

# MULTILEVEL MARKETING, AN UNWINNABLE LOTTERY: HOW MLMs ILLEGALLY TARGET WOMEN AND MINORITIES USING DECEPTIVE AND PREDATORY RECRUITMENT PRACTICES AND THE NEED FOR SPECIFIC AND EXPANDED LEGAL PROTECTIONS

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## ABSTRACT

*This Note details the rise of the modern multilevel marketing companies' (MLMs) business model and explores how MLMs have become synonymous with deceptive recruiting practices that target and exploit women and minorities. To understand the rise of the "modern MLM"—defined by this Note as direct selling companies incorporated after 1979—this Note begins with a discussion of the seminal 1979 Amway decision and goes on to examine the current legal theories behind most states' criminalization of pyramid schemes as unwinnable lotteries. Further, it analyzes the notable exclusion of MLMs from current criminal statutory schemes. Based on that foundation, this Note posits modern MLMs that engage in deceptive and predatory recruiting practices: (1) disproportionately target women and minorities, resulting in the majority of recruits experiencing negative social, mental, and financial ramifications; and (2) create an illegal, unwinnable lottery system by failing to adequately disclose to recruits material information about average income at the onset of employment. The MLMs: Mary Kay, LuLaRoe, and Herbalife National are used as illustrative case studies of the tactics MLMs use to illegally target women and minorities. This Note then offers a proposed amendment to state statutes like California's that do not criminalize MLMs by expanding the statutory language to explicitly address the predatory and deceptive nature of MLM recruiting, which creates an illegal, unwinnable lottery. Finally, this Note explores the danger posed to women and minorities by the Direct Selling Association's policy priorities and asserts its policies only exacerbate and strengthen the disproportionately negative impact felt by women and minorities nationally.*

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Hey girl, how are you? I know we haven't spoken in a while, but I saw your latest [insert social media platform] post and I just wanted to say you look amazing! You have always had such great [insert attribute connected to multilevel marketing product], have you ever thought about opening your own [insert multilevel product] business? I work for myself selling [insert multilevel marketing company name], and I am thriving! I'm actually looking for someone to model [insert multilevel marketing product] for me at a little get-together I'm having for some of my best clients. Would you mind helping me out? I would love to catch up and there would even be some free [insert specific multilevel product type] in it for your trouble! Let me know soon, can't wait to hear from you.<sup>1</sup>

The above message is a trap. A simulated example—derived from real-life messages—used to target women and minorities with the simple promise of a good time and free stuff.<sup>2</sup> But the real reason for these kinds of subliminal and emotionally manipulative messages is far more sinister. To quote the renowned American sculptor and video artist Richard Serra, “[i]f something is free, you’re the product.”<sup>3</sup> Messages like the one modeled above are the preferred recruiting method of modern Multilevel Marketing companies (MLMs). Capitalizing on women and minorities’ pre-existing social circles is a tried-and-true recruitment tactic that lures in new MLM participants under the guise of community, friendship, or “sisterhood.”<sup>4</sup> MLMs adapt this formula to target minorities by simply adjusting the language to appeal to specific minority communities’ cultural norms. Most MLMs train their participants—often called distributors or sellers—to utilize their online presence and in-person social connections to recruit other women and minorities for money.<sup>5</sup> These MLMs are elaborate pyramid schemes hiding in plain sight. Specifically, most MLMs are, “[p]urported income opportunit[ies], in which persons recruited into a company-sponsored program make ongoing purchases of products and services and are incentivized to recruit others

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1. See generally Shelby Heinrich, *14 Times People Did The Lord's Work And Called MLM "Boss Babes" On Their BS*, BUZZFEED (Jan. 23, 2022, 8:46 PM), <https://perma.cc/85XX-3NPW>.

2. *Id.*

3. Soumik Roy, *Facebook: If something is free, 'you' are the product*, TECH HQ DIGITAL MARKETING (Apr. 9, 2018, 9:24 AM), <https://perma.cc/6B49-8LN6>.

4. See Bridget Read, *Hey, Hun! In women's joblessness, multi-level marketers saw opportunity.*, CUT (Feb. 3, 2021, 6:00 AM), <https://perma.cc/3Y5U-W82N>.

5. This Note uses participant, distributor, and seller to describe MLMs lower tier or entry level members.

to do the same . . . in order to qualify for commissions and bonuses [and] advance upward in the hierarchy of levels in a pyramid of participants.”<sup>6</sup> This recruitment cycle is often referred to as an “endless chain” based on the potentially endless additional “links” or recruits that can be added to the metaphorical MLM chain or pool of base-level participants.<sup>7</sup> Participants in an “endless chain” scheme are illegally offered the “chance” to *solely* profit off of the introduction of new participants into the scheme.<sup>8</sup> MLMs know that most states prohibit the operation and advancement of pure “endless chain” schemes and as such, now tend to emphasize the MLM product sales incentives during recruitment. The enticement of potential participants with outlandish product claims and misleading income prospects is now a hallmark aspect of MLM recruitment.<sup>9</sup> Base-level participants are set up to fail.<sup>10</sup> The cruel reality is that, “[t]he vast majority of participants spend more than they receive and eventually drop out, only to be replaced by a stream of similarly misled recruits. . . .”<sup>11</sup> However, most modern MLMs attempt to operate within the bounds of the law, despite incentivizing their participants to engage in misleading, deceptive, and predatory recruiting tactics.

Modern MLMs have accomplished the feat many of their predecessors “get rich quick schemes” have not: basic legality.<sup>12</sup> Where the label of Ponzi and pyramid are today synonymous with schemes and fraud, MLMs are the mighty morphing,<sup>13</sup> antibiotic-resistant, Jason Voorhees’s<sup>14</sup> iteration of the direct selling business model. Just like the killer demon, Jason, in the *Friday the 13th* horror movies, “[i]t doesn’t matter if he’s decapitated, cremated, or exploded — Jason always comes back,”<sup>15</sup> and so too does the multilevel marketing business model. Faced with governmental regulation and statutory criminalization, MLMs, like viruses, morph and adapt to their new regulatory environment to achieve facial compliance with federal and state laws. Facial compliance allows MLMs to avoid being labeled with the only names more cursed than Hitler and Voldemort—Ponzi and Pyramid. Avoiding those monikers allows MLMs to carry on profiting from the entrepreneurial spirit of their seemingly endless supply of independent

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6. Jon M. Taylor, *The Case (For And) Against Multi-Level Marketing: The Complete Guide to Understanding the Flaws – and Proving and Countering the Effects – of Endless Chain “Opportunity” Recruitment, or Product-based Pyramid Schemes*, CONSUMER AWARENESS INST. 2-2 (1st ed. 2011).

7. CAL. PENAL CODE § 327 (West 2019).

8. *Id.*

9. Taylor, *supra* note 6.

10. *Id.*

11. *Id.*

12. *Id.* at 2–3.

13. Referencing *Mighty Morphin Power Rangers* (Fox Kids Aug. 28, 1993–Nov. 27, 1995).

14. See Maria Felix, *The Real Reason Jason Can’t Die In The Friday The 13th Franchise*, LOOPER (May 9, 2021, 4:09 PM), <https://perma.cc/7CXJ-6JQ7> (“Jason Voorhees can’t die. It’s a universal truth that may as well be added to the three laws of motion. ‘If a Jason Voorhees is in motion, then no object can stop him’ . . . It doesn’t matter if he’s decapitated, cremated, or exploded — Jason always comes back.”).

