BEFORE THE

FEDERAL TRADE COMMISSION

OFFICE OF THE SECRETARY

WASHINGTON, DC

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Advance Notice of Proposed Rulemaking	)	Docket FTC-2022-0020
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COMMENTS OF THE NATIONAL CONSUMERS LEAGUE AND CONSUMER FEDERATION OF AMERICA

ADVANCE NOTICE OF PROPOSED RULEMAKING ON DECEPTIVE OR UNFAIR EARNINGS CLAIMS

Executive Summary

The National Consumers League[1] and the Consumer Federation of America[2] (hereafter, "consumer group commenters") have long pushed for stricter regulation of earnings claims while educating consumers and potential recruits about the dangers of fraudulent business opportunities.[3] Given the proliferation of deceptive statements among multi-level marketing businesses ("MLM" or "direct selling") and unsubstantiated advertisements in the gig economy, consumer group commenters strongly support rulemaking by the Federal Trade Commission ("FTC" or "the Commission") that prohibits false, misleading, and unsubstantiated earnings claims. Such a rule should be crafted to explicitly cover companies that continue to escape Commission regulations, such as MLMs, and require covered entities to provide a minimum of two years of substantiated data before making positive earnings claims.

Data have shown the limited effectiveness of income disclosures. For this reason, the Commission should not rely on income disclosures as the primary deterrent to deceptive behavior. Rather, their usage should be one of many actions the FTC takes to restrain illegal conduct among direct selling businesses, the gig economy, for-profit colleges, and other industries that have a history of utilizing misleading earnings claims.

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[1] The National Consumers League, founded in 1899, is America's pioneer consumer organization. Our mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad. For more information, visit www.nclnet.org .

[2] Consumer Federation of America (CFA) is an association of over 250 non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA investigates consumer issues and behavior through surveys, focus groups, investigative reports, and analysis, and advances pro-consumer policies on various issues before federal and state legislatures, regulatory agencies and courts. CFA has a history of working to promote policies and legislation which prioritize fairness in the marketplace for consumers.

[3] National Consumers League. *Pyramid Schemes Posing as Business Opportunities.* (2009). https://nclnet.org/pyramid_schemes_posing_as_business_opportunities/; National Consumers League. *Chicago Conference Explores Multi-Level Marketing in Minority Communities.* (2015). https://nclnet.org/chicago_conference_explores_multi_level_marketing/; National Consumers League. *Consumer Groups Call on House to Oppose Pyramid Scheme Promotion Amendment.* (2017). https://nclnet.org/moolenaar_amendment/; National Consumers League. *FTC Guidance to Multi-Level Marketers Highlights Advocates' Priorities.* (2018). https://nclnet.org/ftc_mlm_guidance/

Consumer group commenters encourage the FTC to undertake robust educational initiatives to complement federal regulation of earnings claims. Social media campaigns and targeted advertising may be particularly effective as digital platforms are a significant source of deceptive earnings claims. Trustworthy and informative messaging from the Federal Trade Commission would help to combat deceptive industry online promotions.

Introduction

The National Consumers League and Consumer Federation of America (hereafter "consumer group commenters") hereby submit the following comments in response to the *Advance Notice of Proposed Rulemaking* ("ANPRM") published by the Federal Trade Commission ("FTC" or "Commission") in the above-captioned proceeding.

Founded in 1899, the National Consumers League ("NCL") is America's pioneering consumer and worker advocacy organization. Our non-profit mission is to promote social and economic justice for consumers and workers in the United State and abroad.

Consumer Federation of America ("CFA") is an association of over 250 non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA investigates consumer issues and behavior through surveys, focus groups, investigative reports, and analysis, and advances pro-consumer policies on various issues before federal and state legislatures, regulatory agencies and courts. CFA has a history of working to promote policies and legislation which prioritize fairness in the marketplace for consumers.

Deceptive Earnings Claims Are Widespread In The Multi-Level Marketing Industry

The use of false, unsubstantiated, and otherwise misleading earnings claims is especially widespread among multi-level marketing ("MLM") businesses. In 2017, Truth in Advertising ("TINA") found that 137 of the Direct Selling Association's ("DSA") 140 members made false or misleading earnings claims.[4] Additionally, according to the

[4] Truth in Advertising. *Multilevel Marketing: The Day Job that Doesn't Pay*. (2017). https://truthinadvertising.org/articles/mlm-income-claims-investigation/

Consumer Awareness Institute, 99% of MLM recruits lose money.[5] It is unlikely that these two statistics would coexist without deception in the income claims presented to potential and existing recruits.

