

# SELF-REGULATION IN THE DIRECT SELLING INDUSTRY: CAN IT EVER BE MORE THAN SYMBOLIC?

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## ABSTRACT

*More than 50 years ago, the national trade association for the direct selling industry known as the Direct Selling Association (DSA or Association) established a Code of Ethics, which it describes as a set of stringent guidelines that companies are required to follow in order to maintain their memberships. The DSA Code of Ethics has allowed hundreds of member companies to represent over the years that they have adopted comprehensive compliance structures that protect consumers and direct sellers alike, however, the reality is that the vast majority of members have largely ignored the Code while engaging in deceptive marketing campaigns to sell their wares and recruit new distributors, and the Association has willingly turned a blind eye to such wrongdoing.*

*In this essay, I detail how the DSA Code of Ethics has primarily been used as a shield to hide rampant misconduct within the direct selling industry and illustrate how the industry's lack of adherence to truth in advertising laws has resulted in mounting criticism of the industry from regulators, third parties and the media. Cognizant of the negative critiques, in January 2019, the DSA created a new self-regulatory program to be administered by the Council of Better Business Bureaus (CBBB) known as the Direct Selling Self-Regulatory Council (DSSRC or Council), which is the DSA's most recent attempt to repair the reputation of the direct selling industry and its tarnished credibility.*

*This essay examines the new policies and procedures that were crafted to guide the DSSRC – measures that have effectively hamstrung the Council's work because of issues concerning transparency, accountability and sanctions. These defects, when combined with the industry's historic hollow commitment to self-regulation, have, to date, rendered the DSSRC ineffective in practice. Further compounding these problems is the Federal Trade Commission's (FTC, Commission or Agency) complete inaction in publicly pursuing any referrals from the DSSRC.*

*I close with a call for the FTC to augment its oversight and accountability of the direct selling industry in order to support this new self-regulatory entity as the Council will never operate effectively without a strong infusion of deterrence-*

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*based enforcement by the FTC. The FTC's recent pivot to resurrecting its Penalty Offense Authority could provide the enforcement authority necessary to exert sufficient external pressures to incentivize the industry to consider embracing more robust self-regulation, but I argue that it will take decisive action against direct selling companies engaged in deceptive marketing to convince the industry to pay heed to truth in advertising laws and reconsider the potential benefits of participating in an open, independent and transparent self-regulatory process. Without such changes and industry commitment, the DSSRC will never be more than a purely symbolic entity.*

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## INTRODUCTION

*“Self-regulation is frequently an attempt to deceive the public into believing in the responsibility of a[n] irresponsible industry. Sometimes it is a strategy to give the government an excuse for not doing its job.”<sup>1</sup>*

Seeking ways to ensure higher levels of compliance with best practices, elevate the direct selling industry's reputation and bring increased accountability, in January 2019 the national trade association for direct selling known as the Direct Selling Association announced the creation of a new self-regulatory entity, the Direct Selling Self-Regulatory Council, to be administered by the Council of Better Business Bureaus.<sup>2</sup> In promoting this new self-regulatory program, the DSA neglected to point out that the need for this new entity's existence arose primarily because of the Association's failure to bring the behavior of its member companies into compliance with truth in advertising laws.<sup>3</sup> Despite the fact that the DSA has

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<sup>1</sup> JOHN BRAITHWAITE, BUSINESS REGULATION AND AUSTRALIA'S FUTURE 93 (Peter Grabosky & John Braithwaite, eds., 1993).

<sup>2</sup> Press Release, Direct Selling Ass'n, Direct Selling Ass'n Establishes Third-Party Self-Regul. Program to be Administered by the Council of Better Bus. Bureaus (Jan. 9, 2019) (on file with author).

<sup>3</sup> See *infra* Section II.

always boasted that its Code of Ethics ensures standards of conduct more stringent than the law,<sup>4</sup> for years member companies have maximized their profits by violating advertising laws while simultaneously pledging their adherence to the DSA Code of Ethics because the benefits of doing so far outweighed any possible cost of getting caught. Indeed, not only has the Association failed to reduce membership wrongdoing over the years, it has provided cover for rampant misconduct.<sup>5</sup>

The establishment of the DSSRC is the Association's latest attempt to repair the reputation of the direct selling industry and its tarnished credibility, and ultimately expand consumer demand for direct selling. One of the primary purposes of the new program is to "monitor claims disseminated by the entire United States direct selling industry."<sup>6</sup> On April 1, 2019, the DSSRC officially began monitoring the industry's marketing practices and accepting complaints from outside sources.<sup>7</sup> Even though the DSSRC possesses several benefits common to self-regulatory entities such as speed of action, flexibility in addressing changing market

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<sup>4</sup> Joseph N. Mariano, *Court Ruling Clarifies Protections Regarding Pyramid Schemes*, THE HILL (June 12, 2014, 12:30PM), <https://thehill.com/blogs/congress-blog/judicial/209086-court-ruling-clarifies-protections-regarding-pyramid-schemes> ("[The] DSA enforces one of the most rigorous self-regulatory codes of ethics in business today, ensuring that direct selling companies not only follow the law, but in many cases exceed its requirements.").

<sup>5</sup> For example, in 2019, after the nonprofit, consumer advocacy organization, Truth in Advertising (TINA.org), twice notified the DSA and its member company USANA that the company was using deceptive marketing tactics, USANA was recognized by the Association for a decade of promoting ethical business standards. In its press release, USANA noted:

[T]he initiative recognizes member companies that go above and beyond in their effort to promote awareness of the code by fulfilling the necessary criteria and adhering to ethical business practices within direct sales. The initiative encourages companies to be truthful about their products, services, identity and privacy. It seeks to eliminate deceptive or unlawful consumer or recruiting practices and creates an environment of ethical business practices.

Press Release, Usana Health Scis., *USANA Achieves Decade of Recognition for Promoting Ethical Bus. Standards* (June 26, 2019) (on file with author). More recently, in October 2021, TINA.org sent another letter to USANA identifying more deceptive marketing claims. *See* Letter from Josh Foukas, Chief Legal Officer and Gen. Couns., Usana Health Scis., to L. Smith, Legal Dir., Truth in Advert., Inc. (Nov. 5, 2021); Letter from Laura Smith, Legal Director, Truth in Advert., Inc., to Josh Foukas, Chief Legal Officer and Gen. Couns., Usana Health Scis. (Nov. 3, 2021). Of note, USANA's CEO is currently the Chairman of the DSA Board of Directors. DSA Board of Directors, *DIRECT SELLING ASS'N*, <https://www.dsa.org/forms/committee/CommitteeFormPublic/view?id=7F3000604E6> (last visited Mar. 9, 2022); *see also* *DSA Award Winners Are Ethics Code Violators*, TRUTH IN ADVERT., INC. (June 7, 2016), <https://truthinadvertising.org/articles/dsa-award-winners-ethics-code-violators/>.

<sup>6</sup> *DIRECT SELLING SELF-REGUL. COUNCIL, PROGRAM ACTIVITY REP. FOR THE DIRECT SELLING SELF-REGUL. COUNCIL* Jan. 2019 – Oct. 2019 (2019).

<sup>7</sup> *Direct Selling Self-Regulatory Council*, BBB NAT'L PROGRAMS, INC., <https://bbbprograms.org/programs/all-programs/dssrc> (last visited Mar. 9, 2022).

circumstances and the elimination of itemized deceptive claims, there are procedural issues and inherent limitations in what the Council can achieve within the direct selling industry. Tellingly, there is a glaring lack of transparency with regard to the majority of actions taken by the DSSRC, which allows deceptive behavior to hide behind the veil of industry self-regulation, resulting in a loss of public confidence and accountability.<sup>8</sup>

Moreover, there is no evidence to date that the Council's actions have in any way persuaded the industry as a whole to change its behavior to conform to legal norms and, as with many self-regulatory bodies, the DSSRC has not been able to compel reluctant direct selling companies to comply with the law.<sup>9</sup> Compounding these problems is the Federal Trade Commission's complete inaction publicly on Council referrals, which has emboldened companies faced with the threat of an Agency referral. Targeted companies presently appear more willing to defy the Council and play the odds that the FTC will do nothing – a safe bet given the Agency's record over the past 40 years against bad actors within the industry, which has been limited in scope and wholly ineffective as a broader deterrent. Unless there is a strong infusion of deterrence-based enforcement by the FTC to motivate this reluctant industry to embrace fully transparent self-regulation, the DSSRC is doomed to a Sisyphean existence.<sup>10</sup>

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<sup>8</sup> As of October 2021, 80 percent of published DSSRC decisions withheld the identity of the wrongdoer. *DSSRC Case Decisions and Administrative Closures*, BBB NAT'L PROGRAMS, <https://bbbprograms.org/programs/all-programs/dssrc/dssrc-cases-and-closures> (last visited Mar. 9, 2022).

<sup>9</sup> By way of example, in January 2019, the Electronic Retailing Self-Regulation Program (ERSP) found that Utah-based supplement company New U Life was deceptively marketing its flagship product. Press Release, BBB Nat'l Programs, Inc., Hormone Gel Cannot Make Health Benefit Claims; Somaderm Agrees to Modify, Discontinue Certain Claims After ERSP Review of its Advertising (Jan. 23, 2019) (<https://bbbprograms.org/archive/hormone-gel-cannot-make-health-benefit-claims-somaderm-agrees-to-modify-discontinue-certain-claims-after-ersp-review-of-its-advertising/>). When the company largely ignored the recommendations of the ERSP, the DSSRC initiated its own inquiry into New U Life's health and income claims and found that the company was continuing to violate truth in advertising laws. *Case #8-2019 – Monitoring Inquiry – New U Life*, BBB NAT'L PROGRAMS, INC. (2019), <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-8-2019-monitoring-inquiry-new-u-life>. Subsequently, when the company refused to comply with the recommendations of the DSSRC, the Council referred New U Life to the FTC. *Case #16-2020 – Government Referral Report – New U Life*, BBB NAT'L PROGRAMS, INC. (2020), <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-16-2020-government-referral-report-new-u-life>. To date, the FTC has not taken any public action against the company.

<sup>10</sup> See Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment*, GEO. LAW THE SCHOLARLY COMMONS, 2010 at 361.