15. *Id.*

consultants.<sup>16</sup> This Note seeks to explore MLM recruitment in comparison to the tactics used by MLMs' illegal fraternal twin—pyramid schemes. Aside from generally not being considered illegal gambling, MLMs distinguish themselves from Ponzi and pyramid schemes by whom they recruit.<sup>17</sup> While most traditional Ponzi and pyramid scheme recruiting is gender nonspecific, modern MLMs have latched onto specific demographics with zeal: women and minority groups.<sup>18</sup>

In Section I, this Note details the rise of the modern MLM and explores the current theory behind one state's criminalization of pyramid schemes as unwinnable lotteries.<sup>19</sup> In Section II, this Note posits modern MLMs who engage in deceptive and predatory recruiting practices: (1) disproportionately target women and minorities, resulting in the majority of recruiters experiencing negative social, mental, and financial ramifications; and (2) create an illegal, unwinnable, lottery system by failing to adequately disclose to recruits material information about average income at the onset of employment. Further, Section II uses Mary Kay, LuLaRoe, and Herbalife Nutrition (Herbalife) as illustrative case studies of how MLMs have illegally targeted and exploited women and minorities through their deceptive practices. Next, Section III of this Note offers a proposed amendment to "endless chain" statutes that seeks to expand consumer protections by explicitly addressing the predatory and deceptive nature of MLM recruiting. Finally, in Section IV, this Note explores the danger posed to women and minorities by the Direct Selling Association (DSA), the lobbyist organization MLMs have commandeered into doing their political bidding. Section IV addresses the DSA's role as the political face of many predatory MLMs and asserts that DSA's policy priorities exacerbate and strengthen the disproportionately negative impact felt by MLM participants nationally.

### I. AN EXCITING NEW BUSINESS OPPORTUNITY OR ILLEGAL GAMBLING?

Modern MLMs stave off being deemed illegal Ponzi or pyramid schemes by carefully crafting and recrafting an image of MLM distributors selling products and services rather than being the product themselves.<sup>20</sup> Quintessentially, that is what all anti-pyramid scheme, or "endless chain" legislation seeks to prevent.<sup>21</sup> This Note defines "modern MLMs" as direct selling companies incorporated after

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16. Taylor, *supra* note 6, at Intro 7–8.

17. WALTER T. CHAMPION & NELSON I. ROSE, *GAMING LAW IN A NUTSHELL* 39 (2d ed. 2018).

18. Other demographics are targeted by Ponzi, pyramid schemes, and MLMs; however, this Note investigates and addresses solely their predatory tendencies toward women and minorities.

19. California's "endless chain" law was selected as an example for this Note because as written, its statute exemplifies how easily MLMs fit into any state's existing "endless chain" or anti-pyramid scheme statute.

20. Taylor, *supra* note 6, at 2–27; *see generally* CAL. PENAL CODE § 327 (West 2019) (considering "sales made to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme" compensation that separates illegal pyramid schemes from legitimate direct selling).

21. *Bounds v. Figurettes, Inc.*, 135 Cal. App. 3d 1, 2 (Div. 1, 1982) (*codified in*, CAL. PENAL CODE § 327 (West 2019)).

1979, after the *Amway* precedent.<sup>22</sup> Today's MLMs are in constant tension with state and federal laws, and yet are rarely complained about or reported to law enforcement as participants fear self-incrimination after having participated in an MLMs' deceptive and predatory tactics while they attempted to turn a profit.<sup>23</sup> While Ponzi and pyramid schemes are often talked about synonymously with MLMs, the U.S. Securities and Exchange Commission (SEC) defines Ponzi schemes as, "investment fraud that pays existing investors with funds collected from new investors, [where] . . . organizers often promise to invest your money and generate high returns with little or no risk."<sup>24</sup> Similarly, pyramid schemes are considered a Ponzi scheme variation where, instead of the promise of a high return on investments, existing participants are compensated for merely recruiting new members. Today, with the rise of the modern MLM business model, the SEC now cautions against purported "business opportunity" schemes that are "pitched" as MLM programs, as recruiting is a major feature of both legal and illegal MLM style programs.<sup>25</sup> Tipping the scale in favor of legality, the product sales or offered service component of the MLM business model prevents all MLMs from being considered illegal pyramid schemes. MLMs often successfully argue their programs are not pyramid schemes, as participants derive their income from both sales and recruitment efforts.<sup>26</sup> This argument critically leaves out an assessment of which activity—sales or recruitment—makes up the majority of a participant's achievable income. Recognizing this often-unexamined metric regarding the proportion of sales and recruitment activity, the Federal Trade Commission (FTC) classifies "[c]lassic, no-product pyramid schemes [as] unfair and deceptive and therefore illegal,"<sup>27</sup> and, "the premise of multilevel vs. pyramid marketing may well represent a distinction without a difference."<sup>28</sup> MLMs thrive in this gray area of the law.

The MLM industry actively works to distance itself from association with pyramid schemes even though MLMs are schemes in practice. According to MLMs' financial reports, "[a]pproximately 99.6% of ALL participants (including drop-outs) lost money, after subtracting ALL expenses."<sup>29</sup> Despite such high loss rates, MLM recruiters employ the same deceptive and predatory tactics, thereby preventing recruits from accurately assessing the risks of joining. Such high rates of loss also suggest recruiting new participants using the rhetoric of an "income" or

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22. *In re Amway Corp.*, 93 F.T.C. 618, 668–70, 706 (1979) (finding the multilevel marketing business model is not inherently a pyramid scheme).

23. Taylor, *supra* note 6, at Intro 9.

24. U.S. Sec. & Exch. Comm'n, *Ponzi Scheme*, INVESTOR.GOV (Nov. 20, 2021), <https://perma.cc/M98G-TTCF>.

25. *Id.*

26. Taylor, *supra* note 6, at Intro 5.

27. *Id.* (citing letter from Robert Frisby, FTC attorney, to Jon M. Taylor (May 22, 2001)).

28. *Id.* (quoting letter from Bruce Craig to Robert Pitofsky, Chairman of the FTC and the official who drafted the Commission's 1979 *Amway* opinion (Feb. 25, 2000)).

29. *Id.* at 1–7.

“business opportunity” is “a misrepresentation in itself.”<sup>30</sup> For instance, MLMs found to be operating as pyramid schemes usually use the sale of products as a smokescreen to hide an underlying investment scheme.<sup>31</sup> In the seminal 1979 *Amway* case, the FTC offered abundant evidence in its complaint to support allegations that:

In truth and in fact . . . distributors . . . are not long likely to recruit other distributors in multiplication, duplication, geometrically increasing, unlimited or endless chain fashion, or to profit from sales to other distributors at lower functional levels . . . because: (a) . . . [over saturation] . . . [renders] it virtually impossible to recruit others. (b) . . . available [new] persons . . . to serve a particular area [have been] exhausted. (c) . . . The greater the number of levels of distribution, the more inefficient the distribution system becomes, and the less profitable it is likely to be at the lower levels.<sup>32</sup>

Amway ultimately defeated these allegations with empirical data, disproving the saturation and exhaustion theories by showing significant increases in recruitment in the exact areas where the FTC claimed saturation, thus narrowly avoiding being deemed a pyramid scheme.<sup>33</sup> This finding is alarming as saturation via recruiting is mathematically “inevitable” because if every recruit brings in two recruits by the 32nd round, the total number of recruits would exceed the earth’s population.<sup>34</sup> The Commissioner’s decision also overlooks the more pressing issue of *market* saturation rather than *total* saturation, which may have prevented recruits from selling to consumers in any given area, drastically diminishing their ability to earn income from sales.<sup>35</sup> This inability to sell products turns part-time sellers into full-time recruiters as recruiting quickly becomes the more stable and lucrative income stream.

