

**NOTE**  
**GIRL-BOSSING TOO CLOSE TO THE FTC**  
**REGULATIONS: HOW MLMS AVOID FTC**  
**ENFORCEMENT ACTIONS AND THE NEED FOR**  
**MORE STRINGENT REGULATION**

I. INTRODUCTION

Imagine a young public school teacher loses every stream of income available to her as summer looms on the horizon and the freelance gigs she had previously picked up to make ends meet are suddenly no longer an option.<sup>1</sup> She needs a way to get by and a way to pay her rent until her financial situation improves.<sup>2</sup> “Hey girlic!”<sup>3</sup> The teacher receives a message from an old friend inviting her to a “party” to learn more about a business opportunity that would allow her to make friends and make ends meet simply by “‘be[ing] [her] own boss’ from [her] phone[.]”<sup>4</sup> Before she knows it, the teacher has maxed out her credit cards in an effort to keep her business afloat.<sup>5</sup> She is amongst the ninety-nine percent of participants who fail to make a profit after joining a Multilevel Marketing Company (“MLM”).<sup>6</sup>

MLMs are just one type of company that utilizes a direct sales structure in which goods are sold directly to consumers rather than through a traditional retail environment.<sup>7</sup> While some may not recognize an MLM on its face, many Americans have had first-hand experiences

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1. Bridget Read, *Hey Hun!*, THE CUT, (Feb. 3, 2021), <https://www.thecut.com/2021/02/pandemic-unemployment-multi-level-marketing.html> [<https://perma.cc/VM2Q-ZMGT>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. JON M. TAYLOR, THE CASE (FOR AND) AGAINST MULTI-LEVEL MARKETING, at 7-2 (2011), <https://www.centerforinquiry.org/wp-content/uploads/site/33/quackwatch/taylor.pdf> [<https://perma.cc/RV32-BX32>].

7. Peter J. Vander Nat & William W. Keep, *Marketing Fraud: An Approach for Differentiating Multilevel Marketing from Pyramid Schemes*, 21 J. PUB. POL’Y & MKTG. 139, 140 (2002).

with the enterprises.<sup>8</sup> The Direct Selling Association (“DSA”) reports that in 2020 the industry reached record high figures, boasting \$40.1 billion in sales, 7.7 million sellers, and more than 41.6 million customers.<sup>9</sup> In 2020, direct sales grew by a staggering 13.9 percent as compared to the 6.7 percent increase experienced by the traditional retail industry during the same year.<sup>10</sup> This unmatched growth is due in part to the MLM business model itself; in an MLM, products are distributed through a network of individuals who, traditionally, sold their goods to friends and family members through door-to-door sales and shopping events called “parties.”<sup>11</sup> MLMs have historically spread quickly through communities due to the social nature of the business, which is often called “network marketing.”<sup>12</sup> Because of the rise of social media, direct sellers have moved their sales efforts online, enabling them to reach more potential customers with relative ease and, in turn, causing network marketing to explode.<sup>13</sup>

The individuals working for the MLMs are not employees but instead are considered consultants who operate as independent contractors.<sup>14</sup> The consultants are not paid a salary or a wage and instead earn commission on the products that they sell and on the products sold by the individuals that they directly and indirectly recruit (their “downline”), as well as bonus incentives for successfully recruiting team members.<sup>15</sup> These incentives are offered by companies because direct selling is difficult work which results in a high turnover rate in the industry.<sup>16</sup> This hierarchical structure allows MLMs to shift the burden of recruitment onto their existent salesforce, while simultaneously encouraging recruitment and retail sales.<sup>17</sup> Because the compensation structure relies on distributors dividing their efforts between sales and

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8. MARGUERITE DELIEMA ET AL., AARP STUDY OF MULTILEVEL MARKETING: PROFILING PARTICIPANTS AND THEIR EXPERIENCES IN DIRECT SALES 13 (2018).

9. *Direct Selling in the United States: 2020 Industry Overview*, DIRECT SELLING ASS’N (2021), [https://www.dsa.org/docs/default-source/research/dsa-industry-overview-fact-sheet/601b69c41746fcd88eaff000002c0f4.pdf?Status=Temp&sfvrsn=6e75d9a5\\_2%27](https://www.dsa.org/docs/default-source/research/dsa-industry-overview-fact-sheet/601b69c41746fcd88eaff000002c0f4.pdf?Status=Temp&sfvrsn=6e75d9a5_2%27) [<https://perma.cc/C9WW-KH9C>] [hereinafter “*Direct Selling in the United States*”].

10. *Id.*; *State of Retail*, NAT’L RETAIL FED’N, <https://nrf.com/topics/economy/state-retail> [<https://perma.cc/FGC6-U7U8>] (last visited Nov. 18, 2022).

11. Vander Nat & Keep, *supra* note 7, at 140.

12. *Id.* at 139.

13. Sara Silverstein et al., *People Who Sell for Multilevel Marketing Companies Look Wildly Successful on Facebook, but the Reality is Much More Complicated*, BUS. INSIDER (Aug. 6, 2019, 12:11 PM), <https://www.businessinsider.com/mlms-use-social-media-facebook-portray-financial-success-2019-7> [<https://perma.cc/27FN-WQGX>].

14. Vander Nat & Keep, *supra* note 7, at 140.

15. *Id.*

16. *Id.*

17. *Id.*

recruitment, MLMs are often criticized for the resemblance that the compensation structure bears to that present in illegal pyramid schemes.<sup>18</sup>

MLMs are regulated through the enforcement power of the Federal Trade Commission (“FTC”) to protect consumers from fraud, deception, and unfair business practices.<sup>19</sup> Companies found to be in violation of the Federal Trade Commission Act (“FTCA”) are subject to action by the FTC.<sup>20</sup> To determine whether a company is a permissible MLM or an illegal pyramid scheme, the FTC looks to the operations of the company.<sup>21</sup> A pyramid scheme is characterized by payment by a participant who receives in return “(1) the right to sell a product *and* (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users.”<sup>22</sup>

Companies are able to survive enforcement actions by the FTC by implementing certain policies that demonstrate that the company is primarily focused on retail sales rather than recruitment efforts.<sup>23</sup> In *In re Amway Corp.*,<sup>24</sup> the FTC found that a company is primarily focused on retail sales and is therefore not an illegal pyramid scheme where it: (1) requires consultants to engage in retail sales; (2) requires consultants to sell seventy percent of merchandise prior to placing an additional order; and (3) institutes a buy-back policy to purchase unsold merchandise from consultants who leave the program.<sup>25</sup> The “*Amway Safeguards*” provide companies with a roadmap to avoid classification as an illegal pyramid scheme without changing much in the way of their compensation structure.<sup>26</sup> Furthermore, current law does very little to prevent potential consultants from falling victim to misrepresentations of earning potential during the recruitment process.<sup>27</sup> Despite the immense

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18. *Id.*

19. *Enforcement*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement> [<https://perma.cc/58BT-GBH3>] (last visited Nov. 18, 2022).

20. *Id.*

21. *Fed. Trade Comm’n v. BurnLounge, Inc.*, 753 F.3d 878, 883 (9th Cir. 2013).

22. *Webster v. Omnitrition Int’l, Inc.*, 79 F.3d 776, 781 (9th Cir. 1999).

23. *BurnLounge*, 753 F.3d at 887.

24. No. 9023, 1979 WL 198944 (F.T.C. May 8, 1979).

25. *Id.* at \*35.

26. *Id.*

27. *See The Dream, S1 E7: Lazy, Stupid, Greedy or Dead*, STITCHER, at 11:51 (Oct. 29, 2018), <https://www.stitcher.com/show/the-dream/episode/s1-e7-lazy-stupid-greedy-or-dead-200144191> [<https://perma.cc/UBT8-EAR8>] (explaining the deceptive recruitment tactics utilized by MLM consultants).

growth of multilevel marketing in recent years, legislative regulation of the industry has failed to mirror that growth.<sup>28</sup>

This Note explores how a lack of meaningful legislation has allowed MLMs to avoid enforcement and designation as illegal pyramid schemes.<sup>29</sup> It maintains that Congress and the FTC need to provide clearer guidance to prevent fraud, deception, and unfair business practices.<sup>30</sup> This Note argues that the best way for Congress and the FTC to protect consumers from unscrupulous business practices is to enact stricter legislation.<sup>31</sup> This legislation would serve as an amendment to the current FTCA, codifying and strengthening the *Amway* Safeguards and adding a requisite educational component to ensure that potential consultants are fully informed prior to joining the venture.<sup>32</sup> The amendment will be similar to the previously proposed, but not passed, Anti-Pyramid Promotional Scheme Act of 2018, but will go further to strengthen the existent regulation of direct sales, drawing a clear line between a permissible multilevel marketing venture and a prohibited pyramid scheme.<sup>33</sup> Unlike other solutions, this Note recommends that the MLM system be reformed in such a way as to tackle both sides of the issue: the business practices themselves and the issue of consumer protection.<sup>34</sup>

Part II of this Note will examine the origins of MLMs in the United States and the development of formal regulation of the practice.<sup>35</sup> Part III of this Note will explore the gaps in current law regarding the regulation of MLMs and will examine a recent attempt of lawmakers to settle the issue of MLM regulation.<sup>36</sup> Part IV of this Note sets forth a solution to the present gap in existing legislation: an amendment to the FTCA that will provide clear guidelines for businesses and will encourage

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28. *Direct Selling in the United States*, *supra* note 9.

29. *See SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 38:24 (discussing how multilevel marketing companies avoid enforcement actions for activities that would otherwise be statutorily prohibited).

30. *See generally id.* (suggesting that the Federal Trade Commission's ("FTC") current practices of enforcement against multilevel marketing companies is insufficient).

31. *See generally id.* (suggesting that the lack of efficacy of the FTC's current enforcement efforts is compounded by the apparent practice of only pursuing enforcement actions against multilevel marketing companies whose violations are "cartoonishly" blatant).

32. Federal Trade Commission Act § 5, 15 U.S.C. § 45; *In re Amway Corp.*, No. 9023, 1979 WL 198944, at \*20 (F.T.C. May 8, 1979); *see infra* Part IV.

33. Anti-Pyramid Promotional Scheme Act of 2018, S. 3, 115th Cong. § 2 (2018).

34. *See infra* Part IV.

35. *See infra* Part II.

36. *See infra* Part III.

consumer protection through disclosure and a requisite educational training for potential consultants.<sup>37</sup>

## II. THE ORIGINS OF MULTILEVEL MARKETING AND ITS REGULATION

Part II of this Note will discuss the origins of multilevel marketing and the evolution of its regulation from 1914 to present day.<sup>38</sup> Part II.A of this Note will describe the history of direct sales in the United States, examining the genesis and development of the MLM industry and highlighting the psychology which underlies the success of recruitment tactics.<sup>39</sup> Part II.B of this Note will examine federal regulation of MLMs, illustrating its evolution beginning with the enactment of the FTCA in 1914, continuing with the FTC's enforcement of the statute in two landmark cases, and culminating with a discussion of the *Amway Safeguards*.<sup>40</sup>

### A. *The Growth of Multilevel Marketing*

Direct selling has been practiced in the United States for just about as long as the country has been in existence.<sup>41</sup> Over time, companies began to utilize a female labor force and to implement the namesake multilevel compensation structure that is used today.<sup>42</sup> These strategic choices allowed MLMs to experience explosive growth and success.<sup>43</sup> Despite the rarity of financial success stories in most MLMs, individuals continue to sign up for these ventures.<sup>44</sup> The psychology and behavioral

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37. See *infra* Part IV.

38. See *infra* Part II.

39. See *infra* Part II.A.

40. See *infra* Part II.B.

41. Eli Terry, *New Britain's Yankee Peddlers Boost 18th-Century Economy*, CONN. HIST. (Jan. 17, 2022), <https://connecticuthistory.org/new-britains-yankee-peddlers-boost-18th-century-economy> [<https://perma.cc/5U7N-BDZJ>]; Joseph T. Rainer, *The "Sharper" Image: Yankee Peddlers, Southern Consumers, and the Market Revolution*, 26 BUS. & ECON. HIST. 27, 27-28 (1997).

42. See *infra* Part II.A.1.

43. See *infra* Part II.A.1; *Compare Direct Selling in the United States*, *supra* note 9 (illustrating the explosive growth experienced by the Direct Sales industry in recent years), with *State of Retail*, *supra* note 10 (demonstrating the contrasting lower rate of growth of retail in recent years).

