

2016 DSA Business & Policy Conference

Panel:
Insights from the Federal Trade Commission

Introductory Remarks:
JOSEPH N. MARIANO, President, Direct Selling Association (DSA)

Speaker:
EDITH RAMIREZ, Chairwoman, Federal Trade Commission (FTC)

9:30 to 10:15 a.m.
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JOSEPH N. MARIANO: Good morning, everyone. I haven't had the opportunity to say hello to everybody. I'm Joe Mariano, president of the Association, so hello. Welcome again.

You know, it was interesting to hear Jonathan talk about his 32 years in the investment business and his advice to stay calm and always think about everything. I've actually been at the association now for 31, working on 32 years, and one of the lessons that I've learned about everything that we deal with, including legal regulatory matters—the FTC—is to always stay calm and rational and evaluate things, not on the basis of innuendo or suspicions, but facts. And so, when we try to do that, we have brought a variety of speakers to the association so we can deal with the facts and listen to people from their own perspective.

Before I formally introduce our next speakers, I want to talk a little bit about some things that we're trying to do as an association. I joined the Association, as I said, 31, almost 32 years ago. I was recruited or brought into the Association by the man sitting right over here, Neil Offen, the former president, always the president of the Association, who was there for 40 years himself—over 40 years. One of the reasons that I took the position at the Association was that Neil convinced me when I interviewed—I wanted the job; I needed the job. But he convinced me, absolutely, that we were really consumer protection officials, if you will, consumerists within the business community, and that notwithstanding our role as advocates for the direct selling business model, we were really committed to the public good and making sure that our model, our businesses, our Association members did what was necessary and, I think, to protect consumers—at that point consumers of our product, but ultimately consumers of our opportunity as well.

It's clear that the direct selling channel and Association members can take justifiable pride in our long-held self-regulatory standards, standards that, as the name implies, we've imposed on

ourselves not because we've been required to do so because of the law, but because as direct sellers, we inherently have understood the special obligation that we have. We are guests in our customers' homes, and our distributors and sales people are guests in our customers' homes, and that places upon us a greater obligation. So, since at least 1975 when Neil adopted one of the first Association strategic plans, consumer protection and protecting the consumer has been a key element of who we are as an association and trying to convey that culture and message to all of our members as well.

Now, direct sellers are not complacent in this, notwithstanding the longstanding goal, nor will we allow ourselves to be satisfied with the status quo when it comes to consumer protection and ethics. And even a steady improvement in evolution of our self-regulatory standards really now is not enough for us.

I was engaged in a strategic planning exercise with a number of our leaders and members of our board a few months ago, and notwithstanding the wonderful and great work that we've done as an association over the last several years to enhance our code, I want to quote one of our members and our leaders. He said, "Well, we've had this wonderful evolution of our self-regulation and our ethical positioning as an industry, but it's time now not for merely an evolution, but a revolution," and those words struck me and said we really have to be doing something more.

So the Association's Code of Ethics, which hopefully you are all more than familiar with, enacted more than 45 years ago, while a robust series of policies that every DSA member agrees to follow as a condition of their membership, needs to grow beyond what we've done over those 45 years. And there have been some very dramatic changes in the code even over the last year and a half in significant part as a result of our listening to some of the things that have been said to us, Chairman Ramirez, by your staff people at the Commission and advice and direction you've given the industry and the Association. And so if you're not familiar, you should be with all of those changes over the last year or two. Please make sure that you become familiar with those.

But, as we go forward as a response to recent events, but also our longstanding obligation to our customers and sales people, it is clear that we must do more, and our Ethics and Self-Regulation Committee, our board of directors, and our leadership is absolutely committed to doing that, and even as we speak, significant changes and enhancements to the code are being considered.