However, the Commissioner did find Amway made illegal misrepresentations and claims about new and existing distributors’ specific earnings and sales potential.<sup>36</sup> The disclosure of earning and sales potential is often concealed, manipulated, or withheld altogether by the MLM industry in an effort to keep potential and existing participants in the dark about their actual income potential. Instead, MLMs only share the income data of those participants they consider inspirational “success” stories. Further, the *Amway* decision looked to the *National Dynamics* case, which similarly found the use of “generalized earnings claims to

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30. *Id.* at Intro 4.

31. *Id.* at Intro 5.

32. *Amway Corp.*, 93 F.T.C. at 624.

33. RODNEY K. SMITH, MULTILEVEL MARKETING: A LAWYER LOOKS AT AMWAY, SHAKLEE, AND OTHER DIRECT SALES ORGANIZATIONS 36–37 (Grand Rapids, Mich. Baker Book House, 1984).

34. Taylor, *supra* note 6, at 3–53.

35. *Id.* at 8–73.

36. *Amway Corp.*, 93 F.T.C. at 732.



be misleading and deceptive because they ‘far [exceeded] the earnings normally received by dealers.’”<sup>37</sup> Despite this finding, modern MLMs are guilty of recycling this same tactic, improving upon it only by attaching simple and ineffective disclaimers such as “results may vary.” The Commissioner’s refusal to brand Amway as a pyramid scheme became the blueprint for emerging modern MLMs.<sup>38</sup> The Commissioner determined Amway’s “Sales and Marketing Plan” was a sufficient safeguard against pyramid scheme conduct as the plan “[imposed] certain limitations upon the distributors’ resale of products purchased from Amway and upon the method of recruiting new distributors.”<sup>39</sup> Naturally, post-1979 MLMs put rules or plans in place that purported to limit or govern distributor conduct. However, the Commissioner seems to have overlooked the reality that rulebooks without real consequences are just paperweights. The *Amway* precedent thus gave birth to a generation of modern MLMs that looked legal on paper, but rarely practiced what company policy preached.

Spurred by the *Amway* decision, MLMs consider recruiting to be “the lifeblood of the industry,”<sup>40</sup> putting all MLMs at risk of becoming pyramid schemes. So long as MLMs incentivize part-time sellers to become full-time recruiters and to enjoy stable income by bringing in new people rather than selling products, MLMs will be inherently predatory to the public.<sup>41</sup> Sellers often choose to leave MLMs when they realize how their “work” has turned them into predators who capitalize on the supportive nature of friendship only to eventually “[pull] on that lever in a way that feels quite icky.”<sup>42</sup> Professor of Organizational Behavior, Dr. Raina Brands, explains that this “ick” factor comes from “pricing the friendship” by abusing social norms and overstepping boundaries only to pressure that friend into “buy[ing] something off you.”<sup>43</sup> The author of the Consumer Awareness Institute’s study *The Case (For And) Against Multi-Level Marketing*, Jon M. Taylor, MBA, Ph.D., points to the *Amway* decision as a dangerous precedent, commenting:

This ruling assumed Amway’s compliance with certain “retail rules” to assure that products were sold to the public and not just stockpiled. These rules were never significantly enforced. MLM promoters cite the *Amway* precedent as justification for their programs, in spite of mounting evidence of misrepresentations in MLM recruitment campaigns and high loss rates among participants.<sup>44</sup>

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37. *Id.* at 732, 735 (ordering Amway to cease and desist misrepresenting past, present, or future profits, earnings, or sales from distributor participation).

38. See generally *Amway Corp.*, 93 F.T.C. at 64; see also Taylor, *supra* note 6, at 3–54.

39. *Amway Corp.*, 93 F.T.C. at 630.

40. Taylor, *supra* note 6, at 2–6.

41. *Id.*

42. Hatti Rex, *Multi-Level Marketing Schemes Are The Friendship Ruiner You Didn't See Coming*, REFINERY29 (Jun. 10, 2020, 11:00 PM), <https://perma.cc/5X4S-M77R>.

43. *Id.*

44. Taylor, *supra* note 6, at Intro 3.

The *Amway* precedent cleared the way for MLMs under the direct selling business label to flourish, resulting in the creation of a national direct selling market that generated approximately \$40 billion in sales in 2017, 2018, 2019, and 2020.<sup>45</sup> As Dr. Taylor notes in his 2011 authoritative report, without strict enforcement of those policies designed to prevent an MLM like Amway from devolving into a pyramid scheme, new participants are “destined to failure and financial loss.”<sup>46</sup>

While the FTC and SEC take action against the most egregious MLMs masquerading as legitimate companies civilly and administratively, it is primarily up to the states to determine an entity’s officers’ criminal culpability. This Note examines the effectiveness of state laws, like California’s anti-pyramid scheme law found under Title 9 of the Penal Code, that make pyramid schemes illegal but fail to address the similarly situated threat of MLMs.<sup>47</sup> Title 9 addresses illegal games of chance, skill, and lotteries or crimes against Public Decency and Good Morals.<sup>48</sup> Famously, courts have struggled with determining if poker is legally a game of skill or chance, as it contains elements of both.<sup>49</sup> Specifically, if courts simply labeled all poker games as a game of chance, that determination “ignores poker’s unique and enduring quality of bluffing.”<sup>50</sup> In *In re Allen*, the California Supreme Court held that games of chance and skill are determined by “[t]he character of the game rather than a particular player’s skill or lack of it . . . the test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game.”<sup>51</sup> Under this theory, endless chain organizations, better known as pyramid schemes, are illegal in California—and in other states under varying legal theories<sup>52</sup>—as they are considered illegal, unwinnable lotteries or endless chains.<sup>53</sup> Specifically, California Penal Code section 327 makes it illegal for “a participant [to pay] a valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant.”<sup>54</sup> Taking the above brief account of the effect of the *Amway* decision and the example of California’s decision to criminalize pyramid schemes as unwinnable games of chance, Section II focuses and expands on the shift

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45. *Industry Fact Sheets*, DIRECT SELLING ASSOC. (2022), <https://perma.cc/B8K7-YV6W>.

46. Taylor, *supra* note 6.

47. CAL. PENAL CODE § 327 (West 2022).

48. *Id.*

49. WALTER T. CHAMPION & NELSON I. ROSE, *GAMING LAW IN A NUTSHELL* 37 (2d. ed 2018).

50. *Id.*

51. *In re Allen*, 59 Cal. 2d 5, 6 (1962).

52. Taylor, *supra* note 6, at Appx. 10E (Individual detailed analysis of all applicable U.S. laws which either make pyramid schemes or endless chains illegal or seek to regulate MLMs, based on deceptive practices as “the case can be made that all MLMs, with their inherent flaws as endless chain recruitment schemes, are violating some federal and state laws.”).