## I. THE FAILURE OF DIRECT SELLING SELF-REGULATION PRE-DSSRC

In 1970, the DSA established a Code of Ethics that it described as “a robust series of policies that...protect independent salespeople and consumers. . . .”<sup>11</sup> This self-regulatory Code, which has been amended on multiple occasions, has been touted by the DSA as a set of “stringent guidelines for earnings representations, product claims, sales and marketing tactics and policies for order cancellations and returns.”<sup>12</sup>

Enforcement of the DSA Code of Ethics has historically been delegated to an alleged independent, third-party administrator appointed by the DSA Board of Directors<sup>13</sup> with “sole authority to determine whether a violation of the Code has occurred.”<sup>14</sup> The Code of Ethics prescribes that “[u]pon receipt of a bona fide complaint from a bona fide consumer” or where the Administrator “has reason to believe that a member has violated the Code,” the Administrator may open an investigation and work with the target company to address Code violations.<sup>15</sup> The Code also provides for an appeals process, and allows the DSA Board of Directors to suspend or terminate the membership of a company that does not cooperate with the Code Administrator.<sup>16</sup>

Prior to June 2015, the Code administrator’s investigations and actions (if any) were completely screened from public view. After that time, the Code of Ethics was amended to permit the Code administrator “to issue public reports that disclose the nature of complaints received, the companies involved and resolution.”<sup>17</sup> Unfortunately, the issuance of public reports<sup>18</sup> has done little to lift the veil on the robustness (or lack thereof) of DSA ethics enforcement as the barebone reports lack detail and pertinent information. Rather than providing any

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<sup>11</sup> *Code of Ethics*, DIRECT SELLING ASS’N, <https://www.dsa.org/consumerprotection> (last visited Mar. 9, 2022).

<sup>12</sup> *Id.*

<sup>13</sup> The current Code Administrator was previously the Vice President and Legal Counsel for the DSA and has been the Code Administrator for more than 50 years. *See Direct Selling Timeline*, DIRECT SELLING ASS’N, <https://www.dsa.org/direct-selling-journal/direct-selling-timeline>; *DSSRC Appellate Board*, BBB NATIONAL PROGRAM, INC., <https://bbbprograms.org/programs/all-programs/dssrc/dssrc-appellate-board> (last visited Mar. 9, 2022).

<sup>14</sup> *Code of Ethics*, *supra* note 11.

<sup>15</sup> *Id.* at D(1).

<sup>16</sup> DIRECT SELLING ASS’N, CODE OF ETHICS ADMINISTRATOR REPORT (2d ed. 2017), available at [https://www.dsa.org/docs/default-source/Code-of-Ethics/dsa\\_coe-administrator-report\\_2nd-edition\\_v2](https://www.dsa.org/docs/default-source/Code-of-Ethics/dsa_coe-administrator-report_2nd-edition_v2).

<sup>17</sup> Direct Selling Ass’n, *Direct Selling Association Strengthens Its Self-Regulatory Framework with Additional Consumer Safeguards and Greater Transparency*, PR NEWswire (June 2, 2015), <https://www.prnewswire.com/news-releases/direct-selling-association-strengthens-its-self-regulatory-framework-with-additional-consumer-safeguards-and-greater-transparency-300092399.html>.

<sup>18</sup> *See generally* Code Administrator Report, DIRECT SELLING ASS’N, <https://www.dsa.org/consumerprotection/downloadables>.

information about the companies involved, the specifics of any complaint or how any individual case was resolved, the reports merely aggregate the number of complaints filed each year by category, state the overall company response rate, and total the number of cases “resolved.”<sup>19</sup>

Over the years, the DSA has used the existence of the Code as a shield to deflect criticism of its member companies.<sup>20</sup> The Association asserts that it “leads the marketplace for direct selling in the United States by requiring companies to implement robust business ethics practices and consumer protection standards as an initial and continuing condition of membership.”<sup>21</sup> In addition, the Association has stated that the “DSA enforces one of the most rigorous self-regulatory codes of ethics in business today, ensuring that direct selling companies not only follow the law, but in many cases exceed its requirements,”<sup>22</sup> and “[c]onsumers can be confident that DSA and its members will not tolerate unethical behavior, and the DSA Code backs up that assurance.”<sup>23</sup>

Despite little to no evidence that the DSA has ever enforced its Code of Ethics, it has continually asserted that it takes a hardline stance on mandating Code adherence:

Every member of DSA is required to abide by DSA’s Code of Ethics as a condition of membership. There are no exceptions to the rule. All companies that use the direct selling model must uphold the highest ethical business standards, including adherence to polices [sic] that protect consumers and members of the salesforce against unrealistic earnings, lifestyle, and product claims. DSA member companies are also subject to ongoing review to ensure Code compliance and adherence to state and federal laws.<sup>24</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *See supra* note 5.

<sup>21</sup> Direct Selling Ass’n, DSA Announces New Partnership with Momentum Factor to Bolster Code of Ethics Enforcement, PR NEWswire (June 16, 2016) <https://www.dsa.org/events/news/individual-press-release/dsa-announces-new-partnership-with-momentum-factor-to-bolster-code-of-ethics-enforcement>.

<sup>22</sup> Mariano, *supra* note 4.

<sup>23</sup> Direct Selling Ass’n, *Direct Selling Association Strengthens Its Self-Regulatory Framework with Additional Consumer Safeguards and Greater Transparency*, PR NEWswire (June 2, 2015), <https://www.prnewswire.com/news-releases/direct-selling-association-strengthens-its-self-regulatory-framework-with-additional-consumer-safeguards-and-greater-transparency-300092399.html>; CODE OF ETHICS ADMINISTRATOR REPORT, *supra* note 17.

<sup>24</sup> Press Release, Direct Selling Ass’n, Statement of the Direct Selling Ass’n on Vemma’s Settlement Agreement with the Fed. Trade Comm’n (Dec. 19, 2016) [https://www.dsa.org/events/news/individual-press-release/statement-of-the-direct-selling-association-\(dsa\)-on-vemmas-settlement-agreement-with-the-federal-trade-commission](https://www.dsa.org/events/news/individual-press-release/statement-of-the-direct-selling-association-(dsa)-on-vemmas-settlement-agreement-with-the-federal-trade-commission).

Unfortunately, the DSA's rhetoric does not and has never aligned with how its member companies operate.<sup>25</sup> Although the DSA Code of Ethics allows member companies to represent that they have adopted comprehensive compliance structures, the reality is that the vast majority of members have never adhered to the DSA Code of Ethics and there is no evidence to suggest that any member company has ever faced a penalty as a result of violating the Code.<sup>26</sup>

## II. TRUTH IN ADVERTISING EXPOSES DSA ETHICS CODE VIOLATORS

Convinced that DSA self-regulatory oversight was inherently feeble and ineffective, Truth in Advertising, Inc. (TINA.org), a nonprofit consumer advocacy organization dedicated to eradicating deceptive marketing claims, began an examination of DSA-member companies' compliance with truth in advertising laws in 2016. Within two years, TINA.org had catalogued more than 5,000 examples from more than 130 DSA member companies using deceptive marketing claims in violation of the Code of Ethics to sell their wares and recruit distributors.<sup>27</sup> Since then, TINA.org has continued to collect hundreds of examples of DSA member companies violating advertising laws.<sup>28</sup>

The data collected over the past five years makes it readily apparent that the DSA Code of Ethics has been used to give the appearance of self-policing while

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<sup>25</sup> See *infra* Section II.

<sup>26</sup> Quite to the contrary, a 2017 to 2019 investigation into Team National, Inc., a Florida-based DSA member company that sold discounts for a variety of third-party products and services, found that the company was engaged in a deceptive marketing campaign. Team Nat'l, Inc. Investigation Summary of Action, TRUTH IN ADVERT., <https://www.truthinadvertising.org/team-national-summary-action/> (last visited Mar. 9, 2022). Of particular concern was the fact that during the investigation, Team National's CEO was the Chair of the Direct Selling Education Foundation. See Direct Selling Educ. Found. Bd. of Dir. (illustration), *in Bd. of Dir.*, TRUTH IN ADVERT. (Apr. 2019), <https://www.truthinadvertising.org/wp-content/uploads/2021/11/DSEF-Board-of-Directors-as-of-April-2019.png>. The DSA's educational arm is supposed to, among other things, "advance understanding of the direct selling industry and its commitment to ethical business practices and consumer protection." DIRECT SELLING EDUC. FOUND., <https://www.dsa.org/about/direct-selling-education-foundation> (last visited Mar. 9, 2022).

<sup>27</sup> See *DSA Companies' Income Claims Database*, TRUTH IN ADVERT., <https://truthinadvertising.org/industries/mlm-income/> (last visited Mar. 9, 2022); *MLM Health Claims Database*, TRUTH IN ADVERT., <https://truthinadvertising.org/industries/mlm-health/> (last visited Mar. 9, 2022).

<sup>28</sup> See, e.g., *USANA Income Claims Database*, TRUTH IN ADVERT., <https://www.truthinadvertising.org/usana-income-claims-database/> (last visited Mar. 9, 2022); *USANA Health Claims Database*, TRUTH IN ADVERT., <https://www.truthinadvertising.org/usana-health-claims-database/> (last visited Mar. 9, 2022); *Team Nat'l Income Claims Database*, TRUTH IN ADVERT., <https://www.truthinadvertising.org/team-national-income-claims-database/> (last visited Mar. 9, 2022); *Young Living Health Claims Database*, TRUTH IN ADVERT., <https://www.truthinadvertising.org/young-living-health-claims-database/> (last visited Mar. 9, 2022); *Mary Kay Income Claims*, TRUTH IN ADVERT., <https://www.truthinadvertising.org/mary-kay-income-claims/> (last visited Mar. 9, 2022); *Primerica Income Claims Database*, TRUTH IN ADVERT., <https://www.truthinadvertising.org/primerica-income-claims-database/> (last visited Mar. 9, 2022).

the trade association has instead served the private interests of its members at the public's expense. A review of TINA.org's findings to date demonstrates how the DSA works against the public good while simultaneously paying lip service to an ethical industry framework in an attempt to avoid government and third-party scrutiny.