But, even beyond that or short of that in the interim, I'd like to announce today some changes that, pursuant to the discussions and direction of the Executive Committee of the Association board, things that we are going to do immediately in addition to those things that have been done over the last year. Beginning in 2017, DSA will annually review our entire membership, 100 percent of all member companies. Separate from the normal customary code complaint process that might generate investigations or review of specific instances, we will now employ our own staff, the existing code administrator, as well as whatever outside resources are

necessary to ensure that a company's corporate website, their social media presence, the independent sales people's own business practices, and activities, including their websites, are all reviewed on a universal basis—again, 100 percent of our members—with three major areas that we will be looking at in these reviews. And some of you will remember that we undertook a significant step in this direction in 2016—late 2015 and '16 already, but those will be product representations and claims—even though those are not necessarily within our purview of expertise, but we will utilize whatever resources are necessary—earnings, representations, and claims, again, by our companies and by independent sales people, and finally and more broadly, a review of, hopefully, an impartial assessment of the overall nature of each individual companies' operating procedures and culture, looking towards the fundamental core of what makes this direct selling business a direct selling business.

Now, I know how proud all of you are as DSA members of the products and services that you sell, of the business opportunities that you offer entrepreneurs or micro entrepreneurs and the manner in which you seek to protect the best interests of those people who are involved as sales people but also as customers of your product. I share that pride, and I am absolutely committed. And it's what's driven me for the last 31 years to be involved with this Association. In working to satisfy DSA's stringent new review process that I've begun to describe here and as we develop this over the next few months leading into 2017, the ethical bona fides of our DSA member companies will be made absolutely clear to the public, the media, policymakers, and potential consumers and entrepreneurs in a way that I hope enhances our already great position in the American marketplace. Now, all of these things are absolutely important and I think will play a pivotal role in the ongoing development of the direct selling channel in the United States and, for that matter, abroad.

Now, part of this, as I suggest, has come out of our own self-revelation. Part of it, to be clear and candid, is also a result of the environment that we've seen over the last several years, as there has been an extraordinary amount of attention on several Direct Selling companies, some member companies, and a lot of discussion as to how the business model works. And what we have seen and understood is that there is not enough understanding of how the business model works in the marketplace, and part of that is our responsibility. And it's our responsibility to speak more transparently and clearly and understand the business model even more perhaps than we have in the past, who are our customers, who are our sales people, how do we distinguish between customers and sales people, all critical questions that, again, I think had been raised in significant part not only by our own self-examination and self-regulation, but also by the conversations that we've had with regulators, other practitioners, the press, and others.

We've had the great privilege over the last 30 years of working very cooperatively with consumer protection officials and others who have joined us at fora like this to tell us their perspective. Over the last several years, we've had many very engaging, constructive discussions with representatives of the Federal Trade Commission and have always had an open door for that kind of dialogue with the Commission.

Several years ago, shortly after our next speaker became chairwoman of the Federal Trade Commission, we took our opportunity to go in and sit down, Adolfo Franco, my colleague and I—I don't know if you remember this, Madam Chair, but we came in and we wanted to just have an absolutely candid discussion, talk about the things we were doing from a self-regulatory perspective and also hear from that leader's perspective what we needed to do. And, as a result of that discussion, we've had some very, very constructive ongoing discussions with members of the FTC staff, which have driven some of our changes.

I was struck after that meeting by the chairwoman, and I'm talking, of course, about Edith Ramirez. I was struck by her seriousness, by her diligence, by her thoughtfulness, and by her candor in speaking to us. She was not going to accept what I said as president of the Association, and the sense I have—I'm not going to quite you here, Chairwoman Ramirez, but the sense I had was that it's a matter of putting up or shutting up. Anybody can come in and tell a good story. Any advocate or lobbyist in Washington, D.C., has the obligation to do that, but it was really a matter of saying, "Okay. What are you really going to do?" And I think over the past 2 years, especially in light of some of the recent settlements and other activities that have taken place, it has been clear that as an industry and a channel, we did have to put up. And we continued to meet that obligation, and we will continue to hopefully demonstrate that effectively.

