

REGULATING THE RELUCTANT: POLICIES THAT BENEFIT
VULNERABLE PARTICIPANTS IN MULTI-LEVEL MARKETING

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Abstract. The vast majority of people who join multi-level marketing companies do not earn a profit. Those people, called participants or independent distributors, also tend to be women who seek additional income to support a family or to find community. Moreover, they are likely to disapprove of attempts by regulators to change the structure of multi-level marketing companies, or MLMs, despite the fact that most participants will experience financial or social harm because of their involvement in these companies. So far, efforts by state and federal regulators have been dampened by this resistance, in addition to unfavorable caselaw and the muddled distinction between an MLM and an illegal pyramid scheme. Many of the policies that those regulators do pursue focus on the efficacy of disclosure, which is unlikely to deter many people who participate in MLMs and is ultimately insufficient to address the harm flowing from these companies. Better strategies that advocates against multi-level marketing companies can employ prioritize the needs of participants themselves—even when they perpetuate harm to others through their participation. By examining the class of people who join these companies, and the reasons they join, policymakers can craft solutions that hit at the underlying issues that drive people to MLMs. The best policy measures identify and seek to solve participant problems in regard to areas such as labor fairness and child care and avoid ineffective punitive measures against those participants.

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INTRODUCTION

It is difficult to support a family with one income in the United States. Although average household income for Americans has increased for the past 50 years, the aggregate income for middle and lower-income households has stagnated or declined—exacerbating the wealth gap where only a small share of wealthy Americans experience income growth.¹ In fact, 60 percent of households now have dual income earners, as opposed to 25 percent in 1960.² But many people cannot or find it difficult to earn income through jobs that impose rigid requirements outside of the home. Those people include caretakers, individuals who experience community social expectations that preclude them from some jobs outside of the home, disabled individuals, and those who desire more autonomy in their career. In those cases, people need opportunities for income that come without the rigid demands that are typical of many traditional workplaces.

Ostensibly, multi-level marketing fills this gap. Companies that use the multi-level, direct sales structure enlist many individuals, called independent distributors or participants, who sell products to personal connections, such as friends, family, and social media connections. The benefit of working for a multi-level marketing company is that those opportunities theoretically give participants the option to work from home, set their own hours, and use work to build on existing social networks. During the COVID-19 pandemic, enrollment in multi-level marketing companies skyrocketed as companies appealed to individuals who had compelling reasons to work from home because of safety concerns or job loss.³

But balancing home life with income demands through multi-level marketing is, unfortunately, often too good to be true. The vast majority of participants in a multi-level marketing company will not make a profit. Many participants even lose money through sign up fees and bulk product acquisitions that they cannot sell to third parties. Despite the statistical implausibility of success, many people in multi-level marketing companies continue to buy products to hopefully sell even when they do not actively make a profit. Research suggests that this persistence can be attributed to complex social and psychological motives: namely that companies target women and vulnerable groups that are more likely to stay because of the community ties that they have to the business—even when they seemingly derive no benefit from sales.

This paper will focus on explaining the social intricacies behind multi-level marketing recruitment, why those factors make it difficult to leave even if a participant has been told that they are unlikely to profit from their efforts, and how reform efforts could focus on solutions that value the needs and voices of participants. Many participants currently involved in a multi-level marketing

¹ See Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochnar, *Most Americans Say There Is Too Much Economic Inequality in the U.S., But Fewer Than Half Call it a Top Priority*, PEW RESEARCH CENTER, 5 (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> [<https://perma.cc/VNH8-9NKG>].

² *The Rise in Dual Income Households*, PEW RESEARCH CENTER (June 18, 2015), https://www.pewresearch.org/ft_dual-income-households-1960-2012-2/ [<https://perma.cc/AGQ6-PJSN>]. See generally *Parenting in America*, PEW RESEARCH CENTER (Dec. 17, 2015), <https://www.pewresearch.org/social-trends/2015/12/17/1-the-american-family-today/> [<https://perma.cc/3AFQ-T4ZM>] (contextualizing how these statistics relate to the changing dynamics of American families).

³ See Bridget Read, *Hey, Hun! In Women's Joblessness, Multi-Level Marketers Saw Opportunity*, THE CUT (Feb. 3, 2021), <https://www.thecut.com/2021/02/pandemic-unemployment-multi-level-marketing.html> [<https://perma.cc/9YF6-NN4C>] (explaining that some distributors saw a 400% increase in participation in the summer of 2020).

company do not see themselves as victims and are unlikely to want regulatory intervention to address the harm that they experience. The biggest challenge for policymakers and advocates is how to address social and economic harms flowing from multi-level marketing companies to participants when those participants do not welcome regulation. Therefore, there are two questions: (1) how can the law address multilevel marketing and (2) how should regulators accomplish that goal in a way that addresses the underlying social issues that drive people, mostly women and other vulnerable groups, into multi-level marketing companies while listening to their stories and understanding the benefits they seek to derive from this business structure?

Current regulatory advancements and advocacy against multi-level marketing businesses focus on the first question. In doing so, they stress the importance of disclosure to participants. I argue that, while disclosure does have benefits and could deter some participants, disclosure would ultimately only result in further harm for the people it seeks to protect. Rather than deter people *from* multi-level marketing companies, disclosures would direct blame *to* those who join multi-level marketing companies—not to companies that take advantage of those distributors. Disclosures may serve some purpose, but regulators who advocate for disclosure requirements neglect to acknowledge the complex social reasons that drive people to multi-level marketing in the first place. Instead, proposals to decrease the harms caused by multi-level marketing companies need to pursue enforcement mechanisms that put the onus of responsibility on companies that facilitate this business structure. Given the need for work from home opportunities and considering the wide support that participants have for their companies, any initiative geared toward decreasing the prominence of multi-level marketing should also seek solutions that incorporate the needs and voices of participants who seek non-traditional work opportunities and community.

Part I of this comment will provide a brief overview of what multi-level marketing is, the distinction between how regulatory bodies view multi-level marketing versus illegal pyramid schemes, and how regardless of that distinction, legitimate multi-level marketing businesses cause significant harm to participants. Part II examines the populations most likely to work for a multi-level marketing company and how complex social interactions lead specific groups of people to these businesses. In Part III explains the current regulatory landscape, focusing on the Federal Trade Commission’s relatively broad power to bring enforcement actions against companies for deceptive advertising. Part IV surveys proposals to strengthen disclosure, including calls to expand the Federal Trade Commission’s existing disclosure rules to multi-level marketing companies, and concludes that forced disclosure of income potential is an inadequate solution to address the harm at hand—in part because disclosure does not disable what propels people to join multi-level marketing companies. Finally, Part V suggests solutions to provide protection for participants in multi-level marketing that address needs in a more holistic scheme of regulation that includes more benefit to participants than just regulating the economic nature of multi-level marketing.

I. MULTI-LEVEL MARKETING

“Hey Hun!”⁴ Many modern multi-level marketing companies, or MLMs, rely on social media to distribute their products and to recruit more people into their business.⁵ The presence of MLM

⁴ *Hey hun!*, THE MLM SCRIPT, <https://www.themlmscript.com/> [https://perma.cc/3CTQ-7B5W] (last visited Nov. 13, 2021).

⁵ Kaitlyn Tiffany, *The Internet Is Starting to Turn on MLMs*, THE ATLANTIC (Dec. 17, 2020), <https://www.theatlantic.com/>

activity on social media platforms has become so ubiquitous that online communities sprouted on platforms such as Facebook, Reddit, and TikTok to address the shared experience of receiving messages from old acquaintances, usually out of the blue, that ask about the recipient's interest in additional income and working from home—always for a multi-level marketing company.⁶ The shared vocabulary common to many MLM cold messages, marketing scripts that have common themes, spawned community memes to mock participants in these businesses. People who have received these messages and are opposed to MLMs share sarcastic messages addressing each other as “boss babe,” calling out “hey girl,” and ribbing on effusive emoji use by participants who talk about being “#blessed” to be making money from home.⁷

This ridicule comes from people who see MLMs as inherently fraudulent.⁸ Much of the anger, however, is directed at participants themselves. Users involved in one anti-MLM Facebook group can buy merchandise that says “Your MLM Sucks and So Do You.”⁹ As the public face of a multi-level marketing company, it makes sense that participants draw ire for their aggressive or annoying marketing strategies. But participants in multi-level marketing companies occupy an uncomfortable position as both potential victims of an unfair, deceptive business structure and as people who perpetuate that same structure to further recruits. To understand how distributors find themselves in this apparently unsympathetic position, it is necessary to first understand how the structure of a multi-level marketing company operates, how it differs from pyramid scheme fraud, and how those companies still cause harm to participants even when they operate legally.

A. What is Multi-level Marketing?

Multi-level marketing is a form of direct selling in which individual people, referred to as independent distributors or participants, sell the products of an umbrella company directly to their personal connections.¹⁰ Sometimes called network marketing¹¹ or direct selling, individuals involved in multi-level marketing use their network of friends, family, and acquaintances to distribute products in a manner that is decentralized from the company that makes those goods. Different MLMs offer a wide variety of products, ranging from home goods, to insurance, to supplements and weight loss products.¹²

atlantic.com/technology/archive/2020/12/tiktok-bans-multilevel-marketing-mlm/617422/ [https://perma.cc/96WE-Q97V].

⁶ Many of the people in these communities are young women, as well as former participants in multi-level marketing who go to platforms like Facebook, Reddit, YouTube, and TikTok, to share their experiences. This has come to be known as the “anti-MLM” movement online. See Kaitlyn Tiffany, *How the Pandemic Stoked a Backlash to Multilevel Marketing*, THE ATLANTIC (Jan. 27, 2021), <https://www.theatlantic.com/technology/archive/2021/01/anti-mlm-reddit-youtube/617816/> [https://perma.cc/A2WM-QG7K].

⁷ Rachael Pavlik, *Your Complete Guide to Becoming A MLM #Bossbabe*, SCARY MOMMY (June 24, 2020), <https://www.scarymommy.com/mlm-bossbabe-guide/> [https://perma.cc/U7R3-RK8U].

⁸ *Id.* (mocking MLM participants for rebutting Federal Trade Commission condemnation of flawed industry practices).

⁹ Tiffany, *supra* note 6.

¹⁰ Stacie A. Bosley, Sarah Greenman & Samantha Snyder, *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 ECON. INQUIRY 1643, 1644 (2020).

¹¹ Multi-Level Marketing Businesses and Pyramid Schemes, FED. TRADE COMM’N (May 2021), <https://www.consumer.ftc.gov/articles/0065-multi-level-marketing-businesses-and-pyramid-schemes> [https://perma.cc/6XZD-9M3W] (last visited Dec. 12, 2021).

¹² Adam Epstein, *Multi-Level Marketing and Its Brethren: The Legal and Regulatory Environment in the Down Economy*, ATL. L.J.,

But despite this variety, MLMs tend to focus on specific products that appeal to their primary consumers who tend to be women. Wellness organizations make up 33.8 percent of direct selling businesses, and home care products and beauty products together make up about the same share.¹³ Together, those three categories describe more than two-thirds of the multi-level marketing industry.

According to one study, 1 in 13 people have been involved in direct selling at some point in their lives.¹⁴ Half of those people engage with more than one direct selling business.¹⁵ Almost all direct selling organizations are multi-level marketing companies.¹⁶ In 2017, the Direct Selling Association (DSA), the trade association that represents direct selling companies,¹⁷ reported that over 18 million people in the United States were involved in direct selling as independent distributors.¹⁸ Most people who join an MLM do so at least in part for promise of additional income, although some are also enticed by the promise of discounts on company products.¹⁹ The Direct Selling Association describes the business model as one that gives individual contractors the entrepreneurial opportunity to market goods outside of a typical sales environment.²⁰

The benefit of this structure for the umbrella company is presumably to avoid the costs of marketing and advertising and the fixed costs of brick-and-mortar stores. In place of overhead costs that traditional businesses grapple with, thousands of participants who are not technically employees of the business work in their own communities to bring sales to the company without leaving the neighborhood. But these savings for the companies do not necessarily translate to more affordable products or more income for participants. For example, many multi-level marketing companies price wholesale products to independent distributors at a markup that is comparable to products that already exist for retail sale in the marketplace.²¹ Consequently, companies make the profit they need during the first transaction with distributors who must then mark up the product further to make money.²² With more than one option in the marketplace and because this pushes distributors to sell MLM products at

91, 95-96 (2010).

¹³ DIRECT SELLING ASS'N, DIRECT SELLING IN THE UNITED STATES: 2017 FACTS AND DATA (2018), https://www.dsa.org/docs/default-source/research/dsa_2017_factsanddata_2018.pdf [<https://perma.cc/MM6H-NQMX>].