In 2016, TINA.org investigated every DSA member company selling nutritional supplements and found that 60 out of 62 (or 97 percent) were making claims that the companies' products could treat, cure, prevent, alleviate the symptoms of, or reduce the risk of developing diseases or disorders, in violation of the law.<sup>29</sup> Deceptive marketing claims included being able to cure cancer,<sup>30</sup> prevent HIV/AIDs<sup>31</sup> and treat Alzheimer's,<sup>32</sup> among others. At that time, TINA.org catalogued more than 2,000 instances of such inappropriate health claims across the 60 DSA companies, and notified each of the companies at issue, as well as the DSA and its Code Administrator of the findings.<sup>33</sup>

The DSA responded to TINA.org's investigation of deceptive health claims by essentially abdicating responsibility for the malfeasance of its member companies and stating, among other things, that:

Federal and state regulatory agencies are ultimately responsible for the direct selling channel, and DSA continues to collaborate closely with regulators to enhance business ethics and consumer protection, which have always been at the heart of our mission. Beginning in 2017, 100 percent of DSA member companies will undergo a mandatory ethics review to ensure compliance with our Code of Ethics, including in the areas of income and product claims.<sup>34</sup>

In 2017, the year of the "mandatory ethics review,"<sup>35</sup> TINA.org investigated how DSA member companies marketed their business opportunities. The inquiry revealed that more than 97 percent (137 out of the 140) of DSA member companies were making deceptive earnings claims to persuade consumers to take advantage of the companies' business opportunities and to convince low-

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<sup>29</sup> DSA Companies' Health Claims Summary of Action, TRUTH IN ADVERT., <https://www.truthinadvertising.org/dsa-health-summary-of-action/> (last visited Mar. 9, 2022).

<sup>30</sup> See, e.g., Transfer Factor, FACEBOOK (Nov. 28, 2014), [https://www.truthinadvertising.org/wp-content/uploads/2016/06/Cancer3\\_Facebook.pdf](https://www.truthinadvertising.org/wp-content/uploads/2016/06/Cancer3_Facebook.pdf).

<sup>31</sup> See, e.g., Exfuze Seven (@exfuze\_seven), TWITTER (Feb. 28, 2012, 11:39PM), [https://twitter.com/exfuze\\_seven/status/172948678670155777](https://twitter.com/exfuze_seven/status/172948678670155777).

<sup>32</sup> See, e.g., Chloe Kitts NYR Organic Independent Consultant, FACEBOOK (Mar. 18, 2014), [https://www.truthinadvertising.org/wp-content/uploads/2016/10/Alzheimers2\\_NYR.pdf](https://www.truthinadvertising.org/wp-content/uploads/2016/10/Alzheimers2_NYR.pdf).

<sup>33</sup> DSA Companies' Health Claims Summary of Action, *supra* note 29.

<sup>34</sup> *Statement of Joseph N. Mariano, Direct Selling Ass'n*, TRUTH IN ADVERT. (Nov. 6, 2016), <https://www.truthinadvertising.org/wp-content/uploads/2016/11/DSA-Statement-to-TINA.pdf>.

<sup>35</sup> *Id.*



level distributors to stay with the companies.<sup>36</sup> Claims ranged from obtaining financial freedom<sup>37</sup> to being able to quit your day job,<sup>38</sup> stay home with your children<sup>39</sup> and make unlimited income.<sup>40</sup> TINA.org collected more than 3,000 examples of DSA member companies making atypical earnings claims on their websites and social media platforms, and notified each of the companies at issue, as well as the DSA and its Code Administrator.<sup>41</sup>

The DSA responded to TINA.org's investigation by stating, in part, that:

DSA welcomes information about compliance with our Code of Ethics from any source. Any credible information relating to possible non-compliance with our Code an [sic] or the law will be reviewed by the DSA Code Administrator and responded to appropriately.<sup>42</sup>

No mention was made of the “mandatory ethics review” and TINA.org is not aware of any further public statement or action taken by the DSA or its Code Administrator regarding the deceptive income claims made by its member companies.

Since TINA.org's two DSA-wide surveys, it has continued to investigate individual DSA member companies and expose hundreds of inappropriate health and income claims.<sup>43</sup> To date, no public action has ever been taken by the DSA or its Code Administrator against any company highlighted in a TINA.org investigation, even in those instances where a formal complaint letter was filed

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<sup>36</sup> *DSA Companies' Income Claims Database*, *supra* note 27.

<sup>37</sup> *See, e.g.*, Official Juice Plus Australia and New Zealand, *Create Financial Freedom with Juice Plus+*, YOUTUBE (Sep. 15, 2015), <https://www.truthinadvertising.org/wp-content/uploads/2017/11/JuicePlusYoutube5.png>; Juice Plus+, *Financial Freedom*, YOUTUBE, <https://www.truthinadvertising.org/wp-content/uploads/2017/11/JuicePlusYoutube5.mp4>.

<sup>38</sup> *See, e.g.*, Brittany Floyd, FACEBOOK (Oct. 10, 2017, 1:43PM), <https://www.truthinadvertising.org/wp-content/uploads/2017/12/Mary-Kay-Facebook-Quit-Full-Time-Job.png>.

<sup>39</sup> *See, e.g.*, Advocare, *Stay Home*, YOUTUBE, <https://www.truthinadvertising.org/wp-content/uploads/2017/09/AdvocareYoutube1StayHome.mp4>.

<sup>40</sup> *See, e.g.*, Mrs. Bimla Rathee Amway Business Owner, FACEBOOK (Sep. 3, 2017), <https://www.truthinadvertising.org/wp-content/uploads/2017/12/Amway-Facebook-Unlimited-Money-Bimla.png>.

<sup>41</sup> A few months later, the Code Administrator informed TINA.org that the “information [would] be...part of a database utilized by [his] office as well as the DSA staff for a comprehensive review of DSA member company Code of Ethics compliance.” Email from Jared Blum, DSA Code Adm'r, Direct Selling Ass'n, to Bonnie Patten, Exec. Dir. & Laura Smith, Legal Dir., Truth in Advert., Inc. (Jan. 2, 2018), [https://www.truthinadvertising.org/wp-content/uploads/2021/11/1\\_2\\_18-email-from-DSA-Code-Administrator-to-TINA.pdf](https://www.truthinadvertising.org/wp-content/uploads/2021/11/1_2_18-email-from-DSA-Code-Administrator-to-TINA.pdf).

<sup>42</sup> E-mail from Joseph N. Mariano, President, Direct Selling Ass'n, to Jason Bagley, Staff Writer, Truth in Advert., Inc. (Dec. 18, 2017) ([https://www.truthinadvertising.org/wp-content/uploads/2021/11/12\\_18\\_17-email-from-DSA-to-TINA.pdf](https://www.truthinadvertising.org/wp-content/uploads/2021/11/12_18_17-email-from-DSA-to-TINA.pdf)).

<sup>43</sup> *See* DSA Companies' Health Claims Summary of Action, *supra* note 29.

with federal and/or state regulators.<sup>44</sup> Although companies have taken down or modified inappropriate claims identified by TINA.org over time, the response to external pressure has not resulted in any transformative change in the way that these companies recruit or market their products and services.<sup>45</sup> In fact, not only has the DSA and its member companies been unresponsive to third-party pressures to change their overall deceptive marketing tactics, but they have staunchly guarded their own vested economic interests by preserving the status quo even in the face of repeated complaints.<sup>46</sup> This is equally true in cases where TINA.org

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<sup>44</sup> See, e.g., E-mail from Bonnie Patten, Exec. Dir. and Laura Smith, Legal Dir., Truth in Advert., Inc., to Andrew Smith, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n and Lois Greisman, Assoc. Dir., Div. of Mktg. Prac., Fed. Trade Comm'n (June 14, 2018), [https://www.truthinadvertising.org/wp-content/uploads/2018/06/6\\_14\\_18-letter-to-FTC-re-Team-National\\_Redacted.pdf](https://www.truthinadvertising.org/wp-content/uploads/2018/06/6_14_18-letter-to-FTC-re-Team-National_Redacted.pdf); E-mail from Bonnie Patten, Exec. Dir. and Laura Smith, Legal Dir., Truth in Advert., Inc., to Jessica Rich, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n, Mary Engle, Assoc. Dir., Div. of Advert. Prac., Fed. Trade Comm'n and Lois Greisman, Assoc. Dir., Div. of Mktg. Prac., Fed. Trade Comm'n (July 12, 2016), [https://www.truthinadvertising.org/wp-content/uploads/2016/07/7\\_12\\_16-ltr-from-TINA-to-FTC-re-Nerium.pdf](https://www.truthinadvertising.org/wp-content/uploads/2016/07/7_12_16-ltr-from-TINA-to-FTC-re-Nerium.pdf); E-mail from Bonnie Patten, Exec. Dir. and Laura Smith, Legal Dir., Truth in Advert., Inc., to Jessica Rich, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n, Mary Engle, Assoc. Dir., Div. of Advert. Prac., Fed. Trade Comm'n and Lois Greisman, Assoc. Dir., Div. of Mktg. Prac., Fed. Trade Comm'n (Apr. 5, 2016), [https://www.truthinadvertising.org/wp-content/uploads/2016/04/Kyani-FTC-Complaint\\_Redacted.pdf](https://www.truthinadvertising.org/wp-content/uploads/2016/04/Kyani-FTC-Complaint_Redacted.pdf); E-mail from Bonnie Patten, Exec. Dir. and Laura Smith, Legal Dir., Truth in Advert., Inc., to Jessica Rich, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n, Mary Engle, Assoc. Dir., Div. of Advert. Prac., Fed. Trade Comm'n and Lois Greisman, Assoc. Dir., Div. of Mktg. Prac., Fed. Trade Comm'n (Oct. 19, 2015), <https://www.truthinadvertising.org/wp-content/uploads/2015/10/10-19-15-Letter-from-TINA-to-FTC-re-Jeunesse.pdf>.