So this thoughtful, committed person that is chairperson of the Commission is, indeed, Edith Ramirez. Ms. Ramirez was sworn in as Commissioner of the FTC back in 2010, and I'm sure if you've looked at her résumé, you will see that she's a very impressive person. As a University of Maryland Law School grad, anybody who comes out of Harvard is particularly impressive to me, but then when I see that they were on the *Harvard Law Review*, I recognize that they have some real background. But more important than educational background is the things that Chairwoman Ramirez has done in her tenure as chair at the FTC with regard to direct selling and a range of other activities in business.

After graduating from law school at Harvard, she not only served as a clerk in the Ninth Circuit Court of Appeals, but then went to practice in Los Angeles in 1993 at the office of Gibson, Dunn & Crutcher in L.A. She then moved to Quinn Emanuel Urquhart & Sullivan, where she was a partner in their antitrust practice and represented a number of large, large clients and significant activities.

We invited Chairwoman Ramirez to join us here today because, while there's always an open invitation to the chair of the Commission, but also because of the extraordinary activities of the last 2 years that relate back to direct selling—and I'm sure she'll address some of those issues with us today. So, with that, let me invite Chairwoman Edith Ramirez of the Federal Trade Commission.

[Applause.]

MR. MARIANO: I've been asked to bring you over here because they want to make sure they get a good picture of us to prove that you were here and that we're really friends, right?

CHAIRWOMAN EDITH RAMIREZ: Absolutely.

[Laughter.]

CHAIRWOMAN RAMIREZ: Good morning, everyone, and I really want to start off by thanking the DSA and, in particular, Joe and John Webb, who invited me to be here with you this morning. I really appreciated that opportunity, and, of course, there's been a lot that's been happening at the Federal Trade Commission. So I did think that it was a timely occasion for me to be here with you.

Direct selling, which using data from last year is a \$36 billion industry, plays a very robust role in the marketplace, and the FTC is been very active in this area for decades, as I think many of you, if not all of you, are aware. Direct selling has the capacity to provide consumers with valuable goods and services and an opportunity to try an entrepreneurial experience.

Now, the FTC often hears from industry members, and one of the frequent themes we hear is about a negative public perception about how the MLM industry operates. Multi-level marketers have a tremendous opportunity to address these concerns by enhancing transparency and fostering credibility across the industry.

Now, there are three important facets to this that I'd like to address this morning: self-regulatory initiatives that Joe was discussing, to improve compliance and level the playing field; realistic and candid communication about the limited nature of earnings potential; and practices that show that MLM companies are making real sales to real consumers.

The DSA works tenaciously as the voice of self-regulation in this market, and as Joe noted, the DSA Code of Ethics can play an important role in modeling behavior for its members. Now, I want to commend the DSA for showing a laudable willingness to continue to work on and improve the Code. Changes, of course, were made in 2015 and in 2016, and among other things, the DSA established a mechanism to handle complaints about practices of member companies and for the DSA to publish reports about those complaints and also included lifestyle representations in the definition of earnings claims. And, as Joe has highlighted, the DSA plans to take further steps next year to bring greater transparency to the industry. So I find it very encouraging to see both the steps that have been taken and the recognition that this work is far from finished, and this activity also reflects that DSA has heard and is open to hearing concerns from the FTC.

Now, I'd like to use the bulk of my time with you to address two areas where multi-level marketers need to take effective action to halt the practices that understandably damage the credibility of the whole industry. One is misleading representations, and the other, business

structures that are unfair or deceptive because they're not focused on real sales to real customers.

I'll start with misleading income representations. Earnings claims, regardless of whether they're express or implied, are highly relevant to consumers in making their investment decisions, and in fact, we find that earnings claims are often the single most decisive factor in those decisions. So it's no surprise that the FTC takes earnings misrepresentations very, very seriously.