¹⁴ Marguerite DeLiema, Doug Shadel, Amy Nofziger & Karla Pak, AARP STUDY OF MULTILEVEL MARKETING: PROFILING PARTICIPANTS AND THEIR EXPERIENCES IN DIRECT SALES, AARP, 13 (Aug. 2018), https://www.aarp.org/content/dam/aarp/aarp_foundation/2018/pdf/AARP%20Foundation%20MLM%20Research%20Study%20Report%2010.8.18.pdf [<https://perma.cc/5FLB-D7L7>].

¹⁵ *Id.* at 6.

¹⁶ Claudia Groß & Dirk Vriens, *The Role of the Distributor Network in the Persistence of Legal and Ethical Problems of Multi-level Marketing Companies*, 156 J. BUS. ETHICS, 333, 333 (2019); Bosley, Greenman & Snyder, *supra* note 10, at 1644 (“In 2014, 96% of firms, 97% of sales, and 99% of sellers in the U.S. direct selling industry were associated with a multilevel compensation structure.”).

¹⁷ DIRECT SELLING ASS'N, *What is Direct Selling?*, <https://www.dsa.org/about> [<https://perma.cc/G3X6-SA6Y>] (last visited Oct. 30, 2021).

¹⁸ Bosley, Greenman & Snyder, *supra* note 10, at 1644 (2020); DIRECT SELLING ASS'N, *supra* note 14.

¹⁹ Bosley, Greenman & Snyder, *supra* note 10, at 1644.

²⁰ See DIRECT SELLING ASS'N, *supra* note 17.

²¹ The Dream, *Yes, I Would Like to Swim In Cash*, at 28:00 (Oct. 1, 2018) (streamed using Spotify).

²² *Id.* at 26:15-29:00 (playing a recording of lawyer Doug Brooks, an expert in franchise law, who remarked that this kind of income structure is “the classic definition of a pyramid scheme.”).

high prices, consumers are often unwilling to buy products from distributors.²³ Because most multi-level marketing companies benefit from selling products to distributors regardless of whether ultimately sell those goods to the broader public, they are able to profit without actually offering utility to the marketplace or delivering goods to consumers who will use them. Experts refer to this as a “closed system.”²⁴ In addition, multi-level marketing companies rely on their independent distributors to recruit more salespeople into the business to expand that workforce.²⁵ Thus, by design, incoming distributors are likely to have entered into their business opportunity through the efforts of friends, family, or acquaintances.²⁶ Further, compensation in a direct selling arrangement, according to the DSA, ultimately depends on a distributor’s sales or “the sales of others in [a participant’s] sales [organization].”²⁷

What truly separates multi-level marketing from other types of direct selling organizations is the emphasis on a complex, multi-layered structure between a headquarters company, independent distributors, and the distributors who have recruited one another and derive part of their sales from what is known as a “downline.”²⁸ The term downline refers to any person that one independent distributor has recruited into the business. Likewise, an “upline” consists of the people who recruited an individual into the business, the people who recruited their recruiters, and so on.²⁹ These lines create an arrangement in which people at the top, who have many downlines, will profit off sales made by the members of their downline. Those at the bottom, however, profit only on their own sales and must establish a downline for themselves to receive those commissions.

B. The Difference Between Multi-Level Marketing and Illegal Pyramid Schemes

Millions of people fall victim to pyramid scheme fraud every year.³⁰ Pyramid scheme fraud can encompass opportunities that operate like a multi-level marketing company that is deemed legitimate by regulators, but it also includes Ponzi schemes, chain letters, and other buy-in business opportunities.³¹ An MLM is considered pyramid scheme fraud when a distributor earns profits

²³ *Id.* at 27:00.

²⁴ *Id.* at 27:30; JON M. TAYLOR, CONSUMER AWARENESS INST., THE 5 RED FLAGS: FIVE CAUSAL AND DEFINING CHARACTERISTICS OF PRODUCT-BASED PYRAMID SCHEMES, OR RECRUITING MLM’S 9 (2006), https://www.ftc.gov/system/files/documents/public_comments/2006/07/522418-12585.pdf [<https://perma.cc/3CS8-NRQT>].

²⁵ *Multi-Level Marketing vs Pyramid Schemes*, S.D. OFF. OF THE ATT’Y GEN., <https://consumer.sd.gov/fastfacts/marketing.aspx> [<https://perma.cc/U2LE-A6PQ>] (last visited Oct. 30, 2021).

²⁶ Groß & Vriens, *supra* note 16, at 338.

²⁷ DIRECT SELLING ASS’N, <https://www.dsa.org/> [<https://perma.cc/44CJ-Z42L>] (last visited Oct. 30, 2021).

²⁸ Groß & Vriens, *supra* note 16, at 333.

²⁹ *Id.*

³⁰ Stacie A. Bosley, Marc F. Bellemare, Linda Umwali & Joshua York, *Decision-Making and Vulnerability in a Pyramid Scheme Fraud*, 80 J. OF BEHAV. AND EXPERIMENTAL ECON. 1 (2019) [hereinafter Bosley, Bellemare, Umwali, & York].

³¹ For this analysis, to the extent that I focus on pyramid scheme fraud, I will refer to pyramid schemes that disguise themselves as multi-level marketing companies. However, some people would be surprised to learn that the definition of “pyramid scheme” includes social media trends like the a “book club” opportunity which promises that if a participant sends one book to a person on the “upline” of a list, they will receive dozens in return. See Dwight Adams, *Parents Beware: The Book Exchange Where You Send 1 to Get 36 Probably Won’t Work*, INDYSTAR (Apr. 17, 2018), <https://www.indystar.com/story/news/2018/04/17/36-book-exchange-letter-parents-beware-pyramid-scheme-facebook/524318002/> [<https://perma.cc/RU58->

predominantly because they recruit more distributors to join the MLM and profit when those distributors recruit more people.³² In this model, the ability to make a profit does not hinge on whether any third party customer purchased an item. Profit could derive solely from recruitment bonuses and independent distributors purchasing products from the umbrella business. A legitimate multi-level marketing company, according to the Federal Trade Commission (FTC), is one where compensation is based on retail sales to actual customers—not based on wholesale purchases, which a distributor can buy whether or not they end up selling their stock to a customer, or recruitment commissions.³³ In a pyramid scheme, a participant will only buy in for the opportunity of a return on their initial investment and only *if* they are able to recruit into their downline.³⁴ While a legitimate multi-level marketing business might offer commissions or other benefits to distributors who recruit more people into the business, pyramid scheme fraud occurs when the profits derived from the business are predominated by those recruitment benefits instead of profits from real sales to third persons for actual goods.³⁵

Despite this apparent distinction, the line between MLMs and illegal pyramid schemes is ambiguous and heavily debated.³⁶ For instance, Amway is one of the most nationally recognized, successful, and long-lasting multi-level marketing companies.³⁷ Its legitimacy has also been the subject of intense examination for half of a century. In the 1970s, pyramid schemes were a relatively new legal issue.³⁸ The federal enforcement approach was consequentially disjointed and underdeveloped. Against this backdrop, and with sparse case law regarding pyramid schemes, the Federal Trade Commission brought suit against Koscot Interplanetary,³⁹ a cosmetics MLM, alleging that company's requirement of an endless stream of distributors for any individual to earn an income violated Section 5 of the FTC

Q2DD). Social media “secret Santa” exchanges are also, sadly, examples of pyramid scheme fraud. *See BBB Scam Alert: Social Media Gift Exchange Is an Illegal Pyramid Scheme*, BETTER BUS. BUREAU, (Nov. 1, 2020), <https://www.bbb.org/article/scams/18854-bbb-warning-secret-sister-gift-exchange-is-illegal> [<https://perma.cc/Y9XZ-T83Z>].

³¹ FED. TRADE COMM’N, *supra* note 11.

³² *Id.*

³³ *Business Guidance Concerning Multi-Level Marketing*, FED. TRADE COMM’N (Jan. 2018), <https://www.ftc.gov/tips-advice/business-center/guidance/business-guidance-concerning-multi-level-marketing> [<https://perma.cc/2XU6-F79Q>] (last visited Nov. 1, 2021).

³⁴ Epstein, *supra* note 12, at 103.

³⁵ FED. TRADE COMM’N, *supra* note 11.

³⁶ *See, e.g.*, Sam Thielman, *Herbalife Dodges ‘Pyramid Scheme’ Label and Agrees to Pay \$200m Fine*, THE GUARDIAN (July 15, 2016), <https://www.theguardian.com/business/2016/jul/15/herbalife-ftc-fine-200-million-pyramid-scheme-label> [<https://perma.cc/YWC7-MA9J>]. Following the Federal Trade Commission’s settlement with MLM Herbalife, agency Chair Edith Ramirez remarked that the company was “not determined to have not been a pyramid,” which, at the time, prompted derision from comedian John Oliver. Melissa Locker, *John Oliver Targets ‘Pyramid Schemes’ on Last Week Tonight*, TIME (Nov. 7, 2016), <https://time.com/4560168/john-oliver-pyramid-scheme-last-week-tonight> [<https://perma.cc/27GK-35VM>]. The comedian acknowledged that the Chair might have refused to call the company a pyramid scheme in the moment because of settlement negotiations the prioritized consumer redress over pyramid scheme label enforcement.

³⁷ Epstein, *supra* note 12, at 91-92; *see also Analysis: Amway Accused of Fraud; Pays \$150 Million; Where’s the FTC and DOJ?*, PYRAMID SCHEME ALERT (Nov. 11, 2010), <https://pyramidschemealert.org/analysis-amway-accused-of-fraud-pays-150-million-wheres-the-ftc-and-doj/> [<https://perma.cc/L3XQ-6ANU>].

³⁸ Note, *Pyramid Schemes: Dare to Be Regulated*, 61 GEO. L. J. 1257, 1257 (1973). The Commission had previously filed a complaint in *Holiday Magic* and *Ger-Ro-Mar, Inc.*, both within two years of the *Koscot* decision. *Id.* at 1266.

³⁹ *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106 (1975).

Act.⁴⁰ In determining how such a company could permissibly operate, an administrative law judge remarked that the core of what was at issue as far as the Section 5 of the FTC Act was concerned was the company's representation that an individual could recover their own investment by recruiting others to join the venture.⁴¹ To that end, the court articulated a two-prong test to qualify certain opportunities as entrepreneurial schemes, or illegal pyramid schemes, as they came to be known: "Such 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."⁴² Participant compensation needed to depend on *sales* to third parties to be legitimate, not on recruitment.

Only a few years after *Koscot*, the FTC filed complaint against Amway.⁴³ This time, however, an administrative judge ruled that Amway had successfully taken precautions to avoid meeting the criteria of a pyramid scheme because of the company's practice of requiring independent distributors to sell products to at least ten people, a buyback policy, and the fact that 70 percent of its distributors were within three levels of a direct distributor, or someone who has no one below them in the downline.⁴⁴ The decision muddled the definition of a pyramid scheme and effectively shielded other MLMs from enforcement.⁴⁵ And yet, although Amway escaped the "pyramid scheme" definition decades ago, in 2010 it agreed to pay \$150 million in class action settlement to plaintiffs that accused the company of operating as an illegal pyramid scheme in violation of state and federal laws.⁴⁶ In the years following the decision, the company and its founder, Richard DeVos, continued to face public backlash for promoting fraudulent products and for promoting what many people saw as a get-rich-quick scheme.⁴⁷ If the distinction between what is legal and what is fraudulent appears unclear, that is because it is. Lest it be thought that that a visual examination of a company's structure could shed light

⁴⁰ *Id.* at 1111-12.

⁴¹ *Id.* at 1181.

⁴² *Id.* at 1180.

⁴³ *In re Amway Corporation, Inc., et al.*, 93 F.T.C. 618 (1979).

⁴⁴ *Id.* at 700. These factors have come to be known as the Amway Safeguards.

⁴⁵ Matt Stroud, *Why the FTC Won't Take Bill Ackman's Advice to Prosecute Herbalife (Even Though It Should)*, FORBES (July 22, 2013), <https://www.forbes.com/sites/mattstroud/2013/07/22/ftc-bill-ackman-prosecute-herbalife/?sh=4497f0ad7eb6>. [<https://perma.cc/DC23-VNEW>].

⁴⁶ Chris Knappe, *Amway Agrees to Pay \$56 Million, Settle Case Alleging it Operates a 'Pyramid Scheme'*, MLIVE, (Apr. 3, 2019), https://www.mlive.com/business/west-michigan/2010/11/amway_agrees_to_pay_56_million.html [<https://perma.cc/4SFJ-D2SE>]; *Analysis: Amway Accused of Fraud; Pays \$150 Million; Where's the FTC and DOJ?*, PYRAMID SCHEME ALERT (Nov. 11, 2010), [<https://perma.cc/ME43-K4DG>]. By 2019, Amway's cash payout was significantly lowered to \$34 million, though the total economic value of the settlement was \$100 million. The Grand Rapids Press Staff, *Lawyers Say Their \$20 Million Payment is Fair for \$100 Million Settlement in Amway Pyramid Scheme Lawsuit*, MLIVE (updated Apr. 3, 2019), https://www.mlive.com/business/west-michigan/2010/11/lawyers_say_their_20_million_p.html [<https://perma.cc/8M2A-DSSY>].