<sup>45</sup> As quickly as TINA.org identifies deceptive marketing claims and the targeted companies take those claims down, new deceptive marketing claims appear. See, e.g., E-mail from Bonnie Patten, Exec. Dir. and Laura Smith, Legal Dir., Truth in Advert., Inc., to Eric Haynes, Chief Legal Officer, Nerium Int'l (July 10, 2017) [https://www.truthinadvertising.org/wp-content/uploads/2017/07/7\\_11\\_17-ltr-from-TINA-to-Nerium\\_Redacted.pdf](https://www.truthinadvertising.org/wp-content/uploads/2017/07/7_11_17-ltr-from-TINA-to-Nerium_Redacted.pdf).

<sup>46</sup> Tellingly, in late 2019, the DSA launched a marketing campaign using the hashtag #RealDirectSellers, which promoted atypical income and lifestyle claims by top distributors in DSA member companies in direct violation of its own Code of Ethics. Bonnie Patten, #RealDirectSellers Don't Obtain Financial or Time Freedom, TRUTH IN ADVERT., (Dec. 13, 2019), <https://www.truthinadvertising.org/realdirectsellers-dont-obtain-financial-or-time-freedom/>. Further, industry self-regulation has been used as support for the continued use of deceptive marketing claims. For example, in a March 2018 letter to TINA.org, DSA member Shaklee Corporation stated:

At the outset, I'd like to note that I also reviewed all the claims listed with the DSA Code Administrator, . . . , and with DSA Ethics Counsel, . . . They and I agreed that none of the claims cited by TINA are violative of law or of the DSA Code of Ethics...The claims cited by TINA are relatively modest or puffery.

Letter from Marjorie L. Fine, Dir., Shaklee Corp., to Laura Smith, Legal Dir., Truth In Advertising, Inc. (March 15, 2018) (on file with author). Among the dozens of deceptive Shaklee claims highlighted by TINA.org were "unlimited career income" and "part time work with FULL TIME pay." Shaklee Distributor – Patty Matlock – Go Green Think Health, FACEBOOK, (June 15, 2015),

complaints (or investigations) have supported FTC actions.<sup>47</sup>

TINA.org's work exposing false and deceptive advertising within the multilevel marketing (MLM) industry underscores the glaring reality that the DSA Code of Ethics has had no influence on industry behavior. The data indicate quite the contrary: the established framework within the industry embraces deceptive marketing, and the Code of Ethics amounts to little more than a self-serving document containing meaningless, industry rhetoric. The compilation of thousands of marketing claims that violate the law highlights the fact that the Code operates merely as window dressing for companies to hide behind as they manipulate consumers and distributors with their illegal marketing tactics. Further, after having been repeatedly made aware of the conventional industry practice of using deceptive marketing, the DSA's inaction makes plain that it has no expectation that member companies will adhere to its Code of Ethics.<sup>48</sup>

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<https://www.truthinadvertising.org/wp-content/uploads/2017/11/ShakleeFacebook13.png>; Bonnie Donahue, FACEBOOK, (Nov. 18, 2015), <https://www.truthinadvertising.org/wp-content/uploads/2017/11/ShakleeFacebook15.png>.

<sup>47</sup> See *Takedown: Feds Move Against Vemma*, TRUTH IN ADVERT., (Aug. 25, 2015), <https://www.truthinadvertising.org/takedown-feds-move-against-vemmas/>; *FTC Sues Neora (Formerly Nerium) Alleging It Was a Pyramid From The Start*, TRUTH IN ADVERT., (Nov. 3, 2019), <https://www.truthinadvertising.org/ftc-sues-nerium-alleging-it-was-a-pyramid-from-the-start/> See also Press Release, Fed. Trade Comm'n, Multi-Level Marketer AdvoCare Will Pay \$150 Million to Settle FTC Charges it Operated an Illegal Pyramid Scheme,(Oct. 2, 2019), <https://www.ftc.gov/news-events/press-releases/2019/10/multi-level-marketer-advocare-will-pay-150-million-settle-ftc>; AdvoCare Income Claims Database, TRUTH IN ADVERT., (Dec. 18, 2017), <https://www.truthinadvertising.org/advocare-income-claims-database/>; AdvoCare Health Claims Database, TRUTH IN ADVERT., (Nov. 1, 2016), <https://www.truthinadvertising.org/advocare-health-claims-database/>.

<sup>48</sup> The DSA published an article in its January 2021 journal that stated, “[d]irect sellers will never be able to wholly prevent distributors from making improper claims.” See John Sanders & Katrina Eash, *Reducing Regulatory Risk: Changes You Can Make to Pass the FTC’s Scrutiny*, DIRECT SELLING JOURNAL, Jan. 2021, at 76, 77. Further, DSA President and CEO has stated, “We know that direct selling has sometimes suffered from perceived problems, occasional bad actors, and others who pretend to be legitimate.” Press Release, Direct Selling Ass’n, Direct Selling Ass’n Establishes Third-Party Self-Regulatory Program to be Administered by the Council of Better Bus. Bureaus (Jan. 9, 2019), <https://www.dsa.org/events/news/individual-press-release/direct-selling-association-establishes-third-party-self-regulatory-program-to-be-administered-by-the-council-of-better-business-bureaus>.

### III. THE CREATION OF A NEW SELF-REGULATORY ENTITY

Unable (or unwilling) to fulfill its theoretical promise of legal compliance within its own ranks and facing mounting scrutiny from federal and state regulators,<sup>49</sup> TINA.org<sup>50</sup> and the media,<sup>51</sup> the DSA announced at the beginning of

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<sup>49</sup> FTC Chairwoman Ramirez stated in October 2016:

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 continue to 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.

Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Remarks at DSA Bus. & Policy Conference, (Oct. 25, 2016), available at [https://www.ftc.gov/system/files/documents/public\\_statements/993473/ramirez\\_-\\_dsa\\_speech\\_10-25-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/993473/ramirez_-_dsa_speech_10-25-16.pdf). Subsequently, Andrew Smith, Director of the FTC's Bureau of Consumer Protection in April 2020 stated that "MLMs and other companies that distribute their products through networks of distributors are responsible for the product and earnings claims those distributors are making. . . . During this health and economic crisis, we are on the lookout for false income claims for work-at-home opportunities, in addition to spurious health claims that products can treat or prevent COVID-19." Press Release, Fed. Trade Comm'n, FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus (April 24, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health>. And FTC Commissioner Noah Phillips stated in October 2020 that "the FTC is fully engaged in this area and is determined to protect hard-working consumers from losing money to illegal pyramid schemes or other business opportunities that make deceptive earnings claims. I caution you to stay on the straight and narrow because now, more than ever, this is a top enforcement priority for me, and I hope the agency." Noah Phillips, Comm'r, Fed. Trade Comm'n, Keynote Address at DSA Legal & Regulatory Summit: Seller Beware, (Oct. 15, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1581726/phillips\\_-\\_dsa\\_remarks\\_10-15-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1581726/phillips_-_dsa_remarks_10-15-20.pdf).

<sup>50</sup> See, e.g., *Multilevel Marketing: The Day Job That Doesn't Pay*, TRUTH IN ADVERT. (Dec. 18, 2017), <https://www.truthinadvertising.org/mlm-income-claims-investigation/>; *Illegal Health Claims By DSA Companies Still Litter Internet*, TRUTH IN ADVERT. (Aug. 28, 2017), <https://www.truthinadvertising.org/illegal-health-claims-dsa-companies-still-litter-internet/>; *Is the DSA Ignoring Illegal Health Claims?*, TRUTH IN ADVERT. (Nov. 6, 2016), <https://www.truthinadvertising.org/dsa-ignoring-illegal-health-claims/>. See also *Consumer Advocates Call For Herbalife Probe*, TRUTH IN ADVERT. (May 28, 2013), <https://www.truthinadvertising.org/consumer-advocates-call-for-herbalife-probe/>; *Class Action Tracker*, TRUTH IN ADVERT., <https://www.truthinadvertising.org/category/class-action-tracker/?s=pyramid> (last visited Feb. 10, 2022).

<sup>51</sup> See, e.g., Michelle Singletary, *Why Multilevel Marketing Won't Make You Rich*, WASH. POST (Sept. 26, 2018), <https://www.washingtonpost.com/business/2018/09/27/why-that-multilevel-marketing-business-is-probably-not-going-pay-off/>; Claire Suddath, *Thousands of Women Say LuLaRoe's Legging Empire Is a Scam*, BLOOMBERG (Apr. 27, 2018), <https://www.bloomberg.com/>

2019 the establishment of a new third-party, self-regulatory entity known as the Direct Selling Self-Regulatory Council<sup>52</sup> to be administered by the Council of

