

**PYRAMID SCHEMES AND THE AMERICAN DREAM:  
THE MANY PROBLEMS WITH MULTI-LEVEL  
MARKETING AND WHY NEW LEGISLATION IS  
NEEDED TO CONSTRAIN THE INDUSTRY**

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ABSTRACT

*Multi-level marketing (MLM) is a large industry in the United States made up of independent salespeople that sell both products and the opportunity to join the business. The increasingly predatory industry has developed over years of under-regulation. Practices such as inventory loading, recruitment mandates, top-loaded compensation plans, and the tendency to recruit from particularly vulnerable groups are essential to the success of the MLM model. Each MLM is slightly different, but the foundational flaws are the same and consistently lead to the same financial losses for salespeople. To prevent more people from falling victim to these schemes, this Note proposes legislation to prohibit these practices and thus ban MLM companies. The proposed legislation is based on previous legislation from China banning MLM companies and a 2017 anti-pyramid scheme bill and aims to confront the most unethical qualities presented by MLM.*

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## INTRODUCTION

Jamie and Josh Ludwig thought they could capture the much-pursued but rarely achieved “American Dream” when they joined a nutritional supplement multi-level marketing (MLM) company, AdvoCare.<sup>1</sup> They were lured in by the promise of “financial freedom” and a flexible work schedule that would allow Jamie to stay at home with their children.<sup>2</sup> The starter kit’s initial cost of seventy-nine dollars did not seem like a large investment; however, the \$900 monthly supplement auto shipment quickly put them in debt.<sup>3</sup> An opportunity that once promised so much took more from them than they could have imagined: Jamie was working fifty to sixty hours a week and was unable to spend time with her children, while the supplements began piling up in her home with no one to sell it to, putting the family in a financial hole for years to come.<sup>4</sup> The Ludwigs’ experience was not unusual. Based on data available from a 2009 average earnings report, 99.65% of AdvoCare participants lost money that year.<sup>5</sup>

The unethical tactics of MLM companies—inventory loading, recruitment, and nondisclosure of earnings, among others—as well as the entire MLM structure, render them too similar to illegal pyramid schemes to be distinguishable.<sup>6</sup> This Note proposes new legislation to regulate MLM companies modeled after the Anti-Pyramid Promotional Scheme Act of 2017<sup>7</sup> and the Chinese Prohibition of Pyramid Marketing from 2005,<sup>8</sup> and

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1. Abby Vesoulis & Elianan Dockterman, *Pandemic Schemes: How Multilevel Marketing Distributors Are Using the Internet—and the Coronavirus—to Grow Their Businesses*, TIME (July 9, 2020, 6:29 AM), <https://time.com/5864712/multilevel-marketing-schemes-coronavirus/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. See JON M. TAYLOR, *MLM’s Abysmal Numbers*, in THE CASE (FOR AND) AGAINST MULTI-LEVEL MARKETING 1-21 (2011).

6. See *infra* Part III (discussing unethical practices that MLM companies commonly engage in).

7. H.R. 3409, 115th Cong. (2017).

8. Regulation on Prohibition of Pyramid Selling, (promulgated by the State Council, Aug. 23, 2005, effective Nov. 1, 2005) No. 444 State Council (China).

further argues that the FTC's case-by-case basis for determining the legality of MLM companies is insufficient because it encourages them to continue their inherently predatory and unethical practices. Part I of this Note describes the history and political backdrop of MLM companies. Part II describes notable legal battles involving these companies. Part III specifies the ethical issues presented and engaged in by MLM companies and, finally, Part IV provides an analysis of previous legislation and proposes new legislation to restrict MLM companies in the United States.

#### I. THE HISTORY AND POLITICS OF MLM COMPANIES IN THE UNITED STATES

Multi-level marketing is “the practice of distributing, selling or supplying products or services through various levels of independent agents (contractors, distributors, etc.).”<sup>9</sup> These independent consultants sell products for the larger company and recruit new salespeople.<sup>10</sup> MLM “[s]ellers are compensated not just for the sales they personally generate but for the sales generated by the people they recruit,” consultants earn compensation “through multiple levels of recruits (i.e., those they recruit, those their recruits recruit, etc.).”<sup>11</sup> Originally referred to as “pyramid selling,” the term “multi-level marketing” was coined in the 1980s as an attempt to legitimize the business structure and entice potential salespeople.<sup>12</sup> MLM

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9. Daryl Koehn, *Ethical Issues Connected with Multi-Level Marketing Schemes*, 29 J. BUS. ETHICS 153, 153 (2001).

10. *Id.*

11. James A. Muncy, *Ethical Issues in Multilevel Marketing: Is It a Legitimate Business or Just Another Pyramid Scheme?*, 14 MKT. EDUC. REV. 47, 47–48 (2004). Multi-level marketing is less commonly referred to as “direct sales” or “network marketing” despite neither label accurately describing the nature of the organizations. *See id.*

12. *See* Jeffrey A. Babener, *MLM: A Brief History of Network Marketing*, MLM LEGAL, <https://www.managementstudyguide.com/multi-level-marketing-history.htm> (last visited Jan. 25, 2022). The multi-level marketing practice was originally described as an “endless chain,” however, proponents of these businesses preferred to use the term “multi-level marketing” as they believed this label sounded less like a scam operation and more like a prestigious business opportunity. *See* JON M. TAYLOR, *MLM Definitions and Legitimacy*, in *THE CASE (FOR AND)*

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has proven to be a profitable model for companies; as a whole, the industry is valued at around \$90 billion in worldwide sales.<sup>13</sup>

### A. Origin Story

Door-to-door sales was the first iteration of the MLM business structure we know today.<sup>14</sup> The practice thrived during the Great Depression as, even amidst job scarcity, men could create their own income by selling and distributing products for companies.<sup>15</sup> A salesperson could buy inventory from the corporation at wholesale prices and haul that inventory from door to door in hopes of finding a buyer.<sup>16</sup> While the door-to-door salesperson did not necessarily have complete control over the products from sourcing to sale, he was a legitimate small business owner who had control over his own earning potential.<sup>17</sup> However successful the door-to-door sales industry was, it was also a slow-moving operation; a single salesperson could only be at one door at a time.<sup>18</sup> The difference between this model and MLM was that “[i]n the culture of [door-to-door] sales, everyone knew there was no such thing as a ‘secret’ to success and income was not ‘unlimited.’”<sup>19</sup>

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AGAINST MULTI-LEVEL MARKETING 1-5 (2011). While many MLM companies refer to themselves as a direct sales service, this is a misnomer as direct sales do not involve excessive recruitment, which is the most unethical aspect of MLM companies. *See id.* The term “network marketing” refers to when a business relies on recruiting or selling within one’s personal network. Muncy, *supra* note 11, at 47.

13. Muncy, *supra* note 11, at 47–48.

14. *See* JAMIE L. MULLANEY & JANET HINSON SHOPE, PAID TO PARTY: WORKING TIME AND EMOTION IN DIRECT HOME SALES, 21–23 (Anita Iltta Garey & Karen V. Hansen eds., 2012).

15. *Id.* at 21–22.

16. *Id.*

17. *Id.*

18. *Id.* at 22.

19. Robert FitzPatrick, *Myth of Direct Selling Blinds the Bulls and Believers at Herbalife*, NASDAQ (Dec. 1, 2014, 1:03 AM), <https://www.nasdaq.com/articles/myth-direct-selling-blinds-bulls-and-believers-herbalife-2014-12-01>.

### B. *The American Way*

MLM truly became a force in the United States with the creation of Amway.<sup>20</sup> Nutrilite, Amway's predecessor, was founded in 1939 by Carl Rehnborg.<sup>21</sup> He was "a self-educated 'scientist,' [and] a classic purveyor of a 'cure-all' potion."<sup>22</sup> The cure-all was sold at American traveling medicine shows and was touted as capable of curing everything from ulcers to arthritis.<sup>23</sup> In reality, what the company was selling was "an utterly ordinary food supplement" that was actually a "vitamin based upon miniscule amounts of vegetable material" and any claims about the supplement by the company were completely unsubstantiated.<sup>24</sup> Lee S. Mytinger and William S. Casselberry bought the company after World War II and applied the MLM model to Nutrilite.<sup>25</sup> Retail sales of the cure-all were devalued and replaced by recruitment bonuses, encouraging the salesforce to sell the opportunity rather than the product.<sup>26</sup> In implementing this business model, Nutrilite became the pioneer of the "'endless chain' of salespeople" structure where salespeople make money not only off of their own purchases as an upline, but also off of their downlines.<sup>27</sup> Two of the most successful recruiters were Richard DeVos and Jay Van Andel who shot up the ranks during the 1950s.<sup>28</sup> During that time, the FTC finally brought claims against Nutrilite, accusing it of being a pyramid scheme and endorsing false health claims.<sup>29</sup> Under heat brought by the lawsuit, DeVos and Van Andel broke off from Nutrilite and were able to dodge the lawsuits by

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20. *See id.*

21. *Id.* Nutrilite is "the clearest, continuous link to MLM's ancestry" and its successor, Amway, often claims to have invented the model. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Uplines are the consultants at higher ranks and downlines are the consultants that a member has recruited and thus are at a lower rank. *Id.*

28. *Id.*

29. *Id.*

“[finding] the perfect passport—patriotism and direct selling.”<sup>30</sup> They created a supplement-based MLM and named the refurbished company Amway, short for “American Way.”<sup>31</sup>

### C. Modern Trends

Beginning at the end of the twentieth century and continuing into the twenty-first, the FTC has had some success in challenging MLM companies, thus hinting at a slow change in the law.<sup>32</sup> The FTC prosecuted more pyramid schemes in the six years from 1996 to 2002 than in the previous seventeen years combined, and has implemented specific strict requirements that MLM companies must adhere to or risk losing the ability to operate.<sup>33</sup> For example, the FTC now requires that companies post income disclosure statements when making public income claims and also bans unfounded health claims.<sup>34</sup> The FTC has issued notices to companies for making such unfounded claims related to the 2014 Ebola outbreak, and more recently with the COVID-19 pandemic.<sup>35</sup> Sixteen MLM companies have received warning letters from the FTC regarding claims about “coronavirus-related health benefits of their products” and “the potential earnings for investors.”<sup>36</sup> Regardless of these small steps, the industry continues to operate with new companies emerging all the time.<sup>37</sup> Additionally, even if the FTC were to

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30. *Id.* (emphasis omitted).

31. *Id.*

32. See 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) (discussing, in part, the investigation and prosecution of pyramid schemes).

33. *Id.*; see generally 16 C.F.R. § 437 (2021) (promulgating trade regulation rules on business opportunity sellers and their affiliates).

34. See 16 C.F.R. §§ 437.3, 437.4, 437.6 (2021).

35. See Vesoulis & Dockterman, *supra* note 1 (“Some sellers imply that their non-FDA-approved supplements and essential oils can protect people from [COVID-19].”); *FTC Announces First Two Enforcement Actions Against Purveyors of Bioterrorism Defense Products*, FED. TRADE COMM'N (Feb. 27, 2002), <https://www.ftc.gov/news-events/press-releases/2002/02/ftc-announces-first-two-enforcement-actions-against-purveyors>.

36. Vesoulis & Dockterman, *supra* note 1.

37. See generally *id.* (noting that social media and difficulty regulating online platforms allows for MLM companies to rapidly evolve).

take more decisive action, its decisions regarding individual companies are not binding on the industry as a whole.<sup>38</sup> Ultimately, the FTC's lack of authority in the oversight of MLM companies speaks to the need for action at the legislative level.<sup>39</sup>

The public opinion of the MLM industry is waning as there is a growing community of people who have been manipulated and scammed by MLM schemes.<sup>40</sup> In 2020, social media platform TikTok categorized MLM companies as a scam and subsequently banned the promotion of MLM companies on the app.<sup>41</sup> Specifically, the platform banned content that "depicts or promotes Ponzi, multi-level marketing, or pyramid schemes . . . [and] called the ban a means to stop users from 'exploiting the platform to take advantage of the trust of users and bring about financial or personal harm.'"<sup>42</sup>

#### D. *The Influence of MLM Companies on American Politics*

MLM companies and politics are closely tied in the United States, leading to conflicts of interest at the expense of protecting consumer rights.<sup>43</sup> The MLM industry has a strong lobbying group that has influence over American politics and is backed by many politicians themselves.<sup>44</sup>

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38. ROBERT L. FITZPATRICK, PONZINOMICS: THE UNTOLD STORY OF MULTI-LEVEL MARKETING 249–51 (2020) [hereinafter PONZINOMICS]; see *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (May, 2021) [hereinafter *FTC Authority*]; JON M. TAYLOR, *MLM's Abysmal Numbers*, in *THE CASE (FOR AND) AGAINST MULTI-LEVEL MARKETING* 1-23 (2011) (discussing the deceptive practices of MLM schemes).