False and unsubstantiated earnings claims are deceptive and unlawful under Section 5 of the FTC Act. Unfortunately, however, our law enforcement experience shows that many MLMs, nevertheless, misrepresent the amount of money participants are likely to earn. In fact, in all of our cases against multi-level marketers, the FTC has alleged that the defendants made false earnings representations. These misrepresentations cause real harm to consumers, and they need to stop.

A legitimate multi-level marketer must accurately represent its business opportunity and what a participant is likely to earn. These representations must be truthful, non-misleading, and substantiated. Practically speaking, this means that multi-level marketers should stop presenting business opportunities as a way for individuals to quit their jobs, earn thousands of dollars a month, make career level income, or get rich because, in reality, very few participants are likely to do that.

Now, it may be true that a very small percentage of participants do have success of this type, but testimonials from these rare individuals are likely to be misleading because participants generally do not realize similar incomes. The fact that most MLM participants do not earn substantial incomes is not new. The low incomes received by most MLM participants is something that the DSA itself acknowledged more than a decade ago. Back in 2006, when commenting on the FTC's business opportunity rule, the DSA cited a 2002 National Sales Force Survey showing that the majority of direct sellers made less than \$10,000 per year from direct selling, with a median annual gross income of about \$2,400 or only approximately \$200 per month.

Now, just last month, Joe noted that the majority of multi-level marketing participants do not earn more than very modest incomes. Now, I comment him for emphasizing that MLMs, quote, "must increase their efforts to ensure prospective distributors are fully aware that for most, direct selling can only provide supplemental income." Most distributors, he said, will not realize replacement income, let alone a lavish lifestyle.

Now, it's time that MLM income representatives matched the income reality of the majority of multi-level marketing participants. This means both explicit statements about how much a participant is likely to earn as well as implied claims and lifestyle claims. We all know examples of the obvious types of lifestyle claims that can be misleading, representations about

participants that they can be set for life or make more money than they ever thought possible and images of expensive houses, luxury cars, and exotic vacations.

But there are also problematic claims that are a bit more subtle, like claims that you can quit your job, fire your boss, become a stay-at-home parent, travel the world, or have the time and money to enjoy the finer things in life. These lifestyle claims, whether made through statements or images, are deceptive when made to a general audience because participants are unlikely to achieve them.

Now, some of you may be thinking that what I'm saying doesn't apply to you because you don't make income representations, and you prohibit your distributors from making income misrepresentations. However, simply prohibiting your distributors from making income misrepresentations is not enough. MLMs need to take reasonable steps to monitor and ensure that participants are not misleading others about the business opportunity.

In addition, MLMs should provide sufficient information and training to participants to ensure that they will adequately understand the business and will not be misled by others. This message is consistent with the DSA's Code of Ethics, which states that member companies must comply and ensure that their independent sales people adhere to the Code's guidance on earnings representations.

As you know, the Code prohibits false, deceptive, misleading, and unsubstantiated earnings claims, and as the Code acknowledges, FTC case law provides ample guidance on the subject. I urge all of you to review FTC precedent and ensure that any income representations you or your distributors make accurately and truthfully reflect distributors' likely earnings.

Let me now turn to the second main problem we see with the MLM industry, namely that many MLMs have structures that are unfair or deceptive because they're not focused on real sales to real customers. A legitimate multi-level marketer must be focused on and must pay compensation that is based on real sales to real customers, not wholesale purchases by its sales force. Now, this is a familiar concept, but I'd like to spend a few minutes breaking it down and showing how it animates FTC enforcement efforts.

You can find this concept embodied in Commission decisions dating back more than 40 years, like the 1974 decision in *Holiday Magic*, which stressed the importance of based multi-level compensation on actual product sales rather than on purchases by recruits, and as the Ninth Circuit's decision in *Omnitrition* and *BurnLounge* made clear, MLMs that pay compensation for product purchases by recruits rather than for actual sales to customers are facially unlawful.

