DIRECT SELLING ASSOCIATION

May 10, 2022

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex B)
Washington, DC 20580

Re: Advanced Notice of Proposed Rulemaking: Trade Regulation Rule on the Use of Earnings Claims

Dear Federal Trade Commission:

Thank you for the opportunity to comment on the Advanced Notice of Proposed Rulemaking ("ANPR") to address deceptive earnings claims. Our association represents more than 7.3 million active direct sellers and 44.6 million preferred customers and discount buyers that contributed $42.7 billion in sales to the American economy in 2021. Sales increased 6.4% from 2020-2021 and have grown almost 22% since 2019.

For more than a century, the Direct Selling Association ("DSA") has served as the national trade association for companies that offer entrepreneurial opportunities to individuals who market and sell products and services, typically outside of a fixed retail establishment. The association serves to police, promote and protect direct selling through advocacy, networking and education for member executives and salesforce.

We share the goals of the Federal Trade Commission ("FTC") that any earnings claims made by businesses, including direct selling companies and their independent salesforce members should not be deceptive or misleading to ensure potential and current business participants have a reasonable expectation of income that can be earned. DSA and our members work tirelessly to protect consumers. We also work diligently to abide by existing laws, rules, guidance, and supervisory requirements that prohibit such practices and protect consumers.

As the FTC considers moving forward with a rule, it should balance the goal of protecting consumers with measures already in place without disrupting the ability of millions of micro-entrepreneurs in the United States to establish their own small businesses and provide beneficial products and services to their consumers.

Because strong ethics, self-regulation and compliance mechanisms are already used in direct selling, we believe a rule on deceptive earnings claims is not warranted. The Commission has also not provided adequate legal or statistical information in the record to justify proceeding with a rule. However, if the rulemaking does proceed, it should follow years of FTC precedent

and advertising principles to ensure a predictable regulatory framework for businesses and consumers.

Background of Direct Selling

Direct selling is a significant business model that serves Americans who desire flexibility and prefer personal relationships to purchase products. These individual sellers are respected by their peers, consumers, and customers.

Industry Statistics

Direct selling provides a low-cost path to starting a flexible, part-time business in the United States. For the 7.3 million direct sellers, 6.8 million work the business only on a part-time basis to earn modest extra income on the side. This allows individuals to engage in their own business as much or as little as they want depending on their schedule and individual financial goals.

Practically any individual can start for an average of $82.50, which enables them to grow a business on their own terms.[1] Direct selling is overrepresented compared with the United States population by women (76%) and Hispanics (23%).[2] Once established, direct sellers may choose to build their business by introducing it to others and can share the business with their friends, family and customers.

Americans Have a Favorable Opinion of Direct Selling

Seventy-nine percent of Americans have a favorable opinion of direct selling and see the business as an attractive option for entrepreneurship. These perceptions have remained stable for the last decade.[3] Perception has remained high with the growth of technology that has allowed direct sellers to establish and grow their businesses with an online presence.

The stability in perception is also notable because technology has resulted in a more informed consumer. They have choices of where they shop and with whom and increasingly are choosing direct sellers. Research has shown that true harm is mostly absent from direct selling.[4] DSA and its member companies share the FTC's goal to protect consumers and engage robust compliance practices to effectuate this goal.

Ethics, Self-Regulation and Compliance Within Direct Selling

As the FTC considers whether to proceed with a new rule, it should acknowledge the extensive self-regulatory and compliance practices that already exist in direct selling. For

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[1] DSA 2018 Evolving Marketplace Study, https://www.dsa.org/docs/default-source/research/dsa-ipsos-2020-consumerattitudesinfographic2-27.pdf?sfvrsn=68ddfa5_2

[2] Women are 50.8% and Hispanics are 18.5% of the United States population according to the most recent Census data, https://www.census.gov/quickfacts/US

[3] 2020 DSA/IPSOS Consumer Attitudes & Entrepreneurship Study, https://www.dsa.org/docs/default-source/research/dsa-ipsos-2020-consumerattitudesinfographic2-27.pdf?sfvrsn=68ddfa5_2%27

[4] Anne Coughlan, *Consumer Harm from Voluntary Business Arrangements: What Conditions are Necessary?* Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3488105

decades, DSA and its member companies have developed a variety of compliance activities with successfully. These mechanisms have proven to be effective and can be backstopped by government enforcement action for the most egregious actions.

The DSA's organizational structure supports self-regulation not only for DSA members, but the entire direct selling business model. As described below, members are held to strict standards as a condition of DSA membership through our Code of Ethics. Understanding the importance of investing in self-regulation, the association also funds an independent entity for that purpose, the Direct Selling Self-Regulatory Council ("DSSRC").

The DSSRC is one of the largest annual line items for the association and applies to the entire direct selling business, not just DSA members. DSA also conducts extensive educational training and assures that its members implement and enforce customer protection laws and regulations through rules, guidelines, and standards.

DSA Code of Ethics

For 40 years, the DSA has had a Code of Ethics[5] that is required for all members. Consumers and salespeople can file complaints with the independent Code Administrator if they believe a provision of the Code of Ethics has been violated. In 2021, the DSA Code Administrator received ninety-six cases that were found to be under its purview and received another thirty-five that were deemed to not be under their authority because they were personal complaints not based on the business, were not DSA members, or it was an issue originating from outside the United States. Most complaints were resolved within 30 days, and only 1% of allegations were related to earnings claims.[6]

In alignment with FTC guidance[7], the DSA Code of Ethics states that earnings claims made by member companies and their independent salespeople must be truthful, accurate, and presented in a manner that is not false, deceptive, or misleading. Additionally, the Code of Ethics requires that independent salespeople are provided with sufficient information to enable a reasonable evaluation of the opportunity to earn income and that any information presented is substantiated.[8] The provisions of the Code of Ethics have been updated regularly to remain consistent with regulatory guidance and have received substantial substantive updates many times over the last 40 years.

To ensure consumer protection, the DSA Code of Ethics requires its members adhere to a 90% inventory repurchase agreement. The policy requires all DSA members to repurchase on reasonably commercial terms currently marketable inventory in possession of the salesperson within twelve months from the salesperson's date of purchase at not less than 90 percent of the

[5] DSA Code of Ethics, https://www.dsa.org/docs/default-source/code-of-ethics/dsa-code-of-ethics-december-2018.pdf?sfvrsn=5598cda5_10

[6] 2021 Code of Ethics Compliance Report, https://www.dsa.org/docs/default-source/code-of-ethics/dsa_coe-compliance2021_generic_v2.pdf?sfvrsn=ec72d7a5_2

[7] Business Guidance Concerning Multi-Level Marketing, https://www.ftc.gov/business-guidance/resources/business-guidance-concerning-multi-level-marketing

[8] DSA Code of Ethics, Section A(8), https://www.dsa.org/docs/default-source/code-of-ethics/dsa-code-of-ethics-december-2018.pdf?sfvrsn=5598cda5_10

salesperson's original net cost.[9] Thus, if a consumer comes into possession of products based on a false or deceptive earnings claim, they have a remedy to ensure minimal harm. The DSA Code of Ethics requires the buyback to be published in multiple formats and locations in a manner easily understood by a typical independent salesperson.