39. See, e.g., Vesoulis & Dockterman, *supra* note 1 (describing enforcement challenges that the FTC has faced, partially as a result of its limited resources); see *FTC Authority*, *supra* note 38 (highlighting how the FTC's authority is limited to the ability to investigate, engage in enforcement activities, and promulgate rules).

40. See Mary Walrath, *TikTok Pyramid Scheme Ban Draws Cheers from Anti-Multi-Level Marketing Groups*, NEWSWEEK (Dec. 18, 2020, 3:13 PM), <https://www.newsweek.com/tiktok-pyramid-scheme-ban-draws-cheers-anti-multi-level-marketing-groups-1555785#>.

41. *Id.*

42. *Id.*

43. See PONZINOMICS, *supra* note 38, at 238 ("The nation's political leaders know the facts of MLM and its dire financial and social consequences but allow it [and] profit from it.").

44. See *id.* at 4, 255.

The Republican party has a long history of supporting and legitimizing MLM companies.<sup>45</sup> A year after the FTC's complaint against Amway for operating a pyramid scheme failed in 1979, Republican nominee Ronald Reagan was elected President of the United States.<sup>46</sup> Reagan was a proponent of deregulation and conservative economic policies.<sup>47</sup> His election, combined with the FTC's Amway defeat, created a breeding ground for MLM companies to prosper.<sup>48</sup>

After Reagan's presidency concluded, Republicans continued to embolden MLM companies. In 1995, Speaker of the House Newt Gingrich gave the keynote address at the Direct Selling Association (DSA) meeting, an annual meeting run by MLM companies.<sup>49</sup> In 2001 George W. Bush appointed Timothy Muris to chair the FTC, who, prior to his appointment, had been an anti-trust lawyer, with his biggest client being Amway.<sup>50</sup> As chair, Muris ensured that the FTC's "oversight [of MLM companies] was effectively abandoned" and stopped "investigations and prosecutions" of MLM companies while ignoring consumer complaints.<sup>51</sup> Muris was not the only member of the FTC with conflicts; several former high-ranking officials within the FTC, such as former Director of Consumer

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45. *Id.* at 255.

46. ROBERT L. FITZPATRICK, *THE MAIN STREET BUBBLE: A WHISTLE BLOWER'S GUIDE TO BUSINESS OPPORTUNITY FRAUD* 10 (2010) [hereinafter *MAIN STREET BUBBLE*]; see also Jefferson Decker, *Deregulation, Reagan-Style*, REGUL. R. (Mar. 13, 2019), <https://www.theregreview.org/2019/03/13/decker-deregulation-reagan-style/> (discussing President Reagan's philosophy of separating social and economic regulation, preference for economic deregulation, and belief that the market should be self-regulated without government intervention).

47. *MAIN STREET BUBBLE*, *supra* note 46, at 10; Decker, *supra* note 46.

48. *MAIN STREET BUBBLE*, *supra* note 46, at 10 (explaining that, following Reagan's election and Amway prevailing over the FTC, "[a]n MLM 'industry' developed that operated exactly as the FTC case against Amway had tried to prevent").

49. Jeff Babener, *The Omnitrition Appeal—An Industry Issue*, MLM LEGAL (2017), <https://mlmlegal.com/omni.html>.

50. *MAIN STREET BUBBLE*, *supra* note 46, at 5.

51. *Id.* at 5–6.

protection J. Howard Beales, have gone on to work for MLM lobbyists after leaving the agency.<sup>52</sup>

Amway has embraced politics more than any other MLM company and has enjoyed much success as a result. Between 1991 and 1997, Amway gave \$4.4 million to the Republican National Committee and again donated \$1.385 million in 2000.<sup>53</sup> Amway has not just limited itself to donating money to politicians—many DeVos and Van Andel family members have run for political office.<sup>54</sup> Jay Van Andel's son ran for governor of Michigan in 2006.<sup>55</sup> Betsy DeVos, wife of Richard DeVos Jr. (who also ran for governor of Michigan), was the Secretary of Education in the Trump Administration.<sup>56</sup> Richard DeVos was inexplicably a member of Ronald Reagan's commission on the HIV epidemic despite his lack of experience in the field.<sup>57</sup> While both Jay Van Andel and Richard DeVos have recently passed away, their legacy and families live on.<sup>58</sup> Amway is so intertwined with politics that both Presidents Bush and Reagan, as well as many other right-wing politicians such as Newt Gingrich, Rick Santorum, Ralph Reed, and Oliver North, have

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52. See, e.g., *id.* at 6 (“[T]imothy Muris and the former head of Consumer Protection, J. Howard Beales (appointed by Timothy Muris while he was FTC Chairman) worked as MLM lobbyists to influence the FTC against regulation of multilevel marketing. Another Director of Consumer Protection, Jodie Bernstein, subsequently became a lobbyist for the Amway Corporation, and has urged the FTC to exempt Amway and similar schemes from any new rules over business opportunity frauds.”).

53. Rick Perlstein, *The Eye on the Pyramids (Part 3: MLMs and the Conservative Republican Infrastructure)*, NATION (July 18, 2013), <https://www.thenation.com/article/archive/eye-pyramids-part-3-mlms-and-conservative-republican-infrastructure/>. Additionally, “[i]n 2004 DeVos and his cofounder Jay Van Andel gave \$2 million each to the right with ‘Progress for America’ 527.” *Id.*

54. *Id.*

55. *Id.*

56. Betsy DeVos, *Secretary of Education—Biography*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/news/staff/bios/devos.html> (June 27, 2019); *Michigan Gubernatorial Election, 2006*, BALLOTPEdia, [https://ballotpedia.org/Michigan\\_gubernatorial\\_election,\\_2006](https://ballotpedia.org/Michigan_gubernatorial_election,_2006) (last visited Jan. 17, 2022).

57. Sandra G. Boodman, *AIDS Panel Appointed by Reagan*, WASH. POST (July 24, 1987), <https://www.washingtonpost.com/archive/politics/1987/07/24/aids-panel-appointed-by-reagan/0754d7f5-5c7c-4aff-8511-2ef36849e084/>.

58. Keith Schneider, *Richard M. DeVos, Amway Co-Founder and G.O.P. Stalwart, Dies at 92*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/obituaries/richard-devos-dead-amway.html>.

spoken at Amway functions.<sup>59</sup> As of 2013, “[f]ive members of the House Republican caucus are also Amway distributors.”<sup>60</sup>

While politicians have long been tied to MLM companies, the most involved of them is likely former President Donald Trump. In 2020, Trump appointed James Miles, a former member of two MLM companies, as the CEO of the government-funded Open Technology Fund.<sup>61</sup> Miles was formerly a member of both Excel Communications and Fortune Hi-Tech Marketing, a company the FTC brought down for operating an illegal pyramid scheme.<sup>62</sup> Additionally, Trump himself has promoted, participated in, and advertised for multiple MLM companies.<sup>63</sup> In 2020, he came under fire for his dealings with the American Communications Network (ACN), an MLM company from which four former sellers have brought suit against Trump alleging that his endorsement gave the company legitimacy and encouraged them to join despite its predatory business structure.<sup>64</sup> In a promotional video for the company, Trump said “I work with a lot of companies and I can say with 100% confidence that you’ve made the right decision choosing ACN.”<sup>65</sup> In total, Trump earned \$8.8 million from ACN between 2005 and 2015.<sup>66</sup> This was not the only time Trump promoted the MLM industry; he also created the Trump Network, an MLM company that sold vitamins during its

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59. Perlstein, *supra* note 54.

60. *Id.*

61. Daniel Lippman, *Trump-Appointed Tech Fund Chief Linked to Multilevel Marketing Companies*, POLITICO (Aug. 6, 2020, 5:47 PM), <https://www.politico.com/news/2020/08/06/government-tech-fund-ceo-multilevel-marketing-392406>; USAGM CEO Michael Pack Names James M. Miles, Former SC Secretary of State, Acting CEO of Open Technology Fund, U.S. AGENCY FOR GLOB. MEDIA (July 7, 2020), <https://www.usagm.gov/2020/07/07/usagm-ceo-michael-pack-names-james-m-miles-former-sc-secretary-of-state-acting-ceo-of-open-technology-fund/>.

62. *Id.*

63. See Lisette Voytko, *Trump’s Biggest Side Hustle Outside of ‘Apprentice’? Multi-Level Marketing Schemes*, FORBES (Sept. 29, 2020, 4:05 PM), <https://www.forbes.com/sites/lisettevoytko/2020/09/29/trumps-biggest-side-hustle-outside-of-apprentice-multi-level-marketing-schemes>.

64. *See id.*

65. *Id.*

66. *Id.* He promoted the company through his show, *The Apprentice*, and according to a New York Times exposé of his tax records, it saved him from imminent financial ruin. *See id.*

short run before declaring bankruptcy in 2011.<sup>67</sup> As of 2016, Trump had made more than \$11 million from his involvement with these two failed MLM scams and, as a result, faces lawsuits alleging fraud, false advertising, and unfair competition.<sup>68</sup>

### E. *The Direct Selling Association and Lobbying*

MLM companies have enjoyed bipartisan support thanks to their strong lobbying efforts.<sup>69</sup> The DSA began as a lobbying group for direct sales companies, the door-to-door salesmen of old, but today mostly represents MLM companies.<sup>70</sup> With the influx of MLM companies since the 1979 *Amway* decision that legitimized the business model,<sup>71</sup> many MLM companies joined the DSA, now making up 90% of its members.<sup>72</sup> Despite DSA's claims that its members make up 90% of the direct selling industry—a legitimate business structure where salespeople earn commission based on their sales of a company's product<sup>73</sup>—MLM companies have overtaken the group and have subsequently “vigorously resist[ed]

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67. *Id.*; Ana Swanson, *The Trump Network Sought to Make People Rich, but Left Behind Disappointment*, WASH. POST (Mar. 23, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/03/23/the-trump-network-sought-to-make-people-rich-but-left-behind-disappointment/>.

68. Voytko, *supra* note 64; Ian Tuttle, *Trump's Multi-Level Marketing Telecom Endorsement Is Another Example of His Terrible Judgement*, NAT'L REV. (Mar. 14, 2016, 8:00 AM), <https://www.nationalreview.com/2016/03/donald-trump-american-communications-network-multi-level-marketing-boondoggle/>.

69. See Michelle Celarier, *Trump's Great Pyramid*, SLATE (Feb. 21, 2017, 11:06 AM), <https://slate.com/business/2017/02/the-trump-era-will-be-a-boon-for-multilevel-marketing-companies.html> (“Then there’s Congress, where critics also fear the passage of legislative efforts they say would virtually legitimize many pyramid schemes. One such bill [was] introduced last summer by a bipartisan caucus organized by the industry lobbying group, the Direct Selling Association . . .”).

70. FitzPatrick, *supra* note 19.

71. *In re Amway Corp.*, 93 F.T.C. 618, 191, 205 (1979) (holding that Amway was not “an illegal ‘pyramid scheme’” because its distributors were not “required to pay a headhunting [sic] fee or buy a large amount of inventory” as Amway bought back inventory and required distributors to sell at least 70% of their inventory).

72. FitzPatrick, *supra* note 19.

73. *Id.*

transparency regarding income claims [necessary] to protect consumers.”<sup>74</sup>

The DSA’s power was illustrated when the FTC proposed the “Business Opportunity Rule” in 2006.<sup>75</sup> The rule required that work-from-home businesses distribute a document to potential customers stating “whether the company was involved in any fraud-based lawsuits; the terms of its refund policies; ‘[t]he total number of purchasers in the past two years and the number of those purchasers seeking a refund or to cancel in that time period;’ and a list of references.”<sup>76</sup> The document was meant to protect consumers against false claims made by companies looking to attract sales and membership by requiring these pre-sale disclosures similar to those distributed by franchises.<sup>77</sup> However, thanks to lobbying efforts by companies like Avon, Herbalife, and Amway—and efforts by the DSA to pressure members of Congress to write letters to the FTC in opposition—the law was modified before it was passed in 2012, exempting most MLM companies from disclosing exact earning potential numbers to prospective distributors.<sup>78</sup> Overall, the influence these companies wield within political groups—with a select number of high-ranking politicians themselves having stakes in

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74. TAYLOR, *supra* note 5, at 7-4. “[D]irect selling died long ago in America, and today’s DSA members merely grabbed the domain name.” FITZPATRICK, *supra* note 19.

75. See Business Opportunity Rule, 16 C.F.R. § 437 (2021); Emily Stewart, *MLMs Might Not Be Able to Get Away with Their Shady Promises Much Longer*, Vox (Oct. 22, 2021, 8:30 AM), <https://www.vox.com/the-goods/22732586/ftc-mlm-rohit-chopra-business-opportunity-rule>;

76. Matt Stroud, *How Lobbying Dollars Prop Up Pyramid Schemes*, VERGE (Apr. 8, 2014, 10:30 AM), <https://www.theverge.com/2014/4/8/5590550/alleged-pyramid-schemes-lobbying-ftc>.

