential to find a supportive community of other sellers and the potential to earn additional retirement income”).

Given that these factors increase the harm that deceptive claims pose in this space, and in light of the Commission’s enforcement history and experience, the Commission believes

⁴³ NCL/CFA ANPR at 5 (“Multi-level marketing recruiters also target immigrant and Latino communities, who may be vulnerable to direct sellers’ claims of getting rich from part-time work”), citing Project Pulso. *The pandemic leaves more Latinos vulnerable to illegal pyramid schemes* (2020), <https://projectpulso.org/2020/10/28/the-pandemic-leaves-more-latinos-vulnerable-to-illegal-pyramid-schemes/>; Comment No. 20-756 (G.) (“I am here representing one of the communities that MLMs like to target the most. The latino community. They like to target especially undocumented latinos taking advantage that we are not very familiar with the rules and regulations of a new country and our big desire to just get a job so that we can provide for our families.”); *see also* Compl., *FTC v. Herbalife Int’l of America, Inc.*, No. 2:16-cv-5217 (C.D. Cal. 2016), ECF No. 1 (alleging that “Defendants promote their business opportunity in both English and Spanish through a variety of channels, including videos, live presentations, and print material.”); Compl., *FTC v. Finc. Ed. Servs.*, No. 2:22-cv-11120 (E.D. Mich. 2022), ECF No. 1 (alleging that “Defendants often provide FES Agents with the necessary promotional and marketing materials, including social media-ready advertising and scripts, to market Defendants’ credit repair services to English- and Spanish-speaking consumers”).

⁴⁴ AARP Study at 7 (finding that 12% of survey respondents had a baby within six months of joining an MLM and 16% were stay-at-home parents while being an MLM participant); Bäckman & Hanspal, *Participation and Losses*, *supra* note 38, at 14 (finding “MLM participation represents, at least for certain households, a potential business activity for non-working spouses”); Comment No. 20-147 (A. Barnett) (“When I became a young mother, I had no idea I would also become a target of dozens of women convinced that I might be interested in their business opportunity to make money to stay home with my child. I had several ‘business opportunities’ presented to me how ‘easy’ it would be to make an additional \$500 per month just by simply sharing the products.”).

⁴⁵ Comment No. 20-986 (A. Gaines) (“I am an Active Duty Navy spouse. ... [O]ne of the biggest issues for spouses is job availability. A majority of military spouses are young women with little to no family support, or advanced schooling. MLMs thrive in this environment. Pr[e]ying on young, vulnerable, females who are looking for a community and a way to make money.”); Comment No. 20-1123 (D. Burch) (spouse of Air Force service member said that a MLM recruiter reassured her that her transfer to Japan “wouldn’t be a problem and in fact that would be a great thing because I’d have lots of other moms to sell to! I’d be able to stay home with my baby and it would only take a couple of hours a month to make hundreds of dollars. Once we moved I was informed by the company that they weren’t in Japan yet and I wasn’t legally allowed to sell there, although I could ‘use my mom[’s] address in the states’ as a workaround.”); *see also* Compl., *FTC v. Mobe Ltd.*, No. 6:18-cv-862 (filed M.D. Fla. 2018), ECF No. 1 (alleging “Defendants created and promoted the ‘Patriot Funnel System,’ which is also nothing more than a re-branded version of the MOBE program that targets service members and veterans”).

⁴⁶ Comment No. 20-289 (T. Fecteau) (“My previous upline preys on alcoholics. Hundreds and hundreds of times, she has said ‘the opportunity’ keeps her sober. They also prey on stay at home moms, LGBTQ+, people suffering from infertility, people with weight issues. Whatever pain point they can.”); Comment No. 20-695 (Anonymous) (“I have observed that there is a growing focus on targeting college students with limited knowledge of the working market, and immigrants. Many immigrants have a limited experience in dealing with these companies, and adapting to a new country, with a different language can be hard enough and no clear friend group can be extremely challenging.”); Comment No. 20-1428 (L. Holley) (“I am a parent coach and work with families in the child welfare system. MLMs prey upon everyone but I see that my clients involved often are at risk of losing their children for MLM activities like spending too much money on products and stashing products at home so they are a cluttering hazard. These parents feel that they are making a good choice to care for their families but really aren’t making any money or having success.”).

it is appropriate to explore whether additional rule provisions could provide further deterrence or otherwise reduce the incidence of deception.

B. Net Earnings Disclosure Requirement

More than 506 commenters responding to the 2022 ANPR advocated for a required earnings disclosure for MLMs. Commenters asked the Commission to require MLMs to create a document that contains complete, easily understandable, and truthful information about the profit their participants commonly earn, and to provide that document to potential recruits⁴⁷ or to current participants annually,⁴⁸ or to make such information publicly available on their websites.⁴⁹ Some argued that such a requirement is appropriate because of information asymmetry between MLMs and current and prospective participants.⁵⁰ As one commenter put it, “[a] ‘serious information imbalance’

⁴⁷ See, e.g., Bosley ANPR Comment at 19 (“An income disclosure statement may impact interest in an MLM opportunity if consumers read and process disclosure information before determining interest. This may reduce regret and increase allocative efficiency.”); *id.* at 24-25 (arguing for “[a] mandatory [e]arnings [d]isclosure [s]tatement” to be “provided to all potential participants,” among others, and describing the contents and format that should be required); Comment No. 20-1281 (Professor William Keep) (“Keep ANPR”) at 10-11 (“The new rule must require the prominent and ubiquitous display of earnings data before a prospective distributor commits to undermine efforts during the recruitment process that deny, dismiss, or denigrate the typical distributor experience.”); NCL/CFA ANPR at 4, 8 (“The Commission should ... require [MLMs] to provide verifiable, easy-to-understand income disclosures to potential recruits.”); Comment No. 20-747 (Professor Claudia Gross) (“Gross ANPR”) at 4 (“[A] rule that requires [MLMs] to provide complete, truthful, and understandable income disclosures would have positive effects on consumers as well as on other parties”); Comment No. 72-26 (Truth in Advertising) (“TINA BOR ANPR”) at 23-24 (“[I]t is likely that requiring MLMs to provide prospective participants with accurate earnings information ... and allow them time to review that information would avert substantial harm for many recruits.”).

⁴⁸ E.g., Brooks ANPR Comment at 3, 24 (“I would urge the Commission to require opportunity sellers to provide their current disclosure document to every existing participant on at least an annual basis”); Bosley ANPR Comment at 24 (arguing for a mandatory earnings disclosure statement to be “produced annually” and “sent to all current participants,” among others).

⁴⁹ E.g., Bosley ANPR Comment at 24.

⁵⁰ Keep BOR ANPR Comment at 3-4 (discussing information asymmetry and calling for mandatory disclosure regarding earnings); Bosley ANPR Comment at 3 (discussing information asymmetry and citing rule-mandated disclosures as an appropriate response); TINA BOR ANPR at 12-13 (discussing information asymmetry and calling for mandatory disclosure regarding earnings); TINA ANPR Comment at 12-13 (arguing information asymmetry prevents many consumers from making informed decisions about MLM participation).

exists between prospective [participants], who often lack business sophistication and cannot in general obtain information about typical MLM earnings, expenses or workload, and the majority of MLM companies that either do not disclose such information, or worse, provide misleading and/or deceptive information.”⁵¹ For example, commenters stated that many MLMs offer evidence of the “income” earned by participants, but do not provide data about the expenses that MLMs know participants will incur, “nor even make clear that there will be expenses to be considered.”⁵²

Some commenters emphasized the need for any mandated earnings disclosure to require “accurate” and “clear information about typical net earnings of all [participants].”⁵³ They argue that having this information “can help to bring potential recruits’ earnings expectations closer to reality,”⁵⁴ and may help potential and current participants avoid significant harm.⁵⁵ This includes a number of former MLM

⁵¹ TINA ANPR Comment at 12; *see also id.* at 13 (“[W]hen MLMs do provide earnings information, it is often not sufficiently ‘full[] or accurate[] ... to allow for proper adjustment of expectations.’ For example, disclosures maybe too complicated for most prospects to digest; they do not provide information about expected expenses, nor even make clear that there will be expenses to be considered; they may emphasize atypical earnings of top distributors; or key information may be omitted or relegated to fine print.”) (quoting and citing Bosley, et al., *Voluntary Disclosure*, *supra* note 38, at 1645 n.3 & 1657-58)).

⁵² TINA ANPR Comment at 13; *see also* Bosley ANPR Comment at 5 (review of dozens of MLM income disclosure statements found that they “typically did not mention expenses and, when they did, the disclosure provided no expense data that the consumer could use to arrive at a profit distribution”).

⁵³ TINA BOR Comment at 13, 19; *see also* TINA ANPR Comment at 14 (“To make rational decisions about MLM participation, potential distributors need accurate information about what they can reasonably expect to earn, and that information needs to be presented in a way that is easily understood.”); Gross ANPR Comment at 4 (arguing that mandatory income disclosures can prevent consumer harm if they are “[c]omplete, understandable, and truthful”); Keep ANPR Comment at 10-12 (mandatory earnings disclosures can help consumers if the rule specifies the right format and contents); Bosley ANPR Comment at 12-21 (discussing results of study consumer understanding of different disclaimer formats, contents and identifying elements that increase consumer understanding).

⁵⁴ NCL/CFA ANPR Comment at 9, citing Bosley, et al., *Voluntary Disclosure*, *supra* note 38.