53. CAL. PENAL CODE § 327 (West 2022).

54. *Id.*



toward the victimization and targeting of women and minorities that developed in the wake of the 1979 *Amway* precedent.

## II. BRING A FRIEND, WE'LL GET TOGETHER, HAVE A FEW LAUGHS...

The *Amway* precedent served as a road map for all modern MLMs on how to continue to operate like a pyramid scheme, profit like a pyramid scheme, but not legally be a pyramid scheme. Then Commissioner and later FTC Chairman,<sup>55</sup> Robert Pitofsky, who authored the *Amway* final order, made a point of referencing the company's "almost uninterrupted growth" as a factor suggesting it was not a pyramid scheme.<sup>56</sup> However, in 2019, "uninterrupted growth" did not prevent Washington State from procuring a \$4.75 million settlement for Washingtonian victims of the California-based MLM, LuLaRoe.<sup>57</sup> Notably, 60% of Washington's victim pool of 3,000 are women and 30% belong to a minority group.<sup>58</sup> These statistics are also reflected among the 21 million Americans involved in direct selling MLMs.<sup>59</sup> This Note posits that certain MLMs engage in predatory and deceptive recruitment tactics that specifically target women and minorities because the MLM industry has identified that demographic as particularly risk illiterate and already in the market for flexible, nontraditional work. Three modern MLMs, A) Mary Kay, B) LuLaRoe, and C) Herbalife Nutrition (Herbalife), each discussed below, are used as illustrative case studies to explore: (1) why MLMs target women and minorities; (2) how MLMs recruit women and minorities using deceptive and predatory tactics; and (3) evidence of how deceptive and predatory recruitment tactics should give rise to criminal liability for violators, as new participants cannot consent to join an illegal unwinable lottery (pyramid scheme) when ill-advised of the actual potential for income.

### A. MARY KAY

Some modern MLMs specifically target women and minorities because the company's policymakers understand that demographics' psychological profile. Targeted recruiting enables MLMs to devise customized recruitment rhetoric and tactics that incentivize participation by appealing to women and minorities' desire to earn income on their terms and without the hassle or risk of starting a small business from scratch. The 2018 study *Decision-Making and Vulnerability in a Pyramid Scheme Fraud* suggests, after sampling 452 subjects at the 2017

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55. *Commissioners and Staff: Robert Pitofsky Former Chairman Biography*, FED. TRADE COMM'N, <https://perma.cc/562V-FF4W> (last visited Nov. 12, 2022).

56. *Amway Corp.*, 93 F.T.C. at 83.

57. Press Release, Washington State Office of the Att'y Gen., LuLaRoe to pay \$4.75 million to resolve AG Ferguson's lawsuit over pyramid scheme (Feb. 2, 2021), <https://perma.cc/F7JX-R6XJ>.

58. Marguerite DeLiema, Doug Shadel, Amy Nofziger, & Karla Pak, *AARP Study of Multilevel Marketing: Profiling Participants and their Experiences in Direct Sales*, 5 (2018), <https://perma.cc/6YF4-LPBM>.

59. *Id.*

Minnesota State Fair, that “[w]omen might be more vulnerable than men to pyramid fraud.”<sup>60</sup> Researchers posit that this predisposition to vulnerability could come from the:

Perceived likelihood of winning [potentially being] inflated for women or those with less education. These inputs to decision-making, Perceived Win Likelihood and Reported Role of Perceived Win Likelihood, are important to the final uptake decision, as are religiosity, perceived benefits from risky investments, and prior exposure to pyramid scheme fraud through friends or family.<sup>61</sup>

The Harvard researchers who proposed the theory on which the above study was based offered a new choice under a risk model dubbed the “salience” theory.<sup>62</sup> This new “salience” theory asserted that the mere idea of lottery payoffs distracts a person’s attention away from the idea of the lottery itself, leaving less cognitive ability available to assess the risk of participating at all.<sup>63</sup> The modern MLM Mary Kay illustrates how MLMs succeed in exploiting women’s salient natures. Mary Kay, in particular, uses a social, “layering” approach to recruit women, coaching existing participants to exploit their existing social network and community clout to subtly groom their friends and family to make the move from client to recruit.<sup>64</sup> In an interview with a former Mary Kay “consultant,” it became clear that capitalizing on a woman’s existing social circle was not only encouraged but expected by recruiters.<sup>65</sup> Selling parties are portrayed as the key to success. A consultant who hosts at least three parties a week *could* sell enough of her products to meet her sales goals, while simultaneously starting the layering process of recruiting her guests.<sup>66</sup> The founder of Mary Kay, Mary Kay Ash, specifically designed Mary Kay to be the antithesis of all of the other “male-dominated” direct sales companies she had worked for prior to starting her own business.<sup>67</sup> Part of Ash’s vision was realized by capitalizing on women’s pre-established social circles as a starting point for a new consultant’s “business.”

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60. Stacie A. Bosley, Marc F. Bellemare, Linda Umwali, & Joshua York, *Decision-making and Vulnerability in a Pyramid Scheme Fraud*, 80 J. BEHAV. & EXPERIMENTAL ECON., 1, 24 (2019) (women and uneducated people may be more vulnerable to pyramid schemes).

61. *Id.* at 26.

62. Pedro Bordalo, Nicola Gennaioli, & Andrei Shleifer, *Salience Theory of Choice Under Risk*, 127 Q.J. OF ECON., 1243, 1244, (2012) (salience defined and explained as a theory).

63. *Id.* at 1280.

64. Telephone Interview with Kimberly Mangan, Former Mary Kay consultant (Nov. 16, 2021).

65. *Id.*

66. *Id.*

67. 2012 *Corporate Fact Sheet*, MARY KAY: THE COMPANY, <https://perma.cc/7RXG-3SCD> (last visited Dec. 14, 2022).

A typical “layering” recruitment experience is likely to include most if not all of the following steps.<sup>68</sup> First, call up a girlfriend and ask if she would like to attend a party as a product model, then offer her a free product for her trouble. At the party, compliment your friend about how wonderful the product looks on her, while casually mentioning how much you love being a consultant. Next, convince the same friend to host a party at her home—again offer her a free product. Once that friend has hosted at least once, begin asking if she has ever thought of selling these products herself. Encourage that friend to join by emphasizing her potential to make money by selling products she now personally uses and can sell part-time from home. Mention the fact that she would be able to buy products “at cost” and make extra money on her terms. Finally, sign up your friend to be a consultant under you and collect your recruitment dividend.<sup>69</sup>

What is noticeably absent from the above typical process is the lack of full and frank disclosure about what new and existing consultants are actually making and what percentage of each consultant’s profits are cannibalized simply by having to buy enough product to stay “active.”<sup>70</sup> The success of the Mary Kay “layering” method is exemplified by the fact that in 2012 alone, Mary Kay had more than 2.4 million Independent Beauty Consultants internationally, with worldwide wholesale sales amounting to \$3 billion.<sup>71</sup> More recently, Mary Kay has found success targeting younger female recruits. A former Mary Kay consultant left the MLM after noticing how the recruiting process was “[a] bit strange and predatory. [Running] campaigns inside universities and colleges because the older generations all ‘knew’ what was up. [Mary Kay] was marketing toward . . . younger girls specifically because they didn’t know the shtick.”<sup>72</sup> However, successful does not necessarily mean legal. While targeting a younger demographic to sell and buy their products is technically a legal marketing strategy, the method in which that strategy is carried out cannot be predatory or deceptive. The FTC and most states in the United States (U.S.) make that abundantly clear by either criminalizing or regulating “deceptive” acts that often include misstatements or omissions of material facts about one’s participation in an MLM.<sup>73</sup>

## B. LULAROE

Modern MLMs like Mary Kay that sell primarily female products, like cosmetics, are uniquely situated to recruit women to sell products to other women.