Direct Selling Self-Regulatory Council

In 2019, the BBB National Programs ("BBBNP") launched and began administering the DSSRC as a self-regulatory program. As part of the BBBNP, the DSSRC is entirely independent of DSA, although the association funds the program and supports its tenets and principles. The program monitors the entire direct selling industry in the United States—not just DSA members—and articulates clear standards on many issues, including product, earning, and lifestyle representations.

As one of BBBNP's six advertising self-regulatory programs, the DSSRC is operated solely by the BBBNP and administered by Vice President and DSSRC Executive Director Peter Marinello who brings a wealth of legal and self-regulatory experience from the National Advertising Division and Electronic Retailing Self-Regulation Program. The BBBNP's other notable staff includes Executive Vice President, Policy, Mary Engle, who formerly directed the FTC's Division of Advertising Practices.

The DSSRC was launched at the suggestion of senior FTC staff with DSA executives and member companies over the course of many years. It represents a good example of how private industry, trade industry groups, and government worked together to craft a solution.

In 2020, the DSSRC released Earnings Claims Guidance in alignment with FTC guidance.[10] The guidance serves as an additional educational resource for companies and independent salespeople. It educates them on presenting truthful claims on social media to ensure a reasonable consumer has access to information and does not carry unrealistic expectations of earnings or lifestyle potential. This is especially important for consumers deciding whether to join a direct selling company and which company to join.

Self-Regulation Has Proven to Be Effective

In its first full three years of operation, the DSSRC has demonstrated how self-regulation not only ensures consumers are protected, but also provides data demonstrating how self-regulation is working to monitor false and misleading claims. The DSSRC has reviewed an average of 300,000 URLs per year. Within those 900,000 URLs, 784 were earnings claims deemed to be potentially deceptive to a reasonable consumer and removed from social media. That is only .0008% of the total URLs reviewed contained an earnings claim.

Moreover, the .0008% is far too large in terms of number of postings. The DSSRC reviewed only URLs that raised potential violations. Given the number of social media postings on various social media outlets made by 7.3 million independent salespeople in the direct selling industry daily, the number of posts are likely in the millions annually. As a result, the percentage

[9] DSA Code of Ethics, Section A(7)

[10] https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc_guidanceonearningsclaimsforthedirectsellingindustry_2020.pdf?sfvrsn=4ecfcd36_8

of violative claims extrapolated is likely far smaller than .0008%, and thus the overall scope of claims that could potentially cause consumer harm is minute.

Of the 325 total cases that DSSRC has opened to date, a total of 180 included earnings claims—that is, 55.4% of the total. Of that number, approximately 85% of these 180 cases are claims that completely omitted a disclosure or disclaimer. In 2021, DSSRC brought 709 representative claims to the attention of direct selling companies, 378 were related to earnings claims.[11] They were either immediately removed and sent to an administrative closure or the subject of a public case decision.

In addition to its robust case work and industry education, the DSSRC employs a strong enforcement mechanism by referring cases to the FTC. In the past three years, seventeen cases have been directly referred to the FTC by the DSSRC for potentially deceptive earnings and product claims. The DSSRC spends considerable time, effort and resources on each case referred to the FTC, including by providing the FTC a case summary, legal points and authorities, and an evidence file.

Compiling these cases and referring them to the FTC saves the Commission valuable time and resources when searching for claims that could harm consumers as these matters have been investigated by an independent and reliable body that provides significant work without expending government resources.

DSA Collaboration and Education

DSA has also provided education programs for decades and has expanded its consumer protection education. In 2021, DSA launched the Direct Selling Compliance Professional Certification Program for individual member executives. In its first three offerings, over three hundred executives have become certified through the program, which has sharpened the industry's understanding of key concepts related to company compliance programs. A major aspect of the program is education regarding current laws, regulations and guidance related to earnings claims to ensure that member company executives have the same basic understanding of key concepts sharing compliance, consumer protection, and effective self-regulation.

Likewise, to increase information sharing regarding compliance best practices and collaboration amongst our member executives about applicable regulations and to ensure good compliance practices in the marketplace, the DSA Board of Directors approved the establishment of the Compliance Officers Council. The Council is currently working on proposals to augment and bring consistency to compliance practices across the direct selling industry for members and non-members alike.

Company Rules, Guidelines, Standards, and Enforcement

In addition to the guidance and rules promulgated by DSSRC and the DSA Code of Ethics, member companies often exceed these requirements. Companies use their own customized methods designed to foster and ensure ongoing compliance and education regarding the importance of presenting their business appropriately. In addition to protecting their

[11] DSSRC 2021 Year End Activity Report, https://www.dsa.org/docs/default-source/dssrc/dssrc-2021-annual-activity-report.pdf?sfvrsn=244ad7a5_2

reputation and their independent sales force, companies want to ensure compliance to protect customers.

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

Companies also monitor the marketplace, especially social media, for claims that violate their rules and guidelines. Many companies use webcrawlers to flag potential violations of company policies regarding earnings and lifestyle claims and assist them in having such claims immediately removed. For more serious and repeat violators, companies regularly penalize, suspend, and even terminate salesforce members for violations of their policies.

There are Sufficient Regulatory and Self-Regulatory Tools to Address Deceptive Earnings Claims

Although the ANPR suggests that the recent unanimous Supreme Court decision in *AMG Capital Management v. FTC* is one of the key reasons why the Commission is considering a rule regarding earnings claims, the FTC already has many tools to prohibit these claims. Despite the loss of Section 13(b) of the FTC Act as a way to recover money, the Commission still has many effective authorities that allow it to stop unlawful conduct and recover money for consumers, and at times obtain penalties, including in actions involving deceptive earnings claims. These should continue to be utilized instead of proceeding with a rulemaking.

Current Authority Used by the FTC to Collect Monetary Damages

The FTC can file administrative complaints alleging violations of the FTC Act and use Section 19 of the FTC Act to obtain monetary relief after the administrative action is complete. Section 19 provides that once there is a final cease and desist order in the administrative litigation, the FTC can seek to establish that "the act or practice to which the cease and desist order relates is one which a reasonable [person] would have known under the circumstances was dishonest or fraudulent" and pursue monetary relief."[12]

Indeed, the FTC has recently seen a notable increase in the volume of administrative litigation, demonstrating this as a viable tool for the Commission to use. In a recent case, the FTC filed two actions against the same company, one in federal court in order to obtain preliminary relief and one in administrative court.[13] The FTC Act, and Sections 13 and 19 in particular, afford the FTC great flexibility in how it can bring and structure lawsuits and the

[12] That relief can include "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages."