⁴⁷ Zack Stanton, *Rich DeVos: The Salesman Who Helped Launch the Modern Right*, POLITICO (Dec. 30, 2018), <https://www.politico.com/magazine/story/2018/12/30/rich-richard-devos-obituary-amway-politics-2018-223306/> [<https://perma.cc/5GUP-CJMZ>]. Richard DeVos was also criticized for using the money he made in Amway to promote a view of American conservatism that married church and state. Despite being an opponent of same-sex marriage and characterizing queer people as seeking "special treatment," President Ronald Reagan named him to the White House AIDS Commission in 1987. Matt Schudel, *Richard DeVos, billionaire co-founder of Amway and GOP financial supporter, dies at 92*, WASH. POST (Sept. 6, 2018), https://www.washingtonpost.com/local/obituaries/richard-devos-billionaire-co-founder-of-amway-and-gop-financial-supporter-dies-at-92/2018/09/06/3fdefb24-b1e9-11e8-aed9-001309990777_story.html [<https://perma.cc/MAS8-UP5C>].

onto the issue, one scholar remarked that a company's "pyramid shape . . . does not mean it is a pyramid scheme."⁴⁸

In one study, every MLM observed was recruitment-driven and seemed to satisfy the requirements of an illegal pyramid scheme,⁴⁹ but the Federal Trade Commission has declined requests to clarify what exactly separates a legitimate multi-level marketing company from a pyramid scheme.⁵⁰ This distinction is necessary to understand how current enforcement systems approach, and fail, to rectify the issue. Ultimately, however, I argue that social and financial harms that flow from multi-level marketing are not particular to pyramid scheme fraud. Whether or not an MLM is classified as pyramid scheme fraud, legitimate MLMs employ recruiting techniques that can be intense and misleading.⁵¹

C. *The Harm of Multi-level Marketing*

The vast majority of people—99.9 percent—who join an MLM will not make a profit.⁵² In fact, distributors involved in multi-level companies are statistically *less* likely to lose money in schemes that fit neatly into the definition of illegal pyramid fraud than they are through a legitimate MLM.⁵³ For example, in 2013, 87.5 percent of Herbalife distributors earned a median annual income of less than \$650.⁵⁴ One study found that 99 percent of Arbonne distributors earned an average annual income of less than \$100.⁵⁵ Those who enter an MLM early or have many people in their downline, however, stand to profit quite a lot. The average income for those within the top .04 percent of earners at Arbonne was over \$330,000.⁵⁶

Joining an MLM can be incredibly expensive. Many MLMs require a fee to begin working, which often pays for a starter kit and a fee for the rights to sell products, although participants are often unable to pick which products they can actually sell.⁵⁷ Considering that many people join MLMs precisely because they do not have excess income, financing these upstart fees can be difficult. Approximately a third of participants admitted to financing their business on a credit card.⁵⁸ Companies

⁴⁸ Epstein, *supra* note 12, at 104.

⁴⁹ JON M. TAYLOR, THE CASE (FOR AND) AGAINST MULTI-LEVEL MARKETING, CONSUMER AWARENESS INST. 7-2 (2012).

⁵⁰ Joe Nocera, *The Pyramid Scheme Problem*, N. Y. TIMES (Sept. 15, 2015) <https://www.nytimes.com/2015/09/15/opinion/joe-nocera-the-pyramid-scheme-problem.html> [<https://perma.cc/Q5VZ-26B7>] (“Lots of reporters have asked that question. Our final response is, We’re not going to answer it.’ . . . I had requested that the [Federal Trade Commission] explain what distinguished an illegal “pyramid scheme” from a legal multilevel marketing company.”).

⁵¹ Epstein, *supra* note 12, at 97.

⁵² See Multi-Level Marketing Businesses and Pyramid Schemes, FED. TRADE COMM’N (Oct. 2019), <https://www.consumer.ftc.gov/articles/0065-multi-level-marketing-businesses-and-pyramid-schemes> [<https://perma.cc/NV93-WZQJ>]; Sergio Pareja, *Sales Gone Wild: Will the FTC’s Business Opportunity Rule Put an End to Pyramid Marketing Schemes?*, 39 MCGEORGE L. REV. 83, 96 (2008).

⁵³ TAYLOR, *supra* note 49 at 7-2.

⁵⁴ Heidi Liu, *The Behavioral Economics of Multilevel Marketing*, 14:1 HASTINGS BUS. L.J. 109, 112 (2018).

⁵⁵ *Id.* at 123-124.

⁵⁶ *Id.*

⁵⁷ Pareja, *supra* note 52, at 96.

⁵⁸ 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->

appeal to low-income people who are looking for additional income and, sometimes, even hoping to pay off significant existing debt.⁵⁹ Some people, like those earning within the top 1 percent in Arbonne, make a significant amount of money in MLMs. That is not the case for most people who join an MLM and is particularly difficult for people who come from low-income communities. While companies advertise their independent distribution as a means to earn money, they ignore the reality that low-income people are more likely to have networks who are also low-income.⁶⁰ Because their potential buyers, and potential downlines, do not have excess disposable income for products that are often expensive and non-essential or unpopular goods, those independent distributors are less likely to succeed.

The business model of an MLM is statistically impossible to sustain long-term, and some consumer activist groups have long advocated against MLMs because of what they see as an inherently exploitative structure.⁶¹ Yet some MLMs have remained viable for years. One reason that a company like Amway could exist for so long, however, is because it specializes in many different products and is able to essentially create “new pyramids” from new ventures.⁶² And in regard to the aspect of the business found to be “protective” in *Amway*—the Amway Safeguards—those company policies are often left unchecked by self-regulation. For example, unused product buy-back programs often take back products at a heavily discounted price.⁶³

Some MLM defenders might counter that these concerns are all issues that are intrinsic in any small business—and many independent distributors refer to themselves as small business owners.⁶⁴ It is true that many small businesses have difficulties making a profit, particularly in the first few years of operation. However, this is not a good faith comparison. The headquarter operations of multi-level marketing companies are multi-million-dollar corporations—and although small businesses frequently fail, they fail at a fraction of the rate of MLM distributors. After 10 years, only a third of small businesses still survive; in the same time frame, only 5 percent of independent distributors will remain with their MLM.⁶⁵ In comparison to the 1 percent profitability rate of MLMs, the fact that a low 39 percent of

off/ [https://perma.cc/7GNV-R69W].

⁵⁹ Liu, *supra* note 54, at 125; *Multilevel Marketing: How Selling Your Way Out of Debt Can Sink You Deeper*, NASDAQ (Dec. 6, 2017), <https://www.nasdaq.com/articles/multilevel-marketing-how-selling-your-way-out-debt-can-sink-you-deeper-2017-12-06>.

⁶⁰ Liu, *supra* note 54, at 130.

⁶¹ Pareja, *supra* note 52, at 91. If everyone in a multi-level venture were able to recruit just 5 people, they would exceed the population of the Earth in 13 levels. Even then, the vast majority of people would be at the bottom with no one in their downline. Herb Greenberg, *Multi-Level Marketing Critic: Beware ‘Main Street Bubble’*, CNBC (Jan. 9, 2013), <https://www.cnbc.com/2013/01/09/multilevel-marketing-critic-beware-main-street-bubble.html> [https://perma.cc/G246-NURC]. See, e.g., *Tina.org Pushes for New Enforcement Against MLM Industry*, TRUTH IN ADVERT. (June 30, 2021), <https://www.truthinadvertising.org/tina-pushes-new-enforcement-tactic-against-mlm-industry/> [https://perma.cc/N8C3-V2CN].

⁶² Taylor, *supra* note 24, at 6.

⁶³ See, e.g., Ginger D. Rough, *LulLaRoe Abruptly Changes Return Policy; Consultants Say They Are Out Thousands*, USA TODAY (Sept. 14, 2017), <https://www.usatoday.com/story/life/allthemoms/news/2017/09/14/lularoe-return-policy-changes-outrage/34915297/> [https://perma.cc/6W2Q-AQMM].

⁶⁴ See Casey Bond, *Joining An MLM Does Not Make You A ‘Small Business Owner’*, HUFFPOST (Jan. 8, 2021), https://www.huffpost.com/entry/mlm-consultant-not-small-business-owner_1_5ff749c2c5b6fc79f46382d8 [https://perma.cc/HXF2-JVLQ].

⁶⁵ Katherine Gustafson, *What Percentage of Businesses Fail and How to Improve Your Chances of Success*, LENDING TREE (Aug. 7, 2020), <https://www.lendingtree.com/business/small/failure-rate/> [https://perma.cc/NL2V-EHSU]; TAYLOR, *supra* note 49,

small businesses make a profit seems extraordinary.⁶⁶

Involvement in a multi-level marketing business is not just a risky business decision because there is virtual certainty of failure. The preceding section demonstrates the ways in which distributors are unlikely to make a profit. Why, then, do people join MLMs?

II. MULTI-LEVEL MARKETING COMPANIES TARGET VULNERABLE POPULATIONS

Naked statistics regarding participants who lose money in multi-level marketing businesses are empty without an understanding about the people these companies target and those who participate. Many people could stand to benefit from the flexibility that direct selling offers. People with children and those who are unable to work outside of their homes, for example, might be attracted to promises from a company that they can make the same amount of money working a remote opportunity with no specific scheduling demands. The issue is that, recognizing this need, MLMs often target vulnerable populations to a model that is incompatible with actual financial success.

*A. Most Participants in MLMs are Women*⁶⁷

Women form the majority of the participants in and the consumers of multi-level marketing products those companies market to them on the basis of their gender.⁶⁸ More than two-thirds of products made by companies that use multi-level marketing are associated with being traditionally feminine.⁶⁹ Multi-level marketing companies like Tupperware and Mary Kay were originally introduced as opportunities for housewives to make money from their own homes and to deliver home goods and cosmetics to women in rural areas who did not have easy access to big department stores.⁷⁰ Avon attracted women to conferences using slogans such as “Now is the time! Avon, *the* company for Women!”⁷¹

Multi-level marketing distributors are still predominantly women. Today, 75 percent of people involved in multi-level marketing companies in the United States are women.⁷² Worldwide, 85 percent

at 6–3.

⁶⁶ TAYLOR, *supra* note 49, at 7–2.

⁶⁷ I acknowledge that people who participate in multi-level marketing may not fall within the gender binary. Throughout this article I will use “women” or “men” to discuss the implication of gendered experiences. This should be understood to discuss traditional notions of gender roles and how companies use them to attract a “female” workforce, but it not an endorsement of non-inclusive language. When talking about pregnancy and child rearing, I use gender-neutral language because many people who become pregnant and/or give birth are not women.

⁶⁸ *Id.* at 19.

⁶⁹ DIRECT SELLING ASS’N, *supra* note 13.

⁷⁰ Laura Richards, *How MLMs — Multilevel Marketing Schemes — Are Hurting Female Friendships*, CHI. TRIB. (Jan. 22, 2019), <https://www.chicagotribune.com/business/ct-biz-mlm-female-friendship-costs-20190122-story.html> [<https://perma.cc/YK64-5MBB>].

⁷¹ Tiffany Lamoreaux, *Home is Where the Work is: Women, Direct Sales, and Technologies of Gender 2* (May 2013) (Ph.D. dissertation, Arizona State University), <https://hdl.handle.net/2286/R.I.17914> [<https://perma.cc/6VA2-APFC>].

⁷² DIRECT SELLING ASS’N, *DIRECT SELLING IN THE UNITED STATES: 2020 FACTS AND DATA* (2021), <https://www.dsa.org/docs/default-source/research/dsa-industry-overview-fact-sheetd601b69c41746fcd88caff000002c0f4.pdf> [<https://perma.cc/F7XE-B4V9>].

of distributors are women.⁷³ The majority of these women in the United States are married, and about half of them have children at home.⁷⁴ Understanding their workforce, MLMs appeal to women in two ways: (1) Many MLM products are understood to be “feminine,” such as LulaRoe clothing or Lipsense makeup and (2) direct selling companies understand the anxiety many women have about balancing work with their roles as homemakers and mothers.⁷⁵ Whether women have historically had access to participate in the formal economy in, women have always contributed in some way.⁷⁶ But women who work outside of the home historically have faced condemnation from people who believe that those working contributions only distract women from their child-rearing duties.⁷⁷ Seizing on that backlash, the early stages of multi-level marketing began in the late 1880s when the traditionally male field of door-to-door sales began to decline because of the rise of mass advertising. Facing that challenge, one businessman turned to white women to instead peddle traditionally traveled goods within their own communities.⁷⁸ By abandoning the traveling model, his business could morph into a venture that instead took advantage of pre-existing relationships to make sales. In order to appeal to the white women he needed for his salesforce, he described his sales model to potential workers as a social act and stressed the importance of communication over sales.⁷⁹ Sales agents focused on the benefits of the program to simultaneously work and take care of a family at home to appeal to their demographic.⁸⁰ From the beginning, however, some companies refused to allow Black women to become sales representatives and explained the decision as one of “respectability.”⁸¹

Through the Great Depression in the 1930s, and for the continued decline of family income in the century since,⁸² the need for women to work only grew. Notwithstanding the fact that women are still underpaid in the workforce,⁸³ more women are able to comfortably work outside of the home now than they were in the late 1800s. Yet, bias against women working outside of the home and the pressure to put family life above all else persists in some places⁸⁴ and the burden of caretaking falls

⁷³ Lamoreaux, *supra* note 71, at 44.