⁵⁵ For example, Prof. Bosley opined that an “income disclosure statement will move earnings expectations closer to objectively determined values if it does the following: clearly reports the share of participants who earn no revenue; clearly indicates information on expected expenses; reports data based on actual achieved

participants who stated that had they been provided with an accurate, understandable earnings disclosure, they would not have joined the MLM, and so would have avoided subsequent losses.⁵⁶

Some commenters, however, cautioned that any requirement for MLMs to provide objective income information would need to be crafted carefully so the required disclosure could not be readily used to mislead consumers.⁵⁷ Additionally, some former MLM participants warned that the participants that recruited them into the business and

earnings (not annualized or projected earnings); reports data in way that avoids bias driven by a small share of high-dollar earners; and is presented in a simple, ideally graphical, format.” Bosley ANPR Comment at 19; *see also* Gross ANPR Comment at 4 (“[c]omplete, understandable, and truthful income disclosures” can help consumers be “better informed about the many risks involved in participating in an MLM”); TINA BOR ANPR Comment at 24 (“The 2018 AARP study found that nearly two-thirds of MLM participants (65 percent) would not rejoin the same MLM knowing what they know now, and 62 percent would not now be interested in joining any MLM.”); Comment No. 20-1215 (Anonymous) (“In the age of social media in which any person can fake an opulent lifestyle to persuade their downlines of their wealth and success, I can’t think of a better way to disprove these deceptive income and lifestyle claims than by directly showing their consultants the real numbers.”).

⁵⁶ *E.g.*, Comment No. 20-1458 (R. Blevins) at 5 (“Had I been given proper income disclosures that show ALL the financial information required to make decisions about joining these companies and not just data on earnings potential that’s been fluffed up for marketing, perhaps I would have been more prepared and educated on the true financial figures, and would have opted out.”); Comment No. 20-165 (C. Wesselmann) (“I luckily got out but was still upside down in the business. If I had seen the income disclosure before signing up I would have seen that only .01% become 6 figure earners, and not signed up, Please require income disclosures be shown [t]o people before signing up and save other people from these predatory practices[.]”); Comment No. 20-288 (D. Coles) (“I have been involved with two multi-level marketing companies ... and I would never have signed up for either company if I had been shown the income disclosure statement. I have no profit and only losses from both companies I signed up through.”); Comment No. 20-301 (T. Sanford) (“I estimate that I ended up spending over \$2000 I was never given an earnings disclosure at any point If I had been given all of these pieces of information and had not had the high pressure recruiting tactics used on me to decide ‘right this minute,’ I would not have joined [MLM Name].”); Comment No. 20-1312 (Anonymous) (“My start up cost was \$500. I didn’t make any money I absolutely would not have joined if someone was honest about the income potential.”).

⁵⁷ For example, Prof. Bosley commented: “An income disclosure statement may inflate upper bound expectations for some (e.g., for those with low numeracy and/or better-than-average self-perception). As a result, it is important for disclosures to highlight the risk of loss and the low probability of atypical outcomes.” Bosley ANPR Comment at 19. *See also* NCL/CFA ANPR Comment at 9 (“If the data are not displayed correctly, or regulatory guidance allows fraudulent actors to use disclosure as an advertising tool, multilevel marketing schemes will highlight what direct sellers have the potential to earn while minimizing the losses the vast majority incur.”); Gross ANPR Comment at 6, 8-9 (arguing disclosures should not include atypically high earnings values to prevent deception); Keep ANPR Comment at 11-12 (arguing certain practices in MLM income disclosures “obscure distributor earnings”); Annie Blackman, *Regulating the Reluctant: Policies that Benefit Vulnerable Participants in Multi-Level Marketing*, 25 Univ. Penn. J. L. & Soc. Change 83, 108-111 (2021) (noting reasons why disclosures may not be enough for consumers to avoid fraud in the MLM context).

other senior participants encouraged them to ignore the income disclosure statement provided by their MLM, arguing that it was for “haters” or only reflected people who did not try very hard to earn money.⁵⁸

Some commenters argued against requiring MLMs to give out a specific, prescribed disclosure, but did not oppose an income disclosure categorically. For example, the Direct Selling Association (DSA) said that the disclosure required by the Business Opportunity Rule or a similar requirement would not work for MLMs.⁵⁹ One MLM stated that “any such requirement should provide companies the flexibility to supplement such disclosures or segment such disclosures in a manner that would help potential participants better understand the potential of the opportunity.”⁶⁰ And another

⁵⁸ See, e.g., Comment No. 20-215 (C.R.) (“When I started as [a participant] in [MLM Name], my upline showed me the income disclosure statement. There was a large percentage of people who weren’t even making \$200 a year, however I was told metaphors and analogies like you reap what you sow, some people don’t run their business like a business, and it just led me to believe it wasn’t an issue.”); Comment No. 20-230 (M. Grimpe) (“I never wanted to prey on my family and friends, but I quickly learned that that is exactly what my Upline wanted from me. They wanted me to sell that same false reality and never show the income disclosure statement. Funny thing is I’d never looked at it myself because we were taught that is just for our haters, it means nothing. So, me being the curious person I am...I looked, I cried, and I left.”); Comment No. 20-458 (T. Rigaux) (“I did see the income statement- my upline showed it to me repeatedly. But I was assured that most people joined for the discount, the consultants that actually genuinely try to work the business made really good money! The income statement was also used as proof to show me that I didn’t need to worry about market saturation, because even though I knew multiple consultants, it didn’t matter because they weren’t serious about building a business. ... I lost so much money. My earnings from [MLM Name] for the 2 years I was in there was less than \$1000, and I spent thousands of my own money.”); Comment No. 20-1380 (M. Harrell) (“[MLM Name] had brochures and CDs that stated the stats about the earning, but all of the leadership said to ignore it because the stats were for losers”); see also Compl. ¶ 38, *FTC v. AdvoCare*, ECF No. 1 (alleging AdvoCare speakers “often negate income disclosures with claims that Distributors ‘are the variable,’ ... ‘get paid what [they’re] worth,’ ... or ‘financially ... are in complete control of where [they] are going to go’ ...”).

⁵⁹ Comment No. 20-729 (Direct Selling Association) (“DSA BOR ANPR”) at 6-8. For example, the DSA stated that a study it conducted in response to the 2006 Business Opportunity Rule notice of proposed rulemaking found that the rule’s proposed requirements would have “substantially chilled the interest for being involved in direct selling.” *Id.* at 6. Additionally, the DSA argued that the requirement to disclose if key personnel were subject to legal actions was “overbroad” as many are “irrelevant to the structure or viability of the business” and that the requirement to provide ten references was “superfluous” given the rise of the internet, risked “consumer privacy rights,” and “would not provide... information necessary to make an informed purchasing decision.” *Id.* at 8-9 (quoting Business Opportunity Rule, 76 FR 76816, 76823 (2011)).

⁶⁰ Comment No. 20-1548 (Nu Skin Enterprises, Inc.) at 11.

MLM commented that participants’ social media posts should not have to be accompanied by a disclosure, that “[t]o the extent the FTC decides to impose a disclosure requirement, the disclosure should be no more extensive than necessary to correct a potentially misleading statement,” and that “[r]equiring individuals to include more information, like the ‘typical’ or ‘average’ experience of an agent may be even more misleading than merely posting that user’s real-life experience.”⁶¹

Only one commenter argued, in response to the 2022 ANPR, that MLMs, or a subset of MLMs operating in the insurance industry, should not have to provide recruits with any earnings information.⁶² The commenter argued that “it would be exceedingly difficult to craft an accurate earnings disclosure that would aid consumers in identifying unlawful pyramid schemes and otherwise unsavory actors,” and that “any benefit to consumers of mandating earnings disclosure statements remains vastly outweighed by the burdens such a requirement would impose on legitimate businesses.”⁶³

The Commission is interested in exploring the potential benefits of a requirement that MLMs provide participants and prospects with objective data about the profits commonly earned by MLM participants. For example, such a provision might deter a substantial number of deceptive claims, and even if not, access to such information might prevent MLM recruits and participants from being deceived.⁶⁴ The Commission is

⁶¹ Comment No. 20-1575 (Integrity Marketing Group, LLC) at 6, 11-14.

⁶² Comment No. 20-1552 (Family First Life, LLC) at 9-11.

⁶³ *Id.* at 10-11.

⁶⁴ Bosley ANPR Comment at 19 (“An income disclosure statement, on balance, has the potential to move earnings expectations toward the typical outcomes for MLM participants, though likely not fully to the objectively determined values indicated by prior participant outcomes... An income disclosure statement may impact interest in an MLM opportunity if consumers read and process disclosure information before

seeking comment on whether it should further propose that the proposed rule contain such a requirement and, if so, when this data should be provided, what data should be included, and how the data should be presented, so that this material information is presented in a way that is clear and conspicuous, is easily understood, and is not misleading. For example, should MLMs or MLM sellers be required to provide non-misleading, objective information about the net earnings of current and past participants to potential recruits before they join, to current participants annually, or, alternatively or in addition, should MLMs be required to post the information publicly on their website? Alternatively, or in addition, should all explicit or implied earnings claims related to MLMs be accompanied by clear and conspicuous information about the typical profits of participants?⁶⁵

determining interest. This may reduce regret and increase allocative efficiency.”); *see also* Heidi Liu, *The Behavioral Economics of Multilevel Marketing*, 14 *Hastings Bus. L.J.* 109, 123-24 (2018) (“[E]ven if a consultant is uninformed about how productive she will be (e.g., low vs. high productivity), knowing the average performance of a consultant can help her to make a calculated risk.”), (citing Anne T. Coughlan, *Multi-Level Marketing Business Opportunities: Analyzing Net Economic Return and Avoidable Economic Loss to Distributors*, at 13 (July 15, 2016) (unpublished manuscript))).