As a practical matter, what does this mean for a multi-level marketer? What does it mean to base compensation on real sales to real customers? Now, there are four aspects of this core principle that I want to highlight. The first is that a legitimate MLM must be focused on real customers. Second, a legitimate MLM opportunity must be based on sales that are both profitable and verifiable. Third, a legitimate MLM should not use targets or thresholds that are

met by mere product purchases. And fourth, the compensation paid by a legitimate MLM must be tied to retail sales.

I'll start by explaining what we mean by real customers. Simply put, products sold by a legitimate MLM should be principally sold to consumers who are not pursuing a business opportunity. For good reason, the law has always taken a skeptical view of paying compensation to someone based on the presumed internal consumption or personal consumption of recruits who are pursuing a business opportunity. When a product is tied to a business opportunity, experience teaches that the people buying it may well be motivated by reasons other than actual product demand.

One of the more vivid examples of this comes from the *BurnLounge* case. The activities of the *BurnLounge* defendants included selling packages of music-related merchandise. Before the FTC brought its enforcement action, anyone who wanted to participate in the business opportunity was also required to buy a package. BurnLounge had monthly revenues of over \$475,000 from product sales, but those revenues did not reflect consumer demand for BurnLounge's merchandise. After the FTC filed suit, charging that BurnLounge made deceptive income representations and paid compensation that was tied to recruitment rather than the sale of merchandise, the court entered a preliminary injunction that radically changed BurnLounge's operations. Under the preliminary injunction, distributors could still buy BurnLounge products if they liked the merchandise, but they could no longer advance in the business opportunity. What happened to sales? In only 2 months, they plummeted from over \$475,000 to less than \$11,000. As it turned out, at most, only a small minority of sales had been motivated by actual product demand, whether internal or external.

So what does an MLM organized around real customers look like? You can see one approach laid out in the recent consent order that we obtained in the *Herbalife* case. The order identifies two classes of people who are not pursuing the business opportunity: retail customers who simply buy product from Herbalife distributors and do not have any direct connection to the company and preferred customers who have registered with Herbalife as customers and do not participate in the business opportunity. Under the order, there are a number of requirements that are intended to ensure that preferred customers represent a genuine class of discount buyers and are not simply business opportunity participants under another name. For example, under the order, preferred customers are not permitted to resell product, recruit, or receive multi-level compensation.

The *Herbalife* order also reflects the law's justified skepticism of compensation based on the presumed internal consumption or personal consumption of recruits who are pursuing a business opportunity. To address this issue, the order incorporates a number of provisions that impose reasonable limits on the compensation paid for the consumption of products by business opportunity, recruits, and I'll highlight one in particular. At least two-thirds of the compensation paid by Herbalife, both to any individual participant and to all participants in the aggregate, must be based on sales to retail customers or preferred customers, not on consumption by business opportunity participants.

The second issue that I want to highlight concerns the meaning of real sales. Real sales are sales that are both profitable and verifiable. To a certain extent, this is just simple logic. An MLM that pays compensation based on claimed sales that do not generate a net profit for the individual making the sale or that cannot be verified as sales cannot reasonably be characterized as based on retail sales, and, of course, decisions like *Omnitrition* and *Holiday Magic* have long recognized that compensation should be based on actually consummated sales to consumers.

The *Herbalife* order also shows how these principles can play out in the operations of an MLM. It requires that retail sales that generate multi-level compensation for a participant or that advance a participant in the business plan must be both profitable and verifiable. Herbalife is required to collect verification information for every claimed retail sale and to take all reasonable steps to verify that these sales both occurred as reported and represent genuine purchases by a true customer.

Third, a legitimate MLM should not use targets or thresholds to satisfy eligibility for compensation or rewards that are met by mere product purchases. Because the focus of a legitimate MLM and the basis for the compensation that it pays must be real sales to real customers, business opportunity participants should buy product only in response to actual consumer demand. For this reason, any requirements or incentives that participants purchase product for reasons other than satisfying genuine consumer demand, such as to join the business opportunity, maintain or advance their status, or to qualify for compensation payments are problematic.