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news/features/2018-04-27/thousands-of-women-say-lularoe-s-legging-empire-is-a-scam; Darlena Cunha, *Beware of Selling Yoga Pants on Facebook*, THE ATLANTIC (Apr. 18, 2018), <https://www.theatlantic.com/business/archive/2018/04/multilevel-marketing-yoga-pants-facebook/558296/>; Kiera Butler, *How Multilevel Marketing Companies Got the Autism Community Hooked on Essential Oils*, MOTHER JONES (Feb. 23, 2018), <https://www.motherjones.com/politics/2018/02/doterra-young-living-multilevel-marketing-companies-got-autism-community-hooked-essential-oils/>; Caroline Thompson, *How to Get a Friend Out of an MLM*, VICE (Oct. 22, 2018), <https://www.vice.com/en/article/43e573/how-to-get-a-friend-out-of-an-mlm-herbalife-amway-younique->; Susannah Snider, *What to Know Before Getting Involved in an MLM Company*, U.S. News (Oct. 9, 2020), <https://money.usnews.com/money/personal-finance/family-finance/articles/2018-06-12/what-to-know-before-getting-involved-in-an-mlm-company>; Sarah Shannon, *Stella & Dot: A Fun Way to Earn or a Path to Financial Loss?*, FIN. TIMES (May 30, 2018), <https://www.ft.com/content/d4bb0690-3e42-11e8-bcc8-cebcb81f1f90>; Kayleen Schaefer, *Inside the Creepy World of Women Selling You Supplements on Facebook*, WOMEN'S HEALTH (Sept. 20, 2018), <https://www.womenshealthmag.com/life/a22749385/direct-sales-social-media-friendship/>; Taylor Lorenz, *How Women Are Fighting the Marketers That Nearly Ruined Them*, THE DAILY BEAST (Mar. 14, 2018), <https://www.thedailybeast.com/how-women-are-fighting-the-marketers-that-nearly-ruined-them>; Scott Cohn, *Want to Work at Home? Take a Lesson from this \$3 Billion Pyramid Scam*, CNBC (June 22, 2018), <https://www.cnbc.com/2018/06/21/want-to-work-at-home-take-a-lesson-from-this-3-billion-pyramid-scam.html>. See also Episodes of the podcast "The Dream" by Stitcher, APPLE PODCASTS, <https://podcasts.apple.com/us/podcast/the-dream/id1435743296>; Katey Rich, *This Podcast Can't Legally Tell You Amway Is a Pyramid Scheme*, VANITY FAIR (Sept. 21, 2018), <https://www.vanityfair.com/style/2018/09/the-dream-podcast-preview>; Shannon Palus, *Why Is Everyone Selling Leggings on Facebook?*, SLATE (Dec. 6, 2018), <https://slate.com/business/2018/12/multilevel-marketing-podcast-review-the-dream-facebook.html>; LastWeekTonight, *Multilevel Marketing: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Nov. 7, 2016), <https://www.youtube.com/watch?v=s6MwGeOm8iI>; Google search for "MLM" from January to December 2018, GOOGLE, [https://www.google.com/search?q=mlm&client=firefox-b-1-d&tbs=cdr:1,cd\\_min:1/1/2018,cd\\_max:12/31/2018&tbm=nws&ei=qpemYbsow7m0BsLKpbgH&start=0&sa=N&ved=2ahUKEwi7pdf9g8H0AhXDHM0KHUJ1CXc4FBDy0wN6BAGBEDY&biw=1824&bih=898&dpr=1.58](https://www.google.com/search?q=mlm&client=firefox-b-1-d&tbs=cdr:1,cd_min:1/1/2018,cd_max:12/31/2018&tbm=nws&ei=qpemYbsow7m0BsLKpbgH&start=0&sa=N&ved=2ahUKEwi7pdf9g8H0AhXDHM0KHUJ1CXc4FBDy0wN6BAGBEDY&biw=1824&bih=898&dpr=1.58).<https://slate.com/business/2018/12/multilevel-marketing-podcast-review-the-dream-facebook.html> (last visited March 6, 2022).

<sup>52</sup> Peter Marinello, executive director of the DSSRC explained the impetus for the creation of the DSSRC as follows:

"There's this industry consumer advocacy organization called Truth in Advertising – kind a better known as TINA that issued this report in 2017 on product and income claims in the direct selling industry. So I think the report, while it may have overreached somewhat, the real utility of the report was that it really galvanized the thought leaders in this industry and helped them recognize that they had to proactively address some of these issues. You know it was interesting, on the heels of this report from TINA, then acting FTC Chair Maureen Olhausen addressed the Direct Selling Association in November 2017 and strongly encouraged the industry to consider . . . effective, third-party self-regulation. And this was definitely a real seminal moment. And, you know, there was some written guidance for the MLM industry that was published by the FTC right on the heels of that report that really helped frame some of these issues that

Better Business Bureaus.<sup>53</sup> The DSSRC describes its mission, in part, as follows:

To enhance consumer and regulatory confidence in direct selling marketing. . . . By providing an independent mechanism for monitoring earning claims and product claims by both DSA members and other members of the direct selling industry, this program will maintain and enhance the confidence of consumers in the direct selling business model and demonstrate the commitment of DSA members to establish and support an industry-wide self-regulatory program.<sup>54</sup>

The Association, together with the CBBB, explained that it created the DSSRC to “monitor claims disseminated by the entire United States direct selling industry,” not just DSA members, although the Council is exclusively funded by the DSA.<sup>55</sup> Limited in scope and resources,<sup>56</sup> the DSSRC was created only to examine “income claims (including lifestyle representations) and product claims (including services) made by direct selling companies and their salesforce.”<sup>57</sup>

Because of the overwhelming failure of the DSA and its Code Administrator to enforce adherence to the law by member companies, the industry environment into which the DSSRC has entered is one in which direct-selling companies are collectively using deceptive marketing to pursue their own self-

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could be addressed in the context of meaningful, independently administered self-regulation. So it was really these sequence of events, which led to the creation of the Direct Selling Self-Regulatory Council or DSSRC as it’s now known.”

The Accountability Studio, *With Great Power Comes Great Responsibility*, BBB NATIONAL PROGRAMS, at 13:47 (Apr. 21, 2021), <https://bbbprograms.org/media-center/podcast-details/great-power-great-responsibility>.

<sup>53</sup> Press Release, Direct Selling Ass’n, Direct Selling Ass’n Establishes Third-Party Self-Regulatory Program to be Administered by the Council of Better Bus. Bureaus (Jan. 9, 2019), <https://www.dsa.org/events/news/individual-press-release/direct-selling-association-establishes-third-party-self-regulatory-program-to-be-administered-by-the-council-of-better-business-bureaus>.

<sup>54</sup> POLICIES AND PROCEDURES FOR BBB NATIONAL PROGRAMS, INC.’S DIRECT SELLING SELF-REGULATORY COUNCIL, <https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/procedures/dssrc-procedures.pdf>.

<sup>55</sup> DIRECT SELLING SELF-REGULATORY COUNCIL, PROGRAM ACTIVITY REPORT FOR THE DIRECT SELLING SELF-REGULATORY COUNCIL: January 2019 – October 2019 3 (2019), [https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/bbb-np-report\\_dssrc-activities-report.pdf?sfvrsn=18c33082\\_2](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/bbb-np-report_dssrc-activities-report.pdf?sfvrsn=18c33082_2).

<sup>56</sup> It is currently staffed by a three-person team: the Director/Vice President, a Senior Staff Attorney, and an Advertising Review Specialist. DIRECT SELLING SELF-REGULATORY COUNCIL, [https://www.dsa.org/docs/default-source/default/2022-dssrc-one-pager.pdf?sfvrsn=adecd8a5\\_2](https://www.dsa.org/docs/default-source/default/2022-dssrc-one-pager.pdf?sfvrsn=adecd8a5_2).

<sup>57</sup> See POLICIES AND PROCEDURES FOR BBB NATIONAL PROGRAMS, INC.’S DIRECT SELLING SELF-REGULATORY COUNCIL, <https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/procedures/dssrc-procedures.pdf>.

interest at the expense of consumers and the public good.<sup>58</sup> As such, it appears that, much like the DSA Code of Ethics, the Council was created to shield the industry from further scrutiny rather than to increase accountability or protect consumers from deception. Fundamentally, there is no reason to believe that the creation of the DSSRC was motivated by any wider consideration than the DSA's own self-interest in deflecting current criticism of the industry. A review of the first 30 months of this new self-regulatory program in action further supports this contention.

#### IV. THE DSSRC IN ACTION (APRIL 2019 TO OCTOBER 2021)

In the 30-month period between April 1, 2019 and October 31, 2021, the DSSRC closed more than 250 cases, persuaded the subjects of its investigations to remove hundreds of deceptive marketing claims from the internet,<sup>59</sup> and, with the emergence of the COVID-19 pandemic, was able to shift resources to increase its monitoring of deceptive coronavirus claims.<sup>60</sup> The speed of action, elimination of deceptive claims, and flexibility in addressing changing market circumstances exemplify the benefits of this new self-regulatory body. However, a more thorough analysis reveals that these positive results have been severely tarnished by a flawed process and an industry that is not committed to self-regulation.

Since April 2019, when the DSSRC began monitoring direct selling marketing practices and accepting complaints from outside entities, there have been only three sources for investigations: one complaint filed by an MLM company after it was the recipient of a DSSRC inquiry;<sup>61</sup> eight complaints filed by a non-government organization (NGO) – TINA.org;<sup>62</sup> and the rest, more than 96

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<sup>58</sup> Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. PENN. L. REV. 71, 111 (2021) (stating that income misrepresentations are "one of the most problematic yet ubiquitous features of [the MLM] industry . . ."); *see also supra* Section II. Truth in Advertising Exposes DSA Ethic Code Violators.

<sup>59</sup> *DSSRC Case Decisions and Administrative Closures*, BBB NATIONAL PROGRAMS, <https://bbbprograms.org/programs/all-programs/dssrc/dssrc-cases-and-closures> (last visited Feb. 10, 2022).

<sup>60</sup> BBB NATIONAL PROGRAMS, BBB NATIONAL PROGRAMS ACTIONS IN RESPONSE TO COVID-19 1 (2022), [https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/bbb-national-programs-work-related-to-covid\\_february20217462a764-a36e-4312-8a93-2819bb4b1a57.pdf](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/bbb-national-programs-work-related-to-covid_february20217462a764-a36e-4312-8a93-2819bb4b1a57.pdf) ("The global coronavirus pandemic has led to an increased focus on NAD and DSSRC monitoring efforts to identify false and misleading claims about a product's ability to treat or prevent COVID-19. This targeted effort comes as both the FDA and Federal Trade Commission (FTC) are issuing dozens of warning letters to companies making such claims.").

<sup>61</sup> Direct Selling Self-Regulatory Council, *Case #22-2020 - Competitor Challenge - BioReigns*, BBB NATIONAL PROGRAMS (July 27, 2020), <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-22-2020-competitor-challenge-bioreigns>.