77. See *id.* (citing 16 C.F.R. § 437); KATHLEEN BENWAY, ALLYSON HIMELFARB, LOIS C. GREISMAN & DAVID VLADECK, DISCLOSURE REQUIREMENTS AND PROHIBITIONS CONCERNING BUSINESS OPPORTUNITIES: STAFF REPORT TO THE FEDERAL TRADE COMMISSION AND PROPOSED REVISED TRADE REGULATION RULE 1-2 [hereinafter FTC DISCLOSURE REQUIREMENTS] (“The [Revised Proposed Business Opportunity Rule] would have required that business opportunity sellers disclose to potential purchasers four categories of material information, including: litigation history of the business opportunity and certain key personnel; the terms of any cancellation or refund policy, if offered; documentation and substantiation for any claims sellers make about potential earnings; and contact information for previous purchasers of the business opportunity. It also would have prohibited sellers from making certain misrepresentations and impose recordkeeping.”).

78. Stroud, *supra* note 77. Fifty-seven Republican and twenty-four Democratic congresspeople wrote letters in opposition. *Id.*

MLM companies—has made regulating the unethical practices of these companies unpopular for politicians.

## II. MULTI-LEVEL MARKETING IN THE UNITED STATES LEGAL SCHEME

Established in 1914, the FTC is the agency responsible for policing the legal business model used by MLM companies and prosecuting what it considers illegal pyramid schemes.<sup>79</sup> The FTC has adjudicatory, enforcement, and rulemaking authority but can only use this authority against “unfair or deceptive” acts explicitly prohibited by the FTC Act.<sup>80</sup> Although no singular statute prohibits the operation of pyramid schemes within the United States, the FTC can choose to prosecute any alleged pyramid scheme for “deceptive practices and fraud” that affects trade.<sup>81</sup> After determining “through adjudication that a practice violates consumer protection or competition law, the FTC must still seek the aid of a court to obtain civil penalties or consumer redress for violations of its orders to cease and desist or trade regulation rules.”<sup>82</sup> To determine whether practices are unfair and deceptive, the FTC utilizes trade regulation rules that address commonly unfair or deceptive practices rather than rely solely on actions against individuals.<sup>83</sup> In its earlier years, the FTC was tough on MLM companies and brought them down relatively easily for being pyramid schemes; however, in 1979, there was a shift stemming from the

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79. *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> (last visited Jan. 21, 2022); *Multi-Level Marketing Businesses and Pyramid Schemes*, FED. TRADE COMM’N, <https://www.consumer.ftc.gov/articles/0065-multi-level-marketing-businesses-and-pyramid-schemes> (last visited Jan. 21, 2022).

80. *FTC Authority*, *supra* note 38.

81. *Charged with a Ponzi Scheme—How Can a Lawyer Help Me?*, HG.ORG, <https://www.hg.org/legal-articles/charged-with-a-ponzi-scheme-how-can-a-lawyer-help-me-49522> (last visited Jan. 20, 2022).

82. *FTC Authority*, *supra* note 38.

83. *Id.*

landmark *FTC v. Amway* decision that established the MLM business structure as legitimate in the United States.<sup>84</sup>

The following Sections highlight three rule-establishing cases and three complaints or settlements that display those rules in action. *Koscot* distinguished pyramid schemes from MLM companies based on product sales,<sup>85</sup> *Amway* verified the legality of the MLM model and established the seventy-three *retail rule*,<sup>86</sup> and *Omnitrition* further clarified the *Koscot* rule.<sup>87</sup> The final three cases, *AdvoCare*, *Amway II*, and *Herbalife*, illustrate the inefficiency and ineffectiveness of current regulations.<sup>88</sup>

#### A. In re *Koscot and the Retail Rule*

*In re Koscot*, brought by the Securities and Exchange Commission, placed limits on claims made in company promotional materials and conceived the rule against recruitment rewards unrelated to sales.<sup>89</sup> The Court of Appeals for the Fifth Circuit found that a scheme in which a promoter controlled the conduct of an enterprise, and where investors' success was directly based on the amount they paid into the business, violated the anti-fraud provisions of the Securities Exchange Act of 1934.<sup>90</sup> *Koscot*, a cosmetic MLM company, was ordered to pay restitution to investors for utilizing a business

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84. *Amway Corp.*, 93 F.T.C. 618, 706 (1979) (holding that the FTC does have jurisdiction over the business practices of Amway Corporation).

85. *Koscot Interplanetary, Inc.*, 86 F.T.C. 1106 (1975), 1975 F.T.C. LEXIS 24, *aff'd sub nom. Turner v. F.T.C.*, 580 F.2d 701 (D.C. Cir. 1978).

86. *F.T.C. v. Advocare Int'l, L.P.*, No. 4:19-CV-715-SDJ, 2020 U.S. Dist. LEXIS 213865 (E.D. Tex. Nov. 16, 2020).

87. *See Webster v. Omnitrition Int'l*, 79 F.3d 779, 781-82 (9th Cir. 1996).

88. *See F.T.C. v. Equinox Int'l Corp.*, CV-S-99-0969-JBR (RLH), 1999 U.S. Dist. LEXIS 19866 (D. Nev. Sept. 14, 1999); Complaint, *Orage v. Amway Corp.*, No. RG20049773 (Cal. App. Dep't Super. Ct. Filed Jan. 10, 2020); Lisette Voytko, *Herbalife, Younique, LulaRoe and Other MLMs Suddenly Under Fire*, FORBES, <https://www.forbes.com/sites/lisettevoytko/2019/11/07/herbalife-younique-lularoe-and-other-mlms-suddenly-under-fire/?sh=6b2ec36e7db6> (Nov. 7, 2019, 2:15 PM).

89. *See Koscot*, 1975 F.T.C. LEXIS 24, at \*110-11 (detailing how the retail rule requires that commission is paid to distributors based on sales rather than based on the recruitment of others).

90. *S.E.C. v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 475 (5th Cir. 1974).

practice that engaged in price fixing and the restriction of competition.<sup>91</sup> Specifically, Koscot was found to have misrepresented its business potential in its promotional and training materials, such as claiming that its sellers “are earning five and even ten thousand dollars per month!” and that “[m]any . . . [d]istributors are presently earning [\$50,000] . . . and more!”<sup>92</sup> In response, the court created a two-element pyramid scheme test to apply to MLM and other businesses conducting investment promotions.<sup>93</sup> The test specifies that pyramid schemes are “characterized by the payment by participants of money to the company in return for which they receive (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 the sale of the product to ultimate users.”<sup>94</sup> Under this holding, a pyramid scheme is any pay-to-play money transfer based on recruitment.<sup>95</sup> A potential investor cannot pay to sell a product, nor can he or she pay to receive recruits unrelated to any product.<sup>96</sup> Later, *Amway* loosened these strict product and recruitment rules with the seventy-thirty retail rule.<sup>97</sup>

### B. *The 1979 Amway Decision: Validating the MLM Industry*

When Jay Van Andel and Richard DeVos left Nutrilite and formed Amway, they brought with them many of the unethical practices that had previously landed Nutrilite in hot water.<sup>98</sup> In response, the FTC initiated an administrative complaint proceeding against Amway and after a lengthy legal battle, the

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91. *Koscot*, 1975 F.T.C. LEXIS 24, at \*171–74.

92. *Id.* at \*15–16.

93. *Id.* at \*166–67.

94. *Id.*; *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> [hereinafter *FTC Business Guidance*].

95. See *infra* Section III.A (discussing the four parts of a pyramid scheme).

96. *FTC Business Guidance*, *supra* note 95.

97. See *Amway Corp.*, 93 F.T.C. 618, 716 (1979).

98. See *supra* Section I.B (discussing *Amway*).

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administrative law judge (ALJ) found that Amway had “made false and misleading earnings claims in attempting to recruit persons to serve as distributors of Amway products.”<sup>99</sup> Amway was found guilty of price fixing and “overstat[ing] profitability;” but the ALJ stopped short of holding that the entire business model was illegal.<sup>100</sup> This decision was based on Amway’s implementation of two policies: (1) a buyback program; and (2) an inventory seventy-thirty sales policy.<sup>101</sup> Specifically, Amway’s legal success was partially based on its practice of “disguis[ing] [the scheme] as a ‘sales’ compensation, paying ‘commissions’ on ‘direct selling’”<sup>102</sup> and by implementing a policy that “required that 70% percent of the inventory a distributor purchased in any given month must be sold in the month it was purchased.”<sup>103</sup> The ALJ used these policies as a way to distinguish Amway’s MLM business structure from that of a pyramid scheme—where distributors would be the end-consumers and would have no potential to climb the pyramid-like structure.<sup>104</sup> However, these policies are not always enforced<sup>105</sup> and the independent consultant structure allows for the company to hide behind its remote relationship to the salesforce when accused of ethical violations.<sup>106</sup> As a result, the consultants instead bear the brunt of accusations of unethical practices.<sup>107</sup>

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99. *Amway*, 93 F.T.C. at 710.

100. Josh Eidelson, *Amway, Welcome to the Gig Economy: You’re Being Sued Over Pay*, BLOOMBERG (Jan. 10, 2020, 1:38 PM) <https://www.bloomberg.com/news/articles/2020-01-10/amway-welcome-to-the-gig-economy-you-re-being-sued-over-pay>.

101. Muncy, *supra* note 11, at 50.

102. FitzPatrick, *supra* note 19.

103. Muncy, *supra* note 11, at 50.

104. *See Amway*, 93 F.T.C. at 710.

105. *See FTC Business Guidance*, *supra* note 95. Given this underenforcement, many companies, like Herbalife, are able to operate pyramid schemes for many years before the FTC enforces the rules as the FTC has discretion on when to pursue prosecutions. *See infra* Section II.F; *FTC Business Guidance*, *supra* note 95.

106. *See generally* Eidelson, *supra* note 101 (explaining Amway’s “independent business owners” model).

107. *See generally* TAYLOR, *supra* note 5, at 3-63–3-64 (explaining how consultants fit into the MLM scheme).

Although the ALJ found that Amway's business model requiring that products be sold and not stockpiled created a basis for legitimizing the company,<sup>108</sup> these rules were not actually helpful for consultants because of the pyramid-like structure of the company itself.<sup>109</sup> Because the loss rates are actually higher in product-based pyramid schemes (MLM companies) than in non-product-based pyramid schemes, selling actual products does not automatically legitimize the company.<sup>110</sup> Measuring "loss rate, aggregate losses, or number of victims" leads to the conclusion that MLM companies are "the worst of all classes of pyramid schemes."<sup>111</sup> In MLM companies, "investments are disguised or laundered through product purchases"<sup>112</sup> whereas, in illegal pyramid schemes, all the investments go to the top of the pyramid and trickle down to be shared by a select few participants.<sup>113</sup> Similarly, in an MLM company, investment is spread throughout the top of the pyramid and is then shared by a greater number of participants, making the bonuses smaller.<sup>114</sup> Buying products only further lowers a consultant's profitability as a result of this seller saturation, and the greater size of the schemes means more people share recruitment investments.<sup>115</sup>

After the decision in *Amway*, the FTC had less power to police unethical MLM companies and the policies it could generate were harder to enforce.<sup>116</sup> As a result, the FTC pursued fewer prosecutions, only filing thirty pyramid scheme complaints against MLM companies in the last forty-one years; by comparison, 1,100 MLM companies were in operation as of

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108. See *Amway*, 93 F.T.C. at 716.

109. See TAYLOR, *supra* note 5, at 2-21.

110. See *id.* at 7-35.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. See Vesoulis & Dockterman, *supra* note 1.

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2020.<sup>117</sup> Given this low rate of prosecution, the FTC’s police power is akin to that of “a policeman trying to stop cars that are speeding on a highway . . . [f]or every one that it stops for speeding, five roll on by.”<sup>118</sup> However, even in the presence of increased policing power, MLM companies have always been hard to police given the independent consultant base of the business—when a non-employee (here, the consultant) acts unethically, it is harder for that act to reflect directly on the business itself because the consultant is considered an actor independent of the company.

But the FTC is not the only governmental body capable of policing MLM companies; some states such as Illinois, California, and Washington have filed complaints against individual MLM companies.<sup>119</sup> However, states combat MLM companies on a case-by-case basis and are unable to create national precedent or uniform regulations governing MLM companies.<sup>120</sup> And “[l]acking FTC support, few states can prosecute the large schemes, due to limited resources. The schemes now operate with relative immunity from prosecution.”<sup>121</sup>

### C. Webster v. Omnitrition: *Confusing the Issues*

*Webster v. Omnitrition* set some moderate restrictions on MLM companies.<sup>122</sup> In 1994, Omnitrition was accused of operating a pyramid scheme in a class-action lawsuit filed in a California district court.<sup>123</sup> The lower court granted summary judgment in

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117. *Id.*

118. *Id.*

119. *Id.*

120. See Emily Stewart, *MLMs Might Not Be Able to Get Away with Their Shady Promises Much Longer*, VOX (Oct. 22, 2021, 8:30 AM), <https://www.vox.com/the-goods/22732586/ftc-mlm-rohit-chopra-business-opportunity-rule>.