44. TAYLOR, *supra* note 6, at 7-2; see *MONAT USA 2020 Income Disclosure Statement*, MONAT, <https://sequenceinc.com/fraudfiles/wp-content/uploads/2020/08/monat2020.pdf> [<https://perma.cc/2WLQ-4SKV>] (last visited Nov. 18, 2022). Less than one percent of individuals who participate in multilevel marketing ventures earn a profit. TAYLOR, *supra*, at 7-2. Monat's 2020 income disclosure statement reveals that the average annual earnings of an entry level consultant (called a "Market Partner") in 2020 was \$161. *MONAT USA 2020 Income Disclosure Statement*, *supra* note 44. Over ninety-two percent of Monat participants are classified as "Market Partners." *Id.*

economics underlying the recruitment strategies implemented by MLMs explains why the companies continue to experience record growth while their consultants receive diminishing returns on their investments.<sup>45</sup>

### 1. The Origins of Multilevel Marketing

The concept of direct selling has been used by entrepreneurs in North America since the eighteenth century.<sup>46</sup> During the eighteenth and nineteenth centuries, Yankee Peddlers in New England began to travel from town to town, bringing completed goods directly to the consumer.<sup>47</sup> In 1855, the Southwestern Company took notice of the very successful sales strategy, and began selling its books door-to-door, turning their company into the first—and now the oldest—direct sales company in the United States.<sup>48</sup> In the beginning of direct sales, the salesforce was entirely made up of men, which begs the question of how an industry composed primarily of men became one overwhelmingly saturated with women in just 150 years.<sup>49</sup>

Women entered the direct selling industry shortly after its inception in the United States, even though their presence would not be what it is today until after the Second World War.<sup>50</sup> In 1886, the California Perfume Company, which would later change its name to Avon, was founded by David H. McConnell.<sup>51</sup> From its inception, the company placed a high emphasis on ethics and social justice and became one of the first companies to allow women to pursue income-earning opportunities.<sup>52</sup> When the Second World War removed the male salesforce from the direct sales industry, women took their places which gave way to the birth of sales “parties” in lieu of traditional door-to-door sales.<sup>53</sup> Women were able to gain access to consumers in a way never before seen; because direct salesmen had gained a negative reputation as unscrupulous, people were generally distrustful of door-to-door

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45. TAYLOR, *supra* note 6, at 9-5 to 9-6 (illustrating the various reasons different groups are drawn to, and fall victim to, multilevel marketing companies).

46. Terry, *supra* note 41.

47. *Id.*; Rainer, *supra* note 41, at 27.

48. E. Michael Fleenor, *The Southwestern Company*, TENN. ENCYC., <http://tennesseencyclopedia.net/entries/the-southwestern-company> [https://perma.cc/ZZ4G-556A] (Mar. 1, 2018).

49. MORRIS L. MAYER, *DIRECT SELLING IN THE UNITED STATES: A COMMENTARY AND ORAL HISTORY* 41 (1995).

50. *Technology Raise in the History of Direct Selling*, S4DS DIRECT SELLING SOFTWARE, <https://www.s4ds.com/blog/technology-raise-in-the-history-of-direct-selling> [https://perma.cc/9TW8-57KK] (last visited Nov. 18, 2022); MAYER, *supra* note 49, at 41.

51. *Technology Raise in the History of Direct Selling*, *supra* note 50.

52. *Id.*; MAYER, *supra* note 49, at 7-8.

53. MAYER, *supra* note 49, at 41.

salesmen and due to gender norms of the time period, women were not likely to invite a strange man into their homes.<sup>54</sup> They were, however, much more likely to welcome another woman into their homes.<sup>55</sup> Companies like Avon, who wanted to sell perfume and other wares of domesticity and femininity, wanted to sell these products to women inside their homes and knew that the gender conventions of the time would not permit men to enter women's homes without raising questions of propriety.<sup>56</sup> After the war ended and the male salesforce returned home, women who wanted to remain in the workforce often worked in direct sales because the jobs were available to them, they were experienced in the work and could leverage their existing social network, and because direct sales had begun to be seen as a line of work that was accommodating to a woman's need to take care of her home and children.<sup>57</sup>

Brownie Wise, the mother of the Party Sales Plan, began her career in direct selling as a sales representative for Stanley Home Products.<sup>58</sup> Unlike her male counterparts who continued the unscrupulous behavior that had become expected from door-to-door salesmen, Brownie hosted themed parties with games and contests, prizes for winners, and special gifts for the hostesses that allowed her to use their homes for the events.<sup>59</sup> Brownie began to sell Tupperware, rather than Stanley Home Products, because she fell in love with the product and began to purchase it and resell it through her existing party network.<sup>60</sup> Prior to her involvement, Tupperware products were exclusively sold in traditional retail stores, and did not sell exceedingly well because the product required a demonstration in order to secure customers.<sup>61</sup> Earl Tupper, the engineer who founded the company, was taken by Brownie's impressive sales of the product and decided to discontinue retail sales entirely in favor of pursuing sales exclusively through the Party Sales Plan, formally welcoming Brownie to the company in the early 1950s.<sup>62</sup>

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54. The Dream, *S1 E2: Women's Work*, STITCHER, at 26:57 (Sept. 24, 2018), <https://www.stitcher.com/show/the-dream/episode/s1-e2-womens-work-200144214> [<https://perma.cc/62UY-U6JU>].

55. *Id.*

56. *Id.* at 28:38.

57. *Id.* at 32:30.

58. The Dream, *S1 E5: Do You Party?*, STITCHER, at 01:40 (Oct. 15, 2018), <https://www.stitcher.com/show/the-dream/episode/s1-e5-do-you-party-200144198> [<https://perma.cc/5UUW-UX76>].

59. *Id.* at 04:00.

60. MAYER, *supra* note 49, at 15.

61. *Id.*

62. *Id.*

Brownie Wise's Party Sales Plan caught on and remains a staple, and maybe even the signature, of the direct selling industry.<sup>63</sup> In 1959, the Amway Corporation permanently altered the direct selling industry with their introduction of a multilevel compensation system, marking the first instance of multilevel marketing.<sup>64</sup> Amway was very successful with its multilevel compensation system and is consistently ranked as the top direct sales company in the world.<sup>65</sup> This compensation structure has been adopted by hundreds of companies and is the basis of the structure implemented by MLMs today.<sup>66</sup> Multilevel marketing and direct sales continued in this way for decades until another major event permanently altered the direct selling industry in the 1990s: the invention of the internet.<sup>67</sup>

The World Wide Web became publicly available on April 30, 1993, forever changing the way people communicate, learn, and spend money.<sup>68</sup> As of January 2021, there were 4.66 billion active internet users in the world.<sup>69</sup> With the increased availability of internet access and the growth of social media, entrepreneurs began to capitalize on the ease of access to consumers, and for good reason.<sup>70</sup> In 2012, a study found that seventy-eight percent of salespeople who utilized social media as a part of their sales strategies outperformed their counterparts who did not use social media.<sup>71</sup> Social media has allowed entrepreneurs to be successful in advertising in a way that companies are often not; consumers who may distrust or ignore advertisements by *companies* on the internet may find comfort in the familiarity of their social media connections and are more likely to be amenable to recommendations from those connections as if they were recommendations made in real

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63. *Id.*

64. *Technology Raise in the History of Direct Selling*, *supra* note 50.

65. *Global 100 Lists: Top Direct Selling Companies in the World*, DIRECT SELLING NEWS, <https://www.directsellingnews.com/global-100-lists> [<https://perma.cc/B2W4-2LXJ>] (last visited Nov. 18, 2022).

66. *Technology Raise in the History of Direct Selling*, *supra* note 50.

67. *Id.*

68. *World Wide Web (WWW) Launches in the Public Domain*, HISTORY.COM (Mar. 30, 2020), <https://www.history.com/this-day-in-history/world-wide-web-launches-in-public-domain> [<https://perma.cc/D26R-W3EU>].

69. Joseph Johnson, *Worldwide Digital Population as of January 2021*, STATISTA, <http://web.archive.org/web/20211114132252/https://www.statista.com/statistics/617136/digital-population-worldwide> [<https://perma.cc/VX83-BHX2>] (last visited Nov. 18, 2022).

70. *Technology Raise in the History of Direct Selling*, *supra* note 50.

71. Mark Fidelman, *Study: 78% of Salespeople Using Social Media Outsell Their Peers*, FORBES (May 19, 2013, 09:51 PM), <https://www.forbes.com/sites/markfidelman/2013/05/19/study-78-of-salespeople-using-social-media-outsell-their-peers/?sh=6651d5fea39e> [<https://perma.cc/S2EN-6FTZ>].



time by a friend in their offline life.<sup>72</sup> Consider the wild success of Brownie Wise’s Tupperware parties in the 1950s, but now compounded by the accessibility and wide reach of social media.<sup>73</sup> Modern day direct sellers are able to reach outside of their immediate communities and personal connections and instead are able to engage with potential customers—and recruits—far beyond their personal network.<sup>74</sup>

## 2. Psychology of Multilevel Marketing

Considering the infrequency with which participants find financial success in a multilevel marketing venture, it is surprising that the companies continue to successfully recruit consultants.<sup>75</sup> The surprising and continued growth of MLMs is due in part to the very nature of network marketing.<sup>76</sup> Reason suggests that individuals would only choose to join and participate in a multilevel marketing venture if the benefits outweighed the costs associated with joining.<sup>77</sup> The sheer number of “victims” of MLM recruitment is indicative of a bigger problem that begs the question of why so many individuals continue to

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72. Yu-Qian Zhu & Houn-Gee Chen, *Social Media and Human Need Satisfaction: Implications for Social Media Marketing*, 58 J. BUS. HORIZONS 335, 339 (2015); Bmayer, *How Multi-Level Marketing Has Changed the Social Media Landscape*, ST. EDWARDS UNIV. (Feb. 16, 2021), <http://sites.stedwards.edu/bmayer/2021/02/16/how-multi-level-marketing-has-changed-the-social-media-landscape> [<https://perma.cc/L4D4-2F6U>].

73. MAYER, *supra* note 49, at 15; Silverstein et al., *supra* note 13.

74. Silverstein et al., *supra* note 13; Kaitlyn Tiffany, *The Internet Is Starting to Turn on MLMs*, THE ATLANTIC, (Dec. 17, 2020), <https://www.theatlantic.com/technology/archive/2020/12/tiktok-bans-multilevel-marketing-mlm/617422/> [<https://perma.cc/VUF9-LVGH>].

75. TAYLOR, *supra* note 6, at 7-2; Price Lindy, *The Cult Psychology Behind MLMs*, MEDIUM (Oct. 28, 2018), <https://pricelindy.medium.com/the-cult-psychology-behind-mlms-f9426e8601e7> [<https://perma.cc/RHU4-GX4Y>].

76. JON M. TAYLOR, THE 5 RED FLAGS: FIVE CAUSAL AND DEFINING CHARACTERISTICS OF PRODUCT-BASED PYRAMID SCHEMES, OR RECRUITING MLM’S 8 (2006), <https://docslib.org/doc/2558034/5-red-flags-of-a-product-based-pyramid> [<https://perma.cc/SM4X-DK87>]; Lindy, *supra* note 75 (describing the fact that individuals join and remain in MLMs despite the low rate of success as “ridiculous”). The term “network marketing” is often used interchangeably with multilevel marketing when referring to direct sales ventures but really refers to a direct sales venture that depends on person-to-person sales and where salespeople leverage their personal and professional networks to grow their business. Adam Hayes, *Network Marketing Meaning and How It Works*, INVESTOPEDIA, <https://www.investopedia.com/terms/n/network-marketing.asp> [<https://perma.cc/E2C9-KKTL>] (last visited Nov. 18, 2022).