⁷⁴ *Id.* at 102.

⁷⁵ *Id.* at 44.

⁷⁶ *Id.* at 46-47. Broad assertions about how women have been included in the workforce beg further explanation. While white women have been historically denied the opportunity to work outside of the home, Black women, Indigenous women, and women of color have been forced to work outside of the home. “Even after Emancipation, political and economic conditions forced many Black mothers to earn a living outside the home. At the turn of the century nearly all Black women worked . . . in white people’s homes.” While white women’s domestic role is tied to their motherhood, Black women were denied experiences of their own motherhood as they worked in the homes of white people. DOROTHY ROBERTS, *KILLING THE BLACK BODY* 15 (1997).

⁷⁷ Lamoreaux, *supra* note 71, at 48.

⁷⁸ *Id.* at 49.

⁷⁹ *Id.* at 52.

⁸⁰ *Id.* at 54.

⁸¹ *Id.* at 57.

⁸² Horowitz et al., *supra* note 1.

⁸³ Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CENTER FOR AMERICAN PROGRESS (Mar. 24, 2020), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/> [<https://perma.cc/3X2W-U715>]. White women make 79 cents for every dollar that a white man makes; Black, Hispanic and Latino, and Indigenous women make comparatively less. *Id.*

⁸⁴ Lesley Evans Ogden, *Working Mothers Face A ‘Wall’ of Bias—But There Are Ways to Push Back*, SCIENCE MAG. (Apr.

disproportionately on women.⁸⁵ In one study, women in direct sales indicated that the most important catalyst for them entering into the business was to have the freedom to be stay-at-home mothers in an industry that seems to have it all—friendship, fun, and much needed additional income in a place where they can still be accessible to their families.⁸⁶

One of the biggest draws of MLMs to participants is that they come with an aspect of community, both online through social media and in person during conferences,⁸⁷ meetups, and independent distributor hosted parties. Part of the reason that MLMs seize on women is because of the gendered expectation that they are more social beings—and women who participate in MLMs are often already active members of their community. The MLM experience only adds to this emphasis on social cohesion. Companies facilitate friendships between distributors in a line, including sometimes daily phone calls between a distributor and their upline.⁸⁸ Through marketing, MLMs seem like completely social endeavors with incidental sales aspects rather than business ventures to earn profit, and companies are able to disguise the real labor women are doing for them as an extension of their gender stereotyped roles as relationship-oriented caretakers.⁸⁹ Framing business as a way to “help others” through “parties” and an insidious focus on positive thinking is a gender coded marketing strategy to get more women on board.

B. MLMs Target Relationships Built on Trust

Independent distributors with It Works!⁹⁰ were explicitly told to “add as many moms” as they could and to “go into mom groups and look for anyone at trying to look for friends or who had financial struggles and go after them, like a friend offering them this thing they needed.”⁹¹ It Works! is a company that sells weight loss wraps and supplements, presumably targeting anxieties about pregnancy weight gain. It also advertises products that “diminish cellulite and stretch marks,” directed at post-pregnancy

10, 2019), <https://www.sciencemag.org/careers/2019/04/working-mothers-face-wall-bias-there-are-ways-push-back> [<https://perma.cc/C6BU-H6KN>].

⁸⁵ Zoya Wazir, *Gender Gap in Child Care Increases Curing Pandemic*, U.S. NEWS (June 28, 2021), <https://www.usnews.com/news/best-countries/articles/2021-06-28/women-men-provided-unequal-child-care-during-pandemic> (“Pre-pandemic, women globally provided an average of 4.5 trillion hours of unpaid child care per year, while men provided 1.4 trillion. After the pandemic hit, the study reports that the total number of hours in unpaid child care went up by 12%.”).

⁸⁶ Lamoreaux, *supra* note 71, at 102.

⁸⁷ Darlena Cunha, *Beware of Selling Yoga Pants on Facebook*, THE ATLANTIC (Apr. 18, 2018), <https://www.theatlantic.com/business/archive/2018/04/multilevel-marketing-yoga-pants-facebook/558296/> [<https://perma.cc/US5Z-QV2A>]; *see also* Singletary, *supra* note 58. Although conferences may seem like a business expense covered by the umbrella company, participants often pay for them out of pocket.

⁸⁸ Groß & Vriens, *supra* note 16, at 339.

⁸⁹ Lamoreaux, *supra* note 71, at 129.

⁹⁰ The FTC recently sent a warning letter to ItWorks! for misleading earnings claims. Federal Trade Commission, *Warning Regarding Earnings Claims Related to Coronavirus Disease 2019 (COVID-19)* (Apr. 24, 2020), https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_it_works_marketing_inc.pdf [<https://perma.cc/S9D6-YEQAJ>].

⁹¹ Sara Silverstein, Jennifer Lee & Amelia Kosciulek, *People Who Sell for Multilevel Marketing Companies Look Wildly Successful on Facebook, but the Reality Is Much More Complicated*, BUS. INSIDER (Aug. 6, 2019), <https://www.businessinsider.com/mlms-use-social-media-facebook-portray-financial-success-2019-7> [<https://perma.cc/S9D6-YEQAJ>].

sales.⁹²

The targeting of pregnant people by It Works! is just one example of how independent distributors in MLMs use their private relationships to drum up business and exploit vulnerable people.⁹³ Private relationships usually involve a significant amount of trust and when a multi-level business has an incentive structure that relies on using these relationships to recruit new participants, it causes harm to valuable social networks.⁹⁴ Potential consumers in an MLM are most likely to receive information about the business from a family member or friend that they trust, and recruitment includes elements of obligation, loyalty, and complex social dynamics that are not necessarily present in other forms of sales conduct.⁹⁵ It is true that the potential for abuse and misusing relationships for a salesperson's own gain is inherent in any type of selling.⁹⁶ Trusted family and friends are usually the first people to feel obligated to support a loved one's new business. Few other businesses, however, are *based* on using these private relationships in the way that MLMs are, and multi-level marketing is more likely to take place in situations of trust than other types of business.⁹⁷

The potential for damage is especially high in certain communities where there is a heightened reliance on trust. This includes religious groups and immigrant groups. An independent distributor might rely on community in their place of worship to sell products, and places of worship occupy a sensitive place in terms of fostering community trust.⁹⁸ In many religious communities, there is a sense of reliance on one another and belonging that could lead religious people to be more suggestible to abuses of trust and more likely to join ventures based on the urging of people within their community of faith. In fact, research shows that religiosity might correspond to fraud sensitivity and to involvement in multi-level marketing.⁹⁹ Many MLMs adopt religious symbolism and create a narrative that is linked to boundless faith, using words like “blessing” to describe success.¹⁰⁰

There is typically a higher reliance on trust in certain marginalized communities that are affected by multi-level marketing and pyramid scheme fraud.¹⁰¹ In the United States, Hispanic and Latino people are overrepresented in the multi-level marketing industry.¹⁰² People of Hispanic origin make up 20 percent of all independent distributors.¹⁰³ Some multi-level marketing companies, like

⁹² *Product Info: Stretch Mark Moisturizing Body Cream*, IT WORKS!, <https://static.myitworks.com/productsheets/212/212-productinfo-en.pdf> [https://perma.cc/2596-VZ89].

⁹³ Groß & Vriens, *supra* note 16, at 339.

⁹⁴ Bosley, Bellemare, Umwali, & York, *supra* note 30, at 2 (explaining that trust plays a role in pyramid scheme fraud and that affinity-based fraud is able to proliferate because it capitalizes on high amounts of in-group trust that exist between communities).

⁹⁵ Bosley, Greenman, & Snyder, *supra* note 10, at 1659.

⁹⁶ Groß & Vriens, *supra* note 16, at 339.

⁹⁷ *Id.*

⁹⁸ Bosley, Bellemare, Umwali, & York, *supra* note 30, at 2-4.

⁹⁹ *Id.* at 3.

¹⁰⁰ Liu, *supra* note 54, at 128.

¹⁰¹ Bosley, Bellemare, Umwali, & York, *supra* note 30, at 2.

¹⁰² Bosley, Greenman, & Snyder, *supra* note 10, at 1648.

¹⁰³ Abby Vesoulis & Eliana Docketerman, *Pandemic Schemes: How Multilevel Marketing Distributors Are Using the Internet—and the Coronavirus—to Grow Their Businesses*, TIME (July 9, 2020), <https://time.com/5864712/multilevel-marketing-schemes-coronavirus/> [https://perma.cc/N3JM-4PUP].

Herbalife, have faced criticism for targeting economically vulnerable communities, and Hispanic or Latino people in general.¹⁰⁴ The Federal Trade Commission recognized that pyramid scheme fraud infiltrates close-knit communities like African American churches and Latino immigrant communities.¹⁰⁵ In 2019, despite reaching an all-time low, poverty rates still stood at 18.8 and 15.7 percent for Black and Hispanic communities respectively.¹⁰⁶ Comparatively, the poverty rate for white people was 7.3 percent and 10.5 for the entire United States on average.¹⁰⁷ Given rates of poverty and increasing unemployment, advocates worry that illegal pyramid schemes will prey on marginalized communities where individuals seek alternative ways to make money.¹⁰⁸ The harm that women experience because of multi-level marketing is only compounded when those women are from low-income communities, and when they are targeted because of their religious affiliation, their identity as parents, their immigration status, and/or their race. Participants of MLMs should be understood in regard to their intersecting identities because they show how multi-level marketing companies target disadvantaged groups.¹⁰⁹

The fact that people are recruited by their trusted connections means it might be more difficult for participants to leave. Participants might fear letting the person who recruited them down. They might also come to feel that failure would mean breaking the trust of the family-like structure¹¹⁰ they have built in their own uplines. Those issues only become more embedded as time goes on. When someone joins an MLM, the company can “colonize every aspect of their lives” by becoming deeply engrained into everything the participant does.¹¹¹ Because the factors of decision-making in joining an MLM are so multifaceted, they cannot be easily measured by more abstract cost-benefit analyses that consider only the economic reward of joining the business opportunity. When someone signs up for an MLM, engage in a social exchange with their pre-existing community, they create new community, and they recruit more people into that new community. For the last reason, the victims of this duplicitous business relationship become, themselves, perpetrators of harm. That dual nature makes it difficult to tell where enforcement is needed and how it can benefit participants. How can regulations avoid depriving participants of the positive community they develop while considering how that community can wreak economic and social havoc?

¹⁰⁴ *Id.*

¹⁰⁵ FED. TRADE COMM’N, *COMBATING FRAUD IN AFRICAN AMERICAN & LATINO COMMUNITIES: THE FTC’S COMPREHENSIVE STRATEGIC PLAN* (2016).

¹⁰⁶ John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html> [<https://perma.cc/67SG-AUKS>].

¹⁰⁷ *Id.*

¹⁰⁸ See Steph Amaya Mora, *The Pandemic Leaves More Latinos Vulnerable To Illegal Pyramid Schemes*, PULSO (Oct. 28, 2020), <https://projectpulso.org/2020/10/28/the-pandemic-leaves-more-latinos-vulnerable-to-illegal-pyramid-schemes/> [<https://perma.cc/UM6F-TGL2>]; Michelle Singletary, *Structural Racism Helps Schemers Attract Blacks to Fake ‘Son-Son’ Scam*, WASH. POST (Aug. 14, 2020), <https://www.washingtonpost.com/business/2020/08/14/fake-sou-sou-lure-blacks/> [<https://perma.cc/J6RD-FWJH>] (explaining that structural racism and wealth inequality creates the potential for an illegal pyramid scheme to victimize some Black people); see also Vesoulis & Dockterman, *supra* note 103.

¹⁰⁹ See Lamoreaux, *supra* note 71, at 21 for a further analysis of intersectionality as it relates to multi-level marketing (citing texts by Kimberlé Crenshaw, Patricia Hill Collins, Glenn, Venus Green).

¹¹⁰ See *id.* at 6.

¹¹¹ Groß & Vriens, *supra* note 16, at 339.