⁶⁵ The NPRM’s proposed prohibition on deceptive earnings claims does not explicitly require such a disclosure. However, representations of earnings are likely to convey the message that the amounts depicted are typical. *See Five-Star Auto Club*, 97 F. Supp. 2d at 528 (“[I]t would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical... [participant.]”); *FTC v. Tashman*, 318 F.3d 1273, 1275-76 (11th Cir. 2003) (finding that ad featuring high dollar amounts that consumers “can make” and telemarketing claims about “the money being made in the industry” created an impression that most customers were reaping nice profits”); *FTC v. Febre*, No. 94-C-3625, 1996 WL 396117, at *2 (N.D. Ill. Jul. 3, 1996) (“[A] consumer would reasonably believe that the statements of earnings potential represent typical or average earnings.”); *Nat’l Dynamics Corp.*, 82 FTC 488, 512, 565 (1973), *modified*, 85 FTC 1052 (1975); *see also* FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR 255.2(b). Disclaimers are not always effective in correcting a misleading message conveyed by advertising claims; thus they are not a defense if the net impression is still misleading. *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006); *see also Noland*, 672 F. Supp. 3d at 783 (holding that disclaimers that “income was not guaranteed” or that large dollar figure examples were “mere ‘theoretical examples’” did not detract from the misleading net impression of defendants’ advertisements). The Commission is interested in exploring whether requiring all earnings claims to be accompanied by accurate information about typical earnings will prevent harm to consumers.

Additionally, if the Commission decides to require sellers to provide earnings data to recruits, participants, or the public, the Commission is interested in obtaining feedback on how information about common expenses incurred by participants should be reflected in this data so that it conveys an accurate impression of participants' likely net earnings. Information about expenses is material to consumers, and the record to date suggests that at least some recruits do not fully understand, when they sign up, the scope of the expenses they will incur,⁶⁶ and that at least some MLMs have either misrepresented⁶⁷ data about expenses or not provided it to participants.⁶⁸ The record suggests that requiring MLMs to provide prospective participants with income data that accurately reflects expenses might prevent prospective participants from being deceived.

At the same time, the Commission has heard from at least some MLMs that they do not possess data as to the total amount of participants' expenses. In the Commission's

⁶⁶ See, e.g., Liu, *supra* note 64, at 125-26 (noting that direct selling may come with more costs than consultants realize; for example, "[f]requently-updated demonstration kits obscure later-occurring costs," "[o]ther fees may be mandatory but only noted in the boilerplate," and companies may encourage the purchase of inventory to advance one's business, while simultaneously stressing its low start-up costs) (citing Tiffany Lamoreaux, *Home is Where the Work is: Women, Direct Sales, and Technologies of Gender* (Apr. 2013) (unpublished Ph.D. dissertation, Arizona State University) (on file with the Arizona State University Digital Repository)); see also TINA ANPR Comment at 13 ("For example, disclosures may be too complicated for most prospects to digest; they do not provide information about expected expenses, nor even make clear that there will be expenses to be considered; they may emphasize atypical earnings of top distributors; or key information may be omitted or relegated to fine print.").

⁶⁷ See also Staff Report at sections III & V (noting that most MLM income disclosure statements represent that they are providing data about "earnings" or "income" earned, but in fact only provide data about amounts the MLM paid to participants, not how much profit participants kept after expenses); see also Comment No. 20-1338 (R. FitzPatrick) at 1-3 (describing problems with one MLM's income disclosure statement).

⁶⁸ See Staff Report at section V (noting that most MLM income disclosure statements provide little to no information about expenses, and the information they do provide is often hidden in fine print); Bosley ANPR Comment at 5-6; see also, e.g., Comment No. 20-13 (L. Ng); Comment No. 20-135 (T. Stone); Comment No. 20-188 (Anonymous); Comment No. 20-273 (K. Squillace); Comment No. 20-299 (T. Reid); Comment No. 20-345 (K. Smith); Comment No. 20-347 (T. Barclay); Comment No. 20-391 (J. Newcomb); Comment No. 20-570 (J. Meltzer); Comment No. 20-781 (Anonymous); Comment No. 20-815 (M. Frank); Comment No. 20-892 (K. Benson); Comment No. 20-1082 (Anonymous); Comment No. 20-1521 (V. Kukla).

experience, at minimum, MLMs should know how much participants pay to the MLM, such as fees to join the MLM, mandatory or optional fees (e.g., website fees), fees for conferences and training events, product purchase costs, and costs to obtain marketing materials and samples.⁶⁹ The Commission seeks comment on whether it is feasible for MLMs to gather data about the other expenses incurred by participants, such as the costs to travel to attend a conference or the cost to host a sales party, as well as the cost to MLMs to gather such data.⁷⁰ The Commission also seeks comment on whether there is a non-misleading way for an MLM to provide data about typical profits to participants and prospective recruits if only some expenses are known to the MLM.

C. Waiting Period

In response to the 2022 ANPR, over 115 commenters asked the Commission to impose a waiting period before potential recruits can formally join an MLM⁷¹ and/or a cooling off period that would give recruits a chance to leave the opportunity and get a refund within a number of days after signing up.⁷² According to commenters, if MLMs

⁶⁹ Bosley ANPR Comment at 21 (“Certain expenses of participation are visible to the MLM firm, especially the costs of the firm’s products or services.”).

⁷⁰ For example, Professor Keep recommended that “a new rule-determined expense survey administered every three years by an independent organization will provide insight into typical distributor expenses. This information will be reported with the required earnings data and can similarly be integrated into a single visualization of earnings, expenses, and profits.” Keep ANPR Comment at 12; *see also* Bosley ANPR Comment at 21 (noting MLMs could use a survey instrument to gather data about other participant expenses).

⁷¹ *See, e.g.*, Bosley ANPR Comment 8, 22-25; Brooks ANPR Comment at 3; Comment No. 20-1458 (R. Blevins) at 6 (“Anyone who’s been in an MLM can attest to the excitement that comes with it. If there is a waiting period imposed before someone can join, to give them a proper amount of time to assess the financial decision of joining and what that can potentially look like, with th[o]rough income disclosure statements that include everything you need to know about the FACTS of what you’re signing up for (7-14 days approx) to allow for the excitement to wane and not cloud clear judgment in high risk financial situations, where an ‘opportunity’ with 99% failure clearly falls.”).

⁷² Bosley ANPR Comment at 25; Comment No. 20-475 (Anonymous); Comment No. 20-711 (M. Winchenbach). Others argued that a cooling off period, in practice, would provide no benefit to consumers.

are required to provide objective data regarding the profits participants commonly earn, a waiting period will give consumers a chance to understand and process this information before making a decision on whether or not to join the MLM.⁷³ Additionally, some former MLM participants reported feeling rushed or pressured to make the decision quickly.⁷⁴ According to one commenter, “[t]he typical MLM recruitment process involves creating a sense of urgency and mystery about the opportunity; to hook the

Brooks ANPR Comment at 23 (“There is serious doubt as to the efficacy of cooling off periods. This may be because MLM opportunity sellers are trained to exploit the cognitive bias known as the ‘sunk cost fallacy.’ Once a prospect has made an initial investment, such as the purchase of a ‘starter kit’ or an opening inventory, their tendency is to continue making investments in order to ‘protect’ that initial investment.”); *see also, e.g.*, Comment No. 20-756 (G.) at 5-6.

⁷³ Bosley ANPR Comment at 19 (“These findings indicate that it is important for the consumer to have time and space to process income disclosure information prior to making a commitment, as interest may change after considering income data”); *see also id.* at 22 (noting research finding “an 11-fold increase in the odds of attention to disclosure when there was an externally imposed waiting period and no observer present” and that “the odds of having questions about a disclosure were 2.4 times higher for participants who received their disclosures before the closing meeting than those who received the disclosure statements at the closing”) (citing A. Chin & D. H. Beckett, *Don’t watch me read: How mere presence and mandatory waiting periods affect consumer attention to disclosures*, 5 *Behav. Pub. Pol’y* 202 (2021)); *see also, e.g.*, Comment No. 20-524 (R. Boettcher) (“Having a mandatory waiting period between the initial pitch and whe[n] you can register for an mlm company allows a person to be able to research the company and for themselves to make an informed decision. It also disallows pressure brought on from the person pitching the company to sign up right away. Which is very common practice for them to do.”).

⁷⁴ Comment No. 20-714 (H. Seres) (“I felt a lot of pressure to sign up right away”); Comment No. 20-135 (T. Stone) (“When I joined [MLM Name] they rushed me...I had FOMO [fear of missing out]. So I borrowed money to get the kit.”); Comment No. 20-363 (A. Caperton) (“[O]nce a person agrees to sign up under a distributor, they should have to wait at least 48 hours before handing over any money. MLMs rely on FOMO and impulse decision making which is an objectively unethical business practice.”); Comment No. 20-391 (J. Newcomb) (“During the pitch to join both MLMs I was never told the percentage of people who los[e]s money in MLMs. I was never shown the company’s income disclosure. I was encouraged to act fast. I would recommend that those being encouraged to join an MLM be given all the facts. As well as be required to wait a few days to think it over before being able to join.”); Comment No. 20-415 (M. Vandridge) (“There should definitely be a waiting period between being pitched and signing up as recruiters in MLM’s often use high pressure sales tactics and FOMO to get people to sign up. I have experienced this personally over almost three decades of people who tried to rope me in.”); Comment No. 20-507 (A. Nedrow) (“There is a lot of social pressure to sign up at that moment, when you are at the party or having lunch with a friend. There should be at least a 7 day delay to be informed in a really clear manner exactly how much the average person makes”) (emphasis omitted); Comment No. 20-777 (Anonymous) (“Finally a mandated 24-48 hour waiting period between pitch and sign-up would help alleviate any pressure on people that want to discuss it with their spouse first. Often after a pitch there is some kind of ‘act fast it’s only for today!’ line. I have heard of MLM reps claiming that their partner doesn’t love them if they don’t support them, or they shouldn’t have to discuss this with their partner, if they do then they are in an abusive relationship. Even if there is no partner, just some time to think and run the numbers, to ensure you are making fully informed decision would help.”).

prospect before they really understand what the opportunity is all about.”⁷⁵ A waiting or cooling off period gives a “designated window of time for a consumer to regain a cool state of mind, seek and process information, and postpone entry (in the case of waiting periods) or exit without barriers (in the case of cooling off periods).”⁷⁶

Only one commenter opposed a waiting period requirement. The DSA stated that “[m]any direct sellers engage in the business for specific periods of time and purposes, such as around the holidays. Imposing a seven-day waiting period before being able to sell would delay the earning opportunities for potential participants who may want to start selling immediately to meet these needs.”⁷⁷ Additionally, the DSA said that self-regulatory standards and State laws in Louisiana, Maryland, Massachusetts and Wyoming already exist and are enforced to protect consumers who have “enter[ed] into a business transaction with little knowledge of the business.”⁷⁸ Other commenters raised concerns

⁷⁵ Brooks ANPR Comment at 32.

