

# FTC Releases Business Guidance on Multi-Level Marketing, Memorializing Principles from Prior Settlements on Hot Button Issues

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The FTC released today [Business Guidance Concerning Multi-Level Marketing](#), which offers answers to frequently asked questions to assist multi-level marketers in evaluating their business practices for compliance with the FTC Act. The Guidance begins by restating the general standard for pyramid schemes set forth in the FTC's 1975 *Koscot* decision and then goes on to address more contentious issues, such as internal consumption, retail sales validation, the importance of refund and buyback policies, and income and business opportunity claims.

The Guidance memorializes and expands on several principles embodied in recent FTC settlements with multi-level marketing companies and makes clear that FTC Staff will look to these principles in assessing whether a company has committed unfair and deceptive acts or practices in violation of the FTC Act. Key points include the following:

- **Internal consumption (*i.e.*, purchases from participants in the business opportunity) may in some cases be permissibly counted as genuine retail sales, but this will be a fact-specific inquiry.** The Guidance cites the Herbalife settlement as an example of a marketing plan that appropriately permits payment of compensation based on internal consumption, but "subject to specific limitations and verification requirements." While emphasizing that the validity of internal consumption will depend on a "comprehensive analysis of a variety of factors," the Guidance highlights two of the foremost factors FTC Staff will consider: (1) whether the compensation plan incentivizes participants to purchase unrelated to demand (*e.g.*, to qualify for bonuses, advance in the marketing plan or obtain a greater discount); and (2) fact-specific information about a purchase bearing on whether it seems demand-driven (*e.g.*, whether the purchases are within typical consumption habits).
- **Multi-level marketers are not expressly required to retain and validate receipts, but should ensure sufficient documentation to ensure that actual sales are made to real customers.** Again, the Commission here emphasizes that there is no single correct way to validate retail sales, and that one approach – or a combination of approaches – may work for one company and not work for another. The Guidance does, however, explain that staff will be most interested in "direct methods" used to verify that retail sales are made to real customers, and that "indirect methods – such as policies requiring participants to attest they have sold a

certain amount of product to qualify to receive reward payments – are less likely to be persuasive, with unsupported assertions being even less persuasive.”

- **Buyback provisions are helpful but not dispositive in preventing inventory loading and unlawful conduct.** The Guidance affirms that allowing participants to return unsold products can help reduce potential consumer harm by decreasing the risk of losing money for those participants who take advantage of the buyback policy. However, the Guidance cautions that “money-back guarantees and refunds are not defenses for violations of the FTC Act” and that unfair and deceptive acts may still occur notwithstanding the existence of those policies. The section appears intended to address pending congressional legislation, [H.R. 3409](#), which would include a controversial carve-out for multi-level marketing companies with inventory repurchase programs.
- **Claims that convey lifestyles or earnings that are only attained by a small subset of participants are likely to be misleading.** The Guidance explains that all business opportunity and earnings claims must be supported by a reasonable basis, and that claims that present atypical earnings as typical will likely be misleading. For example, the Guidance explains that images of expensive houses, luxury automobiles and exotic vacations attained through the multi-level marketing program are likely to be deceptive if those results are not generally achieved by others and properly qualified. Similarly, representations about full-time income and the capacity to “fire your boss” or “become stay-at home parents” are likely to present compliance issues. Even hypothetical scenarios (*e.g.*, you can make \$1,000 if you recruit 30 people and sell X products) may pose compliance risks if those hypotheticals make assumptions that are untrue for the typical participant.
- **Developing and implementing a compliance program is important.** Finally, the Guidance makes clear that it’s not enough to nominally adopt these policies or even ensure that the company itself complies with the policies. Rather, MLMs should develop and maintain a successful compliance program that includes monitoring of participants to ensure they are also complying with applicable policies and procedures, particularly those related to claims, sales validation, and other consumer protection-oriented policies.

While the principles set forth in the Guidance will not come as a surprise to most MLMs, they serve as an important reminder that MLM compliance inquiries are multi-faceted and full of gray areas. Companies would be well-served to evaluate their business practices and compliance programs in light of the Commission’s new guidance and prior related settlements.