121. MAIN STREET BUBBLE, *supra* note 46, at 7.

122. See *Webster v. Omnitrition Int’l*, 79 F.3d 776 (9th Cir. 1996); MAIN STREET BUBBLE, *supra* note 46, at 6 n.8.

123. *In re Omnitrition Int’l Sec. Litig.*, No. C 92-4133 SBA, 1994 U.S. Dist. LEXIS 13089, at \*5 (N.D. Cal. July 25, 1994).

Omnitrition's favor and held that the company was not a pyramid scheme under the *Amway* safeguards test.<sup>124</sup> The court found that Omnitrition required salespeople to certify that 70% of previously purchased products had been sold before purchasing new products and, therefore, was not a pyramid scheme as a matter of law.<sup>125</sup> The Ninth Circuit Court of Appeals reversed the ruling in part and remanded the case,<sup>126</sup> holding that the recruitment with rewards unrelated to product sales element of the *Koscot* test "is the *sine qua non* of a pyramid scheme."<sup>127</sup> It found that merely having a certification policy for sales to end-consumers was not enough to find no issue of fact for whether a pyramid scheme existed.<sup>128</sup> Omnitrition had not provided evidence that the policy had been followed and enforced, and the matter could properly be decided by a jury weighing the evidence.<sup>129</sup> The Ninth Circuit created a rebuttable presumption that MLM companies are pyramid schemes unless there is evidence showing sales from product purchases to end-consumers.<sup>130</sup> However, as a response to this unfavorable holding, the Direct Selling Association filed an amicus brief with the court calling on it to recognize the industry as legitimate *per se*.<sup>131</sup> Omnitrition petitioned for a writ of certiorari with the United States Supreme Court, which was denied.<sup>132</sup> Thus, there is yet to be binding precedent at the national level not only for how sales are calculated under the *Amway* safeguards test, but most importantly when an MLM entity encroaches on pyramid scheme territory.

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124. *Id.* at \*23, 40.

125. *Id.* at \*13, 23.

126. *Webster*, 79 F.3d at 790.

127. *Id.* at 781–82.

128. *Id.* at 783–84.

129. *See id.*

130. *See id.* at 788.

131. Jeffrey A. Babener, *The Omnitrition Appeal—An Industry Issue*, MLM LEGAL (2017), <https://mlmlegal.com/omni.html>.

132. *Omnitrition Int'l v. Webster*, 519 U.S. 865 (1996), *cert. denied*.

*D. FTC Injunction Against AdvoCare*

In a rare move, the FTC dismantled an MLM company, AdvoCare, for being a pyramid scheme in October 2019.<sup>133</sup> The FTC found that “AdvoCare’s main business had little to do with selling energy drinks, shakes, and supplements to the general public and everything to do with keeping a steady stream of new recruits—and their money—flowing into the business.”<sup>134</sup> The FTC found the following practices to be particularly problematic: consultants were required to purchase inventory in order to earn bonuses, or “inventory loading,” which makes the consultants the end-consumer instead of the salesperson;<sup>135</sup> bonuses were based on recruits and recruits’ inventory instead of sales;<sup>136</sup> and 90% of distributors made less than \$250 annually.<sup>137</sup> As a result, AdvoCare was ordered to immediately cease operations of the pyramid scheme, implement a 100% buyback for consultants, and pay \$150 million to consultants and consumers who were affected by the aforementioned practices.<sup>138</sup> Further, the CEOs were banned from ever creating another MLM company.<sup>139</sup> While this was a positive outcome, the FTC’s order did not establish any binding rules on other companies in the industry, but merely applied to those involved in AdvoCare.<sup>140</sup>

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133. Stipulated Order for Permanent Injunction and Monetary Judgment Against Defendants AdvoCare International, L.P. and Brian Connolly, F.T.C. v. AdvoCare Int’l, L.P., No. 4:19-cv-715-SDJ, (E.D. Tex. Nov. 16, 2020) [hereinafter AdvoCare Order].

134. Seena Gressin, *FTC Settlement Ends AdvoCare’s Alleged Pyramid Scheme and Bans Defendants from Multi-Level Marketing*, FED. TRADE COMM’N (Oct. 2, 2019, 11:31 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/10/ftc-settlement-ends-advocares-alleged-pyramid-scheme-bans>.

135. *See id.*; *FTC Business Guidance*, *supra* note 95.

136. *See Gressin*, *supra* note 135.

137. *See id.*; *see also Vesoulis & Dockterman*, *supra* note 1 (“[Seventy-two percent] of AdvoCare’s distributors made no money in 2016, and 18% made \$250 or less that year.”).

138. *See AdvoCare Order*, *supra* note 134, at 149.

139. *Id.* Additionally, the CEOs, Brian Connolly and Lisa and Carlton Hardman, settled with the FTC for \$4 million. *Gressin*, *supra* note 135.

140. *FTC Business Guidance*, *supra* note 95.

## E. Amway II: A New Complaint

In 2020, in California, Amway faced another legal challenge in a dispute stemming from its failure to pay its sales force a minimum wage.<sup>141</sup> Amway argued that, because it labels consultants as “independent business owners,” California law does not require them to pay a minimum wage.<sup>142</sup> However, the plaintiff, William Orage, alleged that the primary task of doing business with Amway is recruitment rather than the sale of the products,<sup>143</sup> and argued that he developed and grew the Amway conglomerate rather than his own “independent” business.<sup>144</sup> In response to Orage seeking compensation for his time devoted to the business,<sup>145</sup> Amway continuously contended that its business model makes it a member of the “gig economy,” where independent contractors do not receive a salary but instead decide their earning potential.<sup>146</sup> However, MLM companies are structured for consultants to fail regardless of their hard work or how much they devote to the business.<sup>147</sup> It cannot be said to be a profitable option, when “[a] single spin of the wheel in a game of roulette in Las Vegas [has odds] 286 times as great as the odds of profiting after enrolling as an Amway ‘distributor.’”<sup>148</sup> There is a high likelihood that Amway will settle with Orage because a similar suit in 2010 settled for \$56 million, and MLM companies generally prefer

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141. Eidelson, *supra* note 101.

142. *Id.*

143. Complaint at 5–7, *Orage v. Amway Corp.*, No. RG20049773 (Sup. Ct. Alameda Cnty. 2020).

144. Eidelson, *supra* note 101.

145. See Complaint at 5, *Orage*, No. RG20049773. He only sold two products during his four-year stint with Amway, but devoted hours attempting to recruit and sell—attending numerous conferences and trainings without any compensation. *Id.*

146. Eidelson, *supra* note 101.

147. *Id.*

148. TAYLOR, *supra* note 5, at 7-18.

settlements rather than litigation that could publicly reveal their unethical business practices.<sup>149</sup>

*F. Herbalife Settlement: Few Repercussions for Unethical Practices*

Herbalife was recently penalized, but not completely dismantled, after a settlement with the FTC.<sup>150</sup> The FTC's complaint claimed that Herbalife distributors had difficulty selling the product to customers "outside [of their] social networks" and that Herbalife's compensation structure pressured consultants to purchase products in larger quantities to receive discounts and recruitment rewards.<sup>151</sup> According to the FTC, the practice of inventory loading forced distributors to throw away or consume the extra products themselves.<sup>152</sup> The FTC imposed a \$200 million fine in restitution and "a seven-year monitoring regime by an independent compliance monitor."<sup>153</sup> To avoid being shut down or subject to additional penalties, Herbalife must comply with these restrictions and change its compensation plan.<sup>154</sup> The former plan rewarded consultants for purchases made by their downlines, rather than bona fide retail customers.<sup>155</sup> The company was operating a pyramid scheme because of the pressure to recruit and heavy prevalence of in-network sales, but because of current United

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149. Chris Knappe, *Amway Agrees to Pay \$56 Million, Settle Case Alleging It Operates A 'Pyramid Scheme'*, MLIVE, [https://www.mlive.com/business/west-michigan/2010/11/amway\\_agrees\\_to\\_pay\\_56\\_million.html](https://www.mlive.com/business/west-michigan/2010/11/amway_agrees_to_pay_56_million.html) (Apr. 3, 2019, 8:07 PM).

150. See Stipulation to Entry of Order for Permanent Injunction and Monetary Judgment, *F.T.C. v. Herbalife Int'l of Am., Inc.*, No. 2:16-cv-05217, at 5, (C.D. Cal. July 25, 2016) [hereinafter *Herbalife Order*]; Douglas M. Brooks, *Coercive Techniques in Business Opportunity Cults* 14–15 (unpublished article).

151. Complaint for Permanent Injunction and Other Equitable Relief, *F.T.C. v. Herbalife Int'l of Am., Inc.*, No. 2:16-cv-05217, at 32, (C.D. Cal. July 15, 2016) [hereinafter *FTC Herbalife Complaint*]; see also Brooks, *supra* note 151, at 13–14.

152. *FTC Herbalife Complaint*, *supra* note 152 at 22 ("Such self-consumption is not driven by genuine demand for the product, but is the easiest and most convenient way for a Distributor to get some benefit from product that the Distributor would not have bought absent his or her participation in the business opportunity.").

153. *Herbalife Order*, *supra* note 151, at 20; Brooks, *supra* note 151, at 14.

154. See Brooks, *supra* note 151, at 14.

155. *Id.* at 14–15.

States law,<sup>156</sup> Herbalife was given a second chance to comply with the arbitrary rules separating a pyramid scheme from an MLM company.<sup>157</sup> Herbalife violated the *Amway* seventy-thirty rule by inventory-loading its consultants.<sup>158</sup> The compensation plan was so top-loaded that only a select few could really earn money while many others lost their life savings.<sup>159</sup>

### III. ETHICAL ISSUES PRESENTED BY MLM COMPANIES

MLM companies present innumerable ethical issues, from recruiting vulnerable people and inventory loading, to engaging in brainwashing tactics. These issues are the crux of why legislation is needed to prevent the harm MLM companies cause.

#### A. MLM Companies are Pyramid Schemes

The FBI defines pyramid schemes as: “marketing and investment frauds in which an individual is offered a distributorship or franchise to market a particular product. The real profit is earned, not by the sale of the product, but by the sale of new distributorships.”<sup>160</sup> This means the pyramid will eventually collapse because the supply of investors inevitably runs out.<sup>161</sup> A 1999 public statement made by former general counsel for the FTC stated that these schemes promise large

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156. See *supra* Sections II.A, II.B (discussing the judicially created rules that distinguish pyramid schemes from MLM companies).

157. See Herbalife Order, *supra* note 151, at \*2. The Stipulated Order defines specific actions which Herbalife must take, such as creating a tiered participation marketing plan and prohibiting compensation for certain actions, to delineate between prohibited practices of a Ponzi scheme and legal practices of an MLM company. *Id.*

158. See FTC Herbalife Complaint, *supra* note 152, at \*17–22; *In re Amway Corp.*, 93 F.T.C. 618, 97–99 (1979); see also Muncy, *supra* note 11, at 50.

159. Brooks, *supra* note 151, at 14–15. Herbalife’s activities were especially heinous because the company targeted Latinos and undocumented immigrants. Kate Kilpatrick, *Seeing Green With Herbalife*, AL JAZEERA (Oct. 15, 2014), <http://projects.aljazeera.com/2014/multilevel-marketing/herbalife.html>. One 2010 document from Herbalife showed “that Latinos account for more than two-thirds of Herbalife’s U.S. market.” *Id.*

160. *Pyramid Schemes, Scams and Safety*, FBI, <https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/pyramid-schemes> (last visited Nov. 16, 2021).

161. *Id.*

profits, and sometimes have a product, but the product only serves to hide the pyramid structure.<sup>162</sup> The report goes on to discuss the 1979 *Amway* decision and how it created an influx of legitimate and illegitimate (pyramid scheme) MLM companies, and the difference is subtle.<sup>163</sup> Some red flags include inventory loading and lack of sales, but these red flags do not tell the full story.<sup>164</sup> MLM salespeople are part of an inherently broken model that relies on the majority to lose money so a select few at the top can earn millions. Without a bright-line rule, MLM companies are free to conduct shady dealings even though the losses incurred by consultants mirror that of pyramid schemes.<sup>165</sup>

According to Robert FitzPatrick, an expert in the field of MLM research, a pyramid scheme disguised as an MLM company has four essential parts: an endless chain of recruitment, a pay-to-play structure, a recruiting mandate, and an extreme money transfer from bottom to top.<sup>166</sup> The MLM companies discussed above have these four essential parts and other unethical practices as well.<sup>167</sup>

### 1. *Endless, unsustainable chain of recruitment*

The foundational issue of MLM companies is the recruitment procedure: the “endless chain of recruitment of participants as primary customers.”<sup>168</sup> An endless chain of recruiting is a myth perpetuated by MLM companies, as market saturation inevitably catches up to the businesses.<sup>169</sup> FitzPatrick claims that

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162. Debra A. Valentine, *International Monetary Funds Seminar on Current Legal Issues Affecting Central Banks*, Pyramid Schemes, FED. TRADE COMM’N (May 13, 1998), <https://www.ftc.gov/public-statements/1998/05/pyramid-schemes>.