77. Heide Liu, *The Behavioral Economics of Multilevel Marketing*, 14 HASTINGS BUS. L.J. 109, 119 (2018). There are two cost-benefit analyses that one could conduct to rationally conclude to join a multilevel marketing venture: either (1) the project earnings outweigh the income to be earned from alternate, traditional, streams of income or (2) the prospective client values other aspects of the job differently which leads her to enter the venture. *Id.* Those who join multilevel marketing companies encounter many unanticipated costs such as training kits (which vary in price up to \$500), inventory purchases, promotional items, and subscription fees to remain active in the company. *Id.* at 112.

join MLM ventures even where the cost-benefit analysis fails to support the decision.<sup>78</sup>

Because the success of a direct selling company relies on a consultant's ability to leverage their connections to make sales in their community through parties (both virtual and live) and through sales demonstrations, the interpersonal aspect of multilevel marketing cannot be ignored when discussing why prospective participants decide to join a venture.<sup>79</sup> The multilevel compensation structure utilized by MLMs places a high pressure on consultants to recruit prospective participants in addition to the pressure to sell products.<sup>80</sup> Many consultants feeling the pressure of this system, and the pressure from their "upline" (the chain of individuals responsible for the consultant's recruitment who receive a commission on the consultant's sales) immediately turn to their close network of family and friends.<sup>81</sup> Feeling sympathetic to the needs of their loved one who is (usually) struggling to kickstart a "small business," family and friends often become, at least initially, consumers of MLM products.<sup>82</sup> The close relationship between the consultant and the consumer-turned-prospective-consultant creates a sense of trust which causes the family and friends to "lower their guard."<sup>83</sup> Family and friends who enjoy the products may fall victim to pressure applied by their recruiter, causing them to sign up to sell the products themselves as a member of the recruiter's downline at the promise of the ability to purchase the product for their personal use at a discount.<sup>84</sup> Those who sign up with an MLM in order to receive a discount for their personal

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78. TAYLOR, *supra* note 6, at 9-5 to 9-6; Liu, *supra* note 77, at 119.

79. See *supra* Part II.A.1; TAYLOR, *supra* note 6, at 9-5 to 9-6 (illustrating the different categories of people who become MLM "victims").

80. See Vander Nat & Keep, *supra* note 7, at 140.

81. TAYLOR, *supra* note 76, at 8; Laureen Miles Brunelli, *Commonly Used Direct Sales Terms*, THE BALANCE CAREERS (Nov. 20, 2019), <https://www.thebalancecareers.com/primer-of-direct-sales-terms-3542505#:~:text=as%20own%20sales,-Upline,as%20well%20as%20their%20own> [<https://perma.cc/D4E7-7AAJ>].

82. TAYLOR, *supra* note 6, at 9-5.

83. See Anne Stych, *Family and Friends Feel Pressure of Multi-level Marketing*, BIZWOMEN (Jan. 9, 2020, 7:00 AM), <https://www.bizjournals.com/bizwomen/news/latest-news/2020/01/friends-and-family-feel-pressure-of-multi-level.html?page=all> [<https://perma.cc/UF9T-FFXH>]; Scott Cohn, *Nxivm's Keith Raniere Used a Common Marketing Technique to Attract Victims*, CNBC, (Jan. 22, 2021, 01:52 PM), <https://www.cnbc.com/2021/01/22/nxivm-keith-raniere-used-multilevel-marketing-to-attract-victims.html> [<https://perma.cc/77SC-P6C2>] (describing Nxivm as a "multilevel marketing scam[]" that employs techniques to get people to "lower their guard" and "stop thinking critically").

84. TAYLOR, *supra* note 6, at 9-5; *Direct Selling in the United States*, *supra* note 9 (illustrating that, in 2020, there were 41.6 million preferred customers and discount buyers in the United States).

use are called “discount buyers” or “preferred customers.”<sup>85</sup> Family and friends who made the choice to sign up out of a desire to help out a loved one soon discover the difficulties that accompany participation in MLMs and previously strong relationships often become strained as a result of the broken trust.<sup>86</sup> Others who are drawn to MLMs are often the most vulnerable to attractive recruitment tactics which promise large paychecks with minimal time required: unemployed and underemployed military spouses and stay-at-home parents.<sup>87</sup>

Spouses of servicemembers often find it difficult to maintain consistent employment because their spouses’ careers can require frequent relocation.<sup>88</sup> Despite findings that military spouses are more likely to have completed high school and at least some post-secondary education than their civilian counterparts, these individuals are more likely to be underemployed.<sup>89</sup> Across the country, families, both military and civilian, struggle with the cost of childcare, but this issue is compounded for military families because they are more likely to support a family on just a single income.<sup>90</sup> When military spouses seek

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85. 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> [https://perma.cc/2DZV-XRSA]; *Direct Selling in the United States*, *supra* note 9.

86. TAYLOR, *supra* note 6, at 9-5.

87. Sergio Pareja, *Sales Gone Wild: Will the FTC’s Business Opportunity Rule Put an End to Pyramid Marketing Schemes?*, 39 MCGEORGE L. REV. 83, 93 (2008) (indicating that work from home schemes often target vulnerable groups, including unemployed people and stay-at-home parents); Crispin Burke, *The Truth About Multi-Level Marketing Businesses And How They Hurt Military Members*, TASK & PURPOSE (Jan. 29, 2018, 6:14 PM), <https://taskandpurpose.com/career/truth-multi-level-marketing-businesses-hurt-military-members> [https://perma.cc/7JZW-MUWU] (examining how underemployed military spouses are drawn to multilevel marketing to their own detriment).

88. Taren E. Wellman, *Employment Discrimination Against Military Spouses: A Case for Illegality Contrary to Popular Belief and Practice*, 79 A.F. L. REV. 207, 210-12 (2018) (examining the rampant employment discrimination, regardless of education level and licensure status, experienced by the spouses of service members due to the perception that military members move more often than civilian counterparts and that their spouses always move with them).

89. GABRIELLA C. GONZALEZ ET AL., EVALUATION OF THE MILITARY SPOUSE EMPLOYMENT PARTNERSHIP 2-3 (2015), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1300/RR1349/RAND\\_RR1349.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1300/RR1349/RAND_RR1349.pdf) [https://perma.cc/73P5-SZ2Y]. As of 2012, ninety-eight percent of military spouses completed high school, which is significantly higher than the national average which hovers around eighty percent. *Id.*; *2014–15 Public High School Graduation Rate*, NAT’L CTR. FOR EDUC. STAT., [https://nces.ed.gov/ccd/tables/acgr\\_re\\_and\\_characteristics\\_2014-15.asp](https://nces.ed.gov/ccd/tables/acgr_re_and_characteristics_2014-15.asp) [https://perma.cc/6ULT-D28U] (last visited Nov. 18, 2022).

90. Naomi R. Cahn & Linda C. McClain, *Gendered Complications of COVID-19: Towards a Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1, 13-14 (2020) (“Long before the pandemic, references to a ‘child care crisis’ in the United States signaled that the lack of affordable, accessible, and high-quality child care was an obstacle to full participation by mothers in the workplace.”); *The Rise in Dual-Income Families*, PEW RSCH. CTR. (June 15, 2017), [https://www.pewresearch.org/ft\\_17-06-14\\_fathers\\_dual\\_income](https://www.pewresearch.org/ft_17-06-14_fathers_dual_income) [https://perma.cc/VXQ9-LSXX]

employment outside of the home, they are faced with not only discrimination on the basis that the military family lifestyle requires spouses to relocate frequently and to be totally dedicated to childcare and domestic responsibilities, but spouses must also deal with the added stress of paying for childcare.<sup>91</sup>

Like military spouses, stay-at-home parents are often drawn to the flexible work schedule that is advertised to prospective consultants.<sup>92</sup> Parents report that many jobs lack the flexibility necessary to accommodate the needs of caregivers and that this rigidity prevents them from entering, or reentering, the workforce.<sup>93</sup> Aware of the would-be working parent's need for flexibility, and the fact that many individuals become involved in MLMs on a part-time basis, recruiting consultants emphasize the flexibility of the industry and downplay the actual time commitment necessary for success.<sup>94</sup> Even though an individual could realistically earn a more substantial and reliable income through other avenues of employment, a parent who values flexibility and the ability to remain at home with his or her children to a greater degree than they value a traditional salary may choose the MLM path.<sup>95</sup>

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(illustrating that sixty-six percent of American couples with children under the age of eighteen report that they are a dual income family); *Military Spouses in the Workplace*, HIRING OUR HEROES, <https://www.uschamberfoundation.org/sites/default/files/Military%20Spouses%20in%20the%20Workplace.pdf> [<https://perma.cc/6KN7-Z4U5>] (last visited Nov. 18, 2022).

91. Wellman, *supra* note 88, at 211-12, 248.

92. Murphy Moroney, *Are Multilevel Marketing Companies a Total Scam? A Look At the Billion-Dollar Industry Targeting Moms*, POP SUGAR (Aug. 23, 2019) <https://www.popsugar.com/family/Multilevel-Marketing-Companies-Predatory-Towards-Moms-46365447> [<https://perma.cc/5P6R-JPFN>] [hereinafter "*Industry Targeting Moms*"] ("For women who stay home with their children . . . , multilevel marketing . . . seems like a sound way to make money without having to go to an office or find consistent childcare.").

93. Brie Weiler Reynolds, *Many Stay-At-Home Parents Return to Work Later Than Planned*, FLEX JOBS, <https://www.flexjobs.com/blog/post/survey-more-than-half-stay-at-home-parents-stop-working-longer-than-planned> [<https://perma.cc/9D4T-4TTE>] (last visited Nov. 18, 2022) (showing that thirty-six percent of parents who left the work force temporarily to care for their children remained out of the workforce due to the inflexibility of their jobs).

94. Tracy Belcher, *If You Are Considering Multi-Level Marketing (MLM) AKA Pyramid Schemes Or You Know of a Loved One, Friend, Colleague Or Employee Who Is – Read This!*, LINKEDIN (Aug. 21, 2017), <https://www.linkedin.com/pulse/you-considering-multi-level-marketing-mlm-aka-pyramid-tracy-belcher> [<https://perma.cc/8MHF-93GR>] [hereinafter "*If You Are Considering MLM*"] (outlining popular myths about multilevel marketing, specifically the idea that in an MLM, a consultant can work on their business just in their spare time and still earn significant income).

95. See Liu, *supra* note 77, at 119.

### B. History of Regulation and Landmark Cases

In the early days of multilevel marketing there was very little regulation of business practices.<sup>96</sup> The regulation of MLMs, and the illegality of pyramid schemes, is found in the FTCA's prohibition of companies that engage in "unfair methods of competition" and "unfair or deceptive acts" which affect commerce.<sup>97</sup> The Act was rarely enforced against MLMs prior to the 1970s when the FTC brought two enforcement actions against companies which led to the Commission's decision of two landmark cases that definitively shaped the regulation of multilevel marketing and pyramid schemes: *In re Holiday Magic*<sup>98</sup> and *In re Amway Corp.*<sup>99</sup>

#### 1. An Introduction to the Federal Trade Commission Act

The FTCA, which was passed in 1914 and created the FTC, sought to tackle antitrust issues in the United States.<sup>100</sup> The Act was enacted to clarify and strengthen the statutory language of earlier antitrust laws including the Sherman Antitrust Act and the Clayton Antitrust Act.<sup>101</sup> The Sherman and Clayton Acts prohibited business practices and conduct by companies and individuals that would impede upon or limit competition to the detriment of consumers and the national economy.<sup>102</sup> In the early days of FTC enforcement actions, "the [Commission] was charged with the responsibility of preventing or dissolving monopolies . . . ."<sup>103</sup> Because monopolies, by nature, are counterproductive to competition, FTC enforcement actions against

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96. See *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 02:48 (implying that in the early days of multilevel marketing there was little to no meaningful regulation of, or actions of enforcement against, MLMs).

97. Federal Trade Commission Act § 5, 15 U.S.C. § 45.

98. No. 8834, 1974 WL 175319 (F.T.C. Oct. 15, 1974).

99. See *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 02:48 (discussing how two landmark FTC decisions changed the landscape of enforcement actions and regulation with respect to MLMs); No. 9023, 1979 WL 198944 (F.T.C. May 8, 1979).

100. *Our History*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/our-history> [<https://perma.cc/5NR7-PXT8>] (last visited Nov. 18, 2022); Marc Davis, *A Short History of the US Federal Trade Commission (FTC)*, INVESTOPEdia (June 25, 2019), <https://www.investopedia.com/articles/financial-theory/10/the-us-federal-trade-commission.asp> [<https://perma.cc/NU84-6829>].

101. Davis, *supra* note 100; Sherman Antitrust Act, 15 U.S.C. § 1; Clayton Antitrust Act, 15 U.S.C. § 12.

102. Davis, *supra* note 100 (discussing the initial motivation behind the enactment of the Federal Trade Commission Act and the creation of the FTC); 15 U.S.C. § 1; 15 U.S.C. § 12.