⁷⁶ Bosley ANPR Comment at 8 (citing L. Van Boven & G. Loewenstein, *Social Projection of Transient Visceral Feelings*, 29 *Personality and Soc. Psych. Bull.* 1159-1168 (2003) and J. Lynch Jr. & Gal Zauberman, *When Do You Want It? Time, Decisions and Public Policy*, 25 *J. of Pub. Pol’y & Mrketing* at 67-68 (2006)); *see id.* at 23 (“This would give consumers the needed time and space to process the disclosure information and decrease the role of interpersonal influence, lessen the impact of implied ‘rules of engagement,’ and reduce bias in attribute attention/weight.”) (citing C. Atwell, *The Franchisee as a Consumer: Determining the Optimal Duration of Pre-Contractual Disclosure*, 38 *J. of Consumer Pol’y* 457-489 (2015)); Comment No. 20-45 (J. Oshields) (“A waiting period before sign up would more than likely give others the opportunity to really look into an MLM company before joining and decide if it is a viable business for them.”); Comment No. 20-376 (H. Knol) (“I would like to see a waiting period be instilled. If people had to wait 48 hours from wanting to sign up to actually starting, then that would prevent people from making split second, irrational decisions.”); Comment No. 20-400 (S. Kelley) (recommending a “[w]aiting period so [recruits] have time to research the company fully and not make an impulse decision”); Comment No. 20-725 (J. Lystad) (“There needs to be a designed waiting period from the time someone chooses to sign up, and the time they officially become a promoter/distributor etc. These reps push the narrative of ‘Don’t think, just jump.’ And before the person can realize what they’ve done, the starter kit has been purchased and they stay in with the hope they’ll earn their money back, plus some. As we all know, rarely does that happen.”); Comment No. 20-1194 (A. Reese) (“Also, a 2-3 day waiting period between the pitch and actual ‘active status’ seems like a wonderful idea to be able to perform [one’s] own research and ask [for] others[’] opinions, something that is extremely frowned upon within MLMs.”).

⁷⁷ DSA BOR ANPR Comment at 7-8.

⁷⁸ *Id.* at 8.

about the efficacy of a cooling-off period, although these commenters generally supported a waiting period.⁷⁹

The Commission believes that it is worthwhile to explore whether a short waiting period could benefit consumers and honest businesses and deter wrongful conduct. If the Commission were to propose requiring MLMs to provide objective data regarding profits, a waiting period would give recruits time to read and understand this information. Even if MLMs are not required to provide earnings data, the Commission is interested in whether a waiting period would help consumers better understand the costs and benefits of joining an MLM, give recruits the opportunity to explore alternative opportunities, or provide other benefits to consumers and competition.⁸⁰ The Commission is also interested in receiving empirical data about the frequency with which recruits are rushed to make a decision or encouraged to join during emotionally charged events and whether such events may place undue pressure on recruits.⁸¹

⁷⁹ D. Brooks ANPR Comment at 23; Comment No. 20-1577 (M. Carpenter) at 10 (stating that a waiting period would have prevented commenter’s loss of “over \$4300,” but that “[a] cooling off period would **NOT** help ... because of the hassle of reversing the decision to join”); Comment No. 20-756 (G.) (arguing that MLMs will make it difficult to exercise a right to cancel, and leverage the sunk cost fallacy to deter consumers from cancelling); *see also* Liu, *supra* note 64 at 127 (arguing that projection bias, the planning fallacy, and the sunk cost fallacy may undermine the effectiveness of a cooling-off period, and stating that “recent research suggests that cooling-off periods may actually entrench consultants or other decision-makers in their decision”).

⁸⁰ The Commission’s Cooling-Off Rule, for example, contains a cooling-off period that gives consumers three days to cancel most sales that take place at a location other than the seller’s business premises, including door-to-door sales. 16 CFR 429.1. In enacting this rule, the Commission noted that “inherent in this method of selling is a potential for high-pressure sales tactics, misrepresentations as to the quality of the goods and services offered, misrepresentations as to the price or characteristics of the products sold, high prices for low quality, and other abuses,” and that “providing for a cooling-off period in door-to-door sales is justified and would be in the public interest as a means of enabling consumers to protect themselves from the tactics widely used by door-to-door salesman.” Cooling Off Rule, Statement of Basis and Purpose, 37 FR 22934, 22944-45 (Oct. 26, 1972).

⁸¹ *Cf.* sources cited *supra* notes 74-75; *see also, e.g.*, Liu, *supra* note 64, at 123 (“MLM company events, with an ambiance similar to religious revivals, are a large part of recruiting. These events play on the likelihood that people are often more present biased in highly charged situations due to cognitive overload. In particular, the emotional intensity of the event may heighten prospective consultants’ propensity to invest in a MLM.”).

The Commission therefore is seeking additional comment about whether it should propose a waiting period before participants can sign up, how long any such period should be, what should trigger the start of the period, whether MLMs should be barred or limited from contacting consumers during the waiting period, and what the benefits to consumers and businesses, particularly small businesses, would be from such a requirement, as well as the costs to businesses, particularly small businesses.

III. Prohibitions of Other Deceptive or Unfair Conduct

The Commission is also interested in exploring whether other deceptive or unfair practices are prevalent in the MLM industry, and whether additional provisions should be added to the Rule to address them. For example, should the Rule prohibit misrepresentations regarding the benefits available to consumers who join the MLM or how participants can earn or qualify to earn types of compensation? Should the Rule prohibit misrepresentations regarding the expenses participants will incur, or require the disclosure of information about expenses when making representations about earnings or profits? Should the Rule prohibit contract provisions that forbid participants from providing honest but negative statements or opinions about the company to the government/regulators, prospective participants, or others?

A. Misrepresentations Regarding Expenses, Benefits, and the Compensation Plan

The Commission is interested in exploring whether the proposed rule should state that it is an unfair or deceptive practice for an MLM to a) misrepresent the benefits available to participants,⁸² how consumers can become eligible for any given type of

⁸² Such benefits may include, for example, whether participants can obtain a car or a vehicle, or go on a free trip.

compensation under the MLM's compensation plan, or the expenses participants will incur,⁸³ or b) fail to disclose information about expenses when making representations regarding earnings or profits.

These topics are generally material to consumers considering a business or other income-earning opportunity, and misrepresentations of such material facts violate section 5 of the FTC Act.⁸⁴ Numerous cases have so held. For example, a company violates section 5 if it provides misleading information about the ways that money can be earned via an opportunity.⁸⁵ A company also violates section 5 if it makes false statements to consumers about the assistance they will receive if they join an opportunity;⁸⁶ misrepresents that certain benefits will be available from joining the opportunity;⁸⁷ or

⁸³ Some of these misrepresentations, if they are earnings claims, would violate the proposed Rule. However, a company could make a misrepresentation concerning these topics without making an earnings claim because, under the proposed Rule, an earnings claim is a representation that conveys, expressly or by implication, a level or range of actual or potential sales or earnings.

⁸⁴ See, e.g., *Five-Star Auto Club*, 97 F. Supp. 2d at 529 (claims that participants in business opportunity were likely to "receiv[e] a free car" were material); *FTC v. Freecom Commc'n, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005) ("Misrepresentations concerning anticipated income from a business opportunity generally are material and likely to mislead consumers because such misrepresentations strike at the heart of a consumer's purchasing decision."); *Febre*, 1996 WL 396117, at *3-5 (finding ads with earnings claims deceptive because they failed to disclose expenses); *Encyclopaedia Britannica, Inc.*, 87 FTC 421, 445-50, 486-87, 505, 510, 532 (1976). See also *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 315 (S.D.N.Y. 2008) (failure to disclose costs necessary to earn income with product was a deceptive telemarketing practice and violated the Telemarketing Sales Rule); *Sw. Sunsites, Inc.*, 105 FTC 7, 99-102 (1985) (claims about potential use of property were deceptive because they implied the property was a good investment but failed to disclose substantial expenses that rendered the proposed uses uneconomical), *aff'd* 785 F.2d 1431, 1438 (9th Cir. 1986).

⁸⁵ For example, the Commission found that it was deceptive to represent to potential purchasers of a business opportunity that "no selling is required on the part of the purchaser," when the purchaser was required to engage in salesmanship after joining the opportunity. *Waltham Watch Co.*, 60 FTC 1692, 1703-05, 1709-10, 1725, 1730 (1962); see also *Wash. Mushroom Indus., Inc.*, 53 FTC 368, 378-79, 381, 383-84 (1956) (seller of mushroom spawn violated section 5 of the FTC Act by representing that "inexperienced persons can successfully raise large quantities [of mushrooms] and earn a substantial income," when in fact mushroom growing is "a highly technical operation" that "[o]nly the experienced grower" will be able to carry out successfully).

⁸⁶ *Goodman v. FTC*, 244 F.2d 584, 597-8 (9th Cir. 1957) (company violated section 5 when, among other things, it falsely represented that it would give personal assistance to recruits to complete courses, but in fact no assistance was given).

⁸⁷ *Five-Star Auto Club*, 97 F. Supp. 2d at 527.

represents that earnings are feasible, typical, or likely, while failing to disclose related expenses that would make those earnings implausible or unlikely.⁸⁸

In the comments to the 2022 ANPR, some current or former MLM participants said they were misled about the type of expenses participants have to incur,⁸⁹ the benefits available to MLM participants,⁹⁰ and how participants can earn money under an MLM's

⁸⁸ *Encyclopaedia Britannica*, 87 FTC at 445-50, 486-87, 505, 510, 532 (finding omission of material limitations on the advertised income, including undisclosed expenses, deceptive); *Sw. Sunsites*, 105 FTC 7, 99-102.