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68. Telephone Interview with Kimberly Mangan, Former Mary Kay consultant, (Nov. 16, 2021) (describing how she was personally recruited and was taught to recruit other women).

69. *Id.*

70. *Id.* (staying active required making a minimum purchase of product every three months, otherwise your contract could be terminated. In 2021, consultants needed to purchase \$225 in products every three months).

71. MARY KAY, *supra* note 67.

72. Megan Liscomb, *Former MLM Members Are Sharing Why They Got Out, And It’s Shocking And Sad*, BUZZFEED (Nov. 27, 2021, 1:16 PM), <https://perma.cc/E6JV-RXTC>.

73. Fed. Trade Comm’n Act, 15 U.S.C. § 45(a)(1) (providing that, “[u]nfair or deceptive acts or practices in or affecting commerce, are . . . declared unlawful.”).

Similarly situated is the California-based clothing MLM, LuLaRoe. While Mary Kay has been conscientious about ensuring its policies are facially compliant with FTC regulations and state laws, LuLaRoe got too big for its leggings in 2019 when the Washington State Attorney General (AG) declared LuLaRoe was operating a pyramid scheme.<sup>74</sup> In a 2019 Complaint, the AG's office alleged that LuLaRoe emphasized recruitment and encouraged inventory purchases in connection with participation rather than bona fide retail sales.<sup>75</sup> The AG's office further emphasized that the key to success is "Group Volume" and that participants could receive large rewards through the "Leadership Bonus Plan."<sup>76</sup> "Group Volume" meant that recruiting, rather than selling LuLaRoe clothing (such as leggings), was generally how most participants saw any profit. The AG correctly identified that incentivizing "Group Volume" recruiting was an illegal "endless chain" aspect of the LuLaRoe business model. This model put an enormous strain on LuLaRoe sellers' personal and familial relationships.<sup>77</sup> Additionally, LuLaRoe consultants found themselves working harder and for longer amounts of time than they would in a traditional full-time job to merely break even.<sup>78</sup> The AG further alleged that LuLaRoe failed to disclose material terms to their new recruits and engaged in unfair and deceptive practices, which encouraged inventory loading.<sup>79</sup> The AG confirmed that based on all of those allegations and more, the majority of the Washingtonian consultants lost money, which is consistent with Dr. Taylor's FTC study finding that 99% of MLM participants suffer financial losses.<sup>80</sup>

If new MLM recruits were told in simple terms and with empirical data that they would likely fail as an MLM distributor, MLMs would lose much of their ability to trick people into buying "tickets" to an "unwinnable lottery." However, the burden to not engage in deceptive practices is on MLMs, not the general public. State laws and federal regulations need to do more to proactively legislate against the litany of bad faith modern MLMs that exist today because of loopholes created by the *Amway* precedent. In states with specific MLM statutes, the laws expressly acknowledge MLMs' frequent devolvement into pyramid scheme practices. MLM-specific laws are necessary to prevent MLMs from operating in legal gray areas just because the companies are not traditional pyramid schemes or endless chains.

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74. Complaint for Injunctive and Other Relief at 1, *Wash. v. LLR*, No. 19-2-02325-2 SEA (K.C.S.C., 2019).

75. *Id.* at 4.

76. *Id.*

77. Stephanie McNeal, *Millennial Women Made LuLaRoe Billions. Then They Paid The Price*, BUZZFEED NEWS (Feb. 22, 2020, 10:32 AM), <https://perma.cc/S59F-SAAE>.

78. *Id.*

79. *Id.* at 13.

80. Taylor, *supra* note 6, at Intro 5.

## C. HERBALIFE

While Mary Kay and LuLaRoe specifically targeted women, the modern MLM Herbalife targeted another vulnerable population: Latina/o(s).<sup>81</sup> Herbalife's particularly predatory recruiting tactics exploited Latina/o community members with undocumented statuses, making it nearly impossible to report Herbalife's misconduct to authorities without disclosing one's immigration status.<sup>82</sup> Reports from former Herbalife participants or "club owners" stated that recruiters would use the fact that a Social Security number was unnecessary to become a distributor as a tactic to sign up new participants.<sup>83</sup> On an even more sinister level, Herbalife knew about its participants' staggering losses based on an in-house company survey.<sup>84</sup> That survey found that "[c]lub owners spent an average of about \$8,500 to open a club, and 57% of club owners reported making no profit or losing money."<sup>85</sup> Fortunately, in 2016, the FTC stepped in, securing a \$200 million settlement for 350,000 Herbalife victims.<sup>86</sup> The groundbreaking settlement required "Herbalife to fundamentally restructure its business" and to reward verified sales rather than recruiting efforts.<sup>87</sup> Former FTC Commissioner and Chairwoman Edith Ramirez<sup>88</sup> explained that in order for Herbalife to begin operating legitimately, the MLM would be required to "[make] only truthful claims about how much money its members are likely to make, and . . . compensate consumers for the losses they have suffered as a result [of the company's] . . . unfair and deceptive practices."<sup>89</sup> Fundamental restructuring is the answer to preventing existing MLMs from flagrantly exploiting minorities and women alike. So long as MLMs are allowed to utilize predatory and deceptive recruiting tactics, the public will always be at risk.

The 2016 settlement was a victory for Herbalife victims. Participants from 2009 to 2015 who paid "at least \$1000" to Herbalife received a \$1000 "refund check" in the mail to compensate them for estimated losses.<sup>90</sup> Financial recovery for victims is essential to disincentivize MLMs from engaging in deceptive and predatory behavior in the future. Settlement terms, like requiring "80% of

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81. Steph Amaya Mora, *The pandemic leaves more Latinos vulnerable to illegal pyramid schemes*, PULSO (Oct. 28, 2020), <https://perma.cc/9RCE-EZF5>.

82. *Id.*

83. *Id.*

84. Press Release, Fed. Trade Comm'n, *Herbalife Will Restructure Its Multi-level Marketing Operations and Pay \$200 Million For Consumer Redress to Settle FTC Charges* (Jul. 15, 2016), <https://perma.cc/8CKG-63RU>.

85. *Id.*

86. Lois Greisman, *Money back for 350,000 Herbalife Distributors*, FED. TRADE COMM'N CONSUMER ADVICE (Jan. 10, 2017), <https://perma.cc/C4ZH-7HGE>.

87. Fed. Trade Comm'n, *supra* note 84.

88. *Commissioners and Staff: Edith Ramirez Former Chairwoman Biography*, FED. TRADE COMM'N, <https://perma.cc/4ZQ4-PM5R> (last visited Nov. 20, 2022) (Edith Ramirez served as the Commissioner of the Federal Trade Commission beginning in April 2010, and served as Chairwoman from March 4, 2013 to January 25, 2017).