As you will recall from the *BurnLounge* example, these incentives can be powerful. There, the defendants were selling nearly half a million dollars of merchandise every month, and almost all of those purchases were driven by the desire to get ahead in the compensation plan rather than by genuine product demand.

Under the *Herbalife* order, the company is prohibited from imposing any requirement that a business opportunity participant purchase a minimum quantity of product. It also prohibits business opportunity participants from joining an automatic shipment or similar program involving standing orders, and targets or thresholds are permitted only if they are met exclusively through sales to retail customers or preferred customers. These provisions underscore that an MLM should always be focused on making real sales to real customers, who are not pursuing a business opportunity. MLMs should not contrive ways to get their business opportunity participants to make purchases for reasons other than actual retail demand.

The fourth point I want to highlight is that compensation paid by legitimate MLM must be tied to real sales to real customers. Now, by this, I mean that if an MLM participant buys a product that does not result in real sales to real customers, this revenue should not be used to fund compensation. Now, it goes without saying that a legitimate MLM should not pay compensation solely for enrolling or recruiting a new participant. This means that there should be no headhunter fees, no recruitment bounties, or anything else of the sort.

In the *Herbalife* order, we require the company to track the percentage of product sold at wholesale each year; that is, sold to a retail or preferred customer or within the limits established for compensating reasonable personal consumption by business opportunity participants. If at least 80 percent of Herbalife's wholesale product is not accounted for within these categories, the order imposes a cap limiting the total amount of compensation Herbalife can pay to its participants.

What does this mean in practice? If hypothetically half of the product that Herbalife sells wholesale results in verifiable retail sales, as defined by the order, and half does not, the total rewards that the company can pay are limited to the 50 percent that consists of verifiable sales to customers. Consequently, if the vast majority of product purchases are genuine retail sales, total compensation can be higher, and if they're not, then the total compensation will be much, much lower.

Now, all of the points that I've highlighted are intended to operate in combination to provide reasonable assurance that product purchases will be driven by real product demand, and providing this assurance is both appropriate and necessary. It's not enough for an MLM to simply assume the existence of real sales to real customers.

And, finally, although this is less common today, in the past, some MLMs have sought to rely on policies similar to those referenced in the Commission's 1979 *Amway* decision, specifically the so-called buyback, 70 percent and 10-customer rules, as a sufficient basis for assuming that their product is purchased by real customers to satisfy genuine demand. This reliance is misplaced. The Commission found those policies were effective, given the specific facts in *Amway*, but neither the Commission nor the courts have ever endorsed those policies for the MLM industry at large. Simply put, the existence of a refund policy and a low refund rate does not necessarily mean that consumers are satisfied with their business opportunity, and both the 10-customer and 70 percent rules offer, at best, weak and attenuated evidence of a business focused on real sales to real customers.

So let me just conclude by thanking you again for allowing me to share some of my thoughts about reforms that the MLM industry should undertake in order to operate lawfully and prevent consumer harm. The industry's self-regulatory efforts to date are steps in the right direction, but more needs to be done. For our part, the FTC will be issuing further guidance for MLMs, but my hope is that the principles that I have outlined today will provide an important foundation for structuring business practices in the MLM industry in a way that provides consumers with truthful information and helps prevent consumer harm. Thank you very much.

[Applause.]

MR. MARIANO: Thank you, Chairwoman Ramirez. I know you have time for two or three questions. What I asked our membership before your presentation, what types of questions they would like to ask, so I think I'm going to reflect some of those, given your remarks.

CHAIRWOMAN RAMIREZ: Sure.

