

Will the FTC Unilaterally Change the Business and Legal Landscape for Direct Selling in 2017?

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In October 2016, FTC Chairwoman Edith Ramirez spoke to the Direct Selling Association, and suggested significant new restriction and regulation that upends decades of industry business practice and legal standards:

1. Rejection of industry and court reliance on the safe harbor standards of the famous 1979 *FTC v. Amway* case.
2. Autoship to distributors should be prohibited.
3. Monthly activity volume requirements may not include any purchases by distributors.
4. Tracking of performance activity connected to wholesale purchasing should be banned.

Actually, notwithstanding the Chairwoman's minimization of *Amway*, courts have embraced *Amway* for 40 years.

And, in 50 years of case authority on pyramid schemes, the courts have condemned inventory loading, earnings misrepresentations, lack of incentives on retailing, absence of return policies, programs that inadequately enforce the ***Amway Rules*** or pay out rewards on sales to those who are not what ***Koscot*** referenced as "ultimate users."

But, in the presence of adequate safeguards under ***Koscot***, ***Amway*** or ***BurnLounge***, no court has insisted on the type of restrictions called for by the FTC. If the FTC has the muscle to impose such marketing prohibitions, it will likely be due to "extra judicial" factors rather than reliance on the existing legal standards of 50 years of case authority.

The FTC will also need to buck an opposite trend in more than a dozen states and a proposed congressional action, **H.R.5230**, a bi-partisan anti-pyramid bill to codify recognition of personal use purchases and establish **legitimacy** standards acceptable to the direct selling industry. The bill is sponsored by Marcia Blackburn, member of the Presidential-Elect Transition Team and other bi-partisan sponsors in a post-2016 election environment that is decidedly "anti-regulatory," where one incoming cabinet member is a family owner of Amway, where a President-Elect was formerly the branded spokesperson for multiple direct selling companies, where one prominent congressional committee chair was previously a ten-year employee of a leading direct selling company and where the incoming President appointed a Special Advisor for reduction of the federal regulatory burden, Carl Icahn, a 23% shareholder of Herbalife, one of the world's largest direct selling companies.

In addition, the FTC Act provides for the President to appoint 5 commissioners to 7 year terms, the composition of which may be 3 from one party and 2 from another. Currently, there are 3 commissioners, 2 Democrat and 1 Republican. After the new President appoints two new commissioners, the likelihood is 3 Republican and 2 Democrat. And the President is entitled to name the Chair of the FTC Commission. In other words, the positions of Chairwoman Ramirez may prove to be short term in duration as a less burdensome regulatory environment is ushered in over the next few years.

And so, the question: Ratchet up the regulation or ratchet down the regulation? Only time will tell. Better yet ... this is a good time for the FTC and direct selling industry to find common ground and workable rules that will allow the industry to prosper in an effective and ethical manner.

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