

# FTC Staff Report on MLM Income Disclosures: Many Observations Lead to Many Questions

John E. Villafranco, Donnelly L. McDowell

September 5, 2024

Yesterday, the Federal Trade Commission issued a staff [report](#) documenting its review of 70 publicly available income disclosure statements from a wide range of multi-level marketing (MLM) and direct selling companies highlighting the “common formats or methods that might affect the messages they convey to consumers.” This report, which expressly represents the views of “the authors and do[es] not necessarily reflect the views of the Commission or any individual Commissioner,” follows the updated Business Guidance Concerning Multi-Level Marketing issued by FTC Staff earlier this year (covered [here](#)), Staff letters to the Direct Selling Association (DSA) and the Direct Selling Self-Regulatory Council (DSSRC) (covered [here](#)), and the FTC’s Advance Notice of Proposed Rulemaking on Earnings Claims in March 2022 (covered [here](#)).

The report restates many of the criticisms raised by staff over the years with respect to income disclosure statements. For example, staff’s findings include the following regarding “most” income disclosure statements:

- Income data excludes participants who made little or no income and often do not clearly explain this exclusion;
- Expenses incurred by participants are not included in the accounting, which is not clearly disclosed;
- Emphasis is placed on high dollar amounts received by a relatively small number of participants;
- Information about the limited income that most participants receive is not disclosed in a clear and conspicuous manner, if at all; and
- The presentation of income data is confusing or ambiguous.

The report does not provide clear direction on how Staff thinks such income disclosure statements should be developed and drafted, nor does it explicitly assert that any of the practices described in the report are per se deceptive. And while many of the principles in the report will not be new to industry, there are important nuances.

- On **segmentation for inactive distributors or distributors who do not receive payments**, the report notes that “[m]ost of the income disclosure statements reviewed do not depict the distribution of income across all participants, but instead present a distribution that

excludes certain groups of participants” and only 16% clearly included all participants in some fashion. The report does not, at least expressly, take issue with exclusion of certain populations, so long as the exclusion criteria and rationale are clearly stated. For example, the report notes that only four income disclosure statements included the exclusionary criteria “in plain language in as prominent, or nearly as prominent a manner as the dollar amounts.” Notably, the report does not define “plain language” generally or in the specific context of income disclosure statements.

- Similarly, on **expenses**, the report asserts that none of the 70 reviewed disclosure statements account for expenses and “most convey information about the omission of expenses in a manner that is less prominent than the display of dollar amounts that MLMs pay to participants, such as in fine print or dense blocks of text.” The staff report echoes Staff’s MLM Guidance here in suggesting that income claims may be inherently considered misleading where “the income disclosure shows that a large majority of participants earned less for the year than the amount of [annual membership] fees.”
- On the use of **tables and headings**, the report critiques approaches that emphasize the high income of a small number of participants, including by breaking out income information by rank and dedicating a disproportionate amount of visual space to higher ranks comprised of smaller numbers of people. The report does not expound on the perceived benefit to consumers of a more detailed breakdown of consumers who do not earn significant income.
- On the use of **average vs. median incomes**, the report expresses Staff’s view that the median is often the preferred approach because, “[w]hile an average can be a useful summary of data that has a relatively small degree of internal variation, it can be misleading when the data is largely consistent but has a small number of outliers.” Staff has made this point previously, but did not do so in its MLM Guidance.

The report also is critical of the manner in which income data is presented and cites to one disclosure statement with an “unexplained discrepancy” where a table listed “both average monthly pay and average annual pay—but the annual pay is not 12 times the monthly pay, and the table does not explain how the MLM calculated the figure.” However, this “discrepancy” appears to be resolved by understanding that not all participants earned income in every month of the year. Indeed, the report elsewhere takes issue with extrapolating monthly earnings to annual earnings because such calculations may incorrectly assume each distributor earns in every month.

The report further takes issue with allegedly unclear terminology without definition or qualification. The report asserts that terms like “income” or “earnings” can mean different things in different contexts, leading to consumer confusion about what the reported figures represent. Similarly, the report is critical of how MLMs leverage the term “active” when narrowing the participant data set for the purposes of disclosing earnings figures without clear explanation and includes as Appendix C a list of different definitions encountered for “active” participants.

Finally, the report criticizes the use of general qualifying claims that purport to modify the basis for income claims without clear rationale or support, such as “qualities needed to earn income, such as hard work, diligence, or leadership.” The report asserts that such statements “may be significant to consumers considering the opportunity” but appears to question the bases for such claims, notwithstanding that many are commonsensical.

While the report does not have the force of law, it does offer important insight into how current Staff interprets, and may attempt to enforce, the law. Nevertheless, staff pronouncements such as this

have never received *Chevron* deference, and the *Garvey* case held that staff interpretations such as this one should be entitled to respect but not deference.

At the same time, Staff fashioned this document as a “Report” rather than “Guidance” for good reason. For the most part, Staff provides a series of observations (albeit often value-laden observations) about the approaches taken by different companies without offering direction on its preferred methodology for developing such statements. And while Staff takes issue with many aspects in currently used income disclosure statements, it does not tackle some of the hardest ones, such as:

- How should companies differentiate between those who join to actively pursue a direct selling opportunity from those who either join primarily as discount buyers or to passively pursue the opportunity? The report seems to suggest that some differentiation is defensible, provided it is clearly and succinctly explained.
- What expenses should companies consider if they attempt to net out earnings to provide net rather than gross earnings? Presumably Staff would acknowledge that certain indirect costs (e.g., gas to drive to meetings, lunch with fellow distributors) should not be subtracted – just as they are not subtracted from earnings in traditional employment opportunities.
- Should companies attempt to estimate retail profit for income disclosure statements, even if they are unable to track that profit directly? The report notes that 14 of the 70 disclosure statements expressly state that they do not include retail income and most provide no indication one way or the other. Of course, excluding an additional category of income would result in a more conservative estimate of income than including it.

These are tough questions that require careful analysis and thought. While Staff may not have provided clear direction, their expectation is that companies will have a deliberate and rational approach when drafting and disseminating income disclosure statements.