[13] Press Release, FTC Sues Intuit for Its Deceptive TurboTax "free" Filing Campaign (March 29, 2022) https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-sues-intuit-its-deceptive-turbotax-free-filing-campaign.

types of relief it can obtain. The FTC can bring an action under Section 13 for injunctive remedies and Section 19 for monetary relief. The Commission is not powerless to collect money for consumers.

And yet there are still more tools available to the Commission short of promulgating a rule. The FTC has a long history of working cooperatively with states and bringing joint actions. The states' ability to obtain monetary relief was not affected by *AMG,* and the FTC continues to bring joint actions with the states, where the states focus on obtaining monetary relief. The Commission has taken this course of action frequently, both before and after the *AMG* decision with respect to earnings claims. In June 2021, the FTC filed a joint complaint with the state of Arkansas against an alleged pyramid "blessing loom" scheme.[14] In 2018, the FTC joined the state of Minnesota to go after a money-making operation that was based out of Minnesota.[15] Thus, the FTC is using the authority already provided to obtain monetary and injunctive relief to address consumer protection and harm issues.

It is also worth noting that although most, if not all the law enforcement cases cited in the ANPR were brought by the FTC before the *AMG* decision was issued, the FTC could have brought many if not all of these cases through the same combination of the authorities and processes discussed above. The Commission could have achieved the same or comparable results without the use of 13(b) or a specific rule designed to address earnings claims.

Other Authorities Used by the Commission to Quickly Remove Claims

In addition to Sections 13 and 19 of the FTC Act, there are still additional tools at the FTC's disposal the Commission can use to quickly remove deceptive earnings claims, including through the Penalty Offense Authority. In October 2021, the Commission sent 1,100 letters and notices to companies warning them of potential civil penalties if the companies misrepresented, among other things, "that a substantial number of participants have made or can make the represented profits or earning."[16]

As the FTC explained in its press release, the letters suggested strongly that this is a highly effective tool for the Commission to use against companies that make deceptive earnings claims, stating that companies that use deceptive earnings claims would pay "a heavy price."[17] Direct selling companies have heeded these letters, taking them with the seriousness they deserve and have certainly been informed that the Commission will seek to use its penalty authority

[14] Press Release, FTC and the State of Arkansas Charge Operators of "Blessing Loom" With Running an Illegal Pyramid Scheme (June 17, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/06/ftc-state-arkansas-charge-operators-blessing-loom-running-illegal-pyramid-scheme.

[15] Press Release, FTC and State of Minnesota Halt Sellers Playbook's Get Rich Scheme (Aug. 6, 2018), https://www.ftc.gov/news-events/news/press-releases/2018/08/ftc-state-minnesota-halt-sellers-playbooks-get-rich-scheme.

[16] FTC Notice of Penalty Offenses Concerning Money-Making Opportunities, https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-money-making-opportunities/mmo-notice.pdf.

[17] Press Release, FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties (Oct. 26, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead-big-penalties ("Preying on consumers and workers with bogus promises of big earnings should never be profitable," said Samuel Levine, Director of the FTC's Bureau of Consumer Protection. "Today's announcement helps ensure that companies that cheat struggling Americans will pay a heavy price.")

under Section 5(m)(1)(B) if there are future law enforcement actions involving false or unsubstantiated earnings claims.

The Commission has also used warning letters as a mechanism to contact businesses to quickly remove false or deceptive earnings claims from the marketplace and thus prevent harm in a timely manner. The FTC has sent warning letters to companies advising them to remove claims within 48 hours and these deadlines are taken seriously and have always been followed by responsible companies. The letters and published notices are an effective means to further consumer protection without the need for further rulemaking.

Indeed, in April 2021, Acting Director of the Bureau of Consumer Protection Daniel Kaufman said in written testimony for a congressional hearing:

> "Warning letters can be issued more quickly than a court complaint and proved to be overwhelmingly successful in removing potentially dangerous claims from markets. The Commission has monitored responses to these warning letters closely and has been pleased to see that in a vast majority of cases, letter recipients removed problematic claims quickly."[18]

The FTC has been given a panoply of tools to remove deceptive earnings claims from the marketplace expeditiously and collect money for consumers. The Commission should continue using these tools instead of promulgating a new rule.

The FTC's Authority Should be Delegated by Congress

The Commission also has a variety of tools given to it by Congress over the years and should continue relying on those. Working with elected leaders who represent members of their communities to pass legislation in these areas is a vital element to determine what additional tools are needed or valid.

Congress continues to debate whether and how to reform Section 13(b) that will allow the FTC to seek monetary relief more generally in federal court. That discussion continues, and the FTC should let Congress do its proper assessment and not move forward with a rule without knowing the extent of the 13(b) authority Congress will provide to the Commission. To the extent that Congress wants to amend Section 13(b) to provide the FTC with the means to recover additional monetary redress in federal court, Congress should make that assessment and legislate accordingly.

For example, in 2020, Congress enacted the COVID-19 Consumer Protection Act[19] which provides that marketers who make deceptive claims about the treatment, cure, prevention, or mitigation of COVID-19 are subject to civil penalties of up to $46,517 per violation. The Act provides the FTC with avenues to easily collect monetary damages from consumers allegedly harmed by these claims and provides a good example where Congressional legislation has provided tools to protect consumers and guard against consumer harm.

[18] Curbing COVID Cons: Warning Consumers about Pandemic Frauds, Scams, and Swindles of the United States Senate Committee on Commerce, Science and Transportation Subcommittee on Consumer Protection, Product Safety, and Data Security, 117th Congress (2021) (testimony of Daniel Kaufman)

[19] Section 1401, Division FF of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260

DSA supports the FTC having tools to bring enforcement actions against frauds and scams with appropriate safeguards. Specifically, earlier this year, DSA and other national trade associations signed a letter to the United States Senate Commerce, Science and Transportation Committee supporting S. 3410 "The Consumer Protection and Due Process Act," sponsored by Senator Mike Lee.[20] DSA will continue to support efforts to ensure there are appropriate, common sense tools to adequately address and prevent against consumer frauds and scams.

The Record Does Not Support the Need for a New Rule or any Prohibition Against Atypical Earnings Claims

The ANPR, for the first time, raises the prospect of the FTC dramatically changing its approach regarding how it oversees claims made for money making opportunities. It has approached such claims in the ANPR that is fundamentally at odds with Commission advertising principles and jurisprudence that has been in place for decades.[21]

The ANPR concedes that the FTC already has specific tools regarding earnings claims, in the TSR, the Franchise Rule and the Business Opportunity Rule. And notably, none of those rules flatly prohibit atypical earnings claims. Despite a history of successful law enforcement and self-regulation in this area, the FTC is considering targeting earnings claims for prescriptive regulation and treating these claims as fundamentally different than all other advertising claims.