MR. MARIANO: First, a general question. I made reference to the fact that in 31 years of investing or in representing the direct selling industry, it might be always calm to take a step back and take a deep breath when some of these kinds of things happen and to evaluate thoughtfully, and as a result of the FTC action against *Vemma* and then even the settlement that you entered into with Herbalife, there were some people within the direct selling channel, the MLM industry, as you say, and even outside observers who suggested that somehow the Federal Trade Commission had a degree of animus towards multi-level companies and really wanted to change the fundamental structure of how direct selling businesses work or multi-level companies work. Can you respond to that in any way? Is there an animus? Does the FTC want to put the multi-level marketing or direct selling business out of business?

CHAIRWOMAN RAMIREZ: I hope that my presence here today really shows to you that there's absolutely no—there's no animus. We are not here to take issue with any particular business models, but the role that we play is to ensure that there is no consumer harm, that consumers receive truthful and accurate information, and as I have outlined in my remarks, there are very serious concerns about the way that some MLMs operate and in particular, what I noted, the issue about income representations not being accurate and being misleading and the issue about the way certain MLMs might be structured in a way that incentivizes recruitment and not the sale of product to real customers.

So we are not animated at all by animus. We're animated by a desire to protect consumers, and in my view, this is something that the numbers of DSA should share. The issue is enhancing the credibility of the industry, and I think that serves both DSA, its membership, as well as serves the interest of the FTC to ensure that consumers are protected. So I hope that among other things that my presence here disabuses anyone who may have felt that something else was motivating the FTC beyond our desire to enforce the law and protect consumers.

MR. MARIANO: Thank you. A somewhat more specific question, if I may. Again, thank you for the great detail and your evaluation of some of the concerns that you have as well as the review of some of the provisions of your recent settlement with Herbalife, and with regard to that settlement, obviously, that is a fact-specific situation, although you've addressed general industrywide concerns as well. There are some very, very specific provisions of the settlement that address those concerns in the context of Herbalife's marketing practices and the FTC's perspective on those practices. The rest of the industry has looked at that, of course, very carefully, continues to look at it very carefully.

How much detail involved in that settlement should the industry—let me rephrase that, if I may. To what extent will the FTC look to the specific provisions of the Herbalife settlement as mandates for other individual companies within the direct selling industry to meet some of the issues of concern that you've broadly outlined.

CHAIRWOMAN RAMIREZ: To me, what's most important are the core principles that I've outlined. At the same time, what the *Herbalife* order shows is one way that you can accomplish the goals that we have, which means to ensure that the compensation structure, the incentives of an MLM business are designed to promote product sales and not recruitment. So it's one way of doing things.

So, for instance, as I noted in my comments about how one can ensure that product sales are coming from real customers, one way to do that is to create a category of customers, like is done in the *Herbalife* order, retail customers or preferred customers that are not pursuing the business opportunity. So that's one way of accomplishing it. It may not be the only way to do it. So I think people can look to that order as a way to do and accomplish what we aim to accomplish, but it's not necessarily the only way to do that. Rather, I think the most important takeaways are the key principles, but also, I think the other key takeaway is to note that we will be looking for specific evidence that shows that, in fact, a compensation structure of an MLM organization is driven by real sales to real customers. So it's not going to be sufficient for a business that we might be looking at to point to just rough estimates. We are looking for verifiable retail sales, and so I think this gives you a sense of the kind of documentation and kind of effort that we will be looking at when we look at these issues going forward.

MR. MARIANO: Two more questions, if I may.

CHAIRWOMAN RAMIREZ: Sure.

MR. MARIANO: With regard to that specific issue of real customers, real sales to real customers, I think you're well aware that as an industry and as individuals, we had a very constructive discussion and at times debate over really 20 years, if not longer, about the question of who is a customer and who can be a customer, and the dilemma that we have faced, frankly, is, I think, one that the FTC at times has been challenged with as well. It's this question of internal consumption, and your understandable skepticism with regard to whether or not internal consumption might merely be a disguise for really recruitment-based compensation has been the challenge for us, because while we recognize that, in fact, there could be abuse in that situation, as I think you know in for many of our companies, there are many sales people within our plans who are also customers as well.

