

MEMORANDUM

TO:                             DSA Board of Directors

DSA Government Relations Committee

                                    DSA General Counsel Committee

                                    DSA Lawyers Council

FROM:                        Brian Bennett, Vice President of Government Affairs and Policy

SUBJECT                    DSA Meeting with FTC Commissioner Chopra and Paper: The Case for Resurrecting the FTC Act’s Penalty Offense Authority

DATE                          October 30, 2020

**October 28 Meeting with FTC Commissioner Chopra**

On Wednesday, Joe Mariano and I met with Commissioner Rohit Chopra of the Federal Trade Commission (FTC) and his attorney advisor, Sam Levine. The conversation is a continuation of DSA educating the FTC on direct selling and multi-level marketing.

Commissioner Chopra started by saying that direct selling can provide robust opportunities to make money on the side. However, his primary interest in the industry is ensuring that representations of the income and product effectiveness is portrayed accurately. He said there is heightened interest in this at the FTC and it is important to have industry-led guidelines and internal processes.

He also knowledgeable and lauded the Direct Selling Self-Regulatory Council (DSSRC) for its role in the marketplace looking at these claims. Specifically citing it is important that the DSSRC has already referred three cases to the FTC. Demonstrating the more an industry can get self-policing right, the lesser burden on the Commission. He acknowledged the importance of not over-regulating industries, but the FTC should be clear about what is permissible.

We brought up our concerns about the conclusions and assumptions made with the Alchemy of a Pyramid Scheme paper, released last year by FTC economists. Commissioner Chopra said he was familiar with the paper and agreed it was concerning if the paper was not grounded in actual practice. He committed to looking into it more and connecting DSA with the authors.

We said if there were any specific concerns he, other Commissioners, or staff had about multi-level compensation or the industry we would like to know so we can work to address them. Commissioner Chopra said he has no concerns about multi-level compensation or direct selling generally, but could not speak to the views of his fellow Commissioners or staff. His personal view is that it was not the FTC’s job to take a position on an industry at large.

**The Case for Resurrecting the FTC Act’s Penalty Offense Authority**

As follow up to a conversation, Mr. Levine sent me an [article](file:///C:\Users\bbennett\AppData\Local\Temp\SSRN-id3721256.pdf) that he and Commissioner Chopra made public yesterday. They did not make us aware of the paper during our meeting.

The article explores the advantages of using an older and seldom used authority that the FTC has against bad actors—the Penalty Offense Authority (POA) under Section 5(m)(1)(B) of the FTC Act. This statute could be used in lieu of other enforcement statutes such as Section 13(b). Commissioner Chopra and Mr. Levine state using this statute holds advantages including effective deterrence, lessened litigation risk, and greater market-wide impact.

Use of the power would require more process than under 13(b) including issuance of a cease and desist order and requiring actual knowledge that the practice they are engaging in is unfair and deceptive. However, there is also no statute of limitations, so the FTC can cite companies for deceptive practices for as far back as desired. Enforcement actions under this statute could also yield a higher amount of damages.

Commissioner Chopra and Mr. Levine specifically discuss how the POA can be used against multi-level marketing/direct selling companies. It speaks about the effectiveness using 13(b) in the settlement with AdvoCare and ongoing litigation with Neora, but says it has drawbacks. Specifically, determining if a company is a pyramid scheme requires resource-intensive investigations.

The article says income misrepresentations should be designated as a penalty offense. If this warning is ignored, a full investigation under Section 13(b) could be initiated, which could determine if the business is a pyramid scheme. Although they argue just targeting income misrepresentations could be done more expeditiously, even in a 13(b) proceeding.

Mr. Levine said he and Commissioner Chopra would be happy to discuss it further. We will work with the General Counsel Committee to provide feedback to them expeditiously.