89. Fed. Trade Comm'n, *supra* note 84.

90. Greisman, *supra* note 86.

[Herbalife's] net sales . . . to be real sales to real buyers," exemplify how the new FTC structure prevents participants from having to absorb the cost of large quantities of unsold product.<sup>91</sup> Where previous participants were required to buy additional products at regular intervals to maintain active status in the program, "[s]uccess [now] depends on whether participants *sell* Herbalife products, not on whether they *buy* products."<sup>92</sup> Another new notable restriction "eliminates the incentives in the current [compensation] system that reward distributors primarily for recruiting."<sup>93</sup> Although financial consequences and forced restructuring for MLMs do benefit victims, federal regulators and state lawmakers can and should do more to prevent rising MLMs from using business structures that are known to devolve into illegal operations when self-regulated.<sup>94</sup> Regulators and lawmakers should instead codify the "revamped" protections now embedded in Herbalife's company structure that include independent monitoring by government-approved compliance auditors to ensure the protections' efficacy.<sup>95</sup>

"[For] marginalized or vulnerable communities, the ramifications of pyramid scheme collapse[s] can be dramatic and long-lasting (citations omitted)."<sup>96</sup> Even though the "FTC launched an initiative in 2016 to combat affinity-based consumer fraud, especially targeting Latino and African American communities (citations omitted),"<sup>97</sup> initiatives of this kind are limited in their effectiveness as they do not get to the root causes of MLMs' structural flaws. Awareness campaigns still put the onus on the public not to be tricked by MLMs, rather than on MLMs not to be deceptive. Despite the FTC's work to combat Herbalife and other MLMs' predatory and deceptive tactics, most of the FTC's work is reactionary. Legislation that prevents MLMs from building inherently flawed recruiting and compensation methods could drastically mitigate their ability to exploit distributors. One method of statutory reform embodying the above is explored in Section III, which examines California's "endless chain" statute and proposes MLM-specific language.

### III. JUST LIKE THE POWERBALL, YOU CAN'T WIN IF YOU DON'T PLAY

The odds of winning any given lottery game are calculable. When provided with accurate numbers, anyone can determine the actual odds of winning the California Powerball and even take active steps to increase their chances of

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91. Lesley Fair, *It's no longer business as usual at Herbalife: An inside look at the \$200 million FTC settlement*, FTC BUSINESS BLOG (Jul. 15, 2016, 8:26 AM), <https://perma.cc/X653-GF7F>.

92. Fed. Trade Comm'n, *supra* note 84.

93. *Id.*

94. Mora, *supra* note 81.

95. Fed. Trade Comm'n, *supra* note 84.

96. Bosley, Bellemare, Umwali, & York, *supra* note 60, at 3.

97. Taylor, *supra* note 6, at 9-6 ("MLM recruiters have enjoyed an unusual pattern of success with tightly-knit groups that we sometimes call 'affinity groups.' Once a member of an organization that has cultivated very close relationships becomes hooked on MLM, he or she may be successful in recruiting others and still others in a subgroup of MLM adherents that eventually involves the whole organization.").



winning by simply buying more tickets or picking higher numbers.<sup>98</sup> Before becoming an official distributor, any new MLM recruit should have all material information at their disposal. Without having full knowledge of all material information relevant to calculating actual income potential, a recruit is unable to properly consent to a distributor agreement, as their compensation is based on an incalculable risk in violation of California Penal Code section 322.<sup>99</sup> MLMs further violate the California Penal Code, specifically section 327,<sup>100</sup> by using deceptive recruiting tactics, such as withholding material information about income potential and emphasizing recruitment over bona fide sales, to further the operation of an illegal endless chain.<sup>101</sup>

For victims, whether a company is a pyramid scheme or an endless chain is legally significant when calculating a potential damages award. For instance, under California Civil Code section 1689.2,<sup>102</sup> participants in companies deemed “endless chains” under Penal Code section 327<sup>103</sup> can rescind their contract with the MLM and recover “all consideration paid pursuant to the schemes,” and prevailing plaintiffs can recover attorney’s fees.<sup>104</sup> However, this form of civil recovery only becomes accessible to victims once an MLM is found to be operating as an endless chain.<sup>105</sup> This distinction noticeably excludes MLMs who engage in similar behavior yet fall short of the exact legal definition. Civil Code section 1689.2 is only a door to potential recovery for a few MLM victims and leaves many with little means of recovery other than attempting a small claims suit or praying for a class action suit to materialize.<sup>106</sup> MLMs fail to inform recruits of the subjective and objective risks of MLM participation, allow recruits to participate in illegal, unwinnable lotteries, and should be subject to criminal liability.

California’s current anti-pyramid scheme or endless chain statute could do more to expressly point to MLMs’ predatory and deceptive behavior as enumerated factors that contribute to the operation of an endless chain. For example, Georgia’s anti-pyramid scheme statutes specifically address multilevel distribution companies and predatory recruiting tactics.<sup>107</sup> One provision in the Georgia statute states in relevant part:

No multilevel distribution company or participant in its marketing program shall:

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98. Liz Gonzalez, *Powerball jackpot reaches \$620 million— can you beat the odds to win?*, FOX 26 NEWS (Sept. 30, 2021), <https://perma.cc/779J-H97N>.

99. CAL. PENAL CODE § 322 (West 2022).

100. *Id.*

101. *Id.*

102. CAL. CIV. CODE §1689.2 (West 2022).

103. CAL. PENAL CODE § 327 (West 2022).

104. CAL. CIV. CODE §1689.2 (West 2022).

105. Univ. Pac. & McGeorge Sch. of L., *Crimes*, 21 PAC L.J. 403, 417 (1990).

106. *Id.*

107. GA. CODE ANN. § 10-1-411(a)(3) (2022).

... Offer to pay, pay, or authorize the payment of any finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration to any participant in a multilevel marketing program in connection with the sale of any product or service unless the participant performs a bona fide supervisory, distributive, selling, or soliciting function in the sale or delivery of such product or services to the ultimate consumer[.]<sup>108</sup>

Georgia's Commerce and Trade Code extensively enumerates how MLMs can and cannot do business. Many other states, including California, use a combination of broader criminal and civil statutes and case law to address pyramid schemes and endless chains.<sup>109</sup> While civil statutes in most states are essential to the fight against MLMs, increasing the criminal liability of those that contrive, prepare, set up, propose, or operate endless chain schemes is a more effective deterrent than the current iteration of the law. While Georgia's limitation on the kinds of recruiting promises an MLM can make does not attach criminal liability to violators, doing so would likely force MLMs to actively discourage their distributors from using those particular misstatements during recruiting or face jail time and/or fines. California Penal Code section 327<sup>110</sup> could be amended to achieve that goal by including the following revisions (*proposed text italicized*):

Every person who contrives, prepares, sets up, proposes, or operates, *or knowingly furthers in whole or in part* any endless chain is guilty of a public offense, and is punishable by imprisonment in the county jail not exceeding one year or in state prison for 16 months, two, or three years.