You set out a fairly rigid structure, again, within the Herbalife settlement of allowing somebody or not allowing somebody to be a distributor and a salesperson and a customer or a customer. I know you can't structure our business model, but I'd like you to react to the challenge we have of making sure that an individual who happens to be a distributor or salesperson can also consume the product at reasonable levels themselves—and legitimately.

CHAIRWOMAN RAMIREZ: And I understand that, but at the same time, I think we are very concerned about incentives that could be creative that really are driven not by genuine product demand by a business opportunity participant but rather being motivated primarily by seeking to advance in the business plan. And therefore, the way that we tried to accommodate that

issue was to set a cap. So our expectation, as I noted, is that for Herbalife that there would be a cap on the amount of personal or internal consumption that we would recognize, and so we tried to accommodate a challenge, recognizing that there will be, of course, some business opportunity participants who will consume the product. But because of the potential for abuse of that, we felt that it was appropriate to set a cap.

Now, again, we're not saying this is the right and the exact cap that ought to apply industrywide, this is how we felt it was appropriate to ensure what we sought to accomplish in the Herbalife situation, but I think it does give you a sense again of what drives—what concerns us and how we sought to address that what we feel is a very legitimate concern about creating incentives that compensate and reward recruitment and internal consumption that's not tied to actual product demand, so that was our way of dealing it.

So, again, it gives you an example of a way that we felt that we could accommodate this issue, but we're not saying that's necessarily going to apply across the board.

MR. MARIANO: Appreciate that. Our last question today—and, again, these reflect questions and issues that were reported to us earlier.

CHAIRWOMAN RAMIREZ: Sure.

MR. MARIANO: You said during your press conferencing in announcing the Herbalife settlement back several months ago now that you hope that the direct selling multi-level industry would look to the settlement as an example of the kinds of issues that needed to be addressed by companies as well as the industry and as well as something of a template, perhaps not in specificity, but as a template for the rest of the industry moving forward.

You also mentioned at that time and again today the specific guidance that the FTC might be issuing. Of course, this presentation today is significant guidance to us, and we appreciate that, but since you mentioned it, in what form might we expect additional guidance in the future?

CHAIRWOMAN RAMIREZ: Look, I completely understand that following such an important case like the *Herbalife* case and given our very active efforts in this area that it is important to make sure that we do provide guidance to the industry. We are working on preparing something that we will be able to issue. I don't want to give a set date when that will come out because every time that I give myself a deadline, sometimes things happen, and we may not be able to meet it. But I can tell you that it's in progress.

What I also want to emphasize, though, is that the key principles that I tried to articulate today in significant detail was also intended to be guidance to you. So my hope is that these principles will be of aid going forward, but I do assure you that we will be issuing additional guidance to answer any other questions that might be out there.

MR. MARIANO: Wonderful. Thank you.

Well, I must tell you, as I met Chairwoman Ramirez outside before her remarks, I indicated to her that I was suffering today from some very significant back pain, so that if she saw me wince or even cry during her remarks, it had nothing to do with what she said, and indeed—

CHAIRWOMAN RAMIREZ: I'm glad he warned me. Otherwise, I might have been worried.

[Laughter.]

MR. MARIANO: I was wincing over there, but it had nothing to do with that.

I really appreciate your time today and your very specific direction and your advice, if you will, and information provided to us. So thank you so much. We really appreciate it.

CHAIRWOMAN RAMIREZ: Thank you.

[Applause.]

MR. MARIANO: We look forward to ongoing discussions with the Commission, other Commissioners, of course, staff members of the Federal Trade Commission, as well as other regulators who are paying very close attention to these matters at the state level and throughout the Federal Government.

We're going to take a break now, I believe—Melissa, right now?—and so we'll have some great discussion, and we'll see you back here in a few minutes.