103. Davis, *supra* note 100.

these prohibited entities were authorized under the unfair competition provision in the FTCA.<sup>104</sup>

As the national economy expanded and changed, giving way to the growth of multilevel marketing, the FTC's role in regulation and enforcement of business practices also changed.<sup>105</sup> With the emergence of direct sales companies utilizing a multilevel compensation plan, the FTC suddenly became tasked with the responsibility of determining whether the representations and business practices of these companies were statutorily permissible or if they rendered the entire venture invalid as an illegal pyramid scheme.<sup>106</sup> The FTCA provides that, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."<sup>107</sup> This language authorizes the FTC to challenge MLMs whose business practices consist of unfair or deceptive acts or unfair methods of competition.<sup>108</sup>

## 2. Application of the FTCA in *In re Holiday Magic*

As MLMs grew in popularity, and notoriety, the FTC began to launch investigations into and enforcement actions against ventures whose business practices were found to be in violation of the FTCA.<sup>109</sup> Initially, the FTC experienced success challenging the practices of MLMs.<sup>110</sup> This success began with the FTC's enforcement action against Holiday Magic, the first MLM that the Commission ever investigated.<sup>111</sup>

The FTC's investigation into Holiday Magic began when the Commission received a complaint from a Holiday Magic distributor alleging that he was unable to make money in the multilevel marketing venture, in spite of representations of earning potential made to distributors by the company.<sup>112</sup> The FTC first pursued Holiday Magic for the deceptive language that the company used when making claims

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104. *Id.*; Federal Trade Commission Act § 5, 15 U.S.C. § 45.

105. Davis, *supra* note 100.

106. *See Enforcement, supra* note 19.

107. Federal Trade Commission Act § 5.

108. *See Enforcement, supra* note 19.

109. *See SI E7: Lazy, Stupid, Greedy or Dead, supra* note 27, at 06:20 (stating that, while MLMs were able to fly under the radar initially, once the FTC became aware of their activities, the Commission began to pursue enforcement and regulation of the entities consistently).

110. *See id.* at 04:08 (indicating that in the first fifteen years of consistent FTC enforcement actions and challenges against MLMs, the FTC experienced continued success).

111. *Id.* at 08:00 (interviewing Joseph S. Brownman, former attorney at the FTC and head attorney on the FTC enforcement action against Holiday Magic).

112. *Id.* at 13:00; *In re Holiday Magic*, No. 8834, 1974 WL 175319, at \*11 (F.T.C. Oct. 15, 1974).

about consultant earning potential and the strategies employed when recruiting potential consultants.<sup>113</sup> The FTC found that the representations with respect to earning potential were fraudulent, as they were rooted in the concept that if each consultant recruited five people every month, and each of those recruits recruited an additional five people every month, within a year the consultant would be a millionaire.<sup>114</sup> This claim assumes that it is possible for each consultant and their recruits to recruit five new individuals every single month.<sup>115</sup> The FTC found that, in every market they investigated, the market was saturated with Holiday Magic consultants to a degree that made it impossible to successfully recruit more participants.<sup>116</sup> The “plan” was set up to fail because it was not feasible to continue recruiting infinitely, and eventually, everyone in the market would have heard about the venture, been recruited to the venture, or joined the venture.<sup>117</sup> The FTC also found that Holiday Magic was engaged in illegally fixing the resale prices of the products it sold to its distributors.<sup>118</sup>

The Administrative Law Judge (“ALJ”) accepted the FTC’s findings and held that Holiday Magic had acted in violation of the FTCA and the Clayton Act.<sup>119</sup> The ALJ found that Holiday Magic had grossly misrepresented the earning potential of prospective consultants, utilized a “plan” which was predicated on, and destroyed by, market saturation, and engaged in illegal price fixing of resale products.<sup>120</sup> Because Holiday Magic’s activities were false and misleading, the ALJ concluded that the company’s activities were statutorily prohibited by the FTCA and the Clayton Act.<sup>121</sup>

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113. See *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 13:00 (explaining how Holiday Magic’s official recruitment pamphlets and materials contained directives on how to get potential consultants to sign up for the venture immediately, including telling recruits that joining the venture would make them happier and displaying large sums of cash in front of the recruit while asking if earning that much money in a week would interest them).

114. *Id.* at 15:00.

115. *Id.* at 15:30 (illustrating the “five-recruit” plan and the clear faults in the plan, mainly that it relies upon the assumption that every consultant has the ability to successfully recruit five people every month in perpetuity).

116. *Id.*; *In re Holiday Magic*, 1974 WL 175319, at \*156.

117. See *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 15:00 (including an interview with Joseph S. Brownman, lead counsel for the FTC in *In re Holiday Magic*). The “plan” refers to the structure of the company that required consultants to continue recruiting with no end in sight. *Id.*; *In re Holiday Magic*, 1974 WL 175319, at \*187.

118. *In re Holiday Magic*, 1974 WL 175319, at \*12, \*230.

119. *Id.* at \*230-35.

120. *Id.* at \*208.

121. See *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 15:00; *In re Holiday Magic*, 1974 WL 175319, at \*230-35.

### 3. Application of the FTCA in *In re Amway Corp.*

After experiencing a great deal of success in its pursuit of enforcement actions against MLMs for about fifteen years, the FTC instituted an enforcement action against Amway Corporation, one of the largest MLMs in the industry at the time.<sup>122</sup> This decision forever changed both how the FTC approached enforcement actions against MLMs as well as the strategies utilized by MLMs when defending themselves against attacks by the FTC.<sup>123</sup> The FTC's decision in *In re Amway Corp.* "emboldened" the MLM industry, providing it with guidelines (the "Amway Safeguards") to avoid and defend against enforcement actions.<sup>124</sup>

Going into *Amway*, the FTC felt confident challenging Amway Corporation's business practices using the exact same approach it took when challenging the practices in *Holiday Magic*.<sup>125</sup> The FTC believed that *In re Holiday Magic*,<sup>126</sup> the first case of its kind, would be a template for future enforcement actions, upon which the FTC could base future cases in order to invalidate the business practices of other MLMs.<sup>127</sup> Joseph S. Brownman served as lead counsel for the FTC on both cases and said when he was interviewed by *The Dream* podcast that not only did he have the same types of evidence that the ALJ in *Holiday Magic* had found conclusive of market over-saturation, but that he actually had more evidence going into the case against Amway.<sup>128</sup> Armed with the knowledge of its previous victory in *Holiday Magic* and confident in its plethora of evidence, the FTC leveraged the same

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122. See *S1 E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 06:20.

123. *Id.*

124. See generally *S1 E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 24:00 (discussing the effect that the *In re Amway Corp.* decision had on the FTC's enforcement power and the ability of MLMs to defend themselves against challenges to their business practices).

125. See generally *S1 E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 24:00 (interviewing Joseph S. Brownman, former attorney at the FTC and lead counsel for the FTC on both the *Holiday Magic* and the *Amway* cases and discussing the Commission's confidence in pursuing enforcement actions against MLMs after the *Holiday Magic* decision).

126. No. 8834, 1974 WL 175319 (F.T.C. Oct. 15, 1974).

127. See generally *S1 E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 24:00 (discussing Brownman's, and the FTC's, hope that *Holiday Magic* would serve as a precedent that would be applied to all future MLM challenges considered by the FTC).

128. See generally *S1 E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 24:45 (illustrating the wealth of evidence that the FTC had gathered in support of its case against Amway and contrasting that evidence with the comparatively weaker evidence the Commission had gathered when it pursued enforcement against *Holiday Magic* just a few years earlier). At the time the FTC commenced its action against *Holiday Magic*, the company had been in business for just two years, whereas the Amway Corporation had been operating for sixteen years when it found itself challenged by the FTC. *Id.* at 25:00.



charges against Amway that it did against Holiday Magic, but to a different result.<sup>129</sup>

Here, the ALJ accepted nearly none of the FTC's findings.<sup>130</sup> Most importantly, the ALJ refused to recognize that the FTC had demonstrated market saturation.<sup>131</sup> To combat the claim of market saturation, Amway provided evidence of the success and ease with which distributors in some parts of the country were able to recruit consultants and sell products; the areas for which Amway provided evidence were not amongst the areas where the FTC alleged there was market saturation.<sup>132</sup> Despite evidence that Amway encouraged distributors to make lavish claims of projected monthly earnings, including using specific figures and prices for specific goods as a benchmark, the ALJ found that these claims did not constitute misrepresentations of earning potential.<sup>133</sup> The ALJ did, however, accept the FTC's charge that Amway was engaged in illegal vertical price fixing.<sup>134</sup> On appeal, the Commission upheld the ALJ's decisions on market saturation and vertical price fixing, but reversed the decision on misrepresentation, finding that the FTC did establish the company's misrepresentations of earning potential.<sup>135</sup> Despite this partial reversal on appeal, Amway Corporation retained its status as a permissible MLM because the misrepresentations of earning potential alone were not sufficient to indicate an illegal pyramid scheme.<sup>136</sup> The *Amway* decision

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129. See *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 27:30; *In re Holiday Magic*, 1974 WL 175319, at \*7-12; *In re Amway Corp.*, No. 9023, 1979 WL 198944, at \*3-7 (F.T.C. May 8, 1979).

130. See generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 27:30 (discussing that notably the Administrative Law Judge ("ALJ") in *Amway* accepted very few of the FTC's findings as fact when deciding the outcome of the case and reviewing the determinative facts).

131. *In re Amway Corp.*, 1979 WL 198944, at \*58-59. The ALJ found that, not only was there no evidence of market saturation, but also that the concept of market saturation was immaterial to the outcome of the case because Amway was not an illegal pyramid scheme. *Id.*

132. See generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 30:00 (illustrating that the court rejected the FTC's evidence of market saturation in favor of evidence to the contrary provided by Amway Corporation despite the fact that Amway's evidence submitted in defense of their position pertained to markets in which no saturation was alleged); *In re Amway Corp.*, 1979 WL 198944, at \*36-37, \*59.

133. *In re Amway Corp.*, 1979 WL 198944, at \*59, \*61-62.

134. See generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 33:00 (discussing the evidence presented by the FTC in the enforcement action against Amway). The evidence of Amway's vertical price fixing would have been difficult for even the very defendant-friendly ALJ to deny as the president of Amway was recorded discussing the vertical price fixing and instructing his staff not to put it in writing to distributors out of fear of enforcement actions by the FTC. *Id.*; *In re Amway Corp.*, 1979 WL 198944, at \*83-84.

135. *In re Amway Corp.*, 1979 WL 198944, at \*84-86.

136. *Id.* at \*68.

was a devastating blow to the FTC and a huge victory for the MLM industry.<sup>137</sup>

#### 4. The Amway Safeguards

There has been a lot of discussion, both within this Note and in the world of multilevel marketing, centered around the *Amway* case and its impact on the multilevel marketing industry.<sup>138</sup> This is because in its argument, the Amway Corporation created a set of rules by which it measured its own conduct in order to persuade the ALJ to conclude that the Amway business practices were statutorily valid and inconsistent with those of an illegal pyramid scheme.<sup>139</sup> These rules, now referred to as the *Amway Safeguards*, were accepted by the ALJ and later by the Commission on appeal, and were treated as binding precedent when deciding the matter.<sup>140</sup> The pyramid rules, as they are called in the opinion, were invented by Amway during the course of litigation and were neither rooted in any widely held industry standard or economic proposition, nor was any evidence in support of their validity requested by the court.<sup>141</sup> The three rules presented by Amway in their argument have been adopted by the MLM industry as “safeguards” against FTC enforcement actions.<sup>142</sup> With the rules in place, companies are able to claim, as a defense to pyramid accusations, that their business is just like that of the Amway Corporation.<sup>143</sup>

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137. See *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 24:00.

138. See *supra* Part II.B.3.

139. See generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 40:00 (explaining that Amway Corporation was given the unique opportunity to craft the framework under which its own conduct and the conduct of future multilevel marketing ventures would be measured when being reviewed for alleged violations of the FTCA and pyramid scheme activity); *In re Amway Corp.*, 1979 WL 198944, at \*20.

140. See generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 40:00 (questioning why Amway Corporation’s proposed standards were accepted as law binding on the court rather than simply evidence of its individual business practices).

141. *In re Amway Corp.*, 1979 WL 198944, at \*20; see generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 42:30 (discussing that Amway Corporation’s proposed “pyramid rules” were novel at the time of the case and were not derived from nor hypothesized in any contemporaneous law or trades customs).

142. *In re Amway Corp.*, 1979 WL 198944, at \*20; see generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 43:00 (illustrating that Amway Corporation’s proposed “pyramid rules” were adopted by the court as the Amway Safeguards and that these Safeguards continue to serve as the measuring stick of the legality and validity of MLM activities).

143. See generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 43:00 (explaining that the crafting of the Amway Safeguards by Amway Corporation and the subsequent adoption of those Safeguards by the court has led MLMs faced with accusations to claim the challenged business practices are analogous to those of Amway as a first line of defense against FTC enforcement actions).