MLMs often target individuals facing financial hardship. Direct selling advertisements targeting students litter college campuses. Student loan debt and lack of entrepreneurial experience make students an especially vulnerable target for MLMs.[6] 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.[7] Women are also disproportionately targeted and are, in fact, the majority of direct sellers.[8]

The COVID-19 pandemic has provided fertile ground for MLM marketing, creating opportunities to push many falsehoods. The Commission has recognized this, distributing warning letters to a dozen firms for false earnings claims in the past two years. [9] These letters, alongside FTC litigation against direct selling businesses such as AdvoCare, Fortune Hi-Tech Marketing, Herbalife and Vemma, underscore the need for a comprehensive rule to rein in deceptive practices among MLMs.[10] A comprehensive earnings claim rule would

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[5] Consumer Awareness Institute. *The Case (for and) against Multilevel Marketing).* (2011). https://www.ftc.gov/sites/default/files/documents/public_comments/trade-regulation-rule-disclosure-requirements-and-prohibitions-concerning-business-opportunities-ftc.r511993-00008%C2%A0/00008-57281.pdf

[6] Moneylife. *MLMs Tap US College Campuses for Recruits.* (2015). https://www.moneylife.in/article/mlms-tap-us-college-campuses-for-recruits/43185.html

[7] 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/

[8] American Association of Retired Persons. *Who Participates in Multilevel Marketing?* (2018). https://www.aarp.org/content/dam/aarp/aarp_foundation/2018/pdf/infographic-whoparticipates.pdf

[9] Federal Trade Commission. *FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus.* (2020). https://www.ftc.gov/news-events/news/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health-earnings-claims-they-or-their; Federal Trade Commission. *FTC Sends Second Round of Warning Letters to Multi-Level Marketers Regarding Coronavirus Related Health and Earnings Claims.* (2020). https://www.ftc.gov/news-events/news/press-releases/2020/06/ftc-sends-second-round-warning-letters-multi-level-marketers-regarding-coronavirus-related-health

[10] Federal Trade Commission. *Multi-Level Marketer Advocare Will Pay $150 Million to FTC Settle Charges it Operated an Illegal Pyramid Scheme.* (2019.) https://www.ftc.gov/news-events/news/press-releases/2019/10/multi-level-marketer-advocare-will-pay-150-million-settle-ftc-charges-it-operated-illegal-pyramid; Federal Trade Commission. *FTC Settle Bans Pyramid Scheme Operators From Multi-Level Marketing.* (204). https://www.ftc.gov/news-events/news/press-releases/2014/05/ftc-settlement-bans-

allow the FTC to hold direct sellers accountable and would create a safer environment for all consumers.

Gig Economy Workers Are Often Targets Of Deceptive Earnings Claims

There is considerable evidence of companies within the so-called gig economy making earnings claims without substantiating evidence. As the Commission found in its litigation against Uber, evidence-free claims about potential wages, salaries, and vehicle financing opportunities are often likely to be misleading or false.[11]

Consumer group commenters had little difficulty finding potentially deceptive earnings claims in advertisements for other gig economy companies. For example, during the week of May 2, 2022, DoorDash was running multiple advertisements containing unsubstantiated earnings claims on TikTok, a social media platform popular among young adults and teenagers. One advertisement claimed that DoorDash is an "easy way to make $100 in 1 day." Another stated "I was able to cover my rent in just 5 days with DoorDash," and a third claimed "I made enough to cover rent in just 3 days with DoorDash."[12] Although the ads do not specify a specific location, the national median rent in the United States is nearly $1,800,[13] making such an earnings claim highly unlikely to be factual.

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pyramid-scheme-operators-multi-level-marketing; Federal Trade Commission. *Herbalife Will Restructure Its Multi-Level Marketing Operations and Pay $200 Million For Consumer Redress to Settle FTC Charges.* (2016). https://www.ftc.gov/news-events/news/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations-pay-200-million-consumer-redress; Federal Trade Commission. *Vemma Agrees to Ban on Pyramid Scheme Practices to Settle FTC Charges.* (2016). https://www.ftc.gov/news-events/news/press-releases/2016/12/vemma-agrees-ban-pyramid-scheme-practices-settle-ftc-charges

[11] Federal Trade Commission. *Uber Agrees to Pay $20 Million to Settle FTC Charges That It Recruited Prospective Drivers with Exaggerated Earnings Claims.* (2017). https://www.ftc.gov/news-events/news/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited-prospective-drivers-exaggerated-earnings

[12] Screen-recorded DoorDash earnings claims as appeared on TikTok. (2022). https://drive.google.com/drive/folders/1tZGQ4pCnYkb07sO1r-s2wIxekbgNMh-r

[13] CNN. *Rent jumped 17% since last year, hitting a new record.* (2022). https://www.cnn.com/2022/03/23/success/us-national-rent-february/index.html

These ads potentially received hundreds of thousands, if not millions of views, with one video receiving 149,000 likes. The link attached to these social media promotions did not include substantiation for any of these earnings claims, making it difficult for potential recruits to verify their validity or gain insight into how much the drivers earned towards their rent.

Additionally, anecdotal posts by consumers on Reddit (another major social media platform) explain that Lyft failed to fulfill promotional offers for new drivers.[14] Lyft's advertised promotions suggested that new drivers would receive a monetary bonus after they completed a certain number of trips. According to numerous posts on Reddit, Lyft allegedly failed to provide the reward even after the drivers fulfilled the ride requirements. These claims of misleading or false bonuses for new recruits mirror complaints made against Lyft in 2015 for the same issue of failing to honor new driver promotions.[15] An earnings claims rule would help consumers and potential recruits verify advertisements' truthfulness while allowing the FTC to more easily hold gig economy businesses accountable.