<u>The Law Enforcement Actions Cited Do Not Attempt to Disclaim or Disclose Atypical Earnings</u>

After decades of jurisprudence and guidance that has greatly benefited consumers and businesses, the Commission is now proposing a rule that would, among other things, take the unprecedented step of implementing a blanket ban on atypical earnings claims and preclude the use of clear and conspicuous disclosures which could clarify and qualify these claims to avoid providing any misleading impressions that could be caused. [22]

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[20] https://www.uschamber.com/assets/documents/220201_Coalition_S3410ConsumerProtection_Sen-CST.pdf

[21] The term "atypical claims" frequently appears in this comment and is used to describe any earnings representations that may exceed what the typical distributor achieves in the program. This includes specific numerical amounts as well as lifestyle claims, which the ANPR describes as "getting to go on expensive vacations, quitting your job, or buying a luxury car." Lifestyle claims, however, can be far more mundane, and can express far less extravagant goals. It is worth noting that many of the cases cited in the ANPR challenged both express earnings claims as well as lifestyle claims. See, e.g., Success by Health Complaint, FTC v. Noland, Case Mo. CV-20-0047-PHX-DWL (filed D. Ariz. 2020) (recruiting materials "includes a 'Lifestyle' section picturing a luxury car and highlighting 'exotic reward trips and vacations' and 'luxury and living incentives'").

[22] "The Commission also is interested in exploring disclaimers: Specifically, whether a disclaimer can be sufficient to correct a misleading impression from an atypical earnings claim, and, if so, what features such a disclaimer must have, and in what contexts will it suffice. In the Commission's experience, we have not seen probative evidence that disclaimers effectively cure atypical earnings claims. In Commission enforcement actions where defendants have argued that disclaimers or disclosures cured any deceptive earnings claims, courts have repeatedly found otherwise. Further, research by the Commission has found that even clear and prominent disclaimers of "Results not typical" or the stronger "These testimonials are based on the experiences of a few people and you are not likely to have similar results," are not sufficient to dispel the implication that a testimonial depicts typical results. Yet, some companies continue to use disclaimers with such language. Based on the foregoing, the Commission seeks comment, information, and evidence on whether a disclaimer can be sufficient to correct an otherwise misleading impression created by earnings claims, and, if so, whether and how the issue should be addressed in a rule."

Such a body of case law does not provide the evidence legally required to support the need for a new rule. A rule that would ban the use of anything other than typical earnings claims would reflect a fundamental shift in FTC jurisprudence, and there has been no authority cited supporting any reason to single out earnings claims for such special treatment while allowing the use of disclaimers in other contexts.

Notably, the FTC would be making this seismic shift only with respect to earnings claims without any clear rationale as to why earnings claims would or should be treated differently from the broad array of other advertising claims that also have the potential to create deception if clarifying information is not adequately disclosed.

Relatedly, the ANPR suggests that the Commission would also propose a rule that included a vague blanket ban on "lifestyle claims." As discussed more below, these actions would conflict with core First Amendment protections afforded to commercial speech and do not comport with the Supreme Court's directive that such restrictions should be a last resort and not a first.

Advertisers in every industry, from direct sellers to car manufacturers, to insurance companies, to telecommunicators, to travel companies use clear and conspicuous disclaimers to effectively qualify claims. The ramifications of a rule based upon a false premise that disclaimers are ineffective to qualify claims would be contradictory to years of advertising precedent and practices.

The ANPR appears to base this proposal in large part on the FTC's track record of law enforcement in this area. Indeed, the ANPR is replete with successful cases brought by the FTC that involve allegedly unsubstantiated earnings claims. Some are settlements and some are the result of extensive litigation. The cases cited and results achieved in these cases for consumers is impressive and commendable, but given the DSSRC data referenced above, the claims cited in these cases likely represent less than 1% of all existing earnings claims that exist. This also demonstrates the FTC's ongoing activity in these areas is effective without the need for more and distinct regulations.

While one could superficially look at these cases and view them as supporting the need for some or all of a new rule, the opposite is the case. In virtually every one of the cases cited by the FTC in the ANPR, the defendants either made no disclaimers at all when presenting atypical claims about earnings claims (similar to the approximately 85% of recent cases monitored by the DSSRC) or, in a few cases, made disclosures that were clearly inadequate in terms of content and/or prominence and do not come close to the type of disclosures that would meet the direct selling industry's own standards for clear and conspicuous.[23]

For example, in footnote 35, the FTC cites to *FTC. v. Medicor*, a 2002 case regarding a medical billing business with an inadequate "results may vary" disclaimer. Medicor advertised to individuals the opportunity to work from home and perform medical billing for doctors' offices. The advertisements told consumers they could earn "$20,000 to $45,000 per year" with Medicor

[23] Guidance on Earnings Claims for the Direct Selling Industry, https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc_guidanceonearningsclaimsforthedirectsellingindustry_2020.pdf?sfvrsn=4ecfcd36_8

telemarketers informing customers that they could "make $20 to $40 per hour or $300 to $600 per week, at a rate of approximately $3 per claim processed."[24]

Medicor's advertisements featured the sole disclaimer that "results may vary," with no further information. Obviously this disclaimer is insufficient given the claims being made by Medicor and not at all typical to the disclaimers used currently. Similar issues were raised in the FTC's actions against Advocare and Success by Health. In the *Advocare* complaint, the FTC describes claims touting six and seven-figure earnings possibilities.[25] Disclaimers, however, "appear in small print and not in close proximity to the claims made."[26] Similarly, in *Success by Health*, the complaint states that "income-related disclaimers frequently are inconspicuously disclosed in fine print" and that defendants would "regularly undermine these disclaimers."[27] *See also* Complaint, *FTC* v. *Ragingbull.com, LLC,* No. 1:20-cv-3538 (filed D. Md. 2020) (Defendants frequently include disclaimers on their services' purchase pages in a small "Terms & Conditions" text box that appears below the purchase button. The text box contains several pages worth of text and requires several minutes to scroll through."); Complaint, *FTC v. Vemma Nutrition Co*., No. 2:15-cv-01578 (filed D. Ariz. 2015) ("While Defendants sometimes attempt to provide disclaimers when making these and other income claims, their attempts are inadequate. Vemma typically dilutes purported disclaimers, such as "results may vary," with statements implying that negative results are due to the inadequate efforts of the Affiliate."); Preliminary Injunction, *FTC* v. *World Patent Mktg.*, No. 17-cv-20848, 2017 WL 3508639 (filed S.D. Fla. 2017) ("[E]ven if the disclaimers contained unambiguous disclosures, they failed to change the net impression created by Defendants' salespeople who verbally promised financial gain.")