The first rule presented by Amway is the “buy-back” rule.<sup>144</sup> By instituting a buy-back rule, Amway assured that either the company, the direct distributor, or a sponsoring distributor would repurchase products from consultants who are unable to sell their products or who want to leave the business.<sup>145</sup> The buy-back policy was seen as an important safeguard for consumers because it allowed consultants who found themselves as one of the ninety-nine percent of MLM participants who are not profitable to recoup some of their investment.<sup>146</sup> The danger that consumers face with buy-back policies, however, is that many MLMs restrict the applicable merchandise significantly and there is always a possibility that the terms of the buy-back policy may change unexpectedly.<sup>147</sup>

The second rule presented by Amway is the “70% Rule” which requires that, in order to receive bonuses and other compensation incentives, distributors must resell at least seventy percent of the product that they purchase each month.<sup>148</sup> The “70% Rule” was designed to ensure that distributors do not receive compensation incentives or bonuses based solely on their monthly purchases.<sup>149</sup> By requiring that consultants keep product moving through their businesses to purchasers, the rule incentivizes consultants to prioritize retail sales.<sup>150</sup> In practice, the “70% Rule” is difficult, if not impossible, for MLMs to enforce and for the FTC to regulate.<sup>151</sup> Furthermore, it is difficult to believe that a consultant would comport with the “70% Rule” as they were likely recruited under the guise that they would be able to earn an unlimited, passive, income through recruitment alone.<sup>152</sup>

The third rule presented by Amway is the “Ten Customer” rule.<sup>153</sup> Under the “Ten Customer” rule, distributors are not eligible to receive compensation incentives or bonuses unless they demonstrate that they

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144. *In re Amway Corp.*, 1979 WL 198944, at \*20.

145. *Id.*

146. *Id.*; TAYLOR, *supra* note 6, at 7-2.

147. Ginger D. Rough, *LulaRoe Abruptly Changes Return Policy; Consultants Say They Are Out Thousands*, USA TODAY (Sept. 14, 2017, 11:33 AM), <https://www.usatoday.com/story/life/allthemoms/news/2017/09/14/lularoe-return-policy-changes-outrage/34915297> [<https://perma.cc/TY5E-8QZZ>].

148. *In re Amway Corp.*, 1979 WL 198944, at \*20.

149. *Id.*

150. *Id.*

151. *See generally* *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 45:00 (discussing the difficulty in providing proof of a company’s compliance and explaining how companies have not been required to provide proof when claiming to follow the rules).

152. *See generally id.* at 40:50 (discussing the “preposterous” concept that consultants who were promised unlimited earning potential from recruiting alone would dedicate time and effort to maintaining a business that is primarily retail based).

153. *In re Amway Corp.*, 1979 WL 198944, at \*20 (1979).

made retail sales to at least ten individual retail customers in a given month.<sup>154</sup> This rule incentivizes retail sales and rewards distributors who prioritize retail sales as opposed to those who simply focus their efforts on recruiting prospective consultants.<sup>155</sup> Where all three *Amway* Safeguards are present and satisfied, the challenged direct sales company will be found to be a permissible MLM as opposed to an illegal and prohibited pyramid scheme.<sup>156</sup>

### III. CONGRESS WORKS HARD BUT MLMs WORK HARDER

Part III of this Note will illustrate the gap in the existing legislation purporting to regulate MLMs, which makes it possible for companies to avoid FTC enforcement actions and pyramid scheme designation.<sup>157</sup> Part III.A of this Note will explore the current state of MLM regulation, highlighting the lack of stringent, meaningful anti-pyramid scheme legislation that would prevent companies from hiding in the shadows between a permissible multilevel marketing venture and an illegal pyramid scheme.<sup>158</sup> Part III.B of this Note will explore the lack of a meaningful consumer protection statute and explain the importance of enacting such a statute in order to prevent potential consultants from falling victim to misrepresentations in the recruitment process.<sup>159</sup>

#### A. Lack of Stringent Regulation

As business practices evolved and the MLM industry expanded, the need for regulation too increased.<sup>160</sup> MLMs are regulated through the FTC's enforcement power under the FTCA and the application of the *Amway* Safeguards.<sup>161</sup> Currently, the FTCA is too broad and the case law interpreting the statute has not added enough to the picture to clearly delineate between a permissible multilevel marketing venture and a

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154. *Id.*

155. *Id.*; see *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 40:50 (considering whether *Amway*'s "ten customer" rule incentivizes multilevel marketing venture participants to prioritize retail sales despite indications that a majority of the salesforce is led to believe and hopes that their success is predicated on their business efforts spent on recruiting prospective consultants).

156. *In re Amway Corp.*, 1979 WL 198944, at \*20; see *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 40:50 (discussing the outcome of the application of the *Amway* Safeguards to MLMs to determine the validity and legality of their business practices).

157. See *infra* Part III.

158. See *infra* Part III.A.

159. See *infra* Part III.B.

160. See *supra* Part II.A.1.

161. See generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27; *In re Amway Corp.*, 1979 WL 198944, at \*20; Federal Trade Commission Act § 5, 15 U.S.C. § 45.

prohibited pyramid scheme.<sup>162</sup> As the industry has grown, a movement in opposition to multilevel marketing (called “anti-MLM”) has gained traction on social media and with lawmakers.<sup>163</sup> In 2018, the Senate introduced a bill which would amend the FTCA, clarifying the statute to more effectively combat the creation and activities of illegal pyramid schemes.<sup>164</sup> While the Anti-Pyramid Promotional Scheme Act of 2018, if passed, would have been an important step towards meaningful and effective regulation of MLMs, the Act did not go far enough to protect consumers and potential consultants from fraud, deception, and unfair business practices.<sup>165</sup>

### 1. Federal Trade Commission Act

The FTCA provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”<sup>166</sup> This language is used to challenge the business practices and conduct of many business entities, including MLMs and pyramid schemes.<sup>167</sup> It is this language which authorizes the FTC to bring enforcement actions against pyramid schemes based on the deceptive acts and practices carried out by the ventures.<sup>168</sup>

A common, and successful, defense established by MLMs in the age of post-*Amway* enforcement is to claim their business practices are

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162. See generally *SI E7: Lazy, Stupid, Greedy or Dead*, supra note 27 (considering whether the FTC’s current apparent practice of only pursuing enforcement actions against MLMs whose business practices are overtly prohibited is related to the lack of statutory clarity).

163. Kaitlyn Tiffany, *How the Pandemic Stoked a Backlash to Multilevel Marketing*, THE ATLANTIC, <https://www.theatlantic.com/technology/archive/2021/01/anti-mlm-reddit-youtube/617816> [<https://perma.cc/6FE6-5YFR>] (last visited Nov. 18, 2022); Anti-Pyramid Promotional Scheme Act of 2018, S. 3, 115th Cong. § 2 (2018).

164. S. 3.

165. *Id.*; *The Dream, SI E11: And That’s When I Woke Up*, STITCHER, at 02:00 (Dec. 3, 2018), <https://www.stitcher.com/show/the-dream/episode/s1-e11-and-thats-when-i-woke-up-200144172> [<https://perma.cc/J6CE-CMNJ>] (discussing H.R. 3409 (also called the Anti-Pyramid Promotional Scheme Act of 2017), a predecessor to the Anti-Pyramid Promotional Scheme Act of 2018, and how, while it purported to protect consumers through regulation, would have effectively prevented companies from facing enforcement as illegal pyramid schemes in the future); Anti-Pyramid Promotional Scheme Act of 2017, H.R. 3409, 115th Cong. § 2 (2017).

166. Federal Trade Commission Act § 5.

167. Debra A. Valentine, Former General Counsel, Fed. Trade Comm’n, Speech on Pyramid Schemes at the International Monetary Funds Seminar on Current Legal Issues Affecting Central Banks (May 13, 1998), <https://www.ftc.gov/public-statements/1998/05/pyramid-schemes> [<https://perma.cc/BY3J-AQTA>].

168. *Id.*

similar to those of the Amway Corporation.<sup>169</sup> The ALJ determined that Amway was a permissible MLM, so it logically follows that a company claiming the *Amway* Safeguards defense, will too be found to be a permissible MLM.<sup>170</sup> As illustrated above, where a company demonstrates the existence of a buyback policy, a seventy percent rule to prevent inventory loading, and a ten customer rule to encourage and incentivize a focus on retail sales rather than on recruitment practices, the company will not be found to constitute an illegal pyramid scheme.<sup>171</sup> A common criticism of the FTC and its adoption of the *Amway* Safeguards is that the Safeguards were not promulgated by the court in *Amway* or by the FTC itself.<sup>172</sup> The *Amway* Safeguards were devised by Amway Corporation in response to the enforcement action by the FTC and were used to legitimize the company's existence and business practices.<sup>173</sup>

## 2. Anti-Pyramid Promotional Scheme Act of 2018

In 2018, Congress considered a bill that would have clarified the definitional elements of and differences between MLMs and illegal pyramid schemes.<sup>174</sup> Though the bill was not passed, it serves as a look into the direction that Congress hoped to take with MLM regulation.<sup>175</sup> While this bill would have been a step in the right direction in terms of regulation, it did not do enough to restrict the activities of MLMs.<sup>176</sup>

The Anti-Pyramid Promotional Scheme Act of 2018 provided that:

- (a) It shall be unlawful for any person to establish, operate, promote, or cause to be promoted a pyramid promotional scheme.
- (b) It shall be unlawful for any person to establish, operate, promote, or cause to be promoted any plan or operation which sells or solicits the

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169. See generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 45:00 (discussing the most common MLM defense to FTC enforcement actions and why these companies are all too often able to avoid enforcement actions by way of the Amway Defense).

170. *Id.*

171. See *supra* Part II.B.4; *In re Amway Corp.*, No. 9023, 1979 WL 198944, at \*20 (F.T.C. May 8, 1979); see generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 40:50 (discussing how adherence by MLMs to the *Amway* Safeguards causes venture participants to prioritize practices which emphasize retail sales rather than distributor recruitment).

172. *In re Amway Corp.*, 1979 WL 198944, at \*20; see generally *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 40:50 (discussing that the *Amway* Safeguards were initially proposed by Amway Corporation themselves in the heat of litigation as a defense and explanation of its own business practices).

173. *In re Amway Corp.*, 1979 WL 198944, at \*20; *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 40:50.

174. Anti-Pyramid Promotional Scheme Act of 2018, S. 3, 115th Cong. § 2 (2018).

175. *Id.*

176. *Id.*

sale of consumer products or services in the home or otherwise than in a permanent retail establishment, and which sells products or services directly or indirectly to independent salespeople for resale, to operate without a bona fide inventory repurchase agreement.

(c) It shall be unlawful for any person to establish, operate, promote, or cause to be promoted a plan or operation which causes inventory loading.

(d) Nothing in this Act may be construed to prohibit a plan or operation, or to define a plan or operation as a pyramid promotional scheme, based upon the fact that participants in the plan or operation give consideration in return for the right to receive compensation based upon purchases of goods or services or intangible property by participants for personal use, consumption, or resale so long as the plan or operation does not cause inventory loading and the plan or operation implements a bona fide inventory repurchase agreement.<sup>177</sup>

The text of the statute purports to provide protection to consumers by preventing illegal pyramid schemes from masquerading as legitimate multilevel marketing companies.<sup>178</sup> However, the language chosen by lawmakers in this case lends itself to highly problematic results in application.<sup>179</sup> Subsection (d) of the bill provided that the Act could not be construed to illegalize an MLM as an illegal pyramid scheme on any basis provided that the company institute, as a matter of policy, a “bona fide inventory repurchase agreement.”<sup>180</sup> This language, alone, would allow any direct sales company, regardless of how unscrupulous their business practices or how obvious their misrepresentations, to avoid designation as a pyramid scheme simply by implementing a repurchase agreement in their policies.<sup>181</sup>

### *B. Lack of Education for Potential Consultants*

In MLMs, potential consultants are often not made fully aware of the financial obligations associated with joining the venture and recruiting consultants often misrepresent the earning potential of venture participants.<sup>182</sup> MLMs are prohibited from making representations about the business opportunity that are “false, misleading, or unsubstantiated and material to customers” because such misrepresentations violate § 5

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177. *Id.*

178. *Id.*

179. *Id.*; see *infra* note 186 and accompanying text.