⁸⁹ *See, e.g.*, Comment No. 20-1521 (V. Kukla) (“When I first joined [MLM Name], I was told that the only investment I would need to make was \$350, as a one time fee. This was a lie. I later learned that there were annual fees, I needed to buy products and product samples for direct selling purposes, and [MLM Name] even made me buy my own pamphlets - they didn’t supply any marketing materials to any sellers for free. I didn’t know any of that when I signed up”); Comment No. 20-13 (L. Ng) (“In my experience as someone who signed up, and then was trained to sign others up, the monthly website fee was also not disclosed until I was ready to sign the agreement. I was trained to not tell potential recruits this information (actually, to not give them all of the information) because it would overwhelm them and scare them away. And of course it would have because I was being sold an easy \$200/party and the sign up fee was only \$29. If I would have known that I’d spend hours on this ‘job’ and have to pay a monthly fee, I would not have signed up.”); *see also, e.g.*, Comment No. 20-135 (T. Stone); Comment No. 20-273 (K. Squillace); Comment No. 20-299 (T. Reid); Comment No. 20-347 (T. Barclay); Comment No. 20-391 (J. Newcomb); Comment No. 20-570 (J. Meltzer); Comment No. 20-781 (Anonymous); Comment No. 20-815 (M. Frank); Comment No. 20-892 (K. Benson); Comment No. 20-1082 (Anonymous).

⁹⁰ For example, some commenters report claims that participants could obtain a free trip or free car from the MLM when, in fact, those items were not free, they required the participant to meet certain qualifications, and the participant could be left with a significant financial burden in the event the qualifications were no longer satisfied. Comment No. 20-3 (A. Carter) (“Many companies offer a ‘car bonus’ which requires the distributor to meet certain product volume requirements to receive the ‘bonus’ each month. Many people outside the MLM industry believe these cars are given to people gratis, which is not true. The car is leased in the distributor’s name. If the distributor is unable to meet the monthly requirements they are still responsible for the monthly payment which could be one month or many months, possibly the remainder of the lease. Being burdened with the lease payment can cause substantial financial hardship.”); Comment No. 20-117 (L. Smith) (“At a [MLM Name] ‘party,’ a consultant told us that it is a poor financial decision to buy a car when opportunities like [MLM Name] exist, where you can ‘earn a free car’.... What they don’t say at those parties is that the car is not ‘free,’ but that you have to buy it under your own name, and if you lose your rank at any point (which is very easy to do), you’ll have to pay for the car yourself. They don’t say that many of the people who DO earn the car only do so by spending a lot of their own money to reach that rank, and they might have spent less just buying a car on their own without an MLM.”); Comment No. 20-327 (C. Mattera) (“I was told there is a FREE car to be earned, when I read the FAQ’s for the motor program, I found out that was a lie. It is only free if you continue to hit your monthly quotas, and if you don’t, you are responsible for the payments.”); *see also, e.g.*, Comment No. 20-79 (M. Williams); Comment No. 20-127 (Anonymous); Comment No. 20-154 (Anonymous); Comment No. 20-160 (Anonymous); Comment No. 20-174 (A. Guy); Comment No. 20-251 (L. Hencke); Comment No. 20-663 (K C).

compensation plan.⁹¹ Some MLM participants also said they were misled about the expenses associated with the opportunity—for example, some were reportedly told that they only would have to pay an initial fee to join the MLM, but discovered after signing up and paying this initial fee that they also had to pay or were pressured into paying various other material fees or costs.⁹² The comments are consistent with the Commission’s law enforcement experience, which has found that misrepresentations

⁹¹ For example, some commenters reported being deceived about the need to continue to buy products or to recruit to earn more money. *E.g.*, Comment No. 20-173 (T. Wilcox) (“It was explained to me that I could just share my experience and start making \$500 monthly and how that could change my life. At the time I thought how simple but no its not. It was never explained to me that to earn that amount of money monthly I had to not only sell products but I had to recruit people under me as well”); Comment No. 20-273 (K. Squillace) (“[MLM Name] was introduced to me at a party I held. When it was time to purchase from the catalogue, we were all quickly told to “sign up” instead for the product pack which would be ‘cheaper with more products’. We were told it was a one time cost of \$99 and that’s it. First month in we were spammed with the fact that we MUST purchase \$300 a month to maintain our employment. This was never disclosed at any point in time.”); *see also, e.g.*, Comment No. 20-25 (C. Waugh); Comment No. 20-149 (Anonymous); Comment No. 20-327 (C. Mattera); Comment No. 20-366 (H. Clark); Comment No. 20-570 (J. Meltzer); Comment No. 20-658 (Anonymous); Comment No. 20-1293 (Anonymous).

⁹² Comment 20-391 (J. Newcomb) (“We were only told about the initial start up cost to join. But once we joined we were told to make the business work we had to attend a weekly meeting \$5-\$10. We had to attend quarterly conferences (usually \$100 ticket plus hotel and travel expenses). We had to subscribe to the team audio app. We got one or two free audios a month but we were encouraged to buy more. We had to buy personal development books. We also had to buy product. We were encouraged to buy a lot of product and to replace everything in our house with [MLM Name] products. All the experience[s] were presented to make us believe we would not be able to make it in the [MLM Name] business unless [we put] our money towards these things.”); Comment No. 20-353 (E. Paulson) (“The only investment I was told I had to make was the initial kit. Of course I was told to buy the biggest one to have the best shot of success. And I was told I wasn’t required to purchase anything else. But that was not true. I couldn’t earn commission if I didn’t spend at least 100 per month. And then there were conventions, conferences, biz ops, all that cost money. Clothes for all of those things. Gifts, incentives for my team, I was encouraged to buy every new product launch etc. I invested way more than I thought I would. And the more I made, the more I spent.”); *see also, e.g.*, Comment No. 20-188 (Anonymous); Comment No. 20-345 (K. Smith); Comment No. 20-347 (T. Barclay); Comment No. 20-397 (Anonymous); Comment No. 20-1177 (Anonymous); Comment No. 20-1238 (T. DeRosa); Comment No. 20-1372 (C. Walker); Comment No. 20-1425 (K. LaPorta); Comment No. 20-1529 (A. Ny).

about costs and benefits often underlie deceptive MLMs⁹³ and business scams generally.⁹⁴

The Commission is therefore interested in receiving comment about whether it should propose that it is an unfair or deceptive practice for an MLM or its agents, including existing participants, to make deceptive claims about how its compensation plan operates, the benefits available under the plan, or the expenses that participants will have to incur or typically incur, or to fail to disclose material expenses when making representations regarding earnings or profits.

B. Non-Disparagement or “Gag” Clauses

A few consumers submitted comments in response to the 2022 ANPR stating that they wanted to provide the FTC with more information, but were prohibited from doing so because the MLM had required them to sign a contract with a non-disparagement clause.⁹⁵

⁹³ Compl. ¶¶ 29-33, 60, *FTC v. Trek Alliance, Inc.*, Case No. 02-cv-9270 (C.D. Cal. 2002), ECF No. 1 (alleging that defendants falsely represented that the opportunity being offered came with a salary).

⁹⁴ *E.g.*, Compl. ¶¶ 23-26, 32, *FTC v. Indep. Mktg. Exch., Inc.*, No. 1:10-cv-00568 (D.N.J. 2010), ECF No. 1 (alleging that defendants falsely represented that they would directly provide to purchasers paying work, along with everything needed to start work immediately); Compl. ¶¶ 32-34, *FTC v. Preferred Platinum Servs. Network, LLC*, No. 3:10-cv-00538 (D.N.J. 2010), ECF No. 1 (alleging that defendants falsely represented that participants in the offered money-making opportunity would be paid certain specified sums for completing certain specified tasks).

⁹⁵ Comment No. 20-1539 (Anonymous) (“I am choosing to make this comment anonymous because [MLM Name]’s ‘coaching a[greement]’ has a clause that even after leaving you are not to say anything disparaging about the company. It is known that [MLM Name] will send cease & desist notices or sue previous ‘coaches’ who express dissent or negative experie[n]ces with the company. It’s another way that these terrible companies choose to control public perception and get away with harming the public.”); Comment No. 20-1245 (Anonymous) (“I would love to speak out and share my story publicly, however, based on the policies and procedures of the multilevel marketing (mlm) company that I signed an agreement with, I am not legally allowed to. I am not allowed to talk negatively about the products, about the company, nor about the direct selling industry as a whole. I clicked agree when the brand partner agreement notice popped up on my computer. I did not take the time to read through the agreement in it[]’s entirety, and even if I did at the time, I would not have understood it anyway. This is why I have to submit my comments anonymously. If and when I can get protection from this agreement, I will share my story publicly.”).

In response, FTC staff reviewed various MLM websites and found that many MLMs require their participants to agree to a contract that contains a non-disparagement clause. In some instances, the contracts state that violating the non-disparagement clause is a material breach that could lead to sanctions or termination.