<sup>62</sup> *See* Direct Selling Self-Regulatory Council, *Case Number: 40-2021 - NGO Inquiry - Mary Kay, Inc.*, BBB NATIONAL PROGRAMS (July 16, 2021), <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-number-40-2021-ngo-inquiry-mary-kay-inc>; Direct

percent, resulted from the DSSRC's own self-monitoring.<sup>63</sup> The failure of the industry to police its own ranks by filing DSSRC complaints exemplifies the general lack of enthusiasm for compliance with advertising laws and demonstrates that the industry is not invested in using this new program to promote the well-being of the public at large. While MLMs will not hesitate to sue one another when it comes to issues related to distributor poaching,<sup>64</sup> and direct selling companies have no problem filing lawsuits against their own distributors,<sup>65</sup> the industry's

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Selling Self-Regulatory Council, *Case #26-2020 - NGO Inquiry - Counter Brands LLC d/b/a/Beautycounter*, BBB NATIONAL PROGRAMS (Oct. 21, 2020), <https://bbbprograms.org/media-center/news/case-26-2020--ngo-inquiry--counter-brands-llc-d-b-a-beautycounter>; Direct Selling Self-Regulatory Council, *Case #24-2020 - NGO Inquiry - Le-Vel Brands LLC*, BBB NATIONAL PROGRAMS (Aug. 31, 2020), <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-24-2020-ngo-inquiry-le-vel-brands-llc>; Direct Selling Self-Regulatory Council, *Case #17-2020 - NGO Inquiry - dōTERRA International LLC*, BBB NATIONAL PROGRAMS (Mar. 27, 2020), <https://bbbprograms.org/media-center/news/case-17-2020-challenge-dōterra-international-llc>; Direct Selling Self-Regulatory Council, *Case #3-2019 - Challenge - Team National, Inc.*, BBB NATIONAL PROGRAMS (Aug. 21, 2019), <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-number-3-2019>; Direct Selling Self-Regulatory Council, *Case #13-2020 Challenge - Young Living Essential Oils, LLC*, BBB NATIONAL PROGRAMS (Feb. 19, 2020), <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-13-2020-challenge-young-living-essential-oils-llc>. TINA.org also filed a complaint with the DSSRC, which it refused to consider because of the pending case against the company by the state of Washington. Letter from Laura Smith, Esq., Legal Dir., Truth In Advert., Inc. & Bonnie Patten, Esq., Exec. Dir., Truth In Advert., Inc. to Peter C. Marinello, Dir., Direct Selling Self-Regulatory Council (July 10, 2019), [https://www.truthinadvertising.org/wp-content/uploads/2021/04/7\\_10\\_19-complaint-to-DSSRC-re-LuLaRoe.pdf](https://www.truthinadvertising.org/wp-content/uploads/2021/04/7_10_19-complaint-to-DSSRC-re-LuLaRoe.pdf).

<sup>63</sup> See *supra* note 60.

<sup>64</sup> See, e.g., Complaint, Neora, LLC f/k/a Nerium Int'l, LLC v. Jeunesse, LLC, No. 2020-CA-000788, (Cir. Ct. Fla. 2020); Notice of Removal, Le-Vel Brands, LLC v. Quintessential Biosciences, No. 3:18-cv-03322 (N.D. Tex. 2018); Complaint, WorldVentures Holdings, LLC v. Mavie, No. 4:18-cv-00393 (E.D. Tex. 2018); Complaint, Wealth Generators, LLC v. Cabral, No. 170401615 (Utah St. Ct. 2017); Defendant's Notice of Removal, Nerium Int'l, LLC v. Burdick, No. 3:16-cv-03545 (N.D. Tex. 2016); Second Amended Complaint, Youngevity Int'l Corp. v. Smith, No. 3:16-cv-00704 (S.D. Cal. 2016); Notice of Removal, Nerium Int'l, LLC v. World Global Network Corp., No. 3:16-cv-02842 (N.D. Tex. 2016); Complaint at 1, Jeunesse LLC v. Zrii, LLC, No. 6:15-cv-02181 (M.D. Fla. 2015); Notice of Removal, Plexus Worldwide, LLC v. TruVision Health, LLC, No. 2:14-cv-02093 (D. Ariz. 2014); First Amended Complaint & Demand for Jury Trial, Melaleuca, Inc. v. Lucrazon Global, Inc., No. 4:14-cv-00024 (D. Idaho 2014); Amended Complaint & Demand for Jury Trial, Melaleuca, Inc. v. Organo Gold Int'l, Inc., No. 4:10-cv-00420 (D. Idaho 2010); Complaint & Demand for Jury Trial, Melaleuca, Inc. v. Max Int'l, LLC, No. 4:09-cv-00572 (D. Idaho 2009); Amended Complaint, Melaleuca, Inc. v. Freeliflife Int'l, LLC, No. 4:03-cv-00055 (D. Idaho 2003).

<sup>65</sup> See, e.g., Complaint, Int'l Mkt.'s Live, Inc. d/b/a iMarkets Live v. Huss, No. 1:20-cv-23080 (S.D. Fla. 2020); Complaint, Int'l Mkt.'s Live, Inc. d/b/a iMarkets Live v. Duncan, No. 2:19-cv-02053, (D. Nev. 2019); Complaint, Int'l Mkt.'s Live, Inc. d/b/a iMarkets Live v. Glower, No. 2:19-cv-01040 (D. Nev. 2019); Notice of Removal, Le-Vel Brands, LLC v. Bland, No. 3:19-cv-00154 (N.D. Tex. 2019); First Amended Complaint, Le-Vel Brands, LLC v. Eckstrom, No. 3:18-cv-01352 (N.D. Tex. 2019); Notice of Removal, Le-Vel Brands, LLC v. Speck, No. 3:19-cv-01097 (N.D. Tex.



apparent refusal to out those responsible for using deceptive marketing tactics is telling. The most likely rationale for the industry's nonparticipation in this new self-regulatory program is its general disinclination to regulate its own behavior, adhering to the proverb "people who live in glass houses shouldn't throw stones."

It is possible to quantify the industry's lack of participation in the self-regulatory process because the DSSRC provides the source for each of its inquiries in its published decisions. However, this is where transparency with the process ends. As of October 2021, 80 percent of DSSRC investigations ended in what it terms "Administrative Closures," which neither disclose the name of the culpable company nor specifically identify the inappropriate marketing material.<sup>66</sup> As a result, the vast majority of wrongdoers are never subject to any sort of public accountability, which runs counter to the DSSRC's stated mission and negatively impacts consumer and governmental confidence in this self-regulatory process.<sup>67</sup>

According to the DSSRC, it issues these secretive closure decisions "if the direct selling company in its initial response (i.e., within 15 business days from receipt of DSSRC's opening letter) commits to discontinue or significantly modify

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2019); Notice of Removal of to Federal Ct., *Kyani, Inc. v. Stevens*, No. 4:18-cv-00137 (D. Idaho 2018); Notice of Removal, *Le-Vel Brands, LLC v. Quintessential Biosciences, Inc. d/b/a QSciences*, No. 3:18-cv-03322 (N.D. Tex. 2018); Second Amended Complaint, *Youngevity Int'l Corp. v. Smith*, No. 3:16-cv-00704 (S.D. Cal. 2016); Complaint, *Jeunesse Glob. Holdings, LLC v. Mohamad*, No. 6:15-cv-02024 (M.D. Fla. 2015); Notice of Removal, *Nerium Int'l, LLC v. Burdick*, No. 3:16-cv-03545 (N.D. Tex. 2016); Notice of Removal, *Nerium Int'l, LLC v. World Global Network Corp.*, No. 3:16-cv-02842 (N.D. Tex. 2016); First Amended Complaint & Demand for Jury Trial, *Melaleuca, Inc. v. Lucrazon Global, Inc.*, No. 4:14-cv-00024 (D. Idaho 2014); First Amended Complaint & Demand for Jury Trial, *Melaleuca, Inc. v. Bartholomew*, No. 4:12-cv-00216 (D. Idaho 2012); Notice of Removal, *Melaleuca, Inc. v. Caissy*, No. 4:09-cv-00048 (D. Idaho 2009); Notice of Removal, *Melaleuca, Inc. v. Foeller*, No. 4:09-cv-00517 (D. Idaho 2009); Complaint & Demand for Jury Trial, *Melaleuca, Inc. v. Max Int'l, LLC*, No. 4:09-cv-00572 (D. Idaho 2009); Amended Complaint, *Melaleuca, Inc. v. Freelif Int'l, LLC*, No. 4:03-cv-00055 (D. Idaho 2003); *New U Life v. Hargett*, No. C-19-00323 (Cal. Super. Ct. 2019); Complaint, *New U Life v. Sinclair*, No. C19-00188 (Cal. Super. Ct. 2019); Plaintiff's Original Petition, *Le-Vel Brands, LLC v. Skvarce*, No. DC-19-19617 (Dist. Ct. Tex. 2019); Plaintiff's Original Petition, *Nerium Int'l, LLC v. Cahill*, No. DC-18-01077 (Dist. Ct. Tex. 2018); Plaintiff's Original Petition, *Nerium Int'l, LLC v. Smith*, No. DC-18-03726 (Dist. Ct. Tex. 2018); Complaint, *Wealth Generators, LLC v. Cabral*, No. 170401615 (Utah St. Ct. 2017); Plaintiff's Original Petition, *Nerium Int'l, LLC v. Hervis*, No. DC-15-12848 (Dist. Ct. Tex. 2015); Complaint, *Plexus Worldwide, LLC v. Fletcher*, No. CV2014-013357 (Ariz. Super. Ct. 2014); Complaint, *Plexus Worldwide, LLC v. Higgins*, No. CV2014-011779 (Ariz. Super. Ct. 2014); Complaint, *Plexus Worldwide, LLC v. Swan*, No. CV2014-011781 (Ariz. Super. Ct. 2014).

<sup>66</sup> See *supra* note 60.

<sup>67</sup> Self-regulatory organizations "must be transparent enough to garner public trust," and "if the process is sufficiently objective and transparent, it permits the public to judge the integrity of the review system and increases confidence in self-regulation." Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Speech at the Council of Better Bus. Bureaus: Self Regulatory Orgs. and the FTC 7-8 (Apr. 11, 2005), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/self-regulatory-organizations-and-ftc/050411selfregorgs.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/self-regulatory-organizations-and-ftc/050411selfregorgs.pdf).

the claims at issue.”<sup>68</sup> This glaring design defect in the process permits wrongdoers to remain anonymous regardless of how egregious or pervasive their misconduct may have been. At a minimum, there should be a requirement of public disclosure of legal breaches and the corresponding potential of adverse publicity regardless of how quickly a direct selling company may cover its tracks after being caught. Not surprisingly, this tactic of rewarding fast actors with nondisclosure deals has done nothing to persuade the industry to comply with truth in advertising laws.