180. Anti-Pyramid Promotional Scheme Act of 2018, S. 3, 115th Cong. § 2(d) (2018).

181. See *SI, E11: And That's When I Woke Up*, *supra* note 165, at 24:30 (discussing the shortcomings of the proposed Anti-Pyramid Promotional Scheme Act of 2017 and potential windfalls for MLMs under the proposed legislation).

182. TAYLOR, *supra* note 6, at 8-55, 8-57.

of the FTCA.<sup>183</sup> The FTC Business Opportunity Rule serves to enforce the Commission's prohibition of misrepresentations regarding business opportunities by imposing a disclosure requirement on those who sell business opportunities.<sup>184</sup> However, MLMs are often exempt from this disclosure requirement.<sup>185</sup>

While the FTC may not require that MLMs provide income disclosures to potential consultants, many companies provide these disclosures voluntarily in an effort to appear transparent.<sup>186</sup> Because the FTC does not promulgate a comprehensive rule requiring uniformity across the industry with respect to mandatory disclosure, consumers are forced to rely on the transparency of the individual companies.<sup>187</sup> This results in the very type of misrepresentations of material information explicitly prohibited by § 5 of the FTCA.<sup>188</sup> These misrepresentations deprive potential participants of the opportunity to gain insight into the structure of the venture.<sup>189</sup>

The FTC Business Opportunity Rule requires that individuals engaged in the selling of a business opportunity disclose information to prospective buyers that will allow them to evaluate the risks and benefits of a business opportunity and to make an informed decision regarding their own participation.<sup>190</sup> To come within the purview of the Business Opportunity Rule, the venture in question must satisfy the regulation's

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183. *Business Guidance Concerning Multi-Level Marketing*, FED. TRADE COMM'N (Jan. 2018), <https://www.ftc.gov/tips-advice/business-center/guidance/business-guidance-concerning-multi-level-marketing> [<https://perma.cc/F7AS-KHVU>] (providing guidance to members of the multilevel marketing community on permissible business practices); Federal Trade Commission Act § 5, 15 U.S.C. § 45.

184. Federal Trade Commission Act § 5; Business Opportunity Rule, 16 C.F.R. § 437.2 (2021).

185. Franchise Rule, 16 C.F.R. § 436 (2021); Beata Krakus, *The New FTC Business Opportunity Rule Makes Waves: Impact on Franchise Systems*, FRANCHISING WORLD 19-20 (Oct. 2012), [https://www.greensfelder.com/media/publication/72\\_Krakus-Franchising-World-New-FTC-Business-Opportunity-Rule\\_October2012.pdf](https://www.greensfelder.com/media/publication/72_Krakus-Franchising-World-New-FTC-Business-Opportunity-Rule_October2012.pdf) [<https://perma.cc/6LGG-A69A>].

186. Katrina G. Eash & John C.C. Sanders, *United States: The Future of the MLM Exemption From the Business Opportunity Rule is At Risk*, MONDAQ (June 25, 2021), <https://www.mondaq.com/unitedstates/consumer-law/1083646/the-future-of-the-mlm-exemption-from-the-business-opportunity-rule-is-at-risk> [<https://perma.cc/LQ5T-KUP9>] (considering how the upcoming review of the Business Opportunity Rule could force MLMs to provide income disclosures to consumers); *MLM Income Disclosure Statements*, FRAUD FILES FORENSIC ACCT. BLOG, <https://www.sequenceinc.com/fraudfiles/2019/11/mlm-income-disclosure-statements> [<https://perma.cc/J7KW-NRPY>] (last visited Nov. 18, 2022).

187. See *MLM Income Disclosure Statements*, *supra* note 186.

188. *Id.*

189. *Id.*

190. *Business Opportunity Rule*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/business-opportunity-rule> [<https://perma.cc/D5WP-9E2X>] (last visited Nov. 18, 2022).



definition of a “business opportunity.”<sup>191</sup> The Business Opportunity Rule defines a “business opportunity” as:

a commercial arrangement in which (1) A seller solicits a prospective purchaser to enter into a new business; and (2) The prospective purchaser makes a required payment; and (3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:

(i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices, owned, leased, controlled, or paid for by the purchaser; or (ii) Provide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser’s goods or services; or (iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser’s home.<sup>192</sup>

To summarize, in order to satisfy the regulation’s definition of a “business opportunity,” a prospective purchaser must be entering into a new business, must be required to make some sort of payment, and must expect some sort of assistance be provided to them by the seller.<sup>193</sup> Where these elements are met, the Business Opportunity Rule is triggered and the furnishment of a disclosure document becomes compulsory.<sup>194</sup>

The Business Opportunity Rule requires that promoters of business opportunities provide a disclosure document to potential participants at least seven days before the potential participant signs any contract or pays any money in connection with the venture.<sup>195</sup> The FTC provides a form for the document to promote uniformity, but the document itself need only disclose: identifying information about the seller; information regarding any earnings claims made by the seller to the prospective purchaser; whether the company or any key personnel “[have] been the subject of any civil or criminal action for misrepresentation, fraud,

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191. Krakus, *supra* note 185, at 19; 16 C.F.R. § 437.1(c).

192. 16 C.F.R. § 437.1(c).

193. *Id.*; Krakus, *supra* note 185, at 19.

194. 16 C.F.R. § 437.1(c); 16 C.F.R. § 437.3; *see also* Krakus, *supra* note 185, at 19 (illustrating the three elements necessary to establish the existence of a business opportunity for the purposes of the mandatory disclosure requirements of the Business Opportunity Rule).

195. 16 C.F.R. § 437.2; *see also* *Selling a Work-at-Home or Other Business Opportunity? Revised Rule May Apply to You*, FTC FACTS FOR BUS. 2 (2011), <https://www.ftc.gov/system/files/documents/plain-language/bus79-selling-work-home-or-other-business-opportunity.pdf> [<https://perma.cc/242Q-NR33>] (explaining the application of the Business Opportunity Rule to prospective sellers of business opportunities).

securities law violations, or unfair or deceptive practices, including violations of any FTC Rule, within the [ten] years immediately preceding the date that the business opportunity is offered”; whether the seller offers a cancellation or refund policy to the prospective purchaser and any associated terms and conditions; and “the name, state, and telephone number of all purchasers who purchased the business opportunity within the last three years.”<sup>196</sup> The disclosure of this information only theoretically ensures that purchasers would be able to carefully evaluate the risks and benefits of the venture; in practice, the disclosure requirement becomes nearly meaningless when considered in light of the information it does not require sellers to disclose, the FTC’s Franchise Exemption Rule, and the current FTC policy which entirely exempts MLMs from classification under the Business Opportunity Rule.<sup>197</sup>

The Business Opportunity Rule generally does not apply to any ventures or business opportunities which satisfy the FTC’s definition of “franchise” as defined in the FTC’s Franchise Rule.<sup>198</sup> There are three elements necessary to establish that a “continuing commercial relationship or arrangement” amounts to that of a “franchise” as defined by the FTC’s Franchise Rule.<sup>199</sup> First, the franchisee must receive the right to operate a business that is associated with the franchisor’s trademark or to “offer, sell, or distribute” products or services that are associated with the franchisor’s trademark.<sup>200</sup> Second, the franchisor must retain its right to exert a substantial degree of control over the business by overseeing the franchisee’s operation of the business or providing substantial assistance to the franchisee in its operation of the business.<sup>201</sup> Finally, third, the commencement of the operation of the franchise agreement must be conditioned upon the franchisee’s furnishment of a payment of a fee to the franchisor.<sup>202</sup>

Businesses that meet the regulation’s definition of “franchise” are subject to mandatory disclosures to ensure transparency and that prospective franchisees are able to adequately evaluate the franchise

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196. 16 C.F.R. § 437.3; *see also Selling a Work-at-Home or Other Business Opportunity? Revised Rule May Apply to You*, *supra* note 195, at 2 (explaining the application of the Business Opportunity Rule to prospective sellers of business opportunities).

197. *MLM Income Disclosure Statements*, *supra* note 186; Krakus, *supra* note 185, at 19 (introducing the FTC’s Franchise Rule and illustrating how businesses which meet the requirements of the Franchise Rule are exempt from the Business Opportunity Rule’s disclosure requirement).

198. 16 C.F.R. § 437.8; *Id.* § 436.

199. 16 C.F.R. § 436.1(h).

200. *Id.* § 436.1(h)(1).

201. *Id.* § 436.1(h)(2).

202. *Id.* § 436.1(h)(3).

opportunity.<sup>203</sup> The Franchise Rule exempts from its mandatory disclosure requirement franchises in which the total of the required payments from the franchisee to the franchisor within the first six months of operation is less than \$615, and franchises where the commercial relationship is predicated on an oral contract or agreement.<sup>204</sup> While the Franchise Rule serves as an exception to the Business Opportunity Rule by exempting franchises that satisfy the requirements set forth, ventures that do not meet these requirements will still be subject to the mandatory disclosure requirement for business opportunities.<sup>205</sup>

While the mandatory disclosure requirements promulgated through the Business Opportunity Rule and the Franchise Rule do allow prospective purchasers and franchisees of business opportunities and franchises, respectively, to become more informed about the risks and benefits of the opportunity with which they are presented, this is often not the experience of prospective participants in MLMs.<sup>206</sup> Because the FTC does not require disclosures from MLMs or independent salespersons engaged in recruitment, prospective participants are forced to rely on the manifestations of the company and its salesforce.<sup>207</sup> The information provided to prospective participants with respect to the risks and benefits of participation is disparately skewed to highlight the likelihood of success in the venture.<sup>208</sup> Aside from the manifestations made by the salesforce on social media, the income disclosures that are made available by the MLM itself are often incomplete and misleading for the purposes of determining one's potential for economic success in the venture.<sup>209</sup>

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203. *Franchise Rule*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/franchise-rule> [<https://perma.cc/JTN9-Y3MM>] (last visited Nov. 18, 2022).

204. 16 C.F.R. § 436.8(a)(1); *Id.* at § 436.8(a)(7).

205. 16 C.F.R. § 437.8; *Id.* at § 436.8(a)(1); *Id.* at § 436.8(a)(7).

206. *Business Guidance Concerning Multi-Level Marketing*, *supra* note 183 (indicating that MLMs do not fall within the mandatory disclosure requirement of the Business Opportunity Rule); *MLM Income Disclosure Statements*, *supra* note 186.

207. *MLM Income Disclosure Statements*, *supra* note 186; Silverstein et al., *supra* note 13 (illustrating that multilevel marketing participants are given directives by the company and other participants to overexaggerate the success of their enterprise on social media and in communications with prospective participants in the venture).

208. Silverstein et al., *supra* note 13.

209. *Id.*; *MLM Income Disclosure Statements*, *supra* note 186; *see also* @Shelma17, INSTAGRAM (Apr. 26, 2021), <https://www.instagram.com/p/COI1oNBnpDO> [<https://perma.cc/V68Y-95CN>] (celebrating the poster's success in the MLM while implying the ease of selling the products).

Monat, a popular MLM that deals in hair care products, is one company that provides an income disclosure statement to consumers.<sup>210</sup> One Monat consultant boasts on Instagram that “the products sell themselves” as she celebrates the accomplishment of being promoted to a “Managing Market Partner.”<sup>211</sup> This consultant’s promotion from “Market Partner” to “Managing Market Partner” is a notable success in the company; in 2020, Monat reported that 92.26% of plan participants were classified at the rank of Market Partner, as compared to the merely 3.78% of participants who attained the rank of Managing Market Partner.<sup>212</sup> As previously illustrated, financial success in MLMs comes to very few; therefore, manifestations that imply the ease of success in the company are misleading and dangerous.<sup>213</sup> Because the representations made by MLMs are not closely regulated, the companies have latitude in the types of claims they make surrounding earning potential, time commitment, and financial obligations.<sup>214</sup> Without the kind of comprehensive information that would be provided under the disclosure requirement of the Business Opportunity Rule, consumers are forced to evaluate the risks and benefits of the venture based solely on the representations of the company.<sup>215</sup>

#### IV. A PATH FORWARD: A NEW ANTI-PYRAMID SCHEME STATUTE

Recognizing the issues with the proposed, but not enacted, Anti-Pyramid Promotional Scheme Act of 2018, Part IV of this Note will use the framework of that Act as a starting point to propose a new amendment to the FTCA.<sup>216</sup> This Note argues that an amendment to the FTCA would serve to promote fair business practices amongst MLMs and to protect consumers from fraud, deception, and unfair business practices in the recruitment process.<sup>217</sup> Part IV.A of this Note will contain a draft of legislation to serve as an amendment to the FTCA.<sup>218</sup> Part IV.B of this Note will discuss the proposed legislation and

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210. *MONAT USA 2020 Income Disclosure Statement*, *supra* note 44.