FTC staff also determined that at least some MLMs have attempted to enforce the non-disparagement clauses in their contracts. Several MLMs have filed lawsuits against MLM participants who allegedly disparaged the company.⁹⁶ Some of these lawsuits explicitly aimed to prevent participants from speaking out publicly about their experiences with the companies. For example, an MLM filed a lawsuit in State court against a participant who wrote an article on *behindmlm.com*, a consumer information website, for, among other things, making “disparaging, demeaning and negative remarks to third parties, the readers of *behindmlm.com*, about [the MLM], its founder and CEO, and its products.”⁹⁷ In another example, an MLM filed a lawsuit to compel a blogger to turn over the identities of participants who provided negative comments about the company, so that the MLM could sue those participants for making disparaging comments.⁹⁸

⁹⁶ See, e.g., *Tori Belle Cosmetics LLC v. McKnight*, No. 2:21-cv-00145, 2022 WL 3927069, at *5 (W.D. Wash. Aug. 31, 2022); *Wimbrey v. WorldVentures Mktg., LLC*, No. 05-19-01520-CV, 2020 WL 7396007, at *1-2 (Tex. App. Dec. 17, 2020); *LifeVantage Corp. v. Domingo*, 208 F. Supp. 3d 1202, 1214-1217 (D. Utah 2016); see also *My Daily Choice, Inc. v. Butler*, No. 2:20-cv-2178 (D. Nev. filed 2020); *My Daily Choice, Inc. v. Donnell*, No. 2:20-cv-2225 (D. Nev. filed 2020); *My Daily Choice, Inc. v. Jackson*, No. 2:20-cv-2237 (D. Nev. filed 2020); *Le-Vel Brands, LLC v. Speck*, No. 3:19-cv-1097 (N.D. Tex. filed 2019); *Le-Vel Brands, LLC v. Eckstrom*, Case No. 3:18-cv-1352 (N.D. Tex. filed 2018); *AdvoCare v. Anderson*, No. 201722709 (Tex. Dist. Ct. Harris Cty. filed 2017).

⁹⁷ *New U Life v. Sinclair*, No. C19-188 (Cal. Super. Ct. Contra Costa Cty. Feb. 7, 2019).

⁹⁸ *LLR, Inc. v. Hinks*, Case No. 17MR000717 (Ill. Cir. Ct. McHenry Cty. 2017) (seeking discovery from a blogger about her sources, arguing that they, among other things, breached their contract with LLR by making negative remarks about the company, which contract requires participants to “speak well of LLR, strengthen the LLR brand, and promote the good reputation of LLR and its products”).

A provision in a contract that prohibits a worker, agent, or other consumer from communicating with government agencies about possible law violations is void as a matter of public policy.⁹⁹ However, even if the form agreement permits participants to provide the FTC or other government agencies with honest but negative statements or opinions, the Commission is interested in exploring whether requiring recruits to sign a contract that forbids them from providing honest but negative statements or opinions, including potential recruits, is an unfair practice in violation of the FTC Act.¹⁰⁰

Many MLMs have delegated authority for recruitment to their participants.¹⁰¹ If MLMs require their recruiters to refrain from providing honest but negative statements or

⁹⁹ See FTC Bureau of Competition, Memorandum Regarding Contracts That Impede Bureau of Competition Investigations (June 15, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Formal-Analysis.pdf; see also *FTC v. AMG Servs., Inc.*, No. 2:12-cv-00536, 2013 WL 12320929, at *2 (D. Nev. Aug. 20, 2013) (“The court finds that the confidentiality agreements at issue before the court are unenforceable to prohibit former employees from willingly cooperating with the FTC.”); *E.E.O.C. v. Astra U.S.A., Inc.*, 94 F.3d 738, 744 (1st Cir. 1996); *E.E.O.C. v. Morgan Stanley & Co.*, No. No. 01-cv-8421, 2002 WL 31108179, at *1-2 (S.D.N.Y. Sept. 20, 2002); *SEC v. Lipson*, No. 97-cv-2661, 1997 WL 801712, at *1-2 (N.D. Ill. Oct. 28, 1997); *Hoffman v. Sbarro, Inc.*, No. 97-cv-4484, 1997 WL 736703, at *1 (S.D.N.Y. Nov. 26, 1997); see also Policy Statement of the Federal Trade Commission on Franchisors’ Use of Contract Provisions, Including Non-Disparagement, Goodwill, and Confidentiality Clauses (July 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/policy-statement-of-the-federal-trade-commission-on-franchisors-use-of-contract-provisions-including-non-disparagement-goodwill-and-confidentiality-clauses_0.pdf; but see Dissenting Statements of Commissioners Melissa Holyoak and Andrew N. Ferguson, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/commissioner-ferguson-dissenting-statement-on-franchise-policy-statement> and <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/commissioner-holyoak-dissenting-statement-on-franchise-policy-statement>. The U.S. Securities and Exchange Commission adopted Rule 21F-17, which prohibits enforcing or threatening to enforce a confidentiality agreement that would impede communications with the agency. 17 CFR 240.21F-17. The National Highway Transportation Safety Administration has stated that it is unlawful to use confidentiality and non-disclosure provisions to impede oversight and enforcement-related regulatory obligations. See, e.g., Neal Boudette, *Tesla Model S Suspension Failures Under Scrutiny by Safety Agency*, N.Y. TIMES, June 9, 2016, <https://www.nytimes.com/2016/06/10/business/tesla-model-s-nhtsa-suspension-failure.html>; see also Fed. Aviation Admin., *Impact of Non-Disclosure and Confidentiality Covenants on Agency Investigations*, https://www.faa.gov/sites/faa.gov/files/about/office_org/headquarters_offices/agc/Non_Disclosure_Guidance.pdf; Compl. ¶¶ 12-13 & Consent Order, *EEOC v. Baker & Taylor, Inc.*, No. 13-cv-03729 (N.D. Ill. 2013), ECF Nos. 1, 14 (requiring that employee agreements include language protecting the right to communicate with the EEOC and comparable regulatory agencies).

¹⁰⁰ *FTC v. Roca Labs, Inc.*, 345 F. Supp. 3d 1375, 1393-97 (M.D. Fla. Sept. 14, 2018); see also *FTC v. World Patent Mktg, Inc.*, No. 17-cv-20848, 2017 WL 3508639, at *15-16, 18 (S.D. Fla. Aug. 16, 2017).

¹⁰¹ See, e.g., sources cited *supra* note 29.

opinions about the MLMs or their products, that likely deprives some prospective participants of important information. It is likely that some prospective recruits would not join an MLM if they had received such honest but negative information from their recruiters or other participants. Thus, the use of non-disparagement clauses by at least some MLMs has resulted or is likely to result in consumers signing up for MLMs when they would not otherwise have done so, which is likely to result in consumer harm.¹⁰²

The Commission is therefore seeking comment about whether it should propose that it is an unfair or deceptive practice for MLMs to require participants to sign form agreements that bar participants from providing honest but negative statements or opinions about an MLM to the government, to prospects, or more broadly with the public,¹⁰³ whether such contract provisions result in consumer harm, whether such conduct is prevalent, and whether a rule requirement regulating the use of such agreements should contain other remedial provisions to prevent the use of such contract provisions. In addition, the Commission is interested in exploring whether it should address the use of other contract provisions or agreements that may directly or indirectly

¹⁰² Cf. *Roca Labs*, 345 F. Supp. 3d at 1393-1397.

¹⁰³ Currently, the Consumer Review Fairness Act (“CRFA”), 15 U.S.C. 45b, prohibits the use of form contracts that bar or restrict an individual who is a party to the form contract from posting a review, performance assessment, or similar analysis of the goods, services, or conduct of someone selling or leasing to them. The CRFA’s coverage, however, “does not include an employer-employee or independent contractor contract.” MLM participants do not necessarily fall within this exception: they may have signed an independent contractor contract, but they may also continue to use the MLM’s products, as would any consumer. It is therefore possible that an agreement barring MLM participants from making any disparaging comments about the MLM, including about their experience with the MLM’s products, may violate the CRFA.

Regardless of whether the MLM/participant relationship would fall outside of the CRFA, the Commission is of the view that any contract provision that directly or indirectly restricts or chills communications between participants and law enforcers or regulators is an unfair or deceptive act or practice, or an unfair method of competition under section 5 of the FTC Act. Moreover, the Commission is interested in exploring whether contracts that restrict or chill MLM participants from providing honest but negative statements or opinions are also an unfair or deceptive act or practice outside the context of government reports.

restrict current and former participants from speaking truthfully about their experiences, such as confidentiality or non-disclosure clauses and goodwill clauses.

C. Other Topics

The Commission is also interested in exploring whether it should address other deceptive or unfair practices relating to earnings, such as misrepresentations or unsubstantiated claims concerning any term or condition of the seller's refund or cancellation policies,¹⁰⁴ misrepresentations or unsubstantiated claims relating to the relationship between work and success,¹⁰⁵ misrepresentations or unsubstantiated claims concerning the cost, performance, efficacy, nature, or central characteristics of the MLM or its goods or services,¹⁰⁶ misrepresentations or unsubstantiated claims concerning real or purported earnings data or statistics concerning a particular industry,¹⁰⁷ or misrepresentations concerning whether the company operates as a multi-level marketing

¹⁰⁴ For example, the Business Opportunity Rule prohibits sellers from misrepresenting “any term or condition of the seller's refund or cancellation policies” or failing to provide a refund pursuant to the seller's terms and conditions. 16 CFR 437.6(k), (l). Also, the Commission has received reports that this conduct is ongoing among at least some multi-level marketing companies. *See also* Compl. ¶¶ 4.25-4.28, 5.2.3, *State v. LLR, Inc.*, No. 19-2-2325-2 (Wash. Super. Ct. King Cty. Jan. 23, 2019) (alleging that LuLaRoe “[f]ail[ed] to honor [its refund policy] for exiting consultants by miscalculating, delaying, or failing to issue refunds”).

¹⁰⁵ Some of these misrepresentations, if they are earnings claims, would violate the proposed Rule. However, a company could make a misrepresentation concerning these topics without making an earnings claim because, under the proposed Rule, an earnings claim is a representation that conveys, expressly or by implication, a level or range of actual or potential sales or earnings.

¹⁰⁶ For example, the Business Opportunity Rule bars this conduct. 16 CFR 437.6(h).

¹⁰⁷ For example, the Business Opportunity Rule bars business opportunity sellers from disseminating such industry financial data to prospective purchasers unless they have substantiation that the information “reflects, or does not exceed, the typical or ordinary” experience of purchasers. 16 CFR 437.4(c). Such data, often derived from reputable sources, may create the impression that the depicted level of sales or earnings is typical in the industry or field, or for the opportunity being advertised, and by implication, that the prospective purchaser, employee, or other participant will achieve similar results. *See, e.g., Med. Billers Network*, 543 F. Supp. 2d at 305-06 (earnings claims based on industry statistics deceptively implied that participants in defendants' opportunity would make the depicted amounts). The Commission sought comment on this issue in the 2022 ANPR, and now seeks further comment and evidence on it.

company.¹⁰⁸ The Commission is seeking comment on whether each practice is prevalent within the multi-level marketing industry, and whether it should propose to prohibit these practices.