163. *Id.*

164. *Id.*

165. See *Multi-Level Marketing Businesses and Pyramid Schemes*, *supra* note 80.

166. PONZINOMICS, *supra* note 38, at 104–06.

167. These other practices include: “[t]he pyramid structure, lack of sustainable retail sales and ‘top loaded’ pay plans (the majority of commission–per sale–is transferred to the top levels of the recruitment chain) *guarantee* these loss rates.” MAIN STREET BUBBLE, *supra* note 46, at 3.

168. TAYLOR, *supra* note 5, at 8-71.

169. See PONZINOMICS, *supra* note 38, at 104.

“the bottom levels will always be over 80% of the total and that percent never appreciably changes . . . Last-ones-in always lose and they are always the vast majority.”<sup>170</sup> This is a result of the structure of MLM companies, which relies on continuous investments from new recruits to reward earlier recruiters, thus creating “an ever-churning recruiting cycle in absence of sustainable, market-based sales or distributor profit.”<sup>171</sup> The model requires the bottom tier to lose money so the top tier can profit.<sup>172</sup> Regardless of any “*Amway* safeguard,” the consultants become the end consumers.<sup>173</sup> Recruitment cannot actually occur in an endless chain. Many people have negative views of the industry, have other goals not in line with the industry, or are unable to join.<sup>174</sup> The infinite and virgin markets required to sustain the MLM structure does not exist in reality.<sup>175</sup> For example, with eleven levels of recruitment, when each person recruits six people, the United States population is exceeded.<sup>176</sup> With thirteen levels, the world’s population is exceeded.<sup>177</sup>

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170. *Id.* at 147.

171. FitzPatrick, *supra* note 19.

172. *See id.*

173. *See id.*

174. *See* PONZINOMICS, *supra* note 38, at 104, 119.

175. TAYLOR, *supra* note 5, at 7-5. Infinite and virgin markets are the ideas that recruitment and sales are always possible because people are always being born so a market cannot become oversaturated, but this does not exist because there are only so many people eligible for recruitment and accessible to distributors. *See id.*

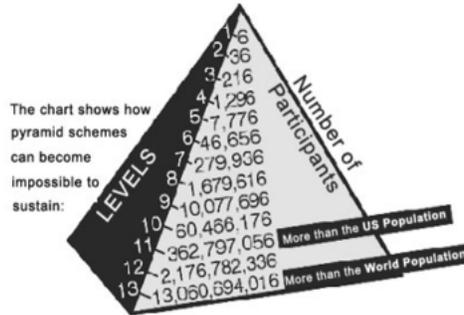
176. *See infra* Figure 1; Harriet Hall, *Plexus: MLM Strikes Again*, SCI. BASED MED. (Sept. 15, 2020), <https://sciencebasedmedicine.org/plexus-mlm-strikes-again/>.

177. *Infra* Figure 1; Hall, *supra* note 177.

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FIGURE 1<sup>178</sup>2. *Pay-to-play*

MLM companies are pay-to-play schemes disguised as businesses, where consultants have to pay for the privilege of working for the company.<sup>179</sup> Pay-to-play refers to the enrollment fees and monthly quotas that create extra burdens on the salespeople without opportunity to receive a return on the “investment.”<sup>180</sup> Often in MLM companies, members are asked to buy products on a monthly subscription to “stay active.”<sup>181</sup> These are just thinly disguised membership fees that consultants pay for the opportunity to promote and sell products for the company.<sup>182</sup>

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178. Hall, *supra* note 177.

179. PONZINOMICS, *supra* note 38, at 105.

180. *Id.*; see also TAYLOR, *supra* note 5, at 2-16. At the lower levels of the compensation structure, consultants make very little commission from selling the product and lack the downline to earn bonuses from sales, therefore they often spend more than they make. PONZINOMICS, *supra* note 38, at 107-08.

181. PONZINOMICS, *supra* note 38, at 105.

182. See *id.*; see also Taylor, *supra* note 5, at 2-16.

### 3. *Recruiting mandate*

The recruiting mandate requires mass recruitment in order to earn a profit because “[s]elling online when thousands of others are selling the same products at the same pricing is . . . fruitless.”<sup>183</sup> MLM companies require sellers to develop a customer base while the company itself acts as the competitor by continuously adding new sellers and offering the seller’s customers the wholesale price as a “preferred customer” or “discount buyer.”<sup>184</sup> As a result, commission on the products is nearly nonexistent.<sup>185</sup> While MLM companies prefer the term “direct selling,” in actuality, recruitment is the essential aspect of the structure.<sup>186</sup> We know this because “[t]he people on the stage at motivation events that make the big bucks are not door-to-door salespeople, but black hat, top gun recruiters.”<sup>187</sup>

### 4. *Money transfers and consultants as the end consumers*

MLM companies are essentially money transfers from bottom levels to the top with complicated and often incomprehensible compensation plans to confuse the unwary.<sup>188</sup>

[T]he pay plan[s] designat[e] that the lower level recruiters—the majority—benefit the least when and if they do make a “sale.” The reward plan for “sales” has been turned upside-down. So not only are most people in the bottom, where they have little or no ‘downline,’ and therefore little or no income, but even when individuals do recruit some others, they still won’t make a profit. The

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183. PONZINOMICS, *supra* note 38, at 106.

184. *Id.*

185. *See id.* at 107–08. Commission is generally a small percentage of the product’s price. *See* TAYLOR, *supra* note 5, at 7–32.

186. PONZINOMICS, *supra* note 38, at 106.

187. *Id.*

188. *Id.* at 106–07, 109.

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money they might have gained is transferred to the upper levels *in extreme*.<sup>189</sup>

In a 2008 survey of eleven MLM companies, FitzPatrick found that “all the companies transferred more than 50% of total payouts to the top 1% in the network in a single year and much more than that for the top 4%.”<sup>190</sup> Nutrilite had this top-weighted formula seventy-five years ago, and the formula continues in the compensation plans of MLM companies today.<sup>191</sup> Under the Nutrilite plan, the lowest ranks earned 5% bonuses and upper levels made 20% bonuses on transactions, giving higher earnings for less work and over-weighting the top tiers.<sup>192</sup>

Consultants often lose money when they join MLM companies and are unable to get a return on their investment because they buy the products and are unable to sell them.<sup>193</sup> Gambling is a better financial decision with a higher potential for profit than joining an MLM.<sup>194</sup> MLM companies do not qualify as a legitimate business any more than gambling, but at least gambling establishments do not promote participation at gaming tables as a “business opportunity.”<sup>195</sup> Based on a study by Jon Taylor, a distributor in a recruitment-based MLM company has a 99.6% chance of losing money, whereas someone gambling only has a 97.1% chance of losing. Even an illegal pyramid scheme without a product gives members only a 90% chance of losing money.<sup>196</sup> Less than 1% of MLM members make a profit.<sup>197</sup> This figure applies to the entire industry and it “occurs among all MLM companies that employ Amway’s ‘endless chain’ pay plan and in which few

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189. *Id.* at 107–08.

190. *Id.* at 108.

191. *Id.* at 109.

192. *Id.*

193. See MAIN STREET BUBBLE, *supra* note 46, at 4.

194. See TAYLOR, *supra* note 5, at 1-8.

195. *Id.*

196. *Id.* at 7-33.

197. *Id.*

distributors earn profits from retail selling.”<sup>198</sup> Ninety-seven to 99% of MLM distributors make no money or lose money when expenses and fees are accounted for.<sup>199</sup> AdvoCare’s setup, which the FTC recently held to be a pyramid scheme, is the rule rather than the exception.<sup>200</sup> Fifty-seven percent of BeachBody distributors earned zero dollars in commission and bonuses in 2019, on top of the \$100 monthly fee; 89% of Young Living distributors based in the United States made about four dollars annually; 67% of Rodan & Fields distributors made about \$227 in 2019; and more than 50% of Color Street distributors made about \$12 in 2018.<sup>201</sup> These so-called businesses provide laughable wages for their salesforce.<sup>202</sup> Further, across the entire MLM industry, 95% or more of consultants quit within ten years.<sup>203</sup> These numbers show that the MLM business model is fundamentally broken. Consultants have essentially no ability to earn money from the so-called “business opportunity” provided by the MLM structure.<sup>204</sup>

An MLM company is nothing but a legal pyramid scheme.<sup>205</sup> After investigating hundreds of MLM companies, one researcher found that every single one had “the characteristic of massive losses by distributors at the lower and mid-levels of the organization, and substantial earnings only at the very highest levels.”<sup>206</sup> Allowing these companies to continue promotes income disparity and manipulative practices in the business arena. MLM companies are inherently fraudulent and should be restricted by new legislation. It is highly unlikely that most of the members will make a profit

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198. MAIN STREET BUBBLE, *supra* note 46, at 3.

199. TAYLOR, *supra* note 5, at Intro-8, 7-49–7-50.

200. See Vesoulis & Dockterman, *supra* note 1, at 5.

201. *Id.* at 6, 10.

202. *See id.*

203. TAYLOR, *supra* note 5, at 6-3.

204. *Id.* at Intro-4.

205. See PONZINOMICS, *supra* note 38, 112–13.

206. Brooks, *supra* note 151, at 2.

because the pyramid-like structure relies on the money transfer from the bottom to the few at the top.<sup>207</sup>

### B. Vulnerable Populations

The MLM structure is inherently predatory. “According to the DSA, 74% of MLM sellers are women, and 20% of sellers are of Hispanic origin, a demographic that critics say highlights the industry’s systemic targeting of economically vulnerable communities.”<sup>208</sup> Because of the recruitment and inventory structure present in the MLM model, the companies often enter into unethical territory, “where more money is being made from the inventories being sold to new recruits than is being made from legitimate sales to bona fide customers.”<sup>209</sup> Other ethical problems include: inventory loading, oversaturated markets, spam messaging, emphasis on recruitment, and low quality products at high prices to cover the bonuses, among others.<sup>210</sup> It is therefore hard to determine the differences between pyramid schemes and legal MLM companies because the line is blurry, unenforced, and often arbitrary. As a result, illegal pyramid schemes have many of the same features as legitimate MLM companies.<sup>211</sup>

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207. PONZINOMICS, *supra* note 38, at 107–09.

208. Vesoulis & Dockterman, *supra* note 1, at 7.

209. Muncy, *supra* note 11, at 50.

210. See generally TAYLOR, *supra* note 5. Inventory loading is when the consultants have to stock up on products to meet sales goals but are unable to sell the products they purchase and end up as the end consumer. *Id.* at 10-50. Oversaturated markets happen when local networks have recruited all willing and eligible people so the consultants at the lower ranks are unable to recruit others and cannot move up the ranks. *Id.* at 10-68, 10-36, 10-37. Spam messaging is a common practice with consultants to get the highest probability of recruiting more members by messaging hundreds of people on social media that they do not know. *Id.* at 10-71. The emphasis on recruitment is an issue because often recruiting becomes more profitable than sales so consultants sell the opportunity instead of the products, making the company a pyramid scheme with a product. *Id.* at 10-39. Many MLM products are low quality, but most have high prices because of the pyramid-like structure where the few at the top have to be compensated for the sales of all of their downline and that bonus must be included into the product costs. *Id.* at 2-50, 10-40.

211. Muncy, *supra* note 11, at 47.

There are over eighteen million people involved in MLM companies in the United States and women make up the majority of the members of the thirty-six-billion-dollar industry, according to the FTC.<sup>212</sup> MLM products are often more attractive to women as many of the companies sell beauty or health products.<sup>213</sup> Of the top fifty MLM companies, thirty-seven are associated with “the beauty, supplement, clothing, or essential oils industries.”<sup>214</sup> Women are also targeted through the “pop-feminism” culture employed by MLM companies.<sup>215</sup> Phrases like “boss babe” are common within MLM culture and are meant to attract women looking to assert their independence.<sup>216</sup> But, in actuality, the industry restricts these women’s independence by failing to pay a livable wage.<sup>217</sup> Women earn less than men nationally and the MLM industry contributes to these losses for women.<sup>218</sup>

MLM companies have grown in 2020 just as they have in past economic-low times.<sup>219</sup> Many people are out of work and

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212. Zach Holz, *Why Paying a Company to Sell Their Products Is Bad for You and Your Finances*, NAT’L NEWS BUS. (Sept. 17, 2020), <https://www.thenationalnews.com/business/money/why-paying-a-company-to-sell-their-products-is-bad-for-you-and-your-finances-1.1079177>.

213. See Leigha Tierney, “Hey Hun!!!”: *How Multi-level Marketing Targets Women*, STUTE (Sept. 6, 2019), <https://thestute.com/2019/09/06/hey-hun-how-multi-level-marketing-targets-women/>.

214. *Id.*

215. See Rebecca L. Judd, *Multi-Level Marketing and the Boss Babes Left Behind*, ALSO COOL MAG. (Jan. 26, 2021), <https://alsocoolmag.com/writingblog/multi-level-marketing-and-the-boss-babes-left-behind>.