Moreover, it is conceivable that this lack of transparency was baked into the self-regulatory program by the DSA, who fully funds this program, to serve as a cloak for the discriminatory treatment of non-DSA member companies in an attempt to advantageously distinguish DSA companies from non-members<sup>69</sup> in this highly competitive industry.<sup>70</sup> The criteria for issuing an Administrative Closure – committing to discontinue or significantly modifying the claims at issue – provides the Council with tremendous discretion in determining when secretive closures are appropriate. Of 261 inquiries opened by the DSSRC between January 2019 and July 2021, 64 percent were of DSA member companies.<sup>71</sup> However, of the 50 Case

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<sup>68</sup> 2020 Year End Activity Report, National Programs Direct Selling Self-Regulatory Council Jan. 1 -Dec. 31, 2020, [https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc\\_activityreport\\_1-25-202117f78cd9-43ed-4442-8b42-6649d1bb9f9a.pdf](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc_activityreport_1-25-202117f78cd9-43ed-4442-8b42-6649d1bb9f9a.pdf).

<sup>69</sup> According to the DSSRC’s executive director, “The purpose of the program is to provide independent, impartial and comprehensive monitoring of direct selling companies on an industry-wide basis; address income representations (including lifestyle claims) and product claims by companies and salesforce members, and enhance the reputation of direct selling and elevate confidence in DSA members.” Peter Marinello, *The DSSRC is Up and Running – Is Your Company Prepared?*, MOMENTUM FACTOR BLOG (Mar. 18, 2019) <https://momofactor.com/qa-with-dssrc-director-peter-marinello/>.

<sup>70</sup> As FTC Chairman Deborah Platt Majoras cautioned more than 15 years ago:

Even when a viable self-regulatory system may be in the long-run self-interest of industry members as a group, it may at particular times be inconsistent with the short-run objectives of any one member firm. As a result, the self-regulator may have mixed motives that are difficult to reconcile. Commercial motives of individual members may diverge from those of the group and from those of the self-regulator, who wants to provide viable regulatory services for firms and consumers, while maximizing membership in the organization. This problem of mixed motives is not uncommon in business or regulatory settings, and it can often be overcome by maintaining maximum transparency in the organization’s processes and by occasionally auditing the self-regulator.

Deborah Platt Majoras, Chairman, Fed. Trade Comm’n, Speech at the Council of Better Business Bureaus: Self Regulatory Orgs. and the FTC, (Apr. 11, 2005), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/self-regulatory-organizations-and-ftc/050411selfregorgs.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/self-regulatory-organizations-and-ftc/050411selfregorgs.pdf).

<sup>71</sup> See DIRECT SELLING SELF-REGULATORY COUNCIL, 2021 ACTIVITY REPORT (2021), [https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc\\_activityreport\\_092021.pdf](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc_activityreport_092021.pdf) (last visited Mar. 9, 2022); DIRECT SELLING SELF-

Decisions published between January 2019 and October 2021 in which the direct selling company is publicly disclosed, DSA members accounted for only 18 percent (or nine in total) of these decisions. (And this percentage includes four cases that were filed by TINA.org.)<sup>72</sup> These data suggest, at a minimum, that the DSSRC subjectively believes that most DSA member companies under investigation are more willing to do the right thing in order to avoid public exposure by the Council than are non-DSA member companies even though there is no evidence to support such a belief.<sup>73</sup>

For an industry that has been marred by its inability to comply with the law,<sup>74</sup> direct selling would benefit from rigorous and remedial oversight. However, the DSSRC provides an incredibly weak form of self-regulatory accountability. In addition to problems with transparency, the Council has no ability to issue any sort of penalties or restrictions. It does not even have the power to expel member companies from the DSA if they refuse to adhere to the law or violate its Code of Ethics.<sup>75</sup> Although the DSSRC was created to both signify and facilitate compliance with the law, with no legal or binding force, it can be—and is—ignored by much of the industry.

The only weapon the DSSRC has to entice companies to comply with the law is the threat of referral to government agencies, which has generally been the FTC. However, the Commission has yet to publicly pursue any DSSRC referral and as a result of this inaction, it appears that more and more direct selling companies faced with such a threat are defying the Council and playing the odds that the FTC will do nothing. Specifically, in its first year of operation (2019), two companies rejected the authority of the DSSRC, the next year (2020) it was four companies, and in the first ten months of 2021, seven companies failed to fully engage with the DSSRC.<sup>76</sup>

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REGULATORY COUNCIL, 2020 YEAR END ACTIVITY-REPORT (2020), [https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc\\_activityreport\\_1-25-202117f78cd9-43ed-4442-8b42-6649d1bb9f9a.pdf](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/dssrc_activityreport_1-25-202117f78cd9-43ed-4442-8b42-6649d1bb9f9a.pdf) (last visited Mar. 9, 2022); DIRECT SELLING SELF-REGULATORY COUNCIL, PROGRAM ACTIVITY REPORT (2019), [https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/bbb-np-report\\_dssrc-activities-report.pdf?sfvrsn=18c33082\\_2](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/bbb-np-report_dssrc-activities-report.pdf?sfvrsn=18c33082_2;); DIRECT SELLING SELF-REGULATORY COUNCIL, PROGRAM ACTIVITY REPORT (2019), [https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/bbb-np-report\\_dssrc-activities-report.pdf?sfvrsn=18c33082\\_2](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/dssrc/bbb-np-report_dssrc-activities-report.pdf?sfvrsn=18c33082_2) (last visited Mar. 9, 2022).

<sup>72</sup> See DSSRC CASE DECISIONS AND ADMINISTRATIVE CLOSURES, <https://bbbprograms.org/programs/all-programs/dssrc/dssrc-cases-and-closures> (last visited Mar. 9, 2022).

<sup>73</sup> See *supra* Section II.

<sup>74</sup> *Id.*

<sup>75</sup> POLICIES AND PROCEDURES FOR BBB NATIONAL PROGRAMS, INC.'S DIRECT SELLING SELF-REGULATORY COUNCIL, <https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/procedures/dssrc-procedures.pdf> (last visited Mar. 9, 2022).

<sup>76</sup> See DSSRC CASE DECISIONS AND ADMINISTRATIVE CLOSURES, <https://bbbprograms.org/programs/all-programs/dssrc/dssrc-cases-and-closures> (last visited Mar. 9, 2022).

As it stands, there is no reason to believe that the DSSRC is engaged in anything other than a never-ending game of whack-a-mole with the direct selling industry as deceptive income and product claims remain on the internet despite pledges from companies to comply with the law after being caught (and identified) by the Council.<sup>77</sup> Of the 50 companies reported in Case Decisions published as of October 2021, all of them that remained in business as a direct selling company continued to engage in deceptive marketing after their DSSRC case was closed.<sup>78</sup> Subsequent violations support the contention that recurrences are the rule and not the exception.<sup>79</sup> With the industry primarily focused on advancing its own self-interest, it appears to be using the DSSRC to counter charges of wrongdoing as it simultaneously attempts to ward off more meaningful industry oversight.<sup>80</sup> To date,

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<sup>77</sup> See DSSRC Income Claims Database, TRUTH IN ADVERT., <https://truthinadvertising.org/evidence/dssrc-database/> (last visited Mar. 14, 2022); see also Laura Smith, *Does Mary Kay Think It's Above the Law?*, TRUTH In Advertising (July 26, 2021), <https://www.truthinadvertising.org/does-mary-kay-think-its-above-the-law/>.

<sup>78</sup> *Id.*

<sup>79</sup> dōTERRA provides an illustrative example of the repeat offender issue. In April 2020, the DSSRC issued a Case Decision recommending that dōTERRA cease using unsubstantiated health and income claims. Direct Selling Self-Regulatory Council, *Case Number: 17-2020—NGO Inquiry—dōTERRA International LLC*, BBB NATIONAL PROGRAMS (Apr. 3, 2020), <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-17-2020-challenge-d%C5%8Dtterra-international-llc>. Later that same month, the FTC sent dōTERRA a warning letter regarding claims that dōTERRA products could treat or prevent COVID-19 and misrepresentations concerning how much dōTERRA distributors were likely to earn. Letter from Fed. Trade Comm'n Staff to Mark A. Wolfert, Gen. Counsel, dōTERRA (Apr. 24, 2020), [https://www.ftc.gov/system/files/warning-letters/covid-19-letter\\_to\\_doterra\\_international\\_llc.pdf](https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_doterra_international_llc.pdf). Subsequently, in October 2020, the National Advertising Division (NAD) determined that dōTERRA did not provide a reasonable basis for claims that its essential oils provided certain health benefits, including specific benefits for mood, emotions and the mind. NAD also determined that the evidence in the record did not support the advertiser's "Certified Pure Therapeutic Grade" claims, and recommended that dōTERRA discontinue such marketing claims. The National Advertising Review Board (NARB) then affirmed NAD's determination and recommendations. See Press Release, BBB National Programs, NARB Recommends dōTERRA Discontinue Certain Health Benefit and "Therapeutic Grade" Essential Oil Claims (Mar. 31, 2021), <https://bbbprograms.org/media-center/newsroom/narb-doterra-health-claims>. Despite adverse opinions from the DSSRC, FTC, NAD and NARB, in November 2021, the DSSRC issued another Case Decision stating that it had reinvestigated dōTERRA and found that it was again using unsubstantiated health and earnings claims to market its products and business opportunity. Direct Selling Self-Regulatory Council, *Compliance Report—dōTERRA International, LLC*, BBB NATIONAL PROGRAMS (Nov. 8, 2021), <https://bbbprograms.org/programs/all-programs/dssrc/cases-and-closures-details/case-51-2021-compliance-report-d%C5%8Dtterra-international-llc>. dōTERRA continues to use deceptive marketing. See dōTERRA Distributors Deceptively Promote Products for COVID-19, <https://truthinadvertising.org/articles/doterra-distributors-deceptively-promote-products-for-covid-19/> (last visited Mar. 9, 2022).

<sup>80</sup> Of note, the FTC has initiated a new rulemaking proceeding concerning false, misleading and unsubstantiated earnings claims, which seeks to hold multilevel marketers, among others, accountable for "bogus money-making claims." If the Agency adopts such a rule, it will be able to compensate consumers injured by deceptive earnings claims and penalize wrongdoers. See Press

it is clear that this self-regulatory program has not brought any sort of fundamental change to the industry.