IV. Request for Comments

Members of the public are invited to comment on any issues or concerns they believe are relevant or appropriate to the Commission's consideration of potential rulemaking in this area. The Commission requests that commenters also submit any relevant factual data upon which their comments are based. In addition to the issues raised above, the Commission solicits public comment on the specific questions identified below. 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. The Commission will consider comments made in response to the NPRM when considering comments made on this ANPR.

Questions

Additional Rule Provisions to Deter the Making of Deceptive Earnings Claims

1. Should the Commission propose additional requirements prescribed for the purpose of preventing misleading and unsubstantiated earnings claims in the MLM industry?

If so, describe the requirements. What are the benefits to consumers, and costs to businesses, and in particular small businesses, from such requirements? Would the

¹⁰⁸ The Commission has held it is a deceptive practice for a company to misrepresent material information about the opportunity being offered, such as the type of opportunity offered. *See Encyclopaedia Britannica*, 87 FTC at 435-39, 442-43, 487-88, 531 (job postings by company known for its door-to-door sales were deceptive where postings intentionally omitted the company's name and industry, and sought "management trainees," when in reality the position offered to applicants was that of door-to-door salesperson); *see also FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011-12 (N.D. Ind. 2000) (use of classified ads found deceptive when ads referred to "Postal Jobs" in "Help Wanted Section," but Defendants were not affiliated with the U.S. Postal Service and were not offering postal jobs)

- requirement benefit competition? 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.
2. Should the Commission propose a requirement for MLMs to provide objective data about the net earnings (income after expenses) of past and current participants to prospective recruits before they sign up? Why or why not? If the proposal mandates an earnings disclosure of some kind:
 - a. How should it define or describe what data should be provided? This includes, for example, whether the Rule should permit any group of participants to be excluded from such data, such as those who have ceased to pursue the income opportunity, and if so, how such a group should be defined.
 - b. How often should the proposal require that the data be updated?
 - c. At what point before or during the recruitment process should the proposal require that the data be provided to recruits?
 - d. What requirements should it impose on how the data is presented, so that prospective recruits will see and understand it?
 - e. In what languages should a proposed rule require the data be provided? For example, 16 CFR Part 14.9 already requires that disclosures that have to be made clearly and conspicuously need to be made in the same language as marketing claims in print media. Should a proposed rule require the data be provided in the same language as any oral earnings claims made to a prospective participant?

- f. What are the benefits to consumers and competition, and costs to businesses, and in particular small businesses, from such a requirement? 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, including the cost to collect this information and provide it to prospective recruits.
 - g. Should a proposed rule require that MLMs or others document prospects' review of any mandated data disclosure? For example, should it mandate that potential recruits must sign a document attesting that they received objective data about net income from the MLM and the date it was received? Why or why not? Provide any evidence that supports your position, including any evidence that quantifies the benefits to consumers and the costs to businesses, and in particular small businesses from such a requirement.
3. Should a proposed rule require MLMs to provide current participants with objective data about the net earnings (income after expenses) of past and current participants on an annual or other periodic basis? Why or why not? Answer each subpart of question 2 as to such a requirement.
 4. Should a proposed rule require MLMs to post objective data about the net earnings (income after expenses) clearly and conspicuously on their website(s)? Why or why not? Answer each subpart of question 2 as to such a requirement.
 5. Should a proposed rule require that all earnings claims concerning MLMs be accompanied by clear and conspicuous information about the typical net earnings

- (income after expenses) of participants? Why or why not? Answer each subpart of question 2 as to such a requirement.
6. What information do MLMs commonly possess about the expenses incurred by their participants? Provide all evidence that supports your answer.
 7. To the extent that at least some MLMs do not know how much their participants spend on all expenses, describe all reliable method(s) that MLMs could use to gather sufficient data about expenses to provide a reasonable basis for claims about participants' general or likely net earnings. For example, conducting a survey of current and recently exited participants, or requesting or requiring current and recently exited participants to disclose information about expenses to the MLM. For each such method:
 - a. How effective will the method be at gathering the relevant information?
 - b. What is the risk that the data produced will not accurately reflect participants' experiences, or otherwise could lead to misleading representations about net earnings?
 - c. What is the cost or burden to MLMs to employ the method to collect income and expense information they do not already have? Provide any evidence that quantifies the costs to businesses, and in particular small businesses, of each such method, and the benefit to consumers in being presented with this information before or after signing up for the opportunity.
 8. Should a proposed rule explicitly provide that any specific method of gathering income and expense data is or is not sufficient (in combination with information about income paid to participants by the MLM) to establish a reasonable basis for

- representations of net earnings? If so, identify the method(s) that should be deemed sufficient, and explain how the proposal should define them. Provide any evidence that quantifies the costs to businesses, and in particular small businesses, of such a proposed provision, and the benefit it would provide to consumers.
9. To the extent at least some MLMs do not know how much their participants spend in total on all expenses, what information about expenses should be provided in an Earnings Disclosure Statement or similar document? Should MLMs be required to describe all the information known to them regarding participant expenses and to summarize any other expenses that participants typically incur? What are the benefits to consumers and costs to businesses, and in particular small businesses, from such a requirement? Provide all evidence that supports your answer, including any evidence concerning the net impression that such a statement would convey to consumers, or any evidence that quantifies the benefits to consumers and the costs to businesses, and in particular small businesses.
 10. Should the proposal require a waiting period before consumers may join an MLM or first pay money to an MLM? If so, how long should the waiting period be, and what should trigger the start of the waiting period? What are the benefits to consumers and competition, and costs to businesses, and in particular small businesses, from such a requirement? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers and the costs to businesses, and in particular small businesses.
 11. Should a proposal require such a waiting period triggered by providing objective data regarding net income to a recruit? If so, how long should the waiting period be? What

- are the benefits to consumers and competition, and costs to businesses, and in particular small businesses, from such a requirement? 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.
12. Provide any empirical data or studies that relate to how much time MLM participants take before deciding to join the opportunity, whether and how frequently potential recruits are rushed to make a decision, and whether and how frequently MLM recruiting takes place in highly charged or emotional settings.
 13. Should the proposal require a cooling off period during which consumers can change their mind after joining an MLM? If so, how long should the cooling off period be, and what refunds should be available to consumers at the end of the cooling off period? What are the benefits to consumers and competition, and costs to businesses, and in particular small businesses, from such a requirement? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers and the costs to businesses, and in particular small businesses.
 14. To what extent do Federal or State laws already impose a waiting period or cooling off period on MLMs or MLM participants? Would a proposed regulatory provision that requires prospective participants to wait a certain number of days before paying money or joining the opportunity overlap with these Federal or State regulations? Why or why not? What evidence supports your answer? With reference to any asserted conflicts, should a proposed rule take these into account?
 15. How should any proposed rule provisions relating to waiting periods address sales that are covered by the FTC's Cooling Off Rule, 16 CFR Part 429? Provide all

evidence that supports your answer, including any evidence that quantifies the benefits to consumers and the costs to businesses, and in particular small businesses.

16. To the extent the Commission proposes any additional rule provisions to deter MLMs, MLM participants, or other MLM sellers from making deceptive or unsubstantiated earnings claims, should any MLMs be exempted from these requirements? Why or why not? If so, how should the proposal define such an exemption, how many MLMs would qualify for this exemption, and how would the exemption impact consumers? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers and competition, and the costs to businesses, and in particular small businesses.
17. What alternatives to regulations should the Commission consider to deter MLMs, MLM participants, or other MLM sellers from making misleading or unsubstantiated earnings claims? Would those alternatives obviate the need for regulation? Why or why not? Provide all evidence that supports your answer.

Misleading Claims Regarding Compensation Plans, Expenses, and Plan Benefits

18. How widespread is the practice of making false or unsubstantiated claims about the MLM's compensation plan, such as the eligibility requirements to earn certain types of compensation under the plan, or whether certain types of activities are required to earn money or certain categories of compensation? Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.
19. Many MLMs provide compensation plans to participants or prospective participants, which explain when and how they are eligible to earn certain types of compensation.

In some cases, the compensation plans themselves may convey representations about likely earnings. In some cases, MLMs may seek to cure any misimpressions regarding earnings by directing prospective participants to the compensation plan. The Commission is interested in whether such uses of compensation plans contribute to the deception of consumers, or, alternatively, prevent it.

- a. Are MLM compensation plans understandable to consumers? In other words, do consumers who review such compensation plans understand when they are signing up for the MLM what they will need to do to earn certain amounts of money or certain types of compensation?
- b. If not, how widespread is the lack of understanding?
- c. Does such lack of understanding MLM compensation plans lead consumers to be harmed? If so, how and why, and what is the extent of such harm?

Provide any evidence, such as empirical data, consumer perception studies, or consumer complaints, that supports your answer as to each subpart of this question.

20. How widespread is the practice of making false or unsubstantiated claims about the expenses incurred by MLM participants, including claims about what expenses are mandatory, claims about whether expenses are typically incurred, and claims about the amount of expenses typically incurred by participants? Provide any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices. Provide all evidence that supports your answer.