C. The Puzzle of Developing Regulation that Helps Participants

Independent distributors are charged with the task of recruiting more distributors into their downline—even if they themselves are not making a profit. This creates a potentially unsympathetic victim. Those participants are almost certain to lose money, but they still buy into and recruit their connections into a business where that is statistically unlikely to succeed. This perpetuates harm to other members of their community. In addition to the nearly inevitable financial fallout, there is significant emotional harm that occurs when, for example, one mother connects with another mother by feigning an emotional connection only for the contact to realize that the basis for their communication was a sale.¹¹² For MLMs that sell products geared toward weight loss, distributors sometimes message potential consumers with hurtful insinuations about their bodies.¹¹³ Some distributors make false health claims about products that can be attractive to consumers in difficult health situations. This can raise hope for those consumers who will ultimately be let down by the false promise of a cure.¹¹⁴ Distributors sometimes drive their families deep into debt through one or multiple MLMs,¹¹⁵ use extreme measures to shame their downlines into producing more sales for their own commission,¹¹⁶ and promote their business in socially inappropriate situations where it is difficult for the potential buyer to refuse.¹¹⁷ Given this nature of distributors, it can be hard to sympathize with them—and perhaps that is why anti-MLM communities exist to mock participants. It also, however, fits into a broader societal tendency to blame people—and women in particular—for being taken advantage of. Despite the harm that distributors facilitate, those harms still ultimately originate with the company itself. People who join MLMs might hold beliefs about their prospects that seem absurd to someone who knows their actual likelihood of success. But they may hold those beliefs because the multi-level marketing model encourages a high degree of positivity and optimism. Companies do not tend to give distributors specific barometers of success, but instead repeatedly tell them that anything is possible and that if they are not able to achieve their wildest dreams it is only due to their own laziness.¹¹⁸ When distributors perpetuate this model to their trusted connections, it is probably because they believe in it themselves.

Society can be unfavorable to people who fall for fraud or are in some way “duped.”¹¹⁹ Surely,

¹¹² Richards, *supra* note 70.

¹¹³ See, e.g., u/SweetHoneyApples, REDDIT (May 31, 2018, 11:02 AM), https://www.reddit.com/r/antiMLM/comments/8njll3/i_need_to_lose_weight_it_seems/ [<https://perma.cc/43VC-CACP>] (showing a message exchange where an MLM distributor suggested that a contact needed to lose 5-10 pounds).

¹¹⁴ See, Kayleen Schaefer, *Inside the Creepy World of Women Selling You Supplements on Facebook*, WOMEN'S HEALTH (Sept. 20, 2018), <https://www.womenshealthmag.com/life/a22749385/direct-sales-social-media-friendship/> [<https://perma.cc/JEX8-PT5V>].

¹¹⁵ See, e.g., Lamoreaux, *supra* note 71, at 126.

¹¹⁶ See Read, *supra* note 3 (giving the example of one former distributor whose upline would send her messages like “you need to press harder,” “Look at me, I’m a stay-at home mom,” and “I’m about to give birth,” to shame her for not meeting sales goals.).

¹¹⁷ Groß & Vriens, *supra* note 16, at 338.

¹¹⁸ Liu, *supra* note 54, at 125.

¹¹⁹ Being duped refers to a situation where one “believes that injustice was the result of deliberate, intentional acts” by a third party. See Kathleen D. Vohs et. al, *Feeling Duped: Emotional, Motivational, and Cognitive Aspects of Being Exploited by Others*, REV. OF GEN. PSYCH. 127, 128 (2007) (In the MLM context, participants can be said to be duped either by companies or upline

that effect is only worsened for women who have not only been duped, but who have continued to buy into the deceit and further induced others to join them as well. But refusing to understand how gender, race, and social hierarchy can influence decision-making in multi-level marketing arrangements ignores a reality that is vital for regulation and harm reduction.¹²⁰ This dual nature of participants does not make them less worthy of protection. Understanding it could provide for a more informed, empathetic approach to enforcement that includes consideration for the benefit that participants. When regulatory intervention occurs, it should work not just for the most vulnerable victims at the bottom of a pyramid scheme, but also for those whose position is more morally ambiguous and for whom regulators might want to assign blame. That intervention must also incorporate the perspective of women who joined MLMs so that it can develop solutions that address those needs instead of solutions that solely work by removing multi-level marketing as an option. This might mean solutions that examine and address the underlying social issues that bring vulnerable populations to multi-level marketing in the first place.

III. ENFORCEMENT MECHANISMS

Before I address the puzzles of a future regulatory scheme that addresses participant harm while accounting for their experiences, I will overview the current enforcement structure against MLMs. Federal and state governments have different mechanisms to regulate and police the activities of multi-level marketing companies. These include regulations that provide *ex ante* standards for companies to abide by as direct selling organizations as well as *ex post* enforcement actions brought by federal and state agencies against MLMs that have conducted activity as illegal pyramid schemes. There are common problems in the industry that frequently lead to regulatory action: (1) when an MLM operates as a pyramid scheme, (2) when income opportunities are exaggerated or not disclosed, (3) customers are harmed by those claims, (4) distributors misuse their private connections to sell products and recruit into the business, and (5) the structure of MLMs restricts their members' ability to think clearly about the quality of their business.¹²¹

State actions may take many forms and will necessarily vary depending on the policy goals and needs of each individual state.¹²² Though states can employ various mechanisms like anti-pyramid scheme laws, broad securities laws that encompass pyramid schemes, and business opportunity laws that apply to MLMs, state enforcement is not universally useful against MLMs because those companies are able to disseminate their business practices across state lines and become unreachable to states that have the strictest laws.¹²³ Although some states are active against multi-level marketing, some states have codified protections for the industry.¹²⁴ But given the broad application of the commerce clause, most multi-level marketing businesses should be able to be subject to federal laws because they almost

participants that induce them into the business).

¹²⁰ Cf. Debora L. Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, WAKE FOREST L. REV. 749 (2010).

¹²¹ Groß & Vriens, *supra* note 16, at 334.

¹²² Pareja, *supra* note 52, at 104-105.

¹²³ *Id.*

¹²⁴ Haley Fuchs, *Sinema's Raking in Cash From MLMs. They Want to Kill Her Party's Labor Bill*, POLITICO (Nov. 5, 2021), <https://www.politico.com/news/2021/11/05/kyrsten-sinema-multi-level-marketing-labor-519661> [<https://perma.cc/U74J-DLQJ>].

always affect interstate commerce.¹²⁵ The nature of multi-level marketing spurs interstate commercial interactions. Because compensation plans in MLMs require recruitment, distributors are almost inevitably pushed to look to connections in other states for recruitment when their own communities become saturated with participants.¹²⁶ Participants also rely on social media, where their messages are likely to reach consumers in other states.¹²⁷ For that reason, I focus on federal enforcement.

A. Federal Agency Enforcement

Multiple federal agencies take some kind of action against multi-level marketing and pyramid scheme companies. The U.S. Department of Justice and Food and Drug Administration (FDA) occasionally bring actions against MLMs. The Justice Department focuses enforcement on mail-fraud businesses and uses a lottery approach that weighs how much a company receives from a participant in proportion to how much that participant may benefit.¹²⁸ FDA can take enforcement actions against multi-level marketing companies that advertise impermissible health claims under the FDA Act—for example, claiming that essential oils could cure cancer or the Ebola virus.¹²⁹ However, MLMs are sometimes able to structure their advertisement claims and instruct independent distributors in ways that do not technically violate the Act, but still make health claims that should be regulated under the spirit of the law.¹³⁰

The Securities Enforcement Commission (SEC) has the authority to bring enforcement actions against a company when security is involved—meaning that the MLM needs to have violated the Securities Act, Securities Exchange Act, or associated regulations¹³¹ when a participant invests money into the company expecting for profit to derive solely from the effects of a third party (their downline).¹³² The SEC is only able to reach pyramid scheme fraud and not legal but harmful effects of legitimate multi-level marketing businesses.¹³³ Even under more stringent standards that classify securities fraud in a way that would reach legitimate MLMs, companies often find ways to work around requirements.¹³⁴

¹²⁵ TAYLOR, *supra* note 49, at 11-6 (explaining that independent distributors often must recruit people they know in other states because their own cities and states are heavily saturated with distributors).

¹²⁶ *Id.* at 10-19.

¹²⁷ See Silverstein et. al, *supra* note 91.

¹²⁸ Liu, *supra* note 54, at 115-16.

¹²⁹ 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/> [<https://perma.cc/P5RT-6Y4R>].

¹³⁰ See, Schaefer, *supra* note 114 (reporting that a Plexus participant was told to frame her pitch in a way that focused on symptoms, not conditions, so as to not attract the attention of FDA).

¹³¹ Liu, *supra* note 54, at 116.

¹³² *Id.* (citing *SEC v. W.J. Howey*, 328 U.S. 293, 298-299 (1946)).

¹³³ After the standard set forth in *Howey*, several lower courts and, ultimately, the Fifth and Ninth Circuits reached decisions that made this prong of the test less restrictive in some pyramid scheme fraud cases by finding that the term “solely” should not be taken literally. For a review of various approaches courts have taken to determine whether pyramid scheme fraud constitutes a security, see Corey Matthews, *Using a Hybrid Securities Test to Tackle to Problem of Pyramid Fraud*, 88 FORDHAM L. REV. 2045, 2067–76 (2020).

¹³⁴ The Ninth Circuit’s test in *Webster v. Omnitrusion International, Inc.* classifies a pyramid scheme for the purpose of

1. The Federal Trade Commission Consumer-Directed Approaches

The goal of the Federal Trade Commission is to protect consumer welfare and promote competition in interstate commerce.¹³⁵ Of the federal agencies that are empowered to regulate the multi-level marketing industry in some way, the FTC's mission most aligns with a solution that benefits the participants of an MLM. The purpose of consumer protection in the FTC from its inception was to protect consumers from deceptive forces in the marketplace.¹³⁶ Its ability to craft rules and bring enforcement actions against multi-level marketing companies is more broad than other agencies. Unlike FDA, it does not need to focus only on products that make health claims, and unlike the SEC, available remedies do not depend upon the finding of a security. The FTC brings action against companies because of their unfair trade practices and deception, stemming from their authority under Section 5 of the FTC Act and related regulations.¹³⁷ FTC remedies can presumably address the core of what makes MLMs harmful: that they can deceive consumers into entering a business structure which is unlikely to meet their needs and benefit them.

Yet, the agency's relationship with and regulation of the direct selling industry is one fraught with tension. After the *Ammway* decision in 1979, discussed *supra* in Part I, the Federal Trade Commission was limited in the type of enforcement action it could take against multi-level marketing companies. Since then, FTC enforcement mechanisms have been relatively ineffective in addressing multi-level marketing schemes.¹³⁸ For one, claims by independent distributors are impossible for the agency to completely monitor. An attorney for the Federal Trade Commission explained that social media makes it difficult for the FTC to determine when distributors are making deceptive claims because they often communicate with others through private messaging, or over private accounts.¹³⁹ Further, she explains that the Commission relies on case-by-case complaints which may not be representative of all consumer harm.¹⁴⁰

In addition, federal agencies face the challenge of regulating an industry that has significant financial resources. This can be daunting for agencies with limited budgets, and the FTC is charged with investigating and regulating many different industries.¹⁴¹ The DSA reports that direct selling

securities fraud in such a way that could potentially apply to many MLMs. But MLMs are often able to carefully construe their incentive structure to meet those requirements by, for example, saying that commissions for new recruits derive from the acquisition of new customers by those recruits but *not* for the recruits themselves—despite the fact that that money comes from new recruit sign up fees and not sales commissions. Pareja, *supra* note 52, at 101-102.

¹³⁵ *About the FTC*, FED. TRADE COMM'N, www.ftc.gov/about-ftc [https://perma.cc/T82F-HCJY].

¹³⁶ Pareja, *supra* note 52, at 89.

¹³⁷ *Id.* at 94-95.

¹³⁸ Pareja, *supra* note 52, at 89.

¹³⁹ Vesoulis & Dockterman, *supra* note 103.

¹⁴⁰ Dylan Miettinen, "LulLaRich" Docuseries Highlights Struggles of MLM Regulation, *Oversight*, MARKETPLACE (Oct. 7, 2021), <https://www.marketplace.org/2021/10/07/lularich-docuseries-highlights-struggles-of-mlm-regulation-oversight/> [https://perma.cc/4HUM-USAB].