Notably, the FTC has failed to cite a single case in which a company made a serious effort to use qualifications to present atypical earnings claims in a way that is not misleading to consumers. Presumably, because disclosures can and often are quite effective at qualifying claims for any potentially misleading claims to the reasonable consumer. Indeed, the effectiveness of the disclaimers is likely the reason why the record is devoid of such cases. In case after case where the FTC has brought law enforcement actions the advertising at issue either contained no disclosures at all, or in the few cases where disclosures were used the disclosures were clearly inadequate on their face because of an egregious lack of prominence, clarity or conspicuousness.

The FTC has itself stated these can be effective. The letters of Penalty Offense Authority state:

> "It is an unfair or deceptive trade practice to misrepresent, explicitly or implicitly, that the represented profits or earnings are the ordinary, typical, or average profits or earnings made by participants. This includes by means of the representation of an earnings figure or the attribution of earnings figures to specific participants, both of which impliedly represent that such figures are likely, are earned by a substantial number of participants, or are the typical, ordinary, or average results, absent clear and conspicuous disclosure of the relevant context, such as the time

[24] *FTC. v. Medicor LLC.*, 217 F. Supp. 2d 1048, 1054 (C.D. Cal. 2002).
[25] Complaint*, FTC v. Advocare Int'l, L.P.*, Case No. 4:19-cv-00715 (filed E.D. Tex. 2019)
[26] *Id.* at ¶ 37. Further, the complaint notes that the company's income disclosure statement was also inaccurate.
[27] Complaint, *FTC v. Noland*, Case Mo. CV-20-0047-PHX-DWL (filed D. Ariz. 2020).

> and effort actually expended by participants who made the amount represented, the percentage of participants making the amount represented, and the amount typically and ordinarily made by participants."

As implied in these letters, a clear and conspicuous disclosure can be effective.

The First Amendment Provides Substantial Protections for Commercial Speech, As Reflected by Countless FTC Documents Over the Years

The FTC, through many presidential Administrations, has consistently observed and respected the important constitutional protections for commercial speech and has advocated against its suppression. Despite this history, the ANPR surprisingly makes no mention of the First Amendment and solicited no specific comments on this vital constitutional freedom.

The First Amendment at its core provides substantial protections for truthful commercial speech, whether that consists of advertising about health products or advertising about income opportunities for consumers. Restrictions placed on commercial speech must be closely scrutinized, and any such restrictions should be narrowly tailored. Indeed, as discussed in more detail below, First Amendment jurisprudence has long expressed a strong preference for the use of disclosures in advertising in order to modify statements that might otherwise be construed as misleading.[28]

Many of the FTC's own comments and related documents have elaborated upon these important issues and have been sensitive to these essential constitutional protections. To the extent that the FTC decides to proceed with this proposed rulemaking, we urge the Commission to heed well-established Constitutional limitations relating to commercial speech restrictions. These principles have been adopted and described in many FTC documents over the years and are discussed in more detail below.

A 1999 FTC report on alcohol advertising emphasized the important role that self-regulation plays when evaluating restrictions on commercial speech.[29] The report observed that "The Commission regards self-regulation as particularly suitable in this area, where government restriction --especially if it involves partial or total advertising bans -- raises First Amendment issues." The report lays out the well-established four-part test set forth in *Central Hudson*:

> A governmental restriction on speech that proposes a commercial transaction must satisfy four criteria to survive First Amendment scrutiny: 1) the speech must concern lawful activity and not be misleading; 2) the asserted governmental interest in restricting it must be substantial; 3) the restriction must directly and materially advance the governmental interest asserted; and 4) the restriction must be no more extensive than necessary to serve that governmental interest. *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). *See also Greater New Orleans Broadcasting Association, Inc. v. United States*, No. 98-387, 1999 U.S. LEXIS 4010 (June 14, 1999) (striking down FCC regulation prohibiting broadcast advertising of lawful private casino

[28] *See, e.g. Pearson v. Shalala,* 164 F.3d 650 (D.C. Cir. 1999).

[29] Self-Regulation in the Alcohol Industry: A Federal Trade Commission Report to Congress (Sept, 1999), https://www.ftc.gov/sites/default/files/documents/reports/self-regulation-alcohol-industry-federal-trade-commission-report-congress/1999_alcohol_report.pdf.

gambling); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down state ban on alcohol price advertising).[30]

One year later, in connection with the release of the FTC's report to Congress on the marketing of violent entertainment to children, the FTC included an appendix that featured an analysis of First Amendment issues involving commercial speech.[31] Consistent with the alcohol report cited above, the violence entertainment report emphasized that "to restrict commercial speech that concerns lawful activity and is not misleading, the government must prove that its interest is substantial, that the regulation directly advances the governmental interest asserted, and that it is not more extensive than is necessary to serve that interest."[32]

The report notes that:

> The government bears the burden of identifying a substantial interest and justifying the challenged restriction: "The government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest – a fit that is not necessarily perfect but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served."[33]

In addition to its own reports, the FTC has often educated other agencies about its First Amendment experience and the limited ability of the government to restrict commercial speech, particularly with respect to banning qualifications and disclosures in advertising.

For example, in a 2005 FTC staff comment to the Department of the Treasury United States Mint, the FTC described concerns about suppressing commercial speech, and the preference for disclosure over banning potentially misleading claims.[34] The Mint was considering a rule that would impose penalties for the misuse of words and symbols related to the Mint. The proposed rule would have determined the existence of violations "without regard to any use of a disclaimer of affiliation with the United States Government."[35] The FTC comment supported the rule but raised concerns about the aspect of the rule that ignored the important role of disclosures in commercial speech. Indeed, the FTC's comment notes that "the treatment of disclaimers of affiliation in this process may raise some potential legal and policy issues." The comment observes that recent federal court opinions "further define the bounds of

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[30] *Id.* Note 7.

[31] Marketing Violent Entertainment To Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries Appendices A-K (Sept. 2000), https://www.ftc.gov/sites/default/files/documents/reports/marketing-violent-entertainment-children/appendicesviorpt.pdf.

[32] *Id.* Appendix C at 2-3.

[33] *Id.* at 4 (quoting *Greater New Orleans Broad. Ass'n v. United State*s, 119 S. Ct. 1923, 1932 (1999) (internal quotation marks omitted).