216. See Tierney, *supra* note 214.

217. See Michelle Singletary, *Why Multilevel Marketing Won’t Make You Rich*, WASH. POST (Sept. 26, 2018), <https://www.washingtonpost.com/business/2018/09/27/why-that-multilevel-marketing-business-is-probably-not-going-pay-off/>.

218. See Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. AM. PROGRESS (Mar. 24, 2020), <https://www.americanprogress.org/article/quick-facts-gender-wage-gap/>; Casey Bond, *MLMs Are a Nightmare for Women and Everyone They Know*, HUFFPOST, [https://www.huffpost.com/entry/mlm-pyramid-scheme-target-women-financial-freedom\\_1\\_5d0bfd60e4b07ae90d9a6a9e](https://www.huffpost.com/entry/mlm-pyramid-scheme-target-women-financial-freedom_1_5d0bfd60e4b07ae90d9a6a9e) (Jan. 29, 2021).

219. See Carmen Reinicke, *Job Scams Have Increased as Covid-19 Put Millions of Americans Out of Work. Here’s How to Avoid One*, CNBC (Oct. 6, 2020, 11:29 AM), <https://www.cnbc.com/2020/10/06/job-scams-have-increased-during-the-covid-19-crisis-how-to-avoid-one.html>; Emma Penrod, *As the COVID-19 Economic Crisis Deepens, Financially Risky MLMs Are Moving in to Fill the Employment Void*, INSIDER (July 14, 2020, 5:23 PM), <https://www.insider.com/unemployed-people-turn-to-risky-multi-level-marketing-companies-2020-7>.

looking for safer, more flexible jobs they can do from home.<sup>220</sup> The industry is primed to prey on these desperate people. People in need of income are less likely to do their due diligence before jumping at an opportunity.<sup>221</sup> Because the industry has little oversight, many people have fallen victim to MLM scams in the past two years during the COVID-19 pandemic.<sup>222</sup> Women especially have lost their jobs at a high rate and have turned to MLM companies to supplement their family's income.<sup>223</sup> The MLM work-from-home model is particularly appealing to moms who have homeschooled their kids throughout the pandemic.<sup>224</sup> In fact, "between March and June 2020, MLM Avon saw a 114 percent 'surge' in new recruits."<sup>225</sup>

The FTC has issued warnings to a number of companies making COVID-19 health claims.<sup>226</sup> Plexus, Youngevity, Vivry, Melaleuca, Isagenix, and Juice+ are some of the MLM companies that were warned by the FTC in 2020.<sup>227</sup> These companies are no strangers to making unfounded health claims; just like the old medicine shows, unsubstantiated health

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220. See Heather Long & Eli Rosenberg, *Why Millions of Job Seekers Aren't Getting Hired in This Hot Job Market*, WASH. POST (Nov. 8, 2021, 6:00 AM), <https://www.washingtonpost.com/business/2021/11/08/job-search-not-getting-hired/>.

221. See, e.g., Reinicke, *supra* note 220.

222. See *id.*

223. Women have lost 5.4 million jobs during the pandemic while men have lost 4.4 million jobs. Diana Boesch & Shilpa Phadke, *When Women Lose All the Jobs: Essential Actions for a Gender-Equitable Recovery*, CTR. AM. PROGRESS (Feb. 1, 2021), <https://www.americanprogress.org/article/women-lose-jobs-essential-actions-gender-equitable-recovery/>; see Jesselyn Cook, *MLMs Are Using Coronavirus Anxiety To Exploit the Quarantined and Unemployed*, HUFFPOST, [https://www.huffpost.com/entry/mlms-capitalizing-on-coronavirus-anxiety\\_n\\_5ecad83ac5b63a8c2095c800](https://www.huffpost.com/entry/mlms-capitalizing-on-coronavirus-anxiety_n_5ecad83ac5b63a8c2095c800) (Dec. 18, 2021).

224. Amelia Tait, *'I Feel Like I Fell for a Trick': Women Losing Work During Lockdown Are Increasingly Drawn into Multi-Level Marketing Companies*, TELEGRAPH (Dec. 24, 2020, 8:00 AM), <https://www.telegraph.co.uk/news/2020/12/24/feel-like-fell-trick-women-losing-work-lockdown-increasingly/>.

225. *Id.*

226. Holz, *supra* note 213; see also *FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus*, FTC.GOV (Apr. 24, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health>.

227. Hall, *supra* note 177.

claims are rampant in MLM companies.<sup>228</sup> In 2014, some MLM companies claimed to have the cure for Ebola.<sup>229</sup> As with many of the less savory practices, MLM companies often offload the fault onto the consultants.<sup>230</sup> Because the consultants ostensibly operate as “independent business owners,” the companies can claim that unfounded COVID-19 cures were promulgated by individual consultants and not endorsed by the company, thus skirting liability.<sup>231</sup>

### C. Using Religion and Cult Tactics

Many members of MLM companies are also members of Christian or Mormon churches.<sup>232</sup> Amway was an innovator when it came to integrating Christianity and MLM companies.<sup>233</sup> Amway’s founders may not have invented the MLM model, but they did “graft a theme of religious righteousness” onto the MLM structure.<sup>234</sup> Amway “assum[ed] a self-anointed moral authority” to elevate the company and create a perfect environment to strengthen the “dogmatic beliefs” and “deceptive promises.”<sup>235</sup> As a result, Amway has been referred to as a “quasi-religious corporation.”<sup>236</sup> Amway

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228. *Id.*; see also Hannah Martin, *Are MLMs the Modern Snake Oil?*, TALENTED LADIES CLUB (Nov. 2, 2021), <https://www.talentedladiesclub.com/articles/are-mlms-the-modern-day-snake-oil/>.

229. Abby Ohlheiser, *FDA Warns Three Companies Against Marketing Their Products as Ebola Treatments or Cures*, WASH. POST (Sept. 24, 2014), <https://www.washingtonpost.com/news/to-your-health/wp/2014/09/24/fda-warns-three-companies-against-marketing-their-products-as-ebola-treatments-or-cures/>.

230. See Hall, *supra* note 177; see generally Jenner Furst & Julia Willoughby Nason, *LuLaRich: Episode 4*, AMAZON PRIME VIDEO (Sept. 9, 2021), <https://www.amazon.com/LuLaRich-Season-1/dp/B09CFXPNSX>.

231. See Hall, *supra* note 177; Emily Stewart, *\$5 Jewelry and an MLM Conference Gone Wrong*, VOX (Sept. 23, 2021), <https://www.vox.com/the-goods/22688317/mlm-covid-19-pandemic-recruiting-sales-paparazzi>. Particularly, “[s]ome MLMs and their sellers have suggested that their products may help protect against COVID-19. Federal regulators have warned several MLMs about their pandemic-related health and earnings claims.” *Id.*

232. See PONZINOMICS, *supra* note 38, at 17–18, 109.

233. See *id.* at 17.

234. *Id.*

235. *Id.*

236. *Id.*

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has established itself as a moral business hinging on the religious undertones of the company.<sup>237</sup> The Amway model benefits directly from the proliferation of the “prosperity gospel” creed.<sup>238</sup> Prosperity gospel teaches that if you give money to God, He will bless you with more money.<sup>239</sup> In short, you get back what you give. This is a predatory tactic that puts the onus on salespeople to blame themselves when they cannot prosper in the business, instead of examining the business model itself.<sup>240</sup>

MLM companies use tactics present in religious cults to brainwash members and alienate them from their loved ones.<sup>241</sup> Some even refer to MLM companies as “commercial cults.”<sup>242</sup> “A cult is an organization that exercises undue influence over its members to make them dependent and obedient,”<sup>243</sup> and the process of gaining undue influence has been conceptualized as the BITE Model: behavior control, information control, thought, and emotional control.<sup>244</sup> By controlling the dialogue, MLM companies can control members to fight for the business even when common sense shows it is harming them. MLM companies use tactics such as love bombing, guilt and shame, financial exploitation, and deception, to exercise undue influence over members.<sup>245</sup>

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237. *See id.*

238. *Id.* at 19.

239. Tara Isabella Burton, *The Prosperity Gospel, Explained: Why Joel Osteen Believes That Prayer Can Make You Rich*, VOX (Sep. 1, 2017, 4:20 PM), <https://www.vox.com/identities/2017/9/1/15951874/prosperity-gospel-explained-why-joel-osteen-believes-prayer-can-make-you-rich-trump>.

240. *See* PONZINOMICS, *supra* note 38, at 19.

241. *See generally* Brooks, *supra* note 151.

242. Steven Hassan, *Multi-Level Marketing Groups Defraud Consumers!*, FREEDOM OF MIND RES. CTR. (Mar. 20, 2017), <https://freedomofmind.com/multi-level-marketing-groups-defraud-consumers/>; *see also* Brooks, *supra* note 151, at 5.

243. Casey Bond, *How MLMs and Cults Use the Same Mind Control Techniques*, HUFFPOST (Jan. 8, 2021), [https://www.huffpost.com/entry/multilevel-marketing-companies-mlms-cults-similarities\\_1\\_5d49f8c2e4b09e72973df3d3](https://www.huffpost.com/entry/multilevel-marketing-companies-mlms-cults-similarities_1_5d49f8c2e4b09e72973df3d3).

244. *See id.*

245. *See id.*

#### IV. A PATH FORWARD: LEGISLATION TO RESTRICT MLM COMPANIES

The core of the issue with MLM companies is the unclear guidance and procedures provided by the FTC in the Federal Trade Commission Act and the aforementioned cases.<sup>246</sup> The FTC states that MLM companies are assessed on a case-by-case basis to determine whether they are operating an illegal pyramid scheme based on “how the structure as a whole operates in practice.”<sup>247</sup> The FTC considers a variety of factors: “marketing representations, participant experiences, the compensation plan, and the incentives that the compensation structure creates.”<sup>248</sup> This method is open to subjective determination and does not fix MLM companies’ structural problems. Rather, it is a band aid on a bullet wound, only reprimanding some of the worst offenders after years of conducting illegal practices. Drawing from previous legislation in both the United States and China, the following Sections lay out proposed legislation that would define practices that should be prohibited to better combat the problems MLM companies present.

This proposal is modeled after both the *Anti-Pyramid Promotional Scheme Act of 2017*<sup>249</sup> and the *Regulation on Prohibition of Chuanxiao*.<sup>250</sup> It resolves the issues of pyramid compensation, inventory loading, recruitment mandates, pay-to-play structures, and nondisclosure of important information by placing restrictions on the harmful practices common in MLM companies that create these issues.<sup>251</sup> This analysis

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246. See Federal Trade Commission Act, 15 U.S.C. § 41–58; see also *supra* Part II.

247. *FTC Business Guidance*, *supra* note 95.

248. *Id.*

249. Anti-Pyramid Promotional Scheme Act of 2017, H.R. 3409, 115th Cong. (2017).

250. Jinzhi Chuanxiao Tiaoli, (禁止传销条例) [Regulation on the Prohibition of Pyramid Selling] (promulgated by the State Council of the People’s Republic of China, Aug. 23, 2005, effective Nov. 1, 2005), CLI.2.59860(EN) (Lawinfochina) [hereinafter *Republic of China Regulation on the Prohibition of Pyramid Selling*].

251. Common harmful practices in MLM include inventory loading and non-disclosure of vital information. See *supra* Part III.

critiques formerly proposed legislation and offers effective changes. Section A describes the Chinese *Regulation on Prohibition of Chuanxiao*, Section B provides the details of the United States *Anti-Pyramid Promotional Act of 2017*, and Section C provides the text of this Note's proposal and explains the details of the legislation and the problems it aims to solve.

*A. Regulation on Prohibition of Chuanxiao – Chinese Anti-MLM Law*

In an extraordinary move in 2005, China banned MLM companies with *Regulation on Prohibition of Chuanxiao* (the "Regulation") that prohibited "pyramid marketing."<sup>252</sup> This came as a result of a large problem with unrestricted pyramid schemes in the country and protests against a particular MLM.<sup>253</sup> The distinguishing feature of the Chinese scams was a combination of pyramid-type operations with cult-like brainwashing.<sup>254</sup> The Chinese government has a keen interest in "social stability" and likely implemented this regulation to control cult-like activities.<sup>255</sup> Article 2 of the Regulation defines the term "pyramid marketing" as an organization that calculates compensation for members based on their number of recruits or the sales performance of their recruits, and that requires the member to pay a fee as a condition of membership.<sup>256</sup> Article 7 classifies three activities that qualify as pyramid schemes: (1) requiring a member to recruit others and paying that member based on the number of directly or

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252. Chuanxiao is the Chinese term for MLM. *Republic of China Regulation on the Prohibition of Pyramid Selling*, *supra* note 251.