211. @Shelma17, *supra* note 209.

212. *MONAT USA 2020 Income Disclosure Statement*, *supra* note 44.

213. TAYLOR, *supra* note 6, at 7-2 (illustrating that less than one percent of multilevel marketing participants see financial success in the venture).

214. *See supra* Part III.B.1.

215. 16 C.F.R. § 437; *Multi-level Marketing or Illegal Pyramid Scheme?*, MICH. DEP'T OF THE ATT'Y GEN., [https://www.michigan.gov/ag/0,4534,7-359-81903\\_20942-208400--,00](https://www.michigan.gov/ag/0,4534,7-359-81903_20942-208400--,00) [<https://perma.cc/XCE3-4V33>] (last visited Nov. 18, 2022) (illustrating warning signs that consumers should be aware of when considering participating in an MLM).

216. *See infra* Part IV.

217. *See infra* Part IV.

218. *See infra* Part IV.A.

reasoning behind the chosen language and provisions.<sup>219</sup> Part IV.C of this Note will explore the external and internal political pressures which have prevented comprehensive regulation of multilevel marketing from gaining traction in the United States.<sup>220</sup>

While all fifty states have codified some prohibition on unfair business practices and pyramid schemes, there is a lack of uniformity between the states.<sup>221</sup> The various approaches to MLM regulation at the state level lead to inequitable enforcement actions against MLMs because while one state may take aggressive action against MLMs, another may statutorily protect the ventures.<sup>222</sup> Therefore, this Note argues that a federal statute regulating MLMs can be enacted pursuant to Congress's Commerce Clause power.<sup>223</sup>

### A. Proposed Legislation

This Note argues for the passage of legislation that will serve as an amendment to the existing FTCA.<sup>224</sup> The amendment is designed to codify the *Amway* Safeguards and to provide increased protection to potential venture participants through requisite educational training and counseling for potential participants prior to their joining of the venture.<sup>225</sup> The proposed statute follows.<sup>226</sup>

SECTION 1. SHORT TITLE. This Act may be cited as the "Multilevel Marketing Anti-Fraud Act."

SECTION 2. PROHIBITION OF PYRAMID SCHEMES; MULTILEVEL MARKETING ANTI-FRAUD PROTECTIONS; OTHER REQUIREMENTS. The Federal Trade Commission Act (15 U.S.C.S. §§ 41-58) is amended by inserting after Section 45e the following:

§ 45f. Prohibition of pyramid scheme; multilevel marketing anti-fraud protections; other requirements.

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219. See *infra* Part IV.B.

220. See *infra* Part IV.C.

221. *MLM Laws in the 50 States*, BABENER & ASSOCS., <https://mlmlegal.com/babener.html> [<https://perma.cc/CG58-LNHP>] (last visited Nov. 18, 2022) (comparing two state anti-pyramid statutes); Annie Blackman, *Regulating the Reluctant: Policies that Benefit Vulnerable Participants in Multi-level Marketing*, 25 U. PENN. J.L. & SOC. CHANGE 83, 100 (2021).

222. See Pareja, *supra* note 87, at 104-05; Blackman, *supra* note 221, at 100.

223. U.S. CONST. art. I, § 8, cl. 3; Blackman, *supra* note 221, at 100-01 (illustrating different kinds of enforcement mechanisms that could be used to regulate MLMs).

224. See *infra* Part IV.A.

225. See *infra* Part IV.A.

226. See *infra* note 227 and accompanying text.

(a) *Illegality of Pyramid Schemes.* It is unlawful for a person to establish, operate, participate in, or promote a pyramid scheme venture.

(b) *Buy-Back Policy.* It is unlawful for a person to establish, operate, participate in, or promote a venture which sells or attempts to sell products or services directly to consumers through any means, other than in a permanent retail location, and which sells products or services to independent salespersons for the purpose of resale without a genuine inventory repurchase agreement.

(c) *Inventory Loading.* It is unlawful for a person to establish, operate, participate in, or promote a venture which causes inventory loading.

(d) *Retail Sale Requirement.* It is unlawful for a person to participate in a venture –

(1) in which financial compensation is predicated solely on the quantity of product that is purchased by an independent salesperson in the course of a calendar month; and

(2) where the venture does not require that independent salespersons resell at least seventy percent of the product that they purchase each month.

The venture shall implement and maintain a system to ensure that every participant complies with the seventy percent resale requirement set forth in subsection (c).

(e) *Retail Customer Requirement.* It is unlawful for a person to participate in a venture that provides financial compensation incentives that are not conditioned on the successful demonstration of retail sales to at least ten individual customers in a calendar month.

(f) *Information Dissemination Activities.*

(1) A venture or participant in a venture that utilizes a direct sales structure and a multilevel compensation structure characterized by the use of independent salespersons and an emphasis on recruitment of that salesforce shall carry out information dissemination activities for all potential and existing participants in the venture regarding the company; the necessary time and financial commitment associated with the venture; and the likelihood of financial success as a result of participation in the venture. The venture shall accurately describe:

(A) all financial obligations required of participants at the outset of their involvement with the venture and as a continuing matter;

(B) comprehensive income disclosures accurately detailing the earnings of participants at each level of the company indicating the likelihood of financial success with the venture;

(C) comprehensive market saturation disclosures accurately detailing the status of the local market in terms of the per capita quantity of individuals already participating in the venture at the

salesperson or consumer level and the status of the local market with respect to competing or comparable ventures;

(D) a statement of the company policies including the complete repurchase agreement, the seventy percent retail resale requirement, and the ten monthly retail customer requirement; and

(E) a statement of the procedure for withdrawing from the venture.

(g) *Entrance Counseling for Participants.*

(1) An entity or person who seeks to establish, operate, participate in, or promote a plan, operation, or venture which utilizes a direct sales structure to market products or services directly to consumers rather than in a traditional retail environment and which utilizes a multilevel compensation scheme characterized by the use of independent salespersons and an emphasis on recruitment of that salesforce shall provide entrance counseling to all incoming participants prior to their official entrance into the venture including:

(A) debt management strategies and credit counseling designed to prevent indebtedness and facilitate understanding of indebtedness and credit; and

(B) a detailed explanation of the materials provided to the incoming participant as required in subsection (e).<sup>227</sup>

### *B. Reasoning Behind Proposed Legislation*

This Note argues that the current crisis in the MLM industry can be solved through the passage of legislation that will modernize the *Amway Safeguards* and protect consumers against unscrupulous business practices.<sup>228</sup> The proposed legislation will accomplish this by restricting the activity of MLMs and by requiring potential consultants to participate in independent educational programs to ensure that they are fully informed of the obligations which they are assuming.<sup>229</sup> Codifying the *Amway Safeguards* will prevent challenged MLMs in the future from promulgating their own standard to be used when judging the legitimacy

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227. See generally *SI, E11: And That's When I Woke Up*, *supra* note 165 (discussing the shortcomings of the proposed Anti-Pyramid Promotional Scheme Act of 2017 and potential windfalls for MLMs under the proposed legislation); see generally *Anti-Pyramid Promotional Scheme Act of 2018*, S. 3, 115th Cong. § 2 (2018) (borrowing language used in the previously proposed law to inspire the proposed amendment to the FTCA); 20 U.S.C. § 1092 (2018) (borrowing language from the Higher Education Act to craft the language requiring the implementation of information dissemination activities and educational counseling for prospective participants).

228. See *supra* Part IV.A.

229. See *supra* Part IV.A.

of their business practices.<sup>230</sup> The two-fold approach recommended by this Note will first ensure that direct sales companies are operating in a transparent manner and focusing their business efforts on retail sales rather than recruitment efforts, and second ensure that potential participants are fully informed of the risks and benefits associated with the venture and are able to properly evaluate those factors.<sup>231</sup>

Section 5A(a) formally illegalizes pyramid schemes.<sup>232</sup> This is an important predicate for the statute as the sections that follow indicate behavior by companies which will render their activities and business practices illegal due to pyramid scheme status.<sup>233</sup> Sections 5A(b) through 5A(d) codify and strengthen the *Amway* Safeguards.<sup>234</sup> Section 5A(b) codifies the requirement that MLMs must institute a buy-back program in order to operate as a legitimate business entity.<sup>235</sup> The statute then formally prohibits the practice of inventory loading.<sup>236</sup> Section 5A(d) codifies the requirement that MLMs institute a policy requiring that distributors resell at least seventy percent of all product that they purchase in a given month.<sup>237</sup> This section also stipulates that a company cannot provide compensation incentives to a consultant who fails to satisfy this requirement.<sup>238</sup> Section 5A(e) codifies the requirement that MLMs must implement a policy requiring that distributors make sales to at least ten retail customers in a given month.<sup>239</sup> This section further stipulates that the company cannot provide compensation incentives to distributors where this requirement is not satisfied.<sup>240</sup>

Sections 5A(f) and 5A(g) create a mandatory disclosure requirement and a compulsory educational counseling requirement.<sup>241</sup> Section 5A(f) imposes a mandatory disclosure requirement on MLMs similar to the disclosure requirement currently in place for business opportunities and franchises under the Business Opportunity Rule and Franchise Rule, respectively.<sup>242</sup> By requiring a comprehensive disclosure from the MLM to prospective participants to include information

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230. *S1 E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 40:50.

231. TAYLOR, *supra* note 6, at 8-55, 8-57; *In re Amway Corp.*, No. 9023, 1979 WL 198944, at \*20 (F.T.C. May 8, 1979).

232. *See supra* Part IV.A.

233. *See supra* Part IV.A.

234. *See supra* Part IV.A.

235. *See supra* Part IV.A; *In re Amway Corp.*, 1979 WL 198944, at \*20.

236. *See supra* Part IV.A.

237. *See supra* Part IV.A; *In re Amway Corp.*, 1979 WL 198944, at \*20.

238. *See supra* Part IV.A.

239. *See supra* Part IV.A; *In re Amway Corp.*, 1979 WL 198944, at \*20.

240. *See supra* Part IV.A.

241. *See supra* Part IV.A.

242. *See supra* Part IV.A; 16 C.F.R. § 437.3; *Id.* at § 436.3.



regarding financial commitment, earning potential, and market saturation, prospective participants will be able to fully evaluate the risks and benefits associated with the venture.<sup>243</sup>

Section 5A(g) creates a requisite educational counseling for prospective consultants similar to the requirements for federal student loan counseling set forth by the Higher Education Act.<sup>244</sup> This will create a system which empowers potential participants to make informed financial decisions about their participation in the venture.<sup>245</sup> As a result, those who do choose to participate in MLM ventures will be more likely to find success in those ventures and will do so without acting to their own detriment.<sup>246</sup>

### *C. The Impact of Political Pressure on Multilevel Marketing Regulation*

This Note calls for reform in the regulation of the business practices of MLMs.<sup>247</sup> Further, this Note recognizes that the passage of such legislation is dependent on the cooperation of the elected officials serving in the United States' legislative branch.<sup>248</sup> While the MLM industry experienced expansive, unprecedented growth on a macro level, the United States experienced a nationwide shift toward increased political polarization in recent years.<sup>249</sup> Discussion about the national political divide and personal involvement of many lawmakers in the MLM industry is necessary to fully understand why Congress has yet to accomplish a large scale regulatory reform like that which is proposed by this Note.<sup>250</sup>

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243. See *supra* Part IV.A; 16 C.F.R § 437.3; *Id.* at § 436.3.

244. See *supra* Part IV.A; 20 U.S.C. § 1092.

245. See *supra* Part IV.A.

246. See *supra* Part IV.A.

247. See *supra* Part IV.A; see *supra* Part IV.B.

248. See *infra* Part IV.C; see generally *SI E11: And That's When I Woke Up*, *supra* note 165, at 02:00 (exploring the difficulties that arise when attempting to pass legislation regulating multilevel marketing).

249. *Direct Selling in the United States*, *supra* note 9; *State of Retail*, *supra* note 10; Michael Dimock & Richard Wike, *America is Exceptional in the Nature of its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide> [<https://perma.cc/J8QF-XGLK>] (reflecting that, despite Joe Biden's promise during his 2020 presidential campaign to close the political divide, the United States has rarely experienced the level of polarization it experiences today).

250. See generally *SI E11: And That's When I Woke Up*, *supra* note 165, at 02:00 (discussing the difficulties in passing legislation to regulate multilevel marketing); *The Dream*, *SI E10: The American Way*, STITCHER, at 03:00 (Nov. 25, 2018), <https://www.stitcher.com/show/the-dream/episode/s1-e10-the-american-way-200144175> [<https://perma.cc/YTB5-SZJY>].