[34] Press Release, Federal Trade Commission Staff Supports U.S. Mints Efforts To Curb Deceptive Ads for Collectible Coins (Mar. 12. 2005) (unanimous Commission vote), https://www.ftc.gov/news-events/news/press-releases/2005/03/federal-trade-commission-staff-supports-us-mints-efforts-curb-deceptive-ads-collectible-coins

[35] FTC Staff Comment to the United States Mint Concerning Civil Penalties for Misuse of Mint Words, Letters, Symbols, and Emblems at 3 (March 11, 2005), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-united-states-mint-concerning-civil-penalties-misuse-mint-words-letters-symbols/050315usmintcomment.pdf

government regulation of commercial speech in general, and consideration of disclaimers in particular."[36]

The 2005 FTC staff comment then outlines the well-accepted First Amendment jurisprudence and provides a detailed discussion of the D.C. Circuit's 1999 decision in *Pearson v. Shalala*.[37] In that seminal case, the FDA had refused to allow a dietary supplement manufacturer to use disclosures to prevent certain health claims from being misleading. The D.C. Circuit held that it was a First Amendment violation for the FDA to not consider "whether disclaimers could have eliminated the potential for misleading consumers."[38] As the comment notes, the D.C. Circuit held that the government had not met its burden "of proving that there was a reasonable fit between banning these claims and the government's interest in the prevention of fraud. The court explained that the First Amendment commercial speech doctrine embodies 'a preference for disclosure over outright suppression.'"[39] Indeed, *Pearson* confirms that in the absence of a real showing that disclosure does not cure if it is misleading, the government has demonstrated that there is indeed a far less restrictive means of advancing its interest.[40]

The 2005 FTC staff comment further explains that the Commission "generally has favored disclosures over banning claims as a means of curing deception" but did note that "disclosures do not always work.[41] The comment then explains FTC principles on making sure that disclaimers or disclosures are clear and prominent.[42] *See also Bellion Spirits, LLC v. United States*, 393 F. Supp 3d 5, 26 (D.D.C. 2019) (Pearson "makes the more limited point that an Commission cannot, consistent with the First Amendment, refuse to consider disclaimers at all as possible less restrictive alternatives to prohibitions on speech.")

Similarly, in a 2002 comment to the FDA, the FTC also repeated the important role that the First Amendment plays when considering a regulation that will impact commercial speech.[43] In this comment, the Commission was responding to an FDA request generally raising First Amendment compliance. In a lengthy response, the FTC touted its post-market review of advertising as a way to curb deception "without overly restricting truthful commercial speech, thus promoting the goals embodied in the First Amendment."[44]

In the 2002 comment, the FTC observed that "First Amendment law looks in part to the availability of less restrictive alternatives, such as mandated disclosures, in assessing the legality

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[36] *Id.*at 4.
[37] 164 F.3d 650 (D.C. Cir. 1999).
[38] FTC Staff Comment, *supra* note __ at 5-6
[39] *Id.* (quoting *Pearson*).
[40] FTC Comment at 6. *Pearson* at 658.
[41] FTC comment at 9.
[42] The Mint appears to have heeded the FTC's counsel, as the rule at issue does not appear to prohibit the use of disclaimers. *See* https://www.usmint.gov/news/consumer-alerts/business-guidelines 31 CFR § 92.17 (NEED TO VERIFY THIS)
[43] Press Release, FTC Staff Provides the FDA with Comments On First Amendment Commercial Speech Doctrine (Sept 20, 2002) (unanimous Commission vote), https://www.ftc.gov/news-events/news/press-releases/2002/09/ftc-staff-provides-fda-comments-first-amendment-commercial-speech-doctrine.
[44] FTC Staff Comment Before the Food and Drug Administration Concerning First Amendment Issues at 3 (Sept. 13, 2002), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-food-and-drug-administration-concerning-first-amendment-issues/fdatextversion.pdf.

of outright bans on potentially misleading commercial speech."[45] The comment discusses disclosures at length, noting that "disclosures can qualify claims in many instances," particularly when they are clear and prominent.[46] Of course, it explains that disclosures can't be used to "remedy a false headline" or there may be concerns if a company directs attention away from the disclosures.

The 2002 comment also discusses *Pearson* and *Thompson v. Western States Medical Center*, a 2002 U.S. Supreme Court case that struck down an FDA regulation that exempted compounded drugs from the ordinary drug approval process as long as pharmacists did not advertise promote or solicit prescriptions for them.[47] According to the FTC comment,

> "[e]ven assuming [a] substantial governmental interest, the Court concluded that they were more extensive than necessary. If the government "could have achieved its interests in a manner that does not restrict speech, or that restricts less speech," then a prohibition on commercial speech is more extensive than necessary. The Court concluded that there were a number of alternatives the government could have used to distinguish between small-scale compounding and large-scale drug manufacturing, including prohibiting equipment that can be used to compound drugs on a commercial scale, barring pharmacists from offering compounded drugs at wholesale, or imposing an absolute limit on interstate sales of compounded drugs by a pharmacist."[48]

Indeed, as the Supreme Court noted in *Western States Medical Center*, "(i)f the First Amendment means anything, it means that regulating speech must be the last - not first – resort."[49] *See also* FTC staff letter regarding Supreme Court of Tennessee proposed amendments related to attorney advertising ("The Commission has consistently taken the position that, while unfair or deceptive advertising by lawyers should be prohibited, consumers do not benefit from the imposition of overly-broad restrictions that prevent the communication of truthful and non-misleading information that some consumers value.")[50]

We urge the FTC as it considers whether to proceed with a rulemaking on deceptive earnings claims to ensure it meets the four-part test as laid out in *Central Hudson*. Additionally, that any rule is consistent with its longstanding interest and adherence to not infringe on commercial free speech under the First Amendment. If the rulemaking is to proceed, the Commission needs to articulate why a rule is not violative of this constitutional protection, prior guidance and judicial rulings.

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[45] *Id.* at 4.

[46] *See also* FTC Comment at 16 (Vague qualifiers that a food or nutrient "may" have a certain health benefit had little or no impact on consumers' perception of the certainty of the science. By contrast, disclosures that stress the need for further research and alert consumers to ongoing scientific debate are most effective in conveying that the science is not yet established.").

[47] 535 U.S. 357 (2002).

[48] FTC Comment at 10 (quoting *Western States Medical Center*)

[49] 535 U. S. at 373 (2002).

[50] FTC Staff Letter to the Supreme Court of Tennessee, Concerning Proposed Amendments to the Tennessee Rules of Professional Conduct Relating to Attorney Advertising (Jan. 24, 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-supreme-court-tennessee-concerning-proposed-amendments-tennessee-rules-professional/130125tennesseeadvertisingletter.pdf.