253. *Pyramid Schemes Cause Huge Social Harm in China*, *ECONOMIST* (Feb. 3, 2018), <https://www.economist.com/china/2018/02/03/pyramid-schemes-cause-huge-social-harm-in-china> [hereinafter *Social Harm in China*]; Mark Schaub & David Hong, *China Crackdown – How Does it Impact International MLMs?*, *CHINA L. INSIGHT* (Aug. 23, 2017), <https://www.chinalawinsight.com/2017/08/articles/compliance/china-crackdown-how-does-it-impact-international-mlms/>.

254. *Social Harm in China*, *supra* note 254.

255. As a communist country, China's total ban was possible; a total ban may not be possible in the U.S., however, there may still be restrictions available. Schaub & Hong, *supra* note 254.

256. *Republic of China Regulation on the Prohibition of Pyramid Selling*, *supra* note 251.

indirectly recruited personnel; (2) requiring a member to pay fees disguised as subscriptions to products in order to join; and (3) requiring a member to recruit others and paying that member based on the sales performance of his or her recruits.<sup>257</sup> After this regulation passed, China only allows true direct sales—meaning companies can only pay out one level of commission and commission is always 30% of the retail price of the goods.<sup>258</sup> The regulation imposes criminal punishment for anyone engaging in MLM practices.<sup>259</sup>

The Regulation is simple, but it accomplishes a lot. Every United States MLM company would be outlawed by the prohibition of organizations that pay based on recruitment and require a fee to join.<sup>260</sup> These two factors are key to the MLM structure and create the financial losses at the root of MLM companies.<sup>261</sup> While China's regulation could be considered a ban on MLM companies, it may be too drastic a measure in a free market country like the United States.<sup>262</sup> Restricting and regulating MLM companies without an outright ban would balance the goal of preventing scams on the one hand without hindering free enterprise on the other.<sup>263</sup>

Notably, the Regulation does not require disclosures by companies for their financial statistics, which would be helpful to combat misinformation.<sup>264</sup> Even with the strict law, some MLM companies have continued to operate successfully in China.<sup>265</sup> MLM companies are resilient and some “[d]odgy companies exploit government propaganda in order to pretend

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257. *Id.*

258. Thomas Price, *Direct Selling in China: Multi-Level Marketing, but Not As You Know It*, TMOGROUP.ASIA (Jan. 28, 2021), <https://www.tmogroup.asia/direct-selling-in-china-multi-level-marketing/>.

259. *Republic of China Regulation on the Prohibition of Pyramid Selling*, *supra* note 251.

260. TAYLOR, *supra* note 5, at 7-14.

261. *See supra* section III.A; PONZINOMICS, *supra* note 38, at 222-24.

262. *See Republic of China Regulation on the Prohibition of Pyramid Selling*, *supra* note 251.

263. *See* Stephen O'Regan, *Multi-Level Marketing: China Isn't Buying It*, CHINA BRIEFING (Sept. 12, 2017), <https://www.china-briefing.com/news/multi-level-marketing-china-isnt-buying/>.

264. *Id.*

265. *See id.*

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they have official status.”<sup>266</sup> Some of the Chinese public have resisted the authoritarian regulation and resented the restrictions it has placed on free enterprise.<sup>267</sup> Though this total ban has not stopped all bad actors and some people disagree with its strictness, the restrictions have saved many people from falling prey to schemes and significantly reduced the number of MLM companies in China.<sup>268</sup> The United States can and should learn from China’s ban and adapt the approach to its capitalistic society to strike the right balance between free enterprise and consumer protection.

B. *H.R. 3409 – Anti-Pyramid Promotional Scheme Act of 2017*

On July 26, 2017, a bill called the *Anti-Pyramid Promotional Scheme Act* was introduced by Senator Marsha Blackburn in the United States House of Representatives to “amend the *Federal Trade Commission Act* to prohibit pyramid promotional schemes and to ensure that compensation is not based upon recruitment of participants into a plan or operation, but on sales to individuals who use and consume the products or services sold, and for other purposes.”<sup>269</sup> The bill was referred to the House Committee on Energy and Commerce and then to the House Subcommittee on Digital Commerce and Consumer Protection, but never received a vote, thus failing when the session ended on December 31, 2018.<sup>270</sup> The bill had forty-nine cosponsors: thirty-five Republicans and fourteen Democrats.<sup>271</sup>

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266. *Social Harm in China*, *supra* note 254.

267. See Michele A. Wong, *China’s Direct Marketing Ban: A Case Study of China’s Response to Capital-Based Social Networks*, 11 PAC. RIM L. & POL’Y J. 257, 275 (2002).

268. See *Social Harm in China*, *supra* note 254.

269. See *Anti-Pyramid Promotional Scheme Act of 2017*, H.R. 3409, 115th Cong. (2017); see also *Federal Trade Commission Act*, 15 U.S.C. §§ 41, 44 (2006).

270. See *US HR3409 Anti-Pyramid Promotional Scheme Act of 2017*, BILL TRACK 50, <https://www.billtrack50.com/BillDetail/888051> (last visited Apr. 1, 2022).

271. See *Anti-Pyramid Promotional Scheme Act*, *supra* note 270.

H.R. 3409 aimed to clarify the FTC's stance on pyramid schemes by amending Section 5 of the FTC Act.<sup>272</sup> The bill proposed adding to the FTC Act a prohibition against inventory loading and required an "inventory repurchase agreement" for MLM companies.<sup>273</sup> The proposed repurchase program was intended to prevent inventory loading—where the consultants become the end consumers of products—by allowing the consultants to sell back any unused products to the company.<sup>274</sup> The bill did not intend to ban MLM companies entirely, but merely create provisions within the existing law to define the power MLM companies could wield.<sup>275</sup> It defined pyramid promotional schemes as: "any plan or operation in which individuals pay consideration for the right to receive compensation that is based upon recruiting other individuals into the plan or operation rather than primarily related to the sale of products or services to ultimate users."<sup>276</sup> The bill required repurchases of products on "commercially reasonable terms" and for those terms to be clearly communicated.<sup>277</sup> A violation of the legislation would be charged "as an unfair or deceptive act or practice in, or affecting, commerce" in a manner consistent with the FTC Act.<sup>278</sup>

H.R. 3407 was, by design, not much of an improvement to the current law. The repurchase plan does not fix the root cause of inventory loading, it only treats the symptoms.<sup>279</sup> Inventory

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272. Section 5 of the FTC Act defines "unfair or deceptive acts or practices." 15 U.S.C. § 45; H.R. 3409; 15 U.S.C. §§ 41, 44 (2021).

273. H.R. 3409 § 2(c).

274. TAYLOR, *supra* note 5, at 10-50 (quoting Debra A. Valentine, Gen. Couns. for the U.S. Fed. Trade Comm'n, What Is a Pyramid Scheme and What is Legitimate Marketing? (May 13, 1998) (transcript available at <https://www.ftc.gov/public-statements/1998/05/pyramid-schemes>)).

275. *See* H.R. 3409 § 2.

276. *Id.* § 3.

277. *Id.*

278. *Id.* § 2(d); Federal Trade Commission Act, 15 U.S.C. § 45.

279. *See* Chris Morran, *Group Tied to Betsy DeVos Is Trying to Block Feds from Investigating Multilevel Marketers*, CONSUMERIST (Sept. 19, 2017, 5:13 PM), <https://consumerist.com/2017/09/19/group-tied-to-betsy-devos-is-trying-to-block-feds-from-investigating-multilevel-marketers/>.

loading occurs because the entire structure of MLM companies is not conducive to product sales but rather emphasizes recruitment.<sup>280</sup> Consultants are required to make purchases to sell, but cannot find buyers because of oversaturated markets and low-quality products offered at high prices.<sup>281</sup> Allowing consultants to return unsold products would only help prevent some financial losses—it could not prevent the occurrence of inventory loading.<sup>282</sup> The MLM companies could continue to operate with unsustainable structures that inevitably lead to the inventory loading.<sup>283</sup> The bill likely failed because its proposed changes were ultimately inadequate and unnecessary, and it was further weakened by the lack of media attention it received.<sup>284</sup>

### C. New Proposed Legislation

Legislation must be passed in the United States to prohibit all practices that make MLM companies unethical.<sup>285</sup> MLM companies are legal pyramid schemes that are statistically incapable of creating income for the majority of their salesforce, leading to consumer protection violations that upset the economic balance.<sup>286</sup> Amendments to existing law that focus on individual practices or adjudications involving individual companies are insufficient because MLM companies continue to thrive on financial losses by participants while avoiding disclosure of low earning potential.<sup>287</sup> The following proposal is

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280. See Muncy, *supra* note 11, at 49–50.

281. See *supra* Section III.A.

282. See James R. Sobieraj, *Myths About Self-Consumption in MLMs*, 8 NAT'L L. REV., no. 53, Feb. 22, 2018, at 1, 2–3, <https://www.natlawreview.com/article/myths-about-self-consumption-mlms>.

283. See H.R. 3409; PONZINOMICS, *supra* note 38, at 148.

284. See Peter Vander Nat, *H.R. 3409: Protecting Pyramid Schemes, Not Consumers*, TRUTH IN ADVERTISING.ORG (Aug. 16, 2017), <https://www.truthinadvertising.org/h-r-3409-protecting-pyramid-schemes-not-consumers/>; Sobieraj, *supra* note 283, at 5.

285. See generally PONZINOMICS, *supra* note 38, at 189–192 (discussing how governments are reluctant to regulate, despite the clear need to do so).

286. See TAYLOR, *supra* note 5, at 7-1.

287. *Id.*; see also FTC DISCLOSURE REQUIREMENTS, *supra* note 88, at 17.

modeled after the best aspects of the Regulation on Prohibition of Chuanxiao and the Anti-Pyramid Promotional Scheme Act of 2017.<sup>288</sup> Legislation that combines the restrictions on recruitment from the China regulation with the emphasis on combating inventory loading from the United States bill, as well as disclosure provisions, will help eliminate the practices that make current MLM companies unethical pyramid schemes.

### 1. *Text of Proposed Legislation*

This text of a new proposed bill modeled after the Chinese Regulation and the Anti-Pyramid Promotional Scheme Act of 2017 might proceed as follows:

#### **SECTION 1. TITLE**

This Act may be cited as the “Anti-MLM Act of 2021.”

#### **SECTION 2. PURPOSE**

This Regulation is enacted to prevent fraud, protect consumers, and promote a fair market free from unethical business structures that rely on unfair recruitment and compensation models.

#### **SECTION 3. DEFINITIONS**

(a) The Term “MLM” or “multi-level marketing” refers to a network of salespeople who sell products and recruit new salespeople.<sup>289</sup>

(b) “Consultant” is a participant in an MLM company that is not considered an employee of the company and does not receive a salary but is an independent contractor who may earn income from sales or recruitment bonuses.<sup>290</sup>

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288. See Republic of China Regulation on the Prohibition of Pyramid Selling, *supra* note 251; H.R. 3409.

289. See FTC Business Guidance, *supra* note 95.

290. *Id.*

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(c) “Downlines” are the chains of recruitment in an MLM company. When a salesperson recruits a new participant, that participant becomes the salesperson’s downline.<sup>291</sup>

(d) A “pyramid scheme” is an illegitimate business that “promise[s] consumers or investors large profits based primarily on recruiting others to join their program, not based on profits from any real investment or real sale of goods to the public.”<sup>292</sup>

(e) “Inventory loading” is “a practice in which a plan or operation requires or encourages its participants to purchase inventory in an amount exceeding that which the participant can reasonably expect to use, consume, or resell to ultimate users.”<sup>293</sup>

(f) “Recruitment” is often a mandate in MLM companies, whether implicit or explicit, that a member of the MLM recruit new members in order to make a profit.<sup>294</sup>

**SECTION 4. PROHIBITIONS AND MANDATES**

(1) No MLM company shall compensate consultants based on the sales of their downlines.

(2) Compensation for consultants must be based on such consultant’s individual sales. MLM companies shall not create endless chains of recruitment, and may only pay to consultants one-time bonuses for recruitment of new consultants.

(3) MLM consultants shall not be expected to buy products to sell at a mark-up, but rather, shall facilitate the sale

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291. *Id.*

292. Valentine, *supra* note 163.

293. Anti-Pyramid Promotional Scheme Act of 2017, H.R. 3409, 115th Cong. § 3 (2017).

294. Valentine, *supra* note 163.

directly from the company to the consumer, without any cost to the consultant.

(4) The Business Opportunity Rule<sup>295</sup> shall apply to MLM companies and MLM companies must make compensation plans and income statistics public on an annual basis.