As used in this section, an "endless chain" means any scheme, *including schemes operating as multilevel marketing programs*, for the disposal or distribution of property whereby a participant pays a valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant. *Offering to pay, pay, or authorizing the payment of any finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration to any participant in a multilevel marketing program in connection with the sale of any product or service unless the participant performs a bona fide supervisory, distributive, selling, or soliciting*

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108. *Id.*

109. Cal. Bus. & Prof. Code, § 17500 (prohibiting untrue or misleading statements used to induce the public to enter into certain obligations); *Bounds v. Figuerettes, Inc.*, 135 Cal. App. at 19 (some retail sales do not legalize a pyramid scheme but plans become illegal because the overall marketing plan depends on an endless chain of middlemen); Taylor, *supra* note 6, at 10.

110. CAL. PENAL CODE § 327 (West 2022).

*function in the sale or delivery of such product or services to the ultimate consumer[is also illegal under this section.]*<sup>111</sup> Compensation, as used in this section, does not mean or include payment based upon sales made to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme.

*Any direct or indirect misrepresentations of material fact regarding the potential for a new participant to be compensated based upon sales made to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme also constitute impermissible chance under this section.*

Anti-pyramid or endless chain laws tend to focus on participants' behavior rather than on the underlying structural features of MLMs.<sup>112</sup> Criminalizing MLMs' distinctive predatory and deceptive tactics will make it harder for MLMs to exploit the public. The proposed amendments to California Penal Code section 327<sup>113</sup> are no more excessive than laws found in other states but are necessary to better address the threat MLMs pose to the public. Moreover, MLM-specific, state-sponsored legislation is necessary to combat the powerful and persistent lobbying efforts of the Direct Selling Association (DSA). The DSA's primary goal is to thwart or weaken existing and proposed laws seeking to regulate MLMs and increase protection for consumers. Section IV explores the dangerous effect the DSA merging with the MLM industry has had on both state and federal government's ability to protect consumers through legislation.

#### IV. PYRAMID SCHEMES, MLMs, AND "REAL DIRECT SELLERS," OH MY!

Modern MLMs have an image problem. Today, MLMs are so closely associated with pyramid schemes that the MLM industry has joined forces with the DSA to rebrand itself without making any substantive changes.<sup>114</sup> Under the direct selling mantle, MLMs associate with traditional "single-level" companies—where profits come from the sale of products alone—to appear to be a more legitimate business model.<sup>115</sup> The MLM industry's immense wealth, and the DSA's aggressive and persistent lobbying, pose a significant threat to women and minorities because of the demographics' salient natures. Industry expert Dr. Taylor describes this merger as a powerful "DSA/MLM cartel," or better yet, the "Deceptive Selling Alliance."<sup>116</sup> This cartel is devoted to "[promoting] the dialogue of deception that shields MLMs from legislation or rulings that could hurt the MLM

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111. GA. CODE ANN. § 10-1-411(a)(3) (2022).

112. Taylor, *supra* note 6, at 2–8.

113. CAL. PENAL CODE § 327 (West 2022).

114. Taylor, *supra* note 6, at 11–14.

115. *Id.*

116. *Id.* at 10–37, 11–14.

industry, regardless of how helpful they may be in protecting consumers from abuse.”<sup>117</sup>

While the rose-colored glasses have been broken or even entirely discarded by MLM survivors, the MLM industry’s deceptive and predatory recruiting tactics still pose a genuine danger to potential recruits and consumers. The danger to women and minorities lies in the DSA/MLM cartel’s policy priorities, which are designed to “[weaken] laws and [mislead] legislators, regulators, consumers, and the media into accepting the deceptive arguments of MLM promoters.”<sup>118</sup> Evidence of the DSA’s handiwork has also been documented by Dr. Taylor, with nineteen<sup>119</sup> out of the fifty states’ anti-pyramid laws either being overtly influenced by the DSA or appearing covertly but noticeably more favorable to DSA policy preferences.<sup>120</sup> In response to increased consumer awareness of MLMs’ deceptive and misleading “business” or “income” opportunities, MLMs and the DSA, have made it their mission<sup>121</sup> to make the legal environment more hospitable to their survival as a business “species.”<sup>122</sup> The DSA works tirelessly to stay ahead of law enforcement and lawmakers, undercut current anti-pyramid scheme statutes, and prevent the development of unfavorable legislation. The DSA does this work on their MLM members’ behalf because MLMs are “inherently flawed” and reliant on “deceptions to survive.”<sup>123</sup> Without the DSA running interference for their criminal members, MLM schemes might already be extinct.

The DSA/MLM cartel’s quest for power in the U.S. legal and legislative landscapes is highlighted by the cartel’s push for self-regulation and corrupted consumer protection goals.<sup>124</sup> The DSA states publicly that it advocates for consumers through self-regulation, however, this is difficult to believe, considering that since 2009, over 90% of the DSA’s member companies engaged in exploitative conduct against their own distributors.<sup>125</sup> It is apparent that the DSA’s efforts on behalf of MLMs to “educate” recruits and consumers about the “difference” between pyramid schemes, MLMs, and “real direct sellers” pose an imminent threat to both women and minorities by actually legitimizing predatory business models.<sup>126</sup> The danger to women and minorities is hidden in plain sight within the DSA’s “Largest 25 Member Companies,” of which Mary Kay and

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117. *Id.*

118. *Id.* at 11–13, 11–14.

119. The nineteen states are Arizona, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Texas, Utah, Virginia, and Washington.

120. Taylor, *supra* note 6, at App. 10E.

121. *Policy Priorities*, DIRECT SELLING ASS’N., <https://perma.cc/U6GY-9GM6> (last visited Dec. 14, 2022).

122. Taylor, *supra* note 6, at 10–49.

123. Taylor, *supra* note 6, at 11–14.

124. Taylor, *supra* note 6, at 11–15.

125. *Id.*

126. DIRECT SELLING ASS’N., *supra* note 121.

Herbalife are included.<sup>127</sup> The DSA/MLM cartel also directly targets women through lobbying during events like the “Women’s Entrepreneurship Roundtable.”<sup>128</sup> In a December 2019 press release from the DSA, the DSA’s President Joseph Mariano stated,

Today, 74.8 percent of direct sellers are women. We are proud to support women entrepreneurs in direct selling and have done so for more than a century. Foundational leaders like these *women are critical to the direct selling industry* and entrepreneurship roundtable events with their *elective representatives* provide the opportunity to share their insights and *affect change*. (emphasis added)<sup>129</sup>

Mariano’s statement appears positive but also reveals why the DSA would organize an event like the Women’s Entrepreneurship Roundtable in the first place—misdirection and influence.<sup>130</sup> Read critically, this statement shows how the DSA/MLM cartel uses ideas like “entrepreneurship” and “women in leadership” to mask efforts at buying legislator support through campaign donations and the promise of votes come reelection time. The DSA/MLM cartel acknowledges women are critical to MLMs’ success and that this roundtable was designed to “affect change,” realized through lobbying for legislation that affords MLMs loopholes and exemptions like the clauses discussed in Section III of this Note.

The DSA’s influence has similarly been used to the detriment of minorities. The DSA both supported and represented Herbalife, along with other similarly situated MLMs that target minorities in their recruiting practices.<sup>131</sup> The DSA helped to legitimize Herbalife early on by awarding the company with a “Success Award” in 2004, which recognizes DSA members for superior customer service and for “[serving] as models [who] set a high standard of excellence, have data to validate success, and have the potential to be adapted, in whole or part, for use by other companies.”<sup>132</sup> This award is an example of the harmful myth the DSA perpetuates: that its members must adhere to a strict code of ethics that prohibits pyramid schemes. This “Success Award” thus gives consumers the illusion that a company like Herbalife is not a pyramid scheme but a legitimate business seeking to promote the economic advancement of minority groups.