## V. THE NEED FOR FTC ACTION TO STRENGTHEN THE DSSRC

With mounting demands and a shrinking budget, the FTC has embraced self-regulatory bodies like the DSSRC in the hope that they will increase compliance with the law.<sup>81</sup> But in the case of the direct selling industry where rampant deception has been the industry norm for years, self-regulation cannot alleviate the need for government oversight and accountability. Quite to the contrary, the DSSRC will never operate effectively without a strong infusion of deterrence-based enforcement from the FTC.<sup>82</sup>

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Release, FTC Takes Action to Combat Bogus Money-Making Claims Used to Lure People into Dead-end Debt Traps, FED. TRADE COMM’N (Feb. 17, 2022), <https://www.ftc.gov/news-events/press-releases/2022/02/ftc-takes-action-combat-bogus-money-making-claims-used-lure>.

<sup>81</sup> See Maureen Ohlhausen, Acting Chairman, Fed. Trade Comm’n, Opening Remarks for the 2017 DSA Fall Conference (Nov. 7, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1271503/2017-11-7\\_dsa\\_posting\\_version.pdf](https://www.ftc.gov/system/files/documents/public_statements/1271503/2017-11-7_dsa_posting_version.pdf) (“Effective self-regulation is also valuable to government agencies like the FTC. The DSA estimates that in 2016, 20.5 million people were involved in direct selling in the United States. In contrast, the FTC has a headcount of approximately 1,160 people. Our employees are hard-working and dedicated to their mission, but if effective self-regulators can help us cover more ground, we welcome it.”) (footnote omitted); Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Keynote Remarks at DSA Bus. & Policy Conference (Oct. 25, 2016),

[https://www.ftc.gov/system/files/documents/public\\_statements/993473/ramirez\\_-\\_dsa\\_speech\\_10-25-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/993473/ramirez_-_dsa_speech_10-25-16.pdf) (“The Direct Selling Association works persistently as the voice of self-regulation in this market. And, as DSA president Joe Mariano has emphasized, the DSA Code of Ethics can play an important role in modeling behavior for its members.”); Deborah Platt Majoras, Chairman, Fed. Trade Comm’n, Speech at the Council of Better Bus. Bureaus: Self Regulatory Orgs. and the FTC (Apr. 11, 2005), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/self-regulatory-organizations-and-ftc/050411selfregorgs.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/self-regulatory-organizations-and-ftc/050411selfregorgs.pdf) (“Among the tools in the toolbox are self-regulation programs. Self-regulation is a broad concept that includes any attempt by an industry to moderate its conduct with the intent of improving marketplace behavior for the ultimate benefit of consumers.”).

<sup>82</sup> As Acting Chairman Ohlhausen told the DSA in 2017, “Effective self-regulation, of course, takes commitment and buy-in from the industry. But the FTC also has a role it can play in building up effective self-regulation. . . . First, the most effective frameworks are those backstopped by robust, yet judicious, use of government regulatory powers. When there is a viable threat of government intervention, more companies are likely to join and adhere to self-regulatory principles.” Maureen Ohlhausen, Acting Chairman, Fed. Trade Comm’n, Opening Remarks for the 2017 DSA Fall Conference, (Nov. 7, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1271503/2017-11-7\\_dsa\\_posting\\_version.pdf](https://www.ftc.gov/system/files/documents/public_statements/1271503/2017-11-7_dsa_posting_version.pdf). (footnote omitted). Ohlhausen advocated for continued use of the case-by-case enforcement process but this was before the FTC lost its ability to obtain equitable relief under Section 13(b) of the FTC Act – the authority predominantly relied upon to challenge MLM wrongdoing and make victims whole. See *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021). Moreover, in 2021 the Executive Vice President for policy at BBB National Programs and former Associate Director For Advertising Practices at the FTC stated, “At the FTC,

This is not to say that FTC enforcement of the direct selling industry has been particularly robust or effective over the past 40 years as deceptive marketing claims have become the norm within the industry on the Agency's watch.<sup>83</sup> However, the FTC's recent pivot to resurrecting its Penalty Offense Authority, which has the potential of effectively punishing wrongdoers and deterring others from engaging in similar misconduct, may provide the enforcement authority necessary to exert sufficient external pressures to incentivize the industry to consider embracing potent self-regulation.<sup>84</sup> Threats alone will not suffice to persuade the industry; the FTC needs to take direct and forceful action that results in punitive enforcement – punishment severe enough to motivate the industry to want to work toward ending the constant and continual use of deceptive marketing within direct selling.<sup>85</sup>

Only when it is no longer economically advantageous for MLM companies to deceive consumers and low-level distributors alike will there be progress toward truth in advertising. The FTC's ability to fine companies up to \$46,517 per violation through its Penalty Offense Authority may be the monetary incentive that tips the scales in favor of industry-wide compliance with the law.<sup>86</sup> As a former

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and up and down the agency, I think that there was always a lot of support for self-regulation – of recognizing that self-regulation could be a compliment to government enforcement and regulation, not an alternative but a compliment to achieve many of the same ends . . . That's not to say that self-regulation is perfect. Of course it's not. It's not a silver bullet. It has its limitations and, . . . it's important to think about why self-regulation works and why it doesn't. Like what can it do and what can it not do when you are crafting the program to make it effective." The Accountability Studio, *With Great Power Comes Great Responsibility*, BBB NAT'L PROGRAMS, at 29:39 (Apr. 21, 2021), <https://bbbprograms.org/media-center/podcast-details/great-power-great-responsibility>.

<sup>83</sup> Chopra & Levine, *supra* note 58, at 93 ("Orders that simply require wrongdoers to return their direct profits are unlikely to deter these practices market-wide, and the result is that the Commission continues to target practices – false earnings claims in particular – that it has been battling for decades, only to see this same misconduct recur year after year.").

<sup>84</sup> *Id.* at 93-104.

<sup>85</sup> Jodi Short & Michael W. Toffel, *Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361, 368 (2010), [https://www.researchgate.net/publication/47654378\\_Making\\_Self-Regulation\\_More\\_Than\\_Merely\\_Symbolic\\_The\\_Critical\\_Role\\_of\\_the\\_Legal\\_Environment](https://www.researchgate.net/publication/47654378_Making_Self-Regulation_More_Than_Merely_Symbolic_The_Critical_Role_of_the_Legal_Environment), ("Numerous studies have demonstrated the importance of external motivators like regulatory enforcement and punitive sanctions in prompting regulated organizations not only to comply with law but to regulate themselves. . . In addition, punitive enforcement, or at least the possibility of it, appears to be essential to the ultimate success of regulatory schemes that incorporate self-regulation. Research has shown that self-regulatory initiatives tend to fail in the absence of external deterrence pressures like the possibility of sanctions. . . .") (citations omitted).

<sup>86</sup> See Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1464 (1979), <https://www.acus.gov/sites/default/files/documents/1979-03%20Agency%20Assessment%20and%20Mitigation%20of%20Civil%20Money%20Penalties.pdf>, ("The penalty for violating a regulation serves as a surrogate 'cost' of production – a way to internalize an otherwise external social cost. As such, its severity becomes as

FTC Commissioner and the current Director of the Bureau of Consumer Protection explained:

The Penalty Offense Authority is well suited to have market-wide impact. By serving notice of a Commission determination on firms across an industry – while making clear that the determination is binding, enforceable, and backed by civil penalties – the Commission can correct market-wide illegal practices . . . . In fact, because civil penalties are available through the Penalty Offense Authority . . . this changes the calculus for firms in ways that increase compliance, while reducing the need to bring enforcement actions for similar conduct over and over again.<sup>87</sup>

To that end, in October 2021, the FTC notified more than 630 MLM companies, including every member company of the DSA, that “if they deceive or mislead consumers about potential earnings, the FTC won’t hesitate to use its authority to target them with large civil penalties.”<sup>88</sup> Unfortunately these letters to the industry, which contain explicit enforcement threats, only apply to income claims and not health claims.<sup>89</sup> Nevertheless, if the Commission follows through with its threat and takes decisive action against direct selling companies engaged in making deceptive earnings claims, the industry will have no option but to take notice and reevaluate how best to market its business opportunity, and in so doing, may also reexamine the potential benefits of participating in the self-regulatory process.

## CONCLUSION

Ultimately, the issue is whether the DSSRC will facilitate adherence to FTC law within the direct selling industry or undermine it as the DSA Code of Ethics has historically done. On paper, the DSA created a voluntary self-regulatory program aimed at protecting consumers and distributors from the damaging consequences of deceptive marketing tactics used within the direct selling industry

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much a part of the rational calculus of the producer as any other cost, and the severity of regulatory fines will likely have significant motivational impact.”).

<sup>87</sup> Chopra & Levine, *supra* note 58, at 103.

<sup>88</sup> Press Release, Fed. Trade Comm’n, FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties (Oct. 26, 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead>.

<sup>89</sup> Letter from Lois C. Greisman, Division of Marketing Practices, Fed. Trade Comm’n, Re: Penalty Offenses Concerning Money-Making Opportunities, <https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-money-making-opportunities/cover-letter-mmo.pdf>. Companies receiving the Notice also received a Notice of Penalty Offenses concerning the proper use of endorsements and testimonials, as companies frequently use testimonials to advertise money-making opportunities.

but it failed to provide the Council with any sanctions to motivate companies to do the right thing, and crafted a process that allows the vast majority of those that violate the law to hide in the shadows. As a result, to date, DSSRC enforcement has been, at a minimum, ineffective. Issues with transparency, accountability and lack of sanctions have hampered the Council's ability to rein in industry wrongdoers. These problems, combined with the industry's general lack of enthusiasm and overall hollow commitment to self-regulation, has meant that DSSRC actions have been largely symbolic as opposed to transformative.

Compounding these problems is the FTC's overall lack of effective enforcement, and failure to publicly prosecute any DSSRC referrals. MLMs will only comply with the law when the costs of doing so are less than the benefits of noncompliance, and the FTC's Penalty Offense Authority may be one way to influence the industry's expected costs by making their deceptive marketing tactics prohibitively expensive. It is clear that the regulation of the direct selling industry cannot be left to its trade association. The FTC must act, and if it exacts costly penalties from MLM wrongdoers, it will not only deter others from engaging in the same conduct but it may also motivate the industry to reconsider the possible benefits of robust self-regulation and save the DSSRC from a futile existence.