## 2. *Proposed legislation explained*

The proposed legislation will strengthen the FTC's oversight abilities, ban the harmful MLM practices, and clarify the law to protect consumers. Under current law, pyramid schemes and MLM companies are functionally indistinguishable because, as FTC rules distinguishing between the two became more diluted over time, so too did the distinction between MLM companies and pyramid schemes.<sup>296</sup> The case law discussed in Part II shows a gradual decline in the factors the FTC decided were unlawful.<sup>297</sup> Under the current regulatory scheme, the FTC cannot distinguish between a pyramid scheme and a "legal" MLM company. On its website the agency states, "[a]t the most basic level, the law requires that an MLM company pay compensation that is based on actual sales to real customers, rather than based on mere wholesale purchases or other payments by its participants."<sup>298</sup> According to the website, the FTC evaluates MLM companies in accordance with case law, focusing on the structure as a whole and observing the business in practice.<sup>299</sup> It considers: marketing representations, participant experiences, the compensation plan, and the incentives of the compensation plan.<sup>300</sup> Each MLM company is evaluated individually and assessed on the facts specific to the

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295. See Business Opportunity Rule, 16 C.F.R. § 437 (2021) (requiring sellers to furnish buyers with documentation about important information regarding the business opportunity).

296. See discussion of cases *supra* Part II; see also *FTC Business Guidance*, *supra* note 95.

297. See discussion of cases *supra* Part II.

298. *FTC Business Guidance*, *supra* note 95.

299. *Id.*

300. *Id.*

company.<sup>301</sup> By being “fact specific,” the FTC allows MLM companies to play the system and continue an inherently predatory structure because there are few restrictions on their practices.<sup>302</sup> Further, the case-by-case basis and common practice of settlements encourages the industry to skirt regulations because as the FTC website states, “[o]rders obtained through settlements of FTC law enforcement actions are not binding on the entire industry.”<sup>303</sup> Some could argue that sweeping legislation would be overstepping because the current case-by-case basis for assessing MLM companies is enough to maintain order.<sup>304</sup> A case-by-case method, the argument goes, allows the FTC to focus on bad actors with specific issues, while a one-size-fits-all approach would be excessive.<sup>305</sup> It could also be argued that the legislation proposed here could create new problems by forcing MLM companies to shut down and put people out of jobs.<sup>306</sup> This Note examined various cases that exemplified the failings of this method.<sup>307</sup> Case-by-case adjudication is ineffective because it moves slowly and does not benefit the general public.<sup>308</sup>

This sweeping legislation may not be popular with those who believe in free markets without regulation.<sup>309</sup> Regulating MLM companies would mean government taking control from

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301. *Id.*

302. *See id.*; *see also* discussion of cases *supra* Part II.

303. *FTC Business Guidance*, *supra* note 95.

304. *See id.*

305. *See id.*

306. In 2020, 7.7 million direct sellers in the United States worked full- or part-time. *See* DIRECT SELLING ASS’N, DIRECT SELLING IN THE UNITED STATES: 2020 INDUSTRY OVERVIEW (2021), <https://www.dsa.org/docs/default-source/research/dsa-industry-overview-fact-sheetd601b69c41746fcd88eaff000002c0f4.pdf>.

307. *See supra* Part II; *see, e.g.*, *Amway Corp.*; 93 F.T.C. 618 (1979); *Koscot Interplanetary, Inc.*, 86 F.T.C. 1106 (1975); *Webster v. Omnitrition Int’l, Inc.*, 79 F.3d 776 (9th Cir. 1996); *Fed. Trade Comm’n v. AdvoCare Int’l, L.P.*, No. 4:19-CV-715-SDJ, 2020 U.S. Dist. LEXIS 213865 (E.D. Tex. Nov. 16, 2020); *Complaint, Orage v. Amway Corp.*, No. RG20049773 (Cal. Sup. Ct. filed Jan. 10, 2020).

308. *See supra* Part II.

309. *See, e.g.*, *Wong*, *supra* note 268, at 274–75; Heidi Liu, *The Behavioral Economics of Multilevel Marketing*, 14 HASTINGS BUS. L.J. 109, 128 (2018).

private enterprise and defining acceptable practices.<sup>310</sup> Some have criticized China's *Regulation on Prohibition of Chuanxiao* for being too restrictive and for taking an authoritarian approach with a "blanket ban, rather than addressing its own internal infrastructural problems."<sup>311</sup> Critics further argue that "[t]his type of response underlies China's inability to effectively address problems associated with market reform."<sup>312</sup> However, the ban came as a result of years of pyramid schemes running rampant in China and public outcry against them.<sup>313</sup>

The proposal here is less restrictive than China's ban by allowing recruitment but prohibiting income from recruitment.<sup>314</sup> In the United States, capitalism and MLM companies are intertwined, but a capitalistic society can still regulate certain practices to protect consumers.<sup>315</sup> Cigarettes, for example, have many restrictions to discourage people from purchasing them because public health requires it and the United States respects public interests over individual greed.<sup>316</sup> Free-market advocates believe the market is self-correcting and will decide how businesses do based on their popularity.<sup>317</sup> But because MLM companies prey on especially vulnerable populations<sup>318</sup> and the odds are already stacked against them, there is an imbalance of power.<sup>319</sup> Thus new regulations and legislative definitions, such as the ones proposed here, are necessary to prevent consumer harms.<sup>320</sup> To best clarify the law,

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310. See, e.g., Wong, *supra* note 268, at 260.

311. Wong, *supra* note 268, at 275.

312. *Id.*

313. *Social Harm in China*, *supra* note 254.

314. Compare *supra* p. 633 (providing language of Proposal Section 4(2)) with *Republic of China Regulation on the Prohibition of Pyramid Selling*, *supra* note 251.

315. See Wong, *supra* note 268, at 275.

316. See, e.g., Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970).

317. Heidi Liu, *The Behavioral Economics of Multilevel Marketing*, 14 HASTINGS BUS. L.J. 109, 128 (2018).

318. Mona Bushnell, *MLMs Are Preying on the Dream of Entrepreneurship*, BUSINESS.COM (Aug. 22, 2019), <https://www.business.com/articles/mlms-target-women-and-immigrants/>.

319. See *supra* Section III.B (describing MLM companies as pay-to-play schemes).

320. See *FTC Authority*, *supra* note 38.

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this proposal directs MLM companies to discontinue endless chain recruitment and compensation based on recruitment, ban pay-to-play structures, disallow consultants from buying products to sell to the end consumer, and require income disclosures.<sup>321</sup>

Section 4, Provisions 1 and 2 of the proposal would solve the problem presented by the MLM recruitment and payment structure.<sup>322</sup> The recruitment aspect of MLM companies is what makes them identical to pyramid schemes.<sup>323</sup> By disallowing payment based on the work of others, the proposal destroys the unsustainable pyramid.<sup>324</sup> MLM companies pay consultants “based on recruiting,” but because cases like *Amway* established certain arbitrary definitions of what this means, MLM companies cannot be labeled pyramid schemes.<sup>325</sup> The proposed legislation would not ban all recruitment, but instead ban earnings based on recruitment tiers.<sup>326</sup> Recruiting incentives alone are not unethical if they are constrained to only a few tiers. After the provisions are implemented, a company could still allow consultants to recruit and share the business, but those consultants would not be able to climb the ranks by selling the opportunity rather than the products.<sup>327</sup> These provisions would not make MLM companies illegal but merely encourage the companies to reorganize and focus on sales of products, rather than endless chain recruitment.<sup>328</sup>

Section 4, Provision 3 aims to discontinue the practice of inventory loading.<sup>329</sup> The consultant is no longer the

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321. See *supra* Section III.A (arguing that MLM companies are pyramid schemes) and pp. 633–34 (providing language of Proposal Section 4).

322. See *supra* p. 633 (providing language of Proposal Section 4, Provisions 1–2).

323. See *supra* Section III.A.3.

324. See *supra* p. 633 (providing language of Proposal Section 4, Provisions 1–2).

325. See *supra* Section II.B (discussing the ruling in *Amway* that held MLM companies as legal so long as they compensated for recruitment as well as sales); Anti-Pyramid Promotional Scheme Act of 2017, H.R. 3409, 115th Cong. (2017).

326. See *supra* p. 633 (providing language of Proposal Section 4, Provision 2).

327. See *supra* pp. 633–34 (providing language of Proposal Section 4).

328. *Id.*

329. See *supra* pp. 633–34 (providing language of Proposal Section 4, Provision 3).

intermediary and is instead the distributor or salesperson.<sup>330</sup> MLM companies promote the idea of consultants as “business owners” to attract people to the business.<sup>331</sup> But consultants are independent contractors and salespeople without the benefits that come from owning a business.<sup>332</sup> There is no need for the consultant to buy the products before selling them.<sup>333</sup> This only makes the consultants the end consumers and causes inventory loading because they are often unable to resell the product.<sup>334</sup> Instead, consultants should make commission off the products but never buy the products themselves. The FTC was satisfied with *Amway’s* seventy-thirty retail rule even though consultants were still often the end consumers.<sup>335</sup> These measures were not sufficient to prevent inventory loading. The FTC does not currently consider internal consumption by consultants as a factor in identifying a pyramid scheme.<sup>336</sup> The language of this proposal addresses this by removing the consultant from the exchange of products, so they are not forced to become the end consumer.<sup>337</sup>

Section 4, Provision 4 tackles the problem of nondisclosure and misinformation.<sup>338</sup> Without better oversight of these companies, there will be no sustainable change to the law and consumer protection.<sup>339</sup> Applying the Business Opportunity Rule to MLM companies would initiate better regulation of the industry and curb the misinformation that the participants and the company expel.<sup>340</sup> Consumers should be aware of the

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330. See *supra* p. 632 (providing language of Proposal Section 3, Provision b).

331. See, e.g., *supra* notes 143, 205 and accompanying text.

332. See, e.g., Eidelson, *supra* note 101.

333. See generally Marguerite DeLiema, Doug Shadel, Amy Nofziger & Karla Pak, *AARP Study of Multilevel Marketing: Profiling Participants and their Experiences in Direct Sales*, AARP (Aug. 2018), at 4–13.

334. See PONZINOMICS, *supra* note 38, at 114.

335. *Amway Corp.*, 93 F.T.C. 618, 646 (1979); *Multi-Level Marketing Businesses and Pyramid Schemes*, *supra* note 80.

336. *FTC Business Guidance*, *supra* note 95.

337. See *supra* pp. 632–33 (providing language of Proposal Section 3).

338. See *supra* p. 634 (providing language of Proposal Section 4, Provision 4).

339. See *FTC Authority*, *supra* note 38.

340. Business Opportunity Rule, 16 C.F.R. § 437.6 (2021).

income statistics before joining an opportunity. All pertinent information must be provided to the public to make informed choices about the businesses they join or support.<sup>341</sup> Currently, the FTC gives guidance to MLM companies that no *consultant* may make false claims about the business or the products, but this proposed legislation would shift that burden to the *company* instead.<sup>342</sup> The FTC states, “an MLM should (i) direct its participants not to make false, misleading, or unsubstantiated representations and (ii) monitor its participants so they don’t make false, misleading, or unsubstantiated representations.”<sup>343</sup> This is important guidance, however, an affirmative duty to disclose financial information would put more responsibility on the companies to be transparent and prevent the spread of misinformation.

Because current law is inadequate, legislation is needed to combat the most harmful and commonplace practices committed by MLM companies,<sup>344</sup> most notably inventory loading, pay-to-play structures, recruitment pressures, and nondisclosure.<sup>345</sup> Each provision in the proposal herein focuses on eliminating each unethical practice and improving the regulations on the industry.<sup>346</sup> The provisions are based on previous legislation, as well as case law, and scholarly and statistical research on MLM companies.<sup>347</sup>

## CONCLUSION

From its origins, multi-level marketing has been a predatory industry preying on the most vulnerable.<sup>348</sup> The integration of

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341. See *supra* pp. 633–34 (providing language of Proposal Section 4).

342. See *supra* p. 634 (providing language of Proposal Section 4, Provision 4); FTC DISCLOSURE REQUIREMENTS, *supra* note 88.

343. See *FTC Business Guidance*, *supra* note 95.

344. See *FTC Authority*, *supra* note 38.

345. See *supra* Section III.A.

346. See *supra* pp. 633–34 (providing language of Proposal Section 4).

347. See *Republic of China Regulation on the Prohibition of Pyramid Selling*, *supra* note 251; Anti-Pyramid Promotional Scheme Act of 2017, H.R. 3409, 115th Cong. (2017); see *supra* Parts II–III.

348. See *supra* Section III.B.

MLM companies with the United States political arena has legitimized MLM companies and empowered them to continue blatantly destructive business practices while profiting from the façade they have created.<sup>349</sup> The companies use tactics common in cults, manipulating people to go into debt to pursue the lies of financial success MLM companies promise.<sup>350</sup> Especially in recent years, many are falling victim to MLM companies as a result of the vulnerable state caused by the COVID-19 pandemic.<sup>351</sup> MLM companies are taking advantage of the situation this vulnerability and employing tactics to recruit members and exploit them financially.<sup>352</sup> The business structure relies on endless chain recruitment and pay-to-play plans, but results in a top-loaded pyramid structure where the majority must fail.<sup>353</sup> As a result, the only solution is new legislation to ban the most harmful MLM practices to protect consumers and encourage a fair market.

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349. *See supra* Section I.D.

350. *See supra* Section III.C.

351. Reinicke, *supra* note 220; *see supra* Section III.B.

352. *See supra* Section III.B.

353. *See supra* Section III.A.