Disclosures Have Been an Accepted Component of Advertising Jurisprudence for Decades

The use of clear and prominent disclosures in advertising has been accepted for decades and indeed, the acceptable use of disclosures is pervasive throughout FTC guidance and jurisprudence. These concepts are embedded in countless FTC guidance documents throughout all areas of consumer protection, including just a few described below:

> Dietary Supplements An Advertising Guide for Industry[51]
> "Thus, if an ad would be misleading without certain qualifying information, that information must be disclosed. For example, advertisers should disclose information relevant to the limited applicability of an advertised benefit."
>
> Enforcement Policy Statement Concerning Negative Option Marketing[52]
> "First, marketers must clearly and conspicuously disclose the material terms of a negative option offer including, at a minimum, key terms such as the existence of the negative option offer, the offer's total cost, and how to cancel the offer."
>
> .com Disclosures: How to Make Effective Disclosures in Digital Advertising[53]
> "This document provides FTC staff guidance concerning the making of clear and conspicuous online disclosures that are necessary pursuant to the laws the FTC enforces."
>
> Soliciting and Paying for Online Reviews: A Guide for Marketers[54]
> "If you offer an incentive for a review, don't condition it, explicitly or implicitly, on the review being positive. Even without that condition, the review should disclose the incentive, because its offer may introduce bias or change the weight and credibility that readers give the review."
>
> Guides for the Use of Environmental Marketing Claims ("Green Guides")[55]
> "To prevent deceptive claims, qualifications and disclosures should be clear, prominent, and understandable. To make disclosures clear and prominent, marketers should use plain language and sufficiently large type, should place disclosures in close proximity to the qualified claim, and should avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure."

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[51] Dietary Supplements An Advertising Guide for Industry, https://www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf.
[52] Enforcement Policy Statement Concerning Negative Option Marketing, https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf.
[53] .com Disclosures: How to Make Effective Disclosures in Digital Advertising, https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf
[54] Soliciting and Paying for Online Reviews: A Guide for Marketers, https://www.ftc.gov/business-guidance/resources/soliciting-paying-online-reviews-guide-marketers.
[55] Guides for the Use of Environmental Marketing Claims, https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-use-environmental-marketing-claims-green-guides/greenguidesfrn.pdf

Guides Concerning the Use of Endorsements and Testimonials in Advertising[56] "If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the ad should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation."

In addition to guidance documents, the ability to use disclaimers as a method to prevent ads from being misleading is deeply embedded within FTC jurisprudence. The Notice of Penalty Offense letters regarding earnings claims sent to companies this past fall relies upon principles set forth in FTC cases going back decades.[57] These cases are, however, built upon the fundamental precept that disclaimers can be used in the context of atypical claims. In other words, disclaimers are effective and the use of appropriate disclaimers affords robust consumer protection regarding earnings claims.

Nowhere is this more clear than in *National Dynamics*, one of the cases prominently featured in the Notice of Penalty Offense documents, which states claims can be deceptive, but only "absent clear and conspicuous disclosure of the relevant context."[58]

In that case, the Commission had initially prohibited the use of atypical earnings claims, but the Court of Appeals of the Second Circuit thought otherwise and remanded. The Second Circuit stated "We likewise do not see why NDC should be limited to advertising only the average sales or earnings of its distributors rather than be permitted to state ranges for various types of distributors, provided it does not make deceptive use of unusual earnings realized only by a few." On remand, the Commission modified the order allowing for certain clear and conspicuous disclaimers. *See also Macmillan, Inc*., 96 FTC 208, 326-329 (1980) (Commission order allowing for the use of disclaimers in connection with testimonials used in advertisements). And many FTC consent orders have generally allowed for the use of disclosures to modify or clarify advertising claims.[59]

Any Proposed Rule is Incapable of Keeping Up with Marketplace Trends

Further, the overall approach to this rulemaking reflects a far more prescriptive approach than the Commission typically takes. The FTC has traditionally understood that while rules can be important and valuable, it is also vital that companies have the flexibility to adapt their practices to the appropriate bounds of a rule.

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[56] Guides Concerning the Use of Endorsements and Testimonials in Advertising, https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf

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

[58] 82 FTC 488, 511-13, 543, 564, 568 (1973); 85 FTC 1052, 1059-60 (1975).

[59] *See, e.g.* Decision and Order, *Dun & Bradstreet, Inc.,* Docket No, C-4762 (April 7, 2022) (order includes specific disclosure requirements); Order, *U.S. v. Vision Path, Inc*. (Jan. 25, 2022 D.D.C.) (order provision requires disclosures of material connections in advertising); Stipulated Order, *FTC. v. Lending Club Corp.,* Case No. 3:18-cv-02454 (July 7, 2021 N.D. Cal.) (order requires disclosures of fees and monetary disbursements); (Stipulated Order, *FTC v. Teami, LLC*, Case No. 8:20-cv-518-T-33TGW (March 17, 2020 M.D. Fla.) (order provision requires disclosures of material connections in advertising).

We have seen that approach across the Commission's consumer protection portfolio, such as the rules implementing the Children's Online Privacy Protection Act and TSR, regardless of whether the rules were Magnuson-Moss rulemaking or rules that were drafted using Administrative Procedure Act rulemaking. Similarly, when finalizing the Business Opportunity Rule in 2011, the Federal Register Notice noted that "The final Rule does not specify any particular format or formula for an earnings claim. This is intended to allow flexibility in presenting earnings information in the manner that is appropriate for each opportunity, provided that any such claim has a reasonable basis and that there is written substantiation for the claim at the time it is made."[60]

In one of the FTC's latest rulemaking efforts, The Gramm-Leach Bliley Act's Safeguard Rule, Commissioners Phillips and Wilson dissented on numerous grounds, including the new rule's prescriptiveness and inflexibility, expressing a preference for the earlier rule's flexibility.[61] The majority statement, however, questioned the premise that the new rule was overly prescriptive, and certainly seemed to indicate that flexibility remained an important principle to consider in the rulemaking. When discussing how the rule would apply to small businesses, the majority statement noted that "[t]here is also no support for the dissent's notion that the amendments eliminate financial institutions' flexibility in a way that will hurt smaller businesses. The amendments require that information security programs address certain aspects of security, but do not prescribe any particular method for doing so." [62] Thus, the Commission has noted that it remains important to craft any new rule with flexibility and without unnecessary prescriptive methodology.

Any Proposed Rule Should be Narrowly Tailored and Consistent with Current Legal Standards

If the FTC elects to proceed with a proposed earnings rule, it must ensure consistency with First amendment principles described above, ensure that any proposed earnings rule be narrowly tailored to address the specific conduct at issue that the Commission has found to be deceptive, ensure that any proposed rule provides adequate notice to industry regarding compliance, and provide sufficient flexibility within any proposed rule to address diversity of industry participants in this area of the economy. In this regard, any proposal should be harmonized across existing rules previously mentioned.

To begin, any new proposal must properly assess the burden to millions of American small businesses. The ANPR states up front that "the Commission believes that initiating a rulemaking to address the use of earnings claims could benefit consumers and could provide

[60] Federal Register Notice, Business Opportunity Rule (Dec. 8, 2011), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/16-c.f.r.part-437-disclosure-requirements-and-prohibitions-concerning-business-opportunities-final-rule/111122bizoppfrn.pdf.