A Strong Earnings Claims Rule Will Protect Consumers in the MLM and Gig Economy Sectors.

Consumer group commenters appreciate the Commission's focus on direct sellers, for-profit colleges, and the gig-economy in this *ANPRM*. These industries have been rife with misleading earnings claims, while often escaping regulation based on the Commission's existing general authority to police unfair and deceptive practices. A critical component of

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[14] Reddit. *Driver Bonus Lies and False Advertising.* (2020). https://www.reddit.com/r/Lyft/comments/i0uauv/driver_bonus_lies_and_false_advertising/; Reddit. *Promised $1500 and now nothing. Well, Lyft is probably unknowingly committing fraud and negligent misrepresentation. Just signed up with a promotion code, completed the required 100 trips within 30 days and now all of a sudden they say there was no code, and I'm not getting the referral bonus.* (2021). https://www.reddit.com/r/Lyft/comments/ofyqio/promised_1500_and_now_nothing_well_lyft_is/

[15] Top Class Actions. *Lyft Driver Bonus Class Action Lawsuit Sent to Arbitration.* (2015). https://topclassactions.com/lawsuit-settlements/lawsuit-news/lyft-driver-bonus-class-action-lawsuit-sent-arbitration/

the recruiting tactics used by many deceptive businesses, especially fraudulent MLMs, is the use of lifestyle claims. For example, direct sellers commonly entice new recruits with promises of being able to quit their full-time job, spend more time with their family, or free themselves from student loans.

For this reason, we urge the Commission to adopt a broad earnings claims rule, including a prohibition on false, misleading, and deceptive lifestyle claims and imagery. The rule should also prohibit false, misleading, and deceptive earnings claims related to wages and salary. While income disclosures are no substitute for strong prohibitions on unfair or deceptive earning claims, they can be useful tools for consumers, anti-fraud researchers, and law enforcement agencies like the FTC. The Commission should therefore require operators of multi-level marketing and gig economy businesses to provide verifiable, easy-to-understand income disclosures to potential recruits.

When a covered business rewards recruitment, the income disclosure should include both the typical (median) income of recruits who actively recruit other individuals to join the business as well as the typical income of those who do not recruit anyone. In addition to typical incomes, the business should be required to disclose every compensation plan the recruit may choose from, any required payments or purchases needed to advance through compensation levels or to maintain earnings, and any required trainings and their costs.

Rigorous substantiation requirements should apply to salary and wage claims, lifestyle claims, and mandatory income disclosures. The Commission should require a minimum of two years of anonymized data before a company is allowed to make a positive earnings claim (above zero dollars) or positive lifestyle claim (more free time, ability to see family more often, freedom from financial obligations, etc.). These data should be required to include employee income, expenses, and hours worked. Covered entities should be required to provide the FTC with an updated copy of these records annually. Additionally, at the potential recruit's request, businesses should be required to provide documentation that is not more than one year old to substantiate the income disclosure and any other earnings claims.

Regarding MLMs, accurate income disclosures can help to bring potential recruits' earnings expectations closer to reality.[16] However, relying solely on income disclosures to deter potential recruits from joining deceptive MLMs is likely to be ineffective. 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.

In addition to an earnings claims rulemaking, the Commission should launch educational initiatives to raise awareness of the harm consumers and potential recruits may face from unsubstantiated, misleading, and false earnings claims. With a specific focus to historically marginalized, geographically isolated, and immigrant communities, such initiatives would complement FTC regulation that holds violative entities accountable. Additionally, social media campaigns and targeted advertisements that promote education about unsubstantiated and false earnings claims may be particularly effective as social media is a significant source of proliferation for deceptive earning claims.

Finally, consumer group commenters believe that a new FTC earnings claims rule prohibiting false, misleading, and deceptive earnings claims should complement the existing Business Opportunity Rule, the Franchise Rule, and the Telemarketing Sales Rule, especially given MLMs' effective exemption from the Business Opportunity Rule. Entities that are covered by the Business Opportunity, Franchise, or Telemarketing Sales Rules should not be exempt from a new earnings claims rule unless there are competing or contradictory requirements between the earnings claims rule and a currently existing rule. In this scenario, the entity should be exempt from the earnings claims rule's requirements only if the competing or contradictory rule is more rigorous in its requirements.

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[16] Bosley, Stacie A., Sarah Greenman, and Samantha Snyder. "Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing." SSRN, October 6, 2020. https://papers.ssrn.com/sol3/papers.cfm

Conclusion

Consumer group commenters appreciates the opportunity to provide our views to the Commission on the need for a strong earnings claims rule.

Communications with respect to this document may be addressed to:

John D. Breyault
Vice President, Public Policy, Telecommunications, and Fraud
National Consumers League
1701 K Street, NW Suite 1200
Washington, DC 20006
Phone: (202) 835-3323 x819
Email: johnb@nclnet.org

or

Eden Iscil
Public Policy Associate
National Consumers League
1701 K Street, NW Suite 1200
Washington, DC 20006
Phone: (202) 835-3323 x821
Email: edeni@nclnet.org