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127. *Largest 25*, DIRECT SELLING ASS’N., <https://perma.cc/9LLD-HBAL> (last visited Dec. 14, 2022).

128. Press Release, DIRECT SELLING ASS’N., Direct Selling Association Members Participate in Women’s Entrepreneurship Roundtable with U.S. Congresswoman Cathy McMorris Rodgers (R-WA), <https://perma.cc/7Y7U-ZSNP> (last visited Dec. 14, 2022).

129. *Id.*

130. Taylor, *supra* note 6, at 11–15.

131. DIRECT SELLING ASS’N., *supra* note 127.

132. *Herbalife Honored with Its First Direct Selling Association Award; Company Wins Success Award for Superior Customer Service; ShapeWorks Program a Finalist for Education for Life Award*, NEW HOPE NETWORK (May 25, 2004), <https://perma.cc/9CZA-U4RF>.

Further, the DSA claims that its ethics code also “requires companies and their sales force members to provide [recruits] with accurate information about the company’s pay structure, products, and sales methods.”<sup>133</sup> However, there is no evidence to support that the DSA’s code of ethics is ever enforced, and in the case of Herbalife, the code was essentially a “hollow, hypocritical, and misleading statement” to sellers and consumers.<sup>134</sup> Remedying Herbalife’s failure to abide by its own code of ethics required the FTC to “fundamentally restructure” the MLM and additionally required the company to employ an Independent Compliance Auditor (ICA) for seven years to ensure compliance.<sup>135</sup> Evidently, sellers and consumers cannot rely on the DSA’s championed “self-regulation” to protect them.

The FTC officially labels “long supported industry self-regulation as an efficient way to secure consumer benefits and promote a robust and competitive marketplace.”<sup>136</sup> However, the FTC decision to make an ICA a part of the Herbalife settlement demonstrates the FTC’s understanding that relying on self-regulation is neither effective nor prudent in an MLM context.<sup>137</sup>

A new 2022 Biden Administration initiative may bring much-needed incentives to the white-collar crime and MLM self-regulating spaces. New Department of Justice (DOJ) policies “will allow more companies that voluntarily report misconduct and cooperate on remedial action to avoid pleading guilty” and “shift the focus on prosecuting executives and employees responsible for wrongdoing.”<sup>138</sup> This kind of “real world” approach makes reporting misconduct more attractive than covering it up and could radically change the effectiveness of self-regulation. Another promising policy creates the “first-ever guidance as to when independent monitors are warranted.”<sup>139</sup> While these new policies are untested, they demonstrate a significant shift in law enforcement methodology from retroactive to proactive regulation by making corporations’ officers and employees a part of the regulatory process. Working these kinds of policies into the MLM self-regulation framework might give rise to the robust, competitive, and secure marketplace the FTC publicly believes self-regulation already creates.

MLM self-regulating, as practiced by the DSA/MLM cartel, remains an ineffective public safety measure. As such, the DSA/MLM cartel should not be allowed to assert that all of their members abide by a code of ethics that does not have any regulatory enforcement powers to ensure and compel compliance with those self-imposed regulations. Allowing the MLM self-regulation lie to persist only exacerbates MLMs’ disproportionately negative impact on women and minorities, as the DSA does nothing to enforce its ethical code and tries to create

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133. Taylor, *supra* note 6, at 8–85.

134. Taylor, *supra* note 6, at 8–75.

135. Fed. Trade Comm’n, *supra* note 84.

136. *Id.*

137. Fed. Trade Comm’n, *supra* note 84.

138. Chris Strohm & Benjamin Penn, *Antitrust: DOJ to Crack Down on Corporate Crime by Luring Cooperators*, BLOOMBERG LAW NEWS (Sept. 15, 2022), <https://perma.cc/ZM74-F75J>.

139. *Id.*



false confidence in what an MLM's membership with the DSA supposedly guarantees. Exploiting women and minorities is the true "lifeblood" of the MLM industry, and no amount of self-regulation will curtail the DSA/MLM cartel's efforts to sustain itself through their exploitation.

#### CONCLUSION

Since the 1980s, the golden age of the modern MLM, the MLM industry has actively suppressed the outraged and embarrassed voices of its exploited distributors and sellers. A non-predatory MLM industry is possible, but it would require the FTC to force MLMs to undergo major structural changes, eliminating an MLM's ability to exploit their participants through recruiting-based compensation schemes.<sup>140</sup> However, the DSA/MLM cartel's lobbying efforts, substantial political donations, and international presence are formidable obstacles to an FTC campaign for radical new federal regulation.<sup>141</sup> Modern MLMs can exploit women and minorities on a large scale because targeting women and minorities' demographics for their salient (risk illiterate) and determined natures is, itself, not illegal. The use of tailored rhetoric, misstatements, and deception as tactics to lure in recruits under the false pretense of guaranteed success is illegal, though.

The real risk to the public comes from modern MLMs who act like pyramid schemes, yet attempt to hide in plain sight under the cover of selling something. As major radical FTC intervention is highly unlikely, the burden of curtailing MLMs' ability to harm the public falls to the states. States are uniquely positioned to make specific predatory and deceptive multilevel marketing practices illegal with legislative schemes that attach civil, administrative, and criminal punishments. Recent national studies have found that 99% of MLM participants suffer financial loss, underscoring the need to codify the illegality of MLMs' predatory and deceptive recruiting.<sup>142</sup> Calling attention to MLM structural issues and assigning violators fitting criminal punishments is the DSA/MLM cartel's worst nightmare. The DSA's mission is to mold the best possible political landscape and garner the most political allies to combat any significant legislation from calling unwanted attention to the industry's rampant exploitation of its participants.

The battle against big Direct Selling is not hopeless. The DSA/MLM cartel may be a mighty morphing, antibiotic-resistant, Jason Voorhees iteration of the direct selling business model, but every monster has a weakness. The battle

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140. Taylor, *supra* note 6, at 11–16 (“MLMs are best regulated on a national level – by the FTC. Endless chain recruitment programs quickly spread beyond state boundaries and become national in scope – even international. It therefore becomes a formidable challenge for states to adequately control MLMs or to protect consumers from abuses. MLM is best regulated on a national basis. And since a primary mission of the FTC is to protect against unfair and deceptive practices, MLM – the most unfair and deceptive of all business practices functioning today – comes under the ambit of the FTC’s responsibility.”).

141. *Id.*

142. Taylor, *supra* note 6, at 8–57.

against the DSA/MLM cartel is not an exercise in futility. Through persistent state and federal MLM-specific legislation, the DSA/MLM cartel can be forced to make necessary structural changes to its business model that will one day eliminate the need for incentivized predatory and deceptive recruiting. Time will tell if the newly-minted DOJ-incentivized self-regulation policies can actually crack down on corporate crime, paving the way for similarly incentivized MLM self-regulation. In the meantime, states can and should criminalize the exploitation of women and minorities through incentivized recruiting. The cycle of MLMs exploiting women and minorities can be broken with the proper application of MLM-specific state criminalization, incentivized self-regulation, and federal restructuring.