21. In some instances, MLMs or their agents have made representations about earnings to prospective recruits, but failed to disclose material information about expenses that the recruits would be required or encouraged to incur if they became a participant. How widespread is this practice? Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.
22. How widespread is the practice of misrepresenting the benefits available to MLM participants (such as falsely representing that they could obtain a free car or vehicle, or go on a free trip)? Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.
23. Are there circumstances in which the practices described in Questions 18 and 20-22 would not be deceptive or unfair? If so, what are those circumstances? Should the Commission exclude such circumstances from the scope of any rulemaking? Why or why not? If so, how should the proposal define such an exclusion? Provide all evidence that supports your answer.
24. Do any of the practices described in Questions 18 and 20-22 cause injury to consumers, and if so, how much? Do such practices cause injury to other businesses by unfairly disadvantaging them? Provide all evidence that supports your answer, including any evidence that quantifies or estimates these injuries if possible.
25. Do any of the practices described in Questions 18 and 20-22 disproportionately target or affect certain groups, including communities of color or other historically

- underserved communities? If so, why and how? Provide all evidence that supports your answer.
26. Is there a need for new regulatory provisions to prevent any of the practices described in Questions 18 and 20-22? Why or why not? Provide all evidence that supports your answer.
27. For each practice described in Questions 18 and 20-22, explain whether additional regulation is needed with respect to these practices assuming the rule proposed in the NPRM is finalized and, if so, how widespread such practices are. Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.
28. How should a rule provision addressing the practices described in Questions 18 and 20-22 be crafted to maximize the benefits to consumers while minimizing the costs to businesses and in particular small businesses? What are the benefits to consumers and costs to businesses, and in particular small businesses, from such an approach? 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.
29. Should the proposal contain additional requirements prescribed for the purpose of preventing any of the practices described in Questions 18 and 20-22? If so, describe any such requirements. What are the benefits to consumers and costs to businesses, and in particular small businesses, from such requirements? 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.

30. What alternatives to regulations should the Commission consider to address any of the practices described in Questions 18 and 20-22? Would those alternatives obviate the need for regulation? If so, why? If not, why not? Provide all evidence that supports your answer.

31. Do existing State or Federal laws and regulations covering practices described in Questions 18 and 20-22 affect businesses, particularly small businesses? If so, how? Provide all evidence that supports your answer.

Non-Disparagement Clauses

32. How widespread among multi-level marketing companies is the practice of requiring new recruits to agree to contracts that explicitly or implicitly prohibit participants from making disparaging or negative comments about the MLM, the MLM opportunity, any participants, executives, and/or employees of the MLM, and/or the products of the MLM (“non-disparagement clauses”)? Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.

33. How widespread among MLMs is the practice of requiring participants to agree to contracts that explicitly or implicitly prohibit participants from providing honest but negative statements or opinions to Federal or State governments about the MLM, the MLM opportunity, any participants, executives, and/or employees of the MLM, and/or the products of the MLM? Provide all evidence that supports your answer,

including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.

34. How widespread among MLMs is the use of other contract provisions or agreements that may directly or indirectly restrict current and former participants from speaking about their experiences, such as confidentiality or non-disclosure clauses and goodwill clauses? Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.

35. How widespread among MLMs is the practice of using or attempting to use contracts that contain non-disparagement clauses or other contract provisions or agreements that may directly or indirectly restrict current and former participants from speaking about their experiences, to restrict or attempt to restrict honest but negative statements or opinions to the public, and, in particular, recruits? Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices. In particular:

- a. Identify all instances where MLMs, in the past ten years, have asked current or former participants to cease and desist from violating a non-disparagement clause or providing honest but negative statements or opinions concerning the MLM, the MLM opportunity, any participants, executives, and/or employees of the MLM, and/or the products of the MLM. Provide all evidence that supports your answer.

- b. Identify any and all lawsuits or arbitrations filed in the past ten years involving MLMs that relate to non-disparagement clauses. Provide all evidence that supports your answer.
- c. Identify any and all lawsuits or arbitrations filed in the past ten years involving MLMs that relate to both a) current or former participants providing honest but negative statements or opinions concerning the MLM, the MLM opportunity, any participants, executives, and/or employees of the MLM, and/or the products of the MLM, and b) other contract provisions or agreements that may directly or indirectly restrict current and former participants from speaking about their experiences. Provide all evidence that supports your answer.
- d. Describe what any MLMs, including their participants, have told current or former MLM participants about non-disparagement provisions and/or their efforts to enforce said provisions. Provide all evidence that supports your answer, including any empirical data, consumer perception studies, or consumer complaints.
- e. Describe what any MLMs, including their participants, have told current or former MLM participants about how other contract provisions or agreements may directly or indirectly restrict current and former participants from speaking about their experiences. Provide all evidence that supports your answer, including any empirical data, consumer perception studies, or consumer complaints.

36. What do current and former MLM participants understand about their a) contracts with the MLM that contain non-disparagement clauses and b) other contract provisions or agreement that may directly or indirectly restrict current and former participants from speaking about their experiences? Provide all evidence that supports your answer, including any empirical data, consumer perception studies, or consumer complaints. For example, provide any evidence relating to how many MLM participants refrain from providing honest but negative statements or opinions to the public and/or recruits and the motivation for their actions.
37. Are there circumstances in which the practices described in Questions 32-35 would not be deceptive or unfair? If so, what are those circumstances? Should the Commission exclude such circumstances from the scope of any rulemaking? Why or why not? If so, how should it craft such an exclusion? Provide all evidence that supports your answer.
38. Do the practices described in Questions 32-35 cause injury to consumers, and if so, how much? Do such practices cause injury to other businesses by unfairly disadvantaging them? Provide all evidence that supports your answer, including any evidence that quantifies or estimates these injuries.
39. Do the practices described in Questions 32-35 disproportionately target or affect certain groups, including communities of color or other historically underserved communities? If so, why and how? Provide all evidence that supports your answer.
40. Is there a need for new regulatory provisions to prevent any of the practices described in Questions 32-35? Why or why not? Provide all evidence that supports your answer.

41. How should a rule provision addressing the practices described in Questions 32-35 be crafted to maximize the benefits to consumers and competition while minimizing the costs to businesses and in particular small businesses? 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.
42. Should a rule provision addressing the practices described in Questions 32-35 contain any additional requirements prescribed for the purpose of preventing any of these practices? If so, describe the requirements. What are the benefits to consumers and competition, and costs to businesses, and in particular small businesses, from such requirements? 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.
43. What alternatives to regulations should the Commission consider to address the practice described in Questions 32-35? Would those alternatives obviate the need for regulation? Why or why not? Provide all evidence that supports your answer.
44. Do existing State or Federal laws and regulations covering practices described in Questions 32-35 affect businesses, particularly small businesses? If so, how? Provide all evidence that supports your answer.

Other Deceptive or Unfair Practices

45. In the cases the Commission has brought, we have repeatedly seen circumstances where earnings claims convey the impression that the represented earnings are typical. Are there circumstances where they do not? If so, describe such circumstances in detail. Provide all evidence that supports your answer.

46. How widespread are deceptive or unfair refund policies among multi-level marketing companies? Are there certain business contexts in which the policies are prevalent, or certain business contexts in which they are not? If so, describe the relevant business context and the basis for your position. Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such policies.
47. How widespread are misrepresentations concerning real or purported earnings data or statistics concerning a particular industry in connection with multi-level marketing? Are there certain business contexts in which the practice is prevalent, or certain business contexts in which it is not? If so, describe the relevant business context and the basis for your position. Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.
48. How widespread are misrepresentations concerning the cost, or the performance, efficacy, nature, or central characteristics of multi-level marketing companies, the opportunity they offer, or the goods or services they offer? Are there certain business contexts in which the practice is prevalent, or certain business contexts in which it is not? If so, describe the relevant business context and the basis for your position. Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.
49. How widespread are misrepresentations concerning whether a particular MLM operates as a multi-level marketing company? Are there certain business contexts in

- which the practice is prevalent, or certain business contexts in which it is not? If so, describe the relevant business context and the basis for your position. Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.
50. How widespread is the practice of making misrepresentations, including unsubstantiated claims, relating to the relationship between work and success by an MLM participant? For example, this could include a deceptive claim that people who work hard are not going to fail at the business. Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.
51. For each practice described in Questions 46-50, explain whether additional regulation is needed with respect to these practices assuming the rule proposed in the NPRM is finalized and, if so, how widespread such practices are. Provide all evidence that supports your answer, including any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices.
52. Are there circumstances in which any of the practices described in Questions 46-50 would not be deceptive or unfair? If so, what are those circumstances? Should the Commission exclude such circumstances from the scope of any rulemaking? Why or why not? If so, how should it define such an exclusion? Provide all evidence that supports your answer.

53. Do any of the practices described in Questions 46-50 cause injury to consumers, and if so, how much? Do such practices cause injury to other businesses by unfairly disadvantaging them? Provide any evidence that quantifies or estimates these injuries if possible. Provide all evidence that supports your answer.
54. Do any of the practices described in Questions 46-50 disproportionately target or affect certain groups, including communities of color or other historically underserved communities? If so, why and how? Provide all evidence that supports your answer.
55. Is there a need for new regulatory provisions to prevent any of the practices described in Questions 46-50? Why or why not? Provide all evidence that supports your answer.
56. How should a rule provision addressing some or all of the practices described in Questions 46-50 be crafted to maximize the benefits to consumers while minimizing the costs to businesses and in particular small businesses? 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.
57. Should the proposed rule contain additional requirements prescribed for the purpose of preventing any of the practices described in Questions 46-50? If so, describe the requirements. What are the benefits to consumers and competition, and costs to businesses, and in particular small businesses, from such requirements? 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.

58. What alternatives to regulations should the Commission consider to address the practices described in Questions 46-50? Would those alternatives obviate the need for regulation? Why or why not? What evidence supports your answer?
59. Do existing State or Federal laws and regulations covering practices described in Questions 46-50 affect businesses, particularly small businesses? If so, how? Provide all evidence that supports your answer.
60. Are there other commercial acts or practices related to earnings claims that are deceptive or unfair that should be addressed in a proposed rulemaking? If so, describe the practices. How widespread are the practices? Provide all evidence that supports your answer, and please answer Questions 51-59 with respect to the practices.

V. Comment Submissions

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

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

If you file your comment on paper, write “Earnings Claims ANPR – Rulemaking, Matter No. R111003” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580. If possible, submit your paper comment to the Commission by overnight service.

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

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 id.* 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 ANPR and the news release describing it. 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>.

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

April J. Tabor,
Secretary