¹⁴¹ Jessica L. Rich, former Director of the FTC's Bureau of Consumer Protection, recently suggested a series of reforms the FTC could institute to strengthen the agency's response to deceptive trade practices. Former Director Rich explains that the agency is relatively small and "strapped for resources," particularly in light of a Supreme Court challenge to the FTC's ability to sue companies for money to redress victims of deceptive business practices. For example, she points to needed reform in the Bureau of Economics, which she says tries to opine on every matter. The analysis conducted by the Bureau of Economics could

accounted for \$40.1 billion dollars of sales in the United States in 2020 alone, with 7.7 million independent distributors—up 13.2 percent from 2019.¹⁴² The year the FTC began an investigation into multi-level marketing company Herbalife, the company spent 800% more in lobbying than he it had the previous year.¹⁴³ Political action committees for MLMs like Amway, Mary Kay, Herbalife, and Nu Skin Enterprises donate thousands of dollars to legislators such as Krysten Sinema when faced with federal policy that could negatively impact them.¹⁴⁴

Some critics doubt that the *Amway* Safeguards and *Koscot* test actually do enough to deter pyramid scheme fraud.¹⁴⁵ The *Amway* Safeguards depend on MLMs to police themselves in many circumstances, relying on them to hold independent distributors to standards such as the 70 percent and “ten retail sales” rules.¹⁴⁶ Yet, with the *Amway* Safeguards in place, whether or not they are enforced in practice, the FTC is limited to pursuing multi-level marketing companies under the theory that they operate as pyramid schemes when they make misleading representations about earnings potential.¹⁴⁷ Those standards and logistical hurdles have made it difficult to address MLM companies that cause complaints but have supposed safeguards in place. Although there were almost 18,000 complaints about MLMs to the FTC from 1997-2005, the agency brought only twenty cases.¹⁴⁸ Since 2005, the Commission has only brought an additional nine cases.¹⁴⁹

Ex post enforcement actions do not address the inherent structural problems of multi-level marketing, but instead focus on those few companies that operate as pyramid schemes under the *Amway* and *Koscot* standards or make false claims about specific products. But lawyers for multi-level marketing companies can always craft language around FTC rules and implement the *Amway* safeguards to reform sales practices without changing the structure of their companies.¹⁵⁰ Even in the cases where the FTC does have the ability to bring enforcement action against a company, that company can successfully defend themselves on the basis that they disclosed their actions through hidden or generic

be burdensome to FTC case load. Jessica Rich, *Five Reforms the FTC Can Undertake Now to Strengthen the Agency*, BROOKINGS (Mar. 1, 2021). <https://www.brookings.edu/blog/techtank/2021/03/01/five-reforms-the-ftc-can-undertake-now-to-strengthen-the-agency/> [<https://perma.cc/24SG-C5YW>]. Issues like those described by Former Direct Rich in the Bureau of Economics could contribute to the FTC’s case burden and make it difficult to pursue action against every violating multi-level marketing company.

¹⁴² Direct Selling in the United States: 2020 Industry Overview, Direct Selling Association (2021), <https://www.dsa.org/statistics-insights/overview> [<https://perma.cc/F7GE-8VYE>]; Miettinen, *supra* note 140.

¹⁴³ Matt Stroud, *How lobbying dollars prop up pyramid schemes*, THE VERGE (Apr. 8, 2014), [<https://perma.cc/JH7R-DXJH>].

¹⁴⁴ Fuchs, *supra* note 124.

¹⁴⁵ Groß & Vriens, *supra* note 16, at 335-336. Bruce Craig, *Herbalife, MLMs And The FTC: Some Questions And A Challenge For Market Analysts And The Financial Press*, SEEKING ALPHA (July 28, 2015) <https://seekingalpha.com/article/3362825-herbalife-mlms-and-the-ftc-some-questions-and-a-challenge-for-market-analysts-and-the-financial-press> [<https://perma.cc/2DGG-84U6>].

¹⁴⁶ Pareja, *supra* note 52, at 95.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 94.

¹⁴⁹ *FTC Pyramid Cases Post-Amway*, TRUTH IN ADVERT. (updated Oct. 14, 2021) <https://www.truthinadvertising.org/ftc-pyramid-cases-by-the-numbers/> [<https://perma.cc/F8JX-L9RB>]. Even given this volume of complaints, FTC assistant director of the Division of Marketing Practices Kati Daffan “notes that the FTC receives fewer pyramid scheme complaints than people may assume, perhaps because of the stigma of financial hardship.” Miettinen, *supra* note 140.

¹⁵⁰ Pareja, *supra* note 52, at 95.

disclaimers.¹⁵¹ In effect, only the most egregious offenders are likely to interact with federal regulators.

More recently, the FTC has signaled a more committed mission to focus on multi-level marketing companies. After the Commission brought only four pyramid scheme cases in over a decade, in the last few years the agency has brought three cases in quick succession.¹⁵² In a 2020 speech to the Direct Selling Association, Commissioner Noah Joshua Phillips acknowledged the Commission's new aggressive stance, granting that he understood that some members of the audience would disagree with the FTC's more rigorous strategy against multi-level marketing.¹⁵³ At least part of the uptick in enforcement action appears to stem from the COVID-19 pandemic and misleading advertising claims made in the six months preceding his speech. In April of 2020, the FTC sent warning letters to ten MLMs instructing them to address agency concerns of misleading statements about the efficacy of their products against the virus and the ability to make money from home through multi-level marketing.¹⁵⁴ A few months later in June, the FTC sent a second round of letters to more MLMs that made similar claims.¹⁵⁵ In Commissioner Phillip's speech, he also made one other thing clear—companies that make false or misleading statements about their businesses contravene the law unless they disclose the fact that most participants make very little or lose money in MLMs.¹⁵⁶

These enforcement mechanisms do not completely address the harm that MLMs cause their participants. They generally only address complaints through enforcement on a case-by-case basis, and on the grounds of requirements that are insufficient to properly police companies and do not get to the root of what hurts participants in multi-level marketing. The current mechanisms only address cases in which companies have misrepresented or not disclosed financial earnings potential. But as federal action currently stands, it does not address the acknowledged¹⁵⁷ fact that the structure of an MLM makes it almost impossible to make a profit and that, knowing this, multi-level marketing companies disproportionately target vulnerable communities. As it is, only the worst actors are pursued and, generally, when they have done something egregious like claim that their products are able to cure cancer or COVID-19.¹⁵⁸ By the time these companies become notable enough to attract the attention

¹⁵¹ *Id.* at 95-96.

¹⁵² Bonnie Patten, *A Multilevel Marketing Company's Battle to Survive an FTC Pyramid Scheme Action*, ADMIN. L. REV. ACCORD 237, 240 (2020).

¹⁵³ Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, *Keynote of Commissioner Noah Joshua Phillips at the DSA Legal & Regulatory Summit: Seller Beware 1* (Oct 15, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581726/phillips_-_dsa_remarks_10-15-20.pdf [<https://perma.cc/8G8Q-69TM>] [hereinafter Phillips Keynote].

¹⁵⁴ *FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus*, FED. TRADE COMM'N (Apr. 24, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health> [<https://perma.cc/5RWK-RKDF>].

¹⁵⁵ *Sends Second Round of Warning Letters to Multi-Level Marketers Regarding Coronavirus Related Health and Earnings Claims*, FED. TRADE COMM'N (June 5, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/second-round-warning-letters-to-mlms-regarding-coronavirus> [<https://perma.cc/U89X-99LG>].

¹⁵⁶ Phillips Keynote, *supra* note 153, at 4.

¹⁵⁷ Both the Federal Trade Commission and the Direct Selling Association acknowledge that participants are not likely to make more than a modest income. *Id.*

¹⁵⁸ *See, e.g., FTC Sends Second Round of Warning Letters to Multi-Level Marketers Regarding Coronavirus Related Health and Earnings Claims*, FED. TRADE COMM'N (June 5, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/second-round-warning-letters-to-mlms-regarding-coronavirus> [<https://perma.cc/2DTK-D3TX>]; *FTC and FDA Send Warning Letters to Companies Selling Dietary Supplements Claiming to Treat Alzheimer's Disease and Remediate or Cure Other Serious Illnesses Such as Parkinson's, Heart Disease, and Cancer*, FED. TRADE COMM'N (Feb. 11, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftc->

of the FTC, they may have already targeted many people who have lost a significant amount of money.¹⁵⁹

Given the income structure in a legitimate MLM and the inadequacy of the *Amway* and *Koscot* tests, it does not necessarily help consumers that the Federal Trade Commission and other actors are generally only able to pursue companies under the theory that they are illegal pyramid schemes—especially considering that participants in MLMs generally lose more money than those in “no-product,” traditional pyramid schemes.¹⁶⁰ Of the current and proposed strategies to alleviate harm by MLMs, few consider the unique social factors tying participants to their companies.

IV. EFFORTS TO STRENGTHEN DISCLOSURE REQUIREMENTS ARE NOT SUFFICIENT TO ADDRESS MLM HARM

Some people anticipated that the advent of the Internet would be beneficial to participants who sought to join MLMs. With income reports and negative testimonials readily available online, it seemed as though participants would be well equipped to research information that would lead them to make well-informed decisions about joining an MLM.¹⁶¹ Despite the unprecedented availability of information, that has not totally come to fruition.¹⁶² Participants are able to search for income information themselves, but they are also repeatedly exposed to emotional ploy advertisements by companies, pressure from their private connections, and increased online networks of other distributors through social media. The question, then, became whether participants are better off when they are not left to search for the information themselves, but when companies are required to disclose important information about their average income earnings and products.

Companies already use disclosure requirements to some extent to avoid restructuring their business. Disclosure requirements, like the *Amway* safeguards, are countermeasures that would ideally prevent companies from taking advantage of participants. The Federal Trade Commission is concerned with deceptive earnings claims, though a company can escape enforcement if it takes some effort to inform its participants of their real earnings potential. But companies are sometimes able to skew income disclosures to lessen their impact on participants or couch them in positive language that obscures their true implications. There is evidence that fraud uptake is lessened when people have information about the probability of success, but only in certain populations.¹⁶³ Much like aspects of

fda-send-warning-letters-companies-selling-dietary [https://perma.cc/W4HC-RT5K].

¹⁵⁹ Corey Matthews, *Using a Hybrid Securities Test to Tackle the Problem of Pyramid Fraud*, 88 FORDHAM L. REV. 2045, 2062-63 (2020).

¹⁶⁰ TAYLOR, *supra* note 49, at 10-35 (explaining that participants in a pyramid scheme where there is no product, which would be impermissible under the existing federal legal standards, are actually 10 to 100 times more likely to profit than participants in an MLM).

¹⁶¹ Epstein, *supra* note 12, at 109.

¹⁶² See Silverstein et. al., *supra* note 91, at 15 (discussing the role that social media plays in deepening deception instead of alleviating it). However, one study suggests that the prevalence of MLMs in the United States might be slowly declining, not accounting for some evidence of an increase during the pandemic. William Keep, *The Decline Of Multi-Level Marketing in the United States by the Numbers*, SEEKING ALPHA (Dec. 13, 2020), <https://seekingalpha.com/article/4394496-decline-of-multi-level-marketing-in-united-states-numbers> [https://perma.cc/9DB8-HUV5].

¹⁶³ Bosley, Bellemare, Umwali, & York, *supra* note 30, at 8-9 (finding that disclosure might lead to less fraud uptake in some populations with high education attainment).

the *Amway* safeguards, companies often find ways to skirt disclosure rules.

A. The FTC's Franchise and Business Opportunity Rules

After a slew of franchise fraud in the 1970s, the Federal Trade Commission enacted a “Franchise Rule” to inhibit the ability of deceptive companies to induce investors to join their company without providing information about the company’s profitability.¹⁶⁴ Accordingly, the FTC adopted the rule to prevent franchise fraud by requiring pre-sale disclosures that include a history of litigation against the parent company and audited financial disclosures.¹⁶⁵ Fearful that the rule would put a heavy burden on smaller scale opportunities (as opposed to growing companies like McDonald’s), the FTC carved out exemptions to the rule when an opportunity does not require an initial investment of \$500 within six months.¹⁶⁶ Things like wholesale purchases for inventory and training do not apply toward the \$500 investment.¹⁶⁷ Therefore, many MLMs, even large companies like Mary Kay, Avon, and Herbalife that make profits in the millions, escape classification under the Franchise rule because they take care to keep initial fees under that amount.

In response to the deceptive practices in business opportunities left unregulated by the Franchise Rule, in 2006 the FTC began rulemaking on a new Business Opportunity Rule that would fold MLMs into a similar framework and provide *ex ante* regulation against the industry.¹⁶⁸ There was initially hope on the part of consumer advocates that revisions to get rid of income limits, which also required less information from companies so that the disclosures would not burden small businesses, would be implemented as a fair compromise.¹⁶⁹ In response, the Direct Selling Association spent \$4 million on a lobbying campaign to have MLMs exempted from the rule.¹⁷⁰ MLM companies and their participants flooded the FTC with form letters to oppose the rule.¹⁷¹ In its 2006 10-K tax form, Herbalife proclaimed that the rule in its original form would harm their U.S. operations.¹⁷² When the final rule was published, it included another carveout for the multi-level marketing industry: “the Commission determined that the [rule] was unworkable with respect to MLMs . . . This decision was based on the overwhelming majority of the approximately 17,000 comments that argued that the [rule] failed to differentiate between unlawful pyramid schemes . . . and legitimate companies using an MLM model.”¹⁷³ The response to these industry comments highlighted the “low economic risk” of

¹⁶⁴ Pareja, *supra* note 52 at 90.

¹⁶⁵ *Id.* at 90-92.

¹⁶⁶ *Id.* at 92.