Political involvement in MLM companies is historically tied to the success of the ventures themselves.<sup>251</sup> The entwinement of lawmakers in Washington with MLMs is pervasive.<sup>252</sup> Former Secretary of Education, Betsy DeVos, became involved in Amway Corporation by way of marriage.<sup>253</sup> Her father-in-law, Richard “Rich” Martin DeVos, cofounder of Amway, was heavily involved in politics throughout his career.<sup>254</sup> Rich DeVos was a personal friend of Gerald Ford.<sup>255</sup> He became financially involved in organizations dedicated to the election of Christian politicians.<sup>256</sup> His generous donations to Ronald Reagan’s campaign in the presidential election of 1980 led to his appointment to Finance Chair of the Republican National Convention.<sup>257</sup> DeVos’s cofounder, Jay Van Andel, found himself equally entrenched in the political process, serving as the chair of the Chamber of Commerce.<sup>258</sup>

The Chamber of Commerce, contrary to popular misconception, is a non-governmental organization and is the largest lobbying group in the U.S.<sup>259</sup> In 2021, the Chamber lobbying expenditures totaled over \$66 million.<sup>260</sup> In the same year, the group with the second highest lobbying

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251. See generally *SI E10: The American Way*, *supra* note 250, at 03:00 (explaining the involvement between the founders of Amway Corporation and Washington lawmakers).

252. See generally *id.* (discussing the entwinement between the multilevel marketing community and politics); Hannah Steinkopf-Frank, *Behind the Pink Curtain*, BITCH MEDIA (Nov. 15, 2018), <https://www.bitchmedia.org/article/the-dream-multi-level-marketing-schemes> [<https://perma.cc/FZ3C-48WZ>].

253. Steinkopf-Frank, *supra* note 252.

254. *Id.*; Zack Stanton, *Rich DeVos: The Salesman Who Helped Launch the Modern Right*, POLITICO MAG. (Dec. 30, 2018), <https://www.politico.com/magazine/story/2018/12/30/rich-richard-devos-obituary-amway-politics-2018-223306> [<https://perma.cc/QB2X-2SG6>].

255. Stanton, *supra* note 254. Gerald Ford served as a longtime Congressional Representative for Grand Rapids, MI prior to serving as President. *Id.* Grand Rapids, MI is the hometown and birthplace of Rich DeVos, Jay Van Andel, and Amway Corporation. *Founders*, AMWAY GLOBAL, <https://www.amwayglobal.com/our-story/founders> [<https://perma.cc/ART2-JNBP>] (last visited Nov. 18, 2022).

256. Stanton, *supra* note 254. As the Amway Corporation became successful, DeVos was able to become involved in organizations such as the Christian Freedom Foundation and Third Century Publishers, as chairman of the board and donor, respectively. *Id.* These organizations shared a mission to encourage the election of conservative Christian politicians in an effort to “return” America to its original status as a Christian Republic. *Id.*

257. *Id.*

258. Steinkopf-Frank, *supra* note 252; *Great American Business Leaders of the 20th Century, Jay Van Andel*, HARV. BUS. SCH., [https://www.hbs.edu/leadership/20th-century-leaders/Pages/details.aspx?profile=jay\\_van\\_andel](https://www.hbs.edu/leadership/20th-century-leaders/Pages/details.aspx?profile=jay_van_andel) [<https://perma.cc/KZP5-ZMW2>] (last visited Nov. 18, 2022) [hereinafter *Jay Van Andel*].

259. *SI E10: The American Way*, *supra* note 250, at 03:00; David Brodwin, *The Chamber’s Secrets*, U.S. NEWS (Oct. 22, 2015, 01:05 PM), <https://www.usnews.com/opinion/economic-intelligence/2015/10/22/who-does-the-us-chamber-of-commerce-really-represent> [<https://perma.cc/PFS9-PN82>].

260. *Client Profile: US Chamber of Commerce*, OPEN SECRETS, <https://www.opensecrets.org/federal->

expenditure total spent nearly thirty-four percent less on its lobbying efforts than the Chamber of Commerce.<sup>261</sup>

Amway Corporation continued to remain involved in politics after the Reagan administration.<sup>262</sup> The company and its founders made generous contributions to the 1988 presidential campaign of George H.W. Bush and later to the 2000 presidential campaign of George W. Bush.<sup>263</sup> During Republican presidencies, the FTC is less likely to pursue successful enforcement actions against MLMs, due, in part, to the entanglement between the Party and industry leaders.<sup>264</sup> Under a Democratic president, however, MLMs are far more susceptible to attack through FTC enforcement actions and the promulgation of unfavorable legislation and regulations.<sup>265</sup> This trend is closely mirrored in recent history, with increased laxity in enforcement actions under a Republican president who had close ties to the MLM industry.<sup>266</sup>

Donald J. Trump's history with multilevel marketing is lengthy.<sup>267</sup> From his partnership with Ideal Health, an MLM focused on the sale of customized vitamins, which would later become The Trump Network, to his promotional recruitment videos made in collaboration with ACN, Trump's experience with MLMs is expansive.<sup>268</sup> Trump's decades long involvement with the industry demonstrates his support of the

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lobbying/clients/summary?cycle=2021&id=D000019798&name=US+Chamber+of+Commerce [https://perma.cc/3JAN-F2M5] (last visited Nov. 18, 2022).

261. *Top Spenders*, OPEN SECRETS, <https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=2021> [https://perma.cc/3JAN-F2M5] (last visited Nov. 18, 2022) (illustrating that the organization which spent the second highest amount of money on lobbying efforts in 2021, the National Association of Realtors, spent just over forty-four million dollars).

262. *SI E10: The American Way*, *supra* note 250, at 21:00.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. See generally Lisette Voytko, *Trump's Biggest Side Hustle Outside of 'Apprentice'? Multi-Level Marketing Schemes*, FORBES (Sept. 29, 2020, 04:06 PM), <https://www.forbes.com/sites/lisettevoytko/2020/09/29/trumps-biggest-side-hustle-outside-of-apprentice-multi-level-marketing-schemes/?sh=489041e71b54> [https://perma.cc/9DHL-4YDL] (detailing former-President Trump's legal troubles with MLMs); Yelena Dzhanova, *Inside Trump's Ties to the Multi-Level Marketing Company That Gave Him \$8.8 Million When He Was Approaching Financial Ruin*, BUS. INSIDER (Oct. 21, 2020, 08:23 AM), <https://www.businessinsider.com/trump-relationship-acn-mlm-company-lawsuit-2020-10> [https://perma.cc/FY8B-QY69]; Jessica Pressler, *"If I Can't Trust Donald Trump, Who Can I Trust?"*, N.Y. MAG. (Jan. 21, 2011), <https://nymag.com/news/business/70831> [https://perma.cc/ZN24-J2E8]; Katie Curley Katzman, *Trump Builds A New Empire . . . in Rowley*, EAGLE TRIBUNE (Mar. 22, 2010), [https://www.eagletribune.com/news/local\\_news/trump-builds-a-new-empire-in-rowley/article\\_bc1436c9-9ec8-5219-babf-d06a546c9aee.html](https://www.eagletribune.com/news/local_news/trump-builds-a-new-empire-in-rowley/article_bc1436c9-9ec8-5219-babf-d06a546c9aee.html) [https://perma.cc/X22R-3W5D].

268. Dzhanova, *supra* note 267; Katzman, *supra* note 267.

practice.<sup>269</sup> It logically follows that, during the Trump administration, Congress considered two iterations of the previously mentioned Anti-Pyramid Promotional Scheme Act.<sup>270</sup> While two iterations of the Act were, concededly, a step in the right direction, both bills provided ample protections for MLMs.<sup>271</sup> Typically, both the executive and legislative branches alternate between Republican and Democratic control across electorate terms.<sup>272</sup> The current scheme of legislation lacks sufficient protections to insulate the FTC from political influence and to prevent the inequitable application of standards when determining whether to pursue enforcement actions against MLMs.<sup>273</sup> Without the enactment of a comprehensive regulatory amendment to the FTCA, consistency in enforcement actions against MLMs cannot be achieved.<sup>274</sup>

## V. CONCLUSION

As multilevel marketing continues to grow, the demand for more stringent regulation will only become more dire.<sup>275</sup> As more individuals turn to remote work in the wake of the COVID-19 pandemic, it is more evident now than ever that the multilevel marketing industry is in desperate need of reform in its regulation and business practices.<sup>276</sup> The

269. NWMStars, *What Does The Donald Have to Say About Network Marketing?*, YOUTUBE (Apr. 27, 2011), <https://www.youtube.com/watch?v=WVPvxu98xRs> [<https://perma.cc/BBB3-VWZR>].

270. Anti-Pyramid Promotional Scheme Act of 2018, S. 3, 115th Cong. (2018); Anti-Pyramid Promotional Scheme Act of 2017, H.R. 3409, 115th Cong. (2017); *Donald J. Trump*, HIST., <https://www.history.com/this-day-in-history/world-wide-web-launches-in-public-domain> [<https://perma.cc/669P-UYD6>] (last updated Jul. 14, 2022).

271. See *supra* Part III.A.2; S. 3; H.R. 3409.

272. See generally *Party Government Since 1857*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Presidents-Coinciding/Party-Government> [<https://perma.cc/FG5J-4UXJ>] (last visited Nov. 18, 2022) (illustrating the trend in American governance that the two major political parties tend to alternate control of the executive and legislative branches each election cycle); Verlan Lewis, *Party Control of Government and American Party Ideology Development*, 35 *STUD. AM. POL. DEV.* 188, 214 (2018).

273. See Richard E. Wiley, *Political Influence at the FCC*, 1988 *DUKE L.J.* 280, 282 (1988) (“[W]hile public discussion of agency ‘independence’ usually focuses on allegations of improper White House influence, the most powerful and persistent ‘political’ influence over the [agency] clearly originates with the congressional appropriations and oversight committees and with other important members of the legislature.”). Richard Wiley’s experience with political influence on independent agencies during his time as Chairman of the Federal Communications Commission is illustrative of the experiences of those in policymaking positions at other agencies. *Id.* at 281-82.

274. Blackman, *supra* note 221, at 100-01.

275. See *SI E7: Lazy, Stupid, Greedy or Dead*, *supra* note 27, at 02:48 (describing the current state of federal enforcement actions against MLMs and the need for more meaningful and targeted enforcement actions).

276. Kim Parker et al., *COVID-19 Pandemic Continues to Reshape Work in America*, PEW RSCH. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19->

current scheme, which relies solely on the FTCA's prohibition on unfair business practices and the application of the *Amway* Safeguards, is not poised to adapt to the demands of the rapidly growing industry.<sup>277</sup>

This Note's proposed solution of an amendment to the FTCA would provide the multilevel marketing industry with the needed guidance and regulation to allow it to continue to grow, while ensuring that that growth is grounded in savory business practices and predicated on consumer protection above all else.<sup>278</sup> The codification of the *Amway* Safeguards is inherently necessary to ensure that all MLMs conduct their businesses in a way that prioritizes retail sales and deemphasizes recruitment in order to prevent classification as an illegal pyramid scheme.<sup>279</sup> The implementation of a mandatory disclosure requirement is necessary to ensure that consumers are not manipulated and do not fall victim to misrepresentations of earning potential, financial commitment, or market saturation when being recruiting into a MLM.<sup>280</sup>

Multilevel marketing is categorically unique; it has always utilized unique business practices, has encouraged the sale of unique products, and, in 2020, experienced unique growth.<sup>281</sup> An industry that is growing like no other, and which operates like no other, demands to be treated, and regulated, like no other, and that is the proposal of this Note.<sup>282</sup>

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pandemic-continues-to-reshape-work-in-america [https://perma.cc/V7WR-6ED6]; Pareja, *supra* note 87, at 93.

277. See Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2018); *In re Amway Corp.*, No. 9023, 1979 WL 198944, at \*20 (F.T.C. May 8, 1979).

278. See *supra* Part IV.

279. See *supra* Part IV; *In re Amway Corp.*, 1979 WL 198944, at \*20.

280. See *supra* Part IV.

281. Terry, *supra* note 41; Rainer, *supra* note 41, at 27; Fleenor, *supra* note 48; *Direct Selling in the United States*, *supra* note 9; *State of Retail*, *supra* note 10.

282. *Direct Selling in the United States*, *supra* note 9; *State of Retail*, *supra* note 10.

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