[61] Joint Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson in the Matter of the Final Rule amending the Gramm-Leach-Bliley Act's Safeguards Rule (Oct, 27, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597994/joint_statement_of_commissioners_phillips_and_wilson_in_the_matter_of_regulatory_review_of_the_1.pdf.

[62] Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding Regulatory Review of the Safeguards Rule (Oct. 27, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598006/statement_of_chair_lina_m_khan_joined_by_commr_slaughter_regarding_regulatory_review_of_safeguards_0.pdf.

useful guidance without burdening businesses."[63] Prohibiting direct sellers from speaking about truthful earnings that go beyond the typical experience would greatly burden millions of American small businesses. DSA believes these messages can be communicated with appropriate disclosures consistent with pre-existing regulatory and self-regulatory guidance.

Any proposed rule should incorporate fundamental concepts from the FTC's jurisprudence—principles that have survived the test of time. The ANPR does not warrant or justify treating earnings or lifestyle claims differently from any other advertising claims. This is especially important because the FTC has developed its advertising jurisprudence through decades of case law. In particular, advertising claims – including earnings and lifestyle claims -- should be viewed and analyzed based on the overall net impression conveyed by the advertisement.

As the Commission evaluates going forward, it should heed the wisdom of the FTC's 1983 Deception Policy Statement. As the Commission stated, "[a]s it has in the past, the Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond. Thus, with regard to advertising the Commission will examine "the entire mosaic, rather than each tile separately."[64]

The FTC should also consider corporate structures that encourage robust training, compliance and monitoring while not punishing companies in the event that a small number of distributors make problematic statements. Monitoring and compliance, however, is never 100 percent successful at locating and preventing problematic claims. The FTC understands it is unrealistic for a company to be aware of every claim being made by its independent salesforce members.[65]

Earnings Claims Should be Permitted with Appropriate Disclosures

If a rule is promulgated, the FTC can look at the DSSRC Earnings Claims guidance as a roadmap for allowing atypical claims. There should be flexibility to make atypical claims if certain disclosures and disclaimers are present and meet other principles of longstanding FTC jurisprudence on advertising. For example, the DSSRC says disclosures must follow the "four P's" of FTC precedent.

1) Presentation: Worded in a way so that consumers can reasonably understand it
2) Prominence: The disclosure is big enough for consumers to read easily
3) Placement: The disclosure is where consumers are likely to look
4) Proximity: The disclosure is close to the claim it is disclosing

[63] ANPR (emphasis added).
[64] FTC Policy Statement on Deception at 3-4 (Oct 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (quoting FTC v. Sterling Drug, 317 F.2d 669, 674 (2d Cir. 1963)
[65] The FTC's Endorsement Guides: What People Are Asking. "It's unrealistic to expect you to be aware of every single statement made by a member of your network. But it's up to you to make a reasonable effort to know what participants in your network are saying. That said, it's unlikely that the activity of a rogue blogger would be the basis of a law enforcement action if your company has a reasonable training, monitoring, and compliance program in place."

The DSSRC guidance also states that a disclosure of typically expected results should account for any significant costs incurred by the salesforce member along with any necessary costs of participating in the opportunity.[66] However, it would be difficult if not impossible to accurately determine and quantify the other types of expenses generally required or available to running a business as those can vary considerably depending upon the individual consumer or location as well as a myriad of other factors. There would be an additional burden if companies were required to monitor and substantiate these varying costs as well. Any adoption of a future rule should provide flexibility to adapt to changing technologies, and differing factors and circumstances.

Alternatives to Earnings Claims Rulemaking

The FTC has long supported industry self-regulation as an efficient way to secure effective consumers protection and promote a robust and competitive marketplace.[67] DSA hopes the FTC will take under serious consideration alternatives to any forthcoming rulemaking or consider factors to mitigate the burden for companies and businesses that strive to prevent deceptive earnings in the marketplace.

Increased Reliance on Independent Self-Regulation

Harnessing the effectiveness of self-regulation is an important way of achieving the deterrence and swiftness of action that the ANPR sets forth as goals of this rulemaking. In this regard, the DSSRC is an important adjunct to the law enforcement presence of the FTC. It has a strong track record of monitoring the market for potentially problematic claims and engaging in quick and effective follow-up to address the relatively rare instances where it finds that distributors are making questionable claims, usually in social media.

Effective self-regulation can help the FTC fulfill its consumer protection mandate without the need for more resources so the Commission can focus its attention on severely egregious conduct that causes material harm. DSA is fully committed to independent self-regulation and this framework. The independent self-regulatory bodies and the sectors of the American economy such as direct selling that embrace self-regulation should be given more attention if a rule is to be considered. References sent by self-regulatory agencies such as the DSSRC to the FTC should be prioritized.

This commitment to self regulation could be further solidified by recognizing the value of self-regulation to businesses that are subject to it and embrace its core tenet—broader and more effective consumer protection. For example, the FTC could add a process whereby if a company is in an industry subject to self-regulation then there will be an option for a safe harbor under certain prescribed circumstances or lowered damages if an enforcement proceeding takes place.

Emphasizing Company Compliance as a Mitigating Factor

Efforts by companies to regulate their own business could also serve as a mitigating factor when assessing potential damages under a forthcoming rule. Our companies track compliance metrics, which are specific to every company, but could be provided to the FTC. Companies

[66] DSSRC Earnings Claims Guidance, Example 5

[67] FTC Business Guidance Concerning Multi-Level Marketing, https://www.ftc.gov/business-guidance/resources/business-guidance-concerning-multi-level-marketing

strive to abide by the law and serve to communicate current legal standards and best practices to their independent salesforce members. If a company is able to document specific compliance practices and concrete actions taken to protect consumers, this should be considered by the Commission before proceeding with a violation under a potential forthcoming rule.

We would also welcome more specifics details on what the FTC views as effective compliance practices. If the FTC views certain approaches or strategies more favorably, then such information will be important to companies as we fulfill our ongoing commitment to consumer protection.

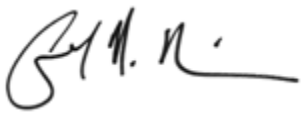
Further Collaboration on Earnings Claims Rule

DSA has enjoyed our collaboration with the FTC over many years to ensure current and prospective salespeople as well as consumers are protected. As we engage with the Commission, we hope you will confirm the value and importance the Commission has previously stated regarding self-regulation.

If the Commission determines that a forthcoming rule meets legal standards, we hope any rule will be narrowly tailored and consistent with existing legal precedent. DSA hopes you will consider the proposals and alternatives described in these comments, demonstrating that atypical income and lifestyle claims can be made under certain circumstances in a way that ensures consumer protection.

If the Commission determines it will proceed with a proposed rule, we hope it will take an approach that preserves the ability of millions of American small businesses to provide great products to consumers and billions of dollars in economic impact. We are happy to answer any questions or provide additional information and look forward to our continued work together.

Sincerely,



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