¹⁶⁷ *Id.*

¹⁶⁸ JON M. TAYLOR, CONSUMER AWARENESS INST., REGULATORY CAPTURE – THE FTC’S FLAWED BUSINESS OPPORTUNITY RULE (rev. Aug. 2014), https://centerforinquiry.org/wp-content/uploads/sites/33/quackwatch/regulatory_capture.pdf [<https://perma.cc/DS8K-S2F6>] (last visited Dec. 20, 2021).

¹⁶⁹ Pareja, *supra* note 52, at 106. The proposed rule required only a 1-page disclosure document that gave information about the seller, background principles, and litigation and bankruptcy. It also simplified the process so that companies could simply check yes or no. Proposed FTC Business Opportunity Rule, 71 Fed. Reg. 19068.

¹⁷⁰ See Pareja, *supra* note 52, at 106; Herb Greenberg, *How Multi-Level Marketers Dodged a Bullet*, CNBC (Jan. 9, 2013), <https://www.cnbc.com/id/100360456> [<https://perma.cc/J88T-W3Z7>].

¹⁷¹ Liu, *supra* note 54, at 121.

¹⁷² See Greenberg, *supra* note 170.

¹⁷³ FTC Business Opportunity Rule, 70 Fed. Reg. 76,816, 76,819 (Dec. 8, 2011).

participating in an MLM, which often only requires a startup fee of less than \$100.¹⁷⁴ Instead, the response said that the FTC will need to conduct an *ex post* review of MLMs to determine if they are actually pyramid schemes masquerading as MLMs.¹⁷⁵ In short, the rule left multi-level marketing regulation where it was at the beginning of the rulemaking process—able to skirt rules by technically coming in below startup requirements and without *ex ante* expectations, despite the fact that MLM participants are in as poor a financial position as participants of an illegal pyramid scheme.

B. Industry Self-Regulation

The DSA, the direct selling association that lobbied against an expansion of the Business Opportunity rule,¹⁷⁶ is also in charge of policing self-imposed disclosure requirements by companies in its industry.¹⁷⁷ As a private regulatory body, the DSA has established a code of ethics and complaint reporting system to reign in fraudulent income reporting by MLMs.¹⁷⁸ But only 26.5 percent of DSA member businesses actually make publicly available income disclosures.¹⁷⁹ And of those companies that do make some kind of income disclosure, they may choose to withhold certain data or release disclosures that are not well studied that could lead consumers to consider incomplete information by not disclosing things that a distributor would have to spend money on like training and selling aids.¹⁸⁰ Former FTC Chairman Maureen Olhausen explained that self-regulators in this industry have “mixed motives” and that poorly constructed disclosures are unlikely to provide a benefit to participants.¹⁸¹ But even though the FTC embraces the self-regulatory function of the DSA,¹⁸² companies are sometimes able to weaponize their self-disclosures to make them seem more trustworthy to prospective participants—even if those disclosures are, in practice, misleading.¹⁸³ Even when companies adhere to requirements of voluntary disclosure, they might follow the “spirit” of the regulation by providing consumers with comprehensive, easy to digest information.¹⁸⁴

The current disclosure scheme in the federal government is not as strong as it could have been if MLMs had been included in the Business Opportunity rule, or if they had been considered franchises in the first place. But it is not clear that even that would have been enough to offset the harm that MLMs cause. Studies have discovered some benefit to disclosure—namely, that it could lower earnings expectations for someone who joins an MLM to earn income, as most participants do.¹⁸⁵ Yet, efforts to focus on either mandated or voluntary disclosure as a solution are misguided because they do not

¹⁷⁴ *Id.* at 76822.

¹⁷⁵ *Id.*

¹⁷⁶ See Greenberg, *supra* note 170.

¹⁷⁷ Bosley, Greenman, & Snyder, *supra* note 10, at 1644.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1645.

¹⁸⁰ *Id.* at 1644.

¹⁸¹ *Id.*

¹⁸² Phillips Keynote, *supra* note 153, at 5-6 (showing how one FTC Commissioner applauded the DSA for their tertiary effort to warn MLMs not to make false health claims about their products efficacy fighting the COVID-19 virus in April 2020).

¹⁸³ Bosley, Greenman, & Snyder, *supra* note 10, at 1644.

¹⁸⁴ *Id.* at 1660.

¹⁸⁵ *Id.* at 1644, 1646.

address social hierarchy and the role that trusted relationships play.

C. Why Disclosure is Not Enough

It often takes more to discourage a person from engaging in a behavior than just disclosure. For example, studies reveal that calorie disclosures at eating establishments do not actually deter people from choosing high caloric foods and drinks.¹⁸⁶ This would seem counter-intuitive if every person's motive in eating a meal was only to eat as few calories as possible and to maximize a particular ideal of health. In reality, people choose food options for many reasons that rarely have to do with rational choice, but are more often due to an "indescribable" combination of flavor, texture, and emotion.¹⁸⁷ Because disclosure requirements do not take those aspects into account and only seek to control calorie intake, they tend not to accomplish deterrence goals. Likewise, participants join MLMs for reasons that go beyond the rational choice theories underlying income disclosures. The social factors that bring participants to MLMs, namely that they are recruited by trusted connections in community settings, also keep them in the organization. Although income is typically one of the most important aspects of multi-level marketing to potential participants, the desire for additional income is only one factor in their decision-making. The choice to join an MLM entails a combination of desire for income, friendship, self-image, and autonomy. Because of this, it is "extremely rare" for MLM participants to recognize the unfair nature of the business structure without intensive intervention.¹⁸⁸

It is not easy for participants to leave MLMs. Distributors might not have another job opportunity to turn to next, and a sunken cost fallacy might compel them to try and make the business work.¹⁸⁹ MLMs also invest in socialization and marketing that could make participants less aware that their company is ethically problematic—or that their own behavior is similarly problematic.¹⁹⁰ People also have an aversion to feeling duped and are motivated to avoid that feeling, which can cause shame and guilt.¹⁹¹ Being duped in the first place relies on placing trust in another party.¹⁹² However, while the ability of one party to dupe another usually increases when there is information asymmetry,¹⁹³ disclosures may still not be enough to balance the situation because participants place such a significant level of trust in companies and their upline connections.

These factors might lead participants to reject earnings disclosures that could otherwise balance information asymmetry. For disclosures to effect decision making participants must acknowledge that they were duped, a feeling that they want to avoid, and also that they were duped by their close connections. People are already likely to avoid admitting that they have been duped.¹⁹⁴ This

¹⁸⁶ Michael S. Rosenwald, *Calorie Counts Don't Change Most People's Dining-Out Habits, Experts Say*, WASH. POST (July 6, 2011), https://www.washingtonpost.com/local/calorie-counts-dont-change-most-peoples-dining-out-habits-experts-say/2011/06/30/gIQAhAqO1H_story.html [https://perma.cc/8ZHR-VHPW].

¹⁸⁷ Egon Peter Koster, *The Psychology of Food Choice: Some Often Encountered Fallacies*, 14 FOOD AND QUALITY PREFERENCE 359, 365 (2003).

¹⁸⁸ Taylor, *supra* note 24, at 11.

¹⁸⁹ Liu, *supra* note 54, at 129.

¹⁹⁰ Groß & Vriens, *supra* note 16, at 340.

¹⁹¹ See Vohs et. al., *supra* note 119, at 128 (2007).

¹⁹² *Id.* at 130.

¹⁹³ *Id.* at 131.

¹⁹⁴ *Id.* at 132.

cognitive dissonance could prime them to accept explanations for worrying income disclosures by MLM headquarters and uplines, leading participants to disregard disclosures. People are reluctant to signal a negative attitude toward people giving them advice.¹⁹⁵ This effect is amplified in developed social relationships because people care about maintaining harmony in their relationships.¹⁹⁶ Multi-level marketing companies sometimes conduct their business in a “quasi-religious” manner and rely on indoctrinating participants to enforce a “strong sense of community.”¹⁹⁷ The source of socialization in MLMs is often the distributor network, or a participant’s upline, instead of the company themselves.¹⁹⁸ Most of the socialization that serves as a catalyst for membership in an MLM comes from other participants who form community in the structure, not necessarily from those at the top. Research shows that disclosures often do not undo the effects of biased advice—in the case of MLMs the recruitment pitch by a connection—but might actually increase trust in the entity that made the disclosure.¹⁹⁹ Particularly in the case of MLMs, where recruiters are connections that the potential distributor would have a compelling social reason to avoid hurting, insinuation anxiety, or the concern that rejection of advice may be interpreted as distrust,²⁰⁰ would work against deterrent effects of disclosure. Therefore, even if a recruiting participant must provide a disclosure from the headquarter company, there is a chance that this disclosure would lead the recruit to trust them *more*.

Critics of FTC disclosure elements in the Franchise and Business Opportunity Rules have said that neither was enough to end opportunity abuse even if broadly applied. Scholars at the time of drafting pointed out that the Business Opportunity Rule would not be enough to deter MLMs.²⁰¹ In regard to the Franchise Rule, franchisors and franchisees are not on equal playing ground—the parent company is a more sophisticated actor. But even though franchisees have less information than the franchisor, the franchisee is often overly optimistic about their prospects for success and avoids reading disclosure documents because of this bias.²⁰² People who are optimistically biased about their risks are unlikely to seek out and digest information about those risks.²⁰³ In this context, the less sophisticated actor, the franchisee, is not equipped to rationally assess the risks imposed on them by the franchisor’s opportunism.²⁰⁴ There is already optimism bias in other business dealings—this is heightened when it comes to multi-level marketing.

Critics of MLM participants fail to recognize how this optimism bias plays into decision making, and those blind spots are compounded by apathy for “duped” women. Seen in another context, in *Vokes v. Arthur Murray*, a widowed woman spent thousands of dollars to receive dance instruction

¹⁹⁵ *Id.* at 1100.

¹⁹⁶ *Id.*

¹⁹⁷ Groß & Vriens, *supra* note 16, at 340-341.

¹⁹⁸ *Id.* at 342.

¹⁹⁹ Sunita Sah, George Loewenstein & Daylian Cain, *Insinuation Anxiety: Concern that Advice Rejection Will Signal Distrust After Conflict of Interest Disclosures*, 45 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1099, 1109 (2019).

²⁰⁰ *See id.*

²⁰¹ Pareja, *supra* note 52, at 107.

²⁰² Uri Benoliel & Jenny Buchan, *Franchisees’ Optimism Bias and the Inefficiency of the FTC Franchise Rule*, 13 DEPAUL BUS. AND COM.L.J. 411, 426 (2015).

²⁰³ *Id.* at 427-28.

²⁰⁴ *Id.* at 420.

from a professional studio.²⁰⁵ Despite the fact that Ms. Vokes was not progressing and, at her age, was unlikely to become a superb dancer, she continued to give the studio her money for increasingly expensive lessons and trips.²⁰⁶ But people do not behave rationally in many contexts. In this case, Ms. Vokes was frequently encouraged by the studio, told that she was a great talent, and thoroughly taken advantage of despite her willing participation. Yet, the district court was not sympathetic when she sued the studio.²⁰⁷ In dismissing her complaint, the court apparently ignored extenuating factors that led Ms. Vokes to act in an irrational way: that she was potentially lonely because of her social conditions, that the studio leveraged their power over her to create optimism bias, and that she was less likely to acknowledge the signs that her probability of success because of this bias.

MLMs appeal to emotion through events that encourage emotional intensity and over-rely on successful outcomes, however rare they are.²⁰⁸ Participants often, because of their social ties and because MLMs sometimes foster quasi-religious organizations, feel strongly connected to the business. This positive thinking is deeply embedded into the culture of and historic structure of multi-level marketing.²⁰⁹ Optimism-bias and the emphasis on positive thinking facilitates group cohesion. In MLMs, an emphasis on grit and hard work, despite the realities of success or failure, keeps some participants involved in the company.²¹⁰ Self-doubt is a sign of weakness.²¹¹ In the case of one MLM, participants were told specifically to “never post anything negative on [their] Facebook . . . no drama. Like [they] were supposed to filter [their] Facebook as though once [they] joined ItWorks all [their] problems went away.”²¹² If they are approached by someone who argues with them about multi-level marketing or doubt claims participants make in their outreach efforts, distributors are instructed on how to counter that criticism.²¹³ Within their own social groups, distributors rely on one another to affirm their belief in the success of their MLMs.²¹⁴

Disclosures can be welfare-improving because they can help temper expectations around earnings.²¹⁵ But they are unlikely to deter participants from joining MLMs. Instead, they might lead

²⁰⁵ See *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Dist. Ct. App. 1968)

²⁰⁶ See *id.* at 906-08.

²⁰⁷ *Id.* at 906 (explaining that the district court dismissed Ms. Voke’s complaint with prejudice for failure to state a cause of action).

²⁰⁸ Liu, *supra* note 54, at 125.

²⁰⁹ William Penn Patrick, founder of Holiday Magic, was influenced by Norman Vincent Peale’s book “The Power of Positive Thinking,” which instructed adherents to only think positive thoughts and to exude self-confidence, “[elevating] capitalism and [honoring] wealth,” which Penn Patrick drew from to develop training programs for Holiday Magic. The Dream, *The Mind is a Fertile Field*, at 4:15-10:00, 21:00-22:00 (Oct. 8, 2018) (explaining also that the language embedded in MLMs like girl boss is rooted in a the positive thinking movement and playing audio clips of an early MLM founder and MLM advisors who tell participants that if they do not succeed it is their own fault and not a structural failure of the business) (streamed using Spotify); see also The Dream, *Wanna Swim in Cash?*, at 4:31 (Sep. 24, 2018) (explaining the influence of the human-potential movement on the nascent multi-level marketing industry, which stresses the importance of positive thinking and self-manifestation to create abundance) (streamed using Spotify).

²¹⁰ Liu, *supra* note 54, at 128.

²¹¹ *Id.* at 130.

²¹² See Silverstein et. al., *supra* note 91.

²¹³ Groß & Vriens, *supra* note 16, at 339.

²¹⁴ *Id.*

²¹⁵ Bosley, Greenman, & Snyder, *supra* note 10, at 1657.

outsiders to blame participants for not heeding warnings, which obfuscates the complex social reasons that bring participants to MLMs and the psychology of optimism bias.

D. The Complex Problem Of Developing Solutions That Benefit Participants

Policymakers have to address a series of questions to regulate MLMs: how to improve the outcomes for a business when the people being harmed do not want help, how to incorporate the voices of the vulnerable groups who are being most harmed in the solution, and how to ensure that any new regulation does not cause more harm to participants. Each is a complex puzzle with no easy answers.

In seeking solutions to the harm caused by multi-level marketing companies going forward, regulation should take seriously the benefit that people derive from MLMs. Because participants join MLMs for both economic and social reasons, regulatory efforts cannot ignore one for the other. They cannot regulate multi-level marketing as a purely economic activity because that ignores any social benefit that people believe they receive—and by the same token, those efforts cannot ignore the real economic harm vulnerable people experience just because those people derive some benefit from an organization. This is what makes regulating MLMs so difficult.

The benefits of mandatory disclosure can be helpful to the extent that they are able to confer any amount of gain to a participant. Perhaps the least controversial of proposals, federal agencies could increase advocacy and education efforts toward vulnerable populations to spread awareness about the dangers of multi-level marketing.²¹⁶ In reaching out to current participants, there are documented cognitive benefits to helping people understand how they have been duped.²¹⁷ The Federal Trade Commission has previously conducted outreach to vulnerable, marginalized communities who are most susceptible to fraud.²¹⁸ Under the Biden Administration, it could continue to facilitate that outreach to communities most likely to join MLMs.

But outreach and advocacy alone does not address structural issues that draw people to multi-marketing or allow those businesses to exploit participants in the first place. In terms of structural modification, however, one significant obstacle is that multi-level marketing participants and the DSA are likely to oppose any suggested change to the industry. Even though 99 percent of participants will make no profit, MLM participants often oppose punitive actions against their companies. When the FTC attempted to implement the Business Opportunity Rule, participants wrote opposition letters *en masse*.²¹⁹ Perhaps the simplest way to eliminate harms from MLMs would be to ban them entirely, but proposals that seek to completely rid the marketplace of multi-level marketing will meet significant pushback. Some commentators have proposed rules that would ban MLMs from allowing recruitment or rules that would restructure the commission process and distribution of income between the upline and downlines.²²⁰ Given how steep the financial loss in an MLM is, this is an attractive solution. It is, however, worth acknowledging the legitimate purposes that MLMs serve. People, particularly women who face pressure to balance work, family, and cultural expectations, need a way to earn income on the

²¹⁶ Groß & Vriens, *supra* note 16, at 347.

²¹⁷ See Vohs et. al., *supra* note 119, at 132-33.

²¹⁸ Bosley, Bellemare, Umwali, & York, *supra* note 30, at 2.

²¹⁹ Liu, *supra* note 54, at 121.

²²⁰ Groß & Vriens, *supra* note 16, at 347.

flexible schedule that MLMs provide.²²¹ Holistic strategies to support participants limit the power of MLMs as well as provide for those participants' needs.

Most people who enter an MLM are looking for additional income to their family and even see themselves as small business owners. But because participants in an MLM are technically consultants, or contractors, they do not qualify for benefits normally given to employees and parent companies are not subject to federal and state minimum wage requirements.²²² In this way, distributors in an MLM resemble gig economy workers.²²³

A growing movement in the United States has pushed the federal and state governments to classify gig economy workers as employees.²²⁴ In 2018, the California Supreme Court ruled that employers who claimed their workers were independent contractors must pass a three-prong test in order to avoid classifying their workers as “employees” who are entitled to full employment benefits.²²⁵ The state legislature strengthened this ruling by passing Assembly Bill 5, a bill that strengthens requirements on employers to reclassify their contractors as employees.²²⁶ Pursuant to the bill, a former Amway distributor filed a complaint against the company in California as part of a class action alleging that Amway improperly classifies workers as independent distributors when they should be full employees under the law.²²⁷ If efforts such as that care were successful, this approach would force multi-level marketing companies to give their distributors minimum wage and, when applicable, benefits like healthcare, sick leave, and retirement options.

After AB-5 was passed in California, gig economy startups like Uber and Lyft spent \$200 million fighting for a ballot measure, Proposition 22, that exempts gig economy workers from the independent contractor classification—and in just one state.²²⁸ After months of battle about the measure, gig workers were ultimately successful.²²⁹ The Biden Administration rescinded a Department

²²¹ Perhaps as more workplaces see that virtual work is possible, traditional workplaces will expand these opportunities. That hope may be wishful thinking, especially considering that MLMs saw growth during the pandemic and the wider availability of virtual work. See Michael Waters, *They Saw an Opportunity With the Pandemic: How Social Media Platforms Gave Multi-Level Marketing a Coronavirus Surge*, MODERN RETAIL (Nov. 10, 2020) <https://www.modernretail.co/retailers/they-saw-an-opportunity-with-the-pandemic-how-social-media-platforms-gave-multi-level-marketing-a-coronavirus-surge/> [<https://perma.cc/4W2G-4489>]. It is possible, however, that MLM growth resulted instead due to growing unemployment and this growth has no implications for the future of virtual work if there is rebound in the job market post-pandemic.

²²² Liu, *supra* note 54, at 133.

²²³ R. Todd Eliason & Sarah Paulk, *Direct Selling vs. The Gig Economy*, DIRECT SELLING NEWS (Nov. 27, 2018) <https://www2.directsellingnews.com/direct-selling-vs-the-gig-economy/> [<https://perma.cc/XL3C-Z2T4>] (explaining that direct selling industry insiders acknowledge that the relationship between direct selling and gig workers is uncomfortably close).

²²⁴ Veena Dubal & Juliet B. Schor, *Gig Workers Are Employees. Start Treating Them That Way*, N. Y. TIMES (Jan. 18, 2021), <https://www.nytimes.com/2021/01/18/opinion/proposition-22-california-biden.html>.

²²⁵ *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 7 (2018).

²²⁶ Assemb. B. 5, CH 296, Reg. Sess. (Ca. 2019)

²²⁷ See John C.C. Sanders, Katrina G. Eash & William G. Fox, *New Class Action Calls Into Question MLM's Independent-Contractor Classifications*, WINSTON & STRAWN LLP (May 26, 2020), <https://www.winston.com/en/direct-sellers-update-regulation-law-and-policy/new-class-action-calls-into-question-mlms-independent-contractor-classifications.html> [<https://perma.cc/UMY5-PEQE>].

²²⁸ Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N. Y. TIMES (Nov. 7, 2020), <https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html> [<https://perma.cc/CT56-FRUR>].

²²⁹ *Id.*

of Labor rule that mimicked the outcome of Proposition 22 in California.²³⁰ After, the agency was poised to submit guidance that standardizes the California Supreme Court's three-prong test, something that President Biden called a priority during his campaign.²³¹ Given the willingness of participants to defend MLMs, it is likely that if measures were extended to reclassify independent distributors as employees, they would create a counterattack. Forcing companies to classify distributors as employees would cause a larger burden on them than the Business Opportunity rule would have and would likely provoke a proportionate response.

But if the goal is to preserve the aspects of MLMs that distributors need, like flexibility and community, and to eliminate the aspects that cause harm, like the downline structure that makes it virtually impossible to turn a profit, does it need to go as far as imposing full employment responsibilities? Distributors could be classified as part-time hourly employees. This would allow them to retain their flexibility and to receive a minimum wage. Alternatively, independent distributors could be considered commission-based workers, like sales representatives who derive the majority of their income from portions of sales or from rewards for making certain deals. Commissions based employees receive minimum wage when they fall short of federal and state wage requirements—though participants do not currently qualify for this category because of exemptions.²³² The move to reclassify distributors as employees, however, would radically change the industry in a way that is politically infeasible.

A more effective regulatory scheme to address harm by MLMs would listen to the people in them about what attracted them to those businesses in the first place and address those needs. This means that regulation cannot come only from the FTC or the Department of Labor. More holistic reforms should seek to cure the underlying issues that are so compelling they keep participants in a business structure that provides them with no net economic benefit and often hurts their social relationships. For MLM participants, and especially for women within them, the main draw is a job that allows flexible work from home and the opportunity to grow community. Regulatory efforts need to address those issues for there to be any real chance to dismantle the harmful aspects of multi-level marketing.

Creating solutions that could dismantle MLMs means embracing policies that allow vulnerable communities real choice in deciding how to support themselves and their families. For example, people who oppose MLMs should call for employers to provide more work-from-home opportunities and flexible schedules that accommodate caregivers.²³³ Creating more flexible workplaces also includes abundant leave opportunities and fair pay for all. Closing wealth gaps gives predatory companies less opportunity to prey on disempowered people. Because childcare is so important for people who join

²³⁰ Eric Mulvaney, *Uber Will Push to Shape Direction of Biden Gig Worker Regulation*, BLOOMBERG L. (Mar. 12, 2021), <https://news.bloomberglaw.com/daily-labor-report/uber-will-push-to-shape-direction-of-biden-dols-gig-worker-rule> [<https://perma.cc/98K9-UKV5>].

²³¹ *Id.*

²³² *Do You Need to Pay Minimum Wage or Overtime to Your Commission-Paid Employees?*, FOLEY & LARDNER LLP (Sept. 21, 2015), <https://www.foley.com/en/insights/publications/2015/09/do-you-need-to-pay-minimum-wage-or-overtime-to-you> [<https://perma.cc/5MG9-FFXV>] (explaining that the Fair Labor Stands Act and state wage laws usually grant over-time and minimum wage to employees unless they “outside” salespeople who regularly work away from the business in the sale of goods).

²³³ In addition to traditionally being the primary caregivers to children, women also make up the majority of caregivers for the elderly. *Women, Caregiving, and COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/women/caregivers-covid-19/index.html> [<https://perma.cc/4EAX-CKA2>] (last visited July 26, 2021).

MLMs, initiatives for universal childcare and for the government to provide compensation for primary child caretakers could address one reason why so many women feel compelled to join MLMs.²³⁴ Policymakers who want to diminish the power of direct sales need to acknowledge the needs of those who direct sales companies target. Perhaps if participants resist regulation to the point where it is politically impossible, the better option is to give people the underlying support they need to be drawn away from those fraudulent opportunities.

V. CONCLUSION

The most attractive regulatory solution to multi-level marketing harms is more punitive measures by federal regulators—or to completely eradicate and make illegal companies that follow the multi-level marketing structure. But those solutions do not prioritize the needs of those who are most harmed by these business practices. Any proposal for consumer protection should look to the unique social conditions of an MLM: the fact that they are more likely to target women, target women within vulnerable social groups, use those targets for their trusted connections, and facilitate optimism bias and group cohesion through those trusted connections. It also needs to address why so many people, especially women, are drawn to the multi-level marketing structure and why those participants resist change to the industry. Historic and cultural conditions inhibit the ability of many women to have more traditional jobs. Those women are often drawn to flexible work that allow them to care for their families and foster their trusted relationships. But what really occurs is that people join MLMs because of their connections, most of them make no profit at all, experience social harm, and then are unlikely to leave without serious intervention. If imposing rules that put at least some profit into the hands of participants destroys those companies, then they are not a viable option for women or vulnerable communities. But strategies that seek to undermine this destructive effect of MLMs needs use government and community resources to lessen the ability of MLMs to also address historic and cultural conditions that drive women to MLMs in the first place.

²³⁴ Women are more likely to make career sacrifices for their children and bear the brunt of the lack of access to childcare. Leila Schochet, *The Child Care Crisis Is Keeping Women Out of the Workforce*, CTR. FOR AMERICAN PROGRESS (Mar. 28, 2019) <https://www.americanprogress.org/issues/early-childhood/reports/2019/03/28/467488/child-care-crisis-keeping-women-workforce/> [https://perma.cc/96WZ-CBJW].