



United States of America
Federal Trade Commission

Opening Remarks for the 2017 DSA Fall Conference

Acting Chairman Maureen K. Ohlhausen¹

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Thank you for the kind introduction. I appreciate the invitation to speak with you at your Fall Conference today. Within weeks of being named as the Acting Chairman of the Federal Trade Commission, I was invited to testify before a Senate committee regarding the Commission's work. I took that opportunity to emphasize some of the areas I wanted to focus on during my tenure as Acting Chairman, and one of those areas in particular was to increase the FTC's support of small businesses and entrepreneurs.² Since then, I'm proud of how much we have accomplished in such little time. For example, in May, we launched [FTC.gov/smallbusiness](https://www.ftc.gov/smallbusiness) dedicated to helping small business owners.³ Likewise, this past summer

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

² See *Staying a Step Ahead: Fighting Back Against Scams Used to Defraud Americans: Hearing Before the S. Subcomm. On Consumer Prot., Prod. Safety, Ins., and Data Security* (March 21, 2017) (statement of Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n) available at https://www.ftc.gov/system/files/documents/public_statements/1203943/p174400_commission_testimony_statement_of_acting_chairman_ohlhausen_3-21-17.pdf.

³ Press Release, Federal Trade Commission, New FTC Website Helps Small Businesses Avoid Scams and Cyber Attacks (May 9, 2017) available at <https://www.ftc.gov/news-events/press-releases/2017/05/new-ftc-website-helps-small-businesses-avoid-scams-cyber-attacks>.

and fall we hosted a series of roundtables around the country with the National Cyber Security Alliance on small business data security and the privacy issues they face.⁴

My commitment to helping small businesses and entrepreneurs is one of the reasons I'm excited to be speaking to the DSA today. I recognize that at the heart of the direct selling model are entrepreneurs – those men and women who are out there innovating, taking risks, and trying to generate value from their investments.

And the direct selling model has a lot to offer those entrepreneurs. Start-up costs are often low and the affiliated company can provide administrative and logistical support, which allows the entrepreneurs to focus on what they care most about – building up their business. The direct selling model can also lead to efficiencies in the marketplace. For example, for some types of product, such as credence or experience goods, recommendations from friends or family may be a more efficient way for the product to be distributed. And an open and efficient market benefits consumers.

The direct selling industry covers a vast landscape of the retail marketplace and the methods of direct selling can differ significantly. Likewise, the goods and services being sold through this retail channel are varied and diverse. It's also an innovative industry. From internet advertising to email marketing to social media promotions, direct selling companies have incorporated new technologies into their selling model. And as technology continues to evolve, so will the industry.

The FTC thus faces important questions about the best way to oversee a diverse industry that is constantly changing. Because of the dynamic and diverse nature of the direct selling

⁴ Press Release, Federal Trade Commission, FTC to Host Cybersecurity Roundtables with Small Businesses (July 20, 2017) *available at* <https://www.ftc.gov/news-events/press-releases/2017/07/ftc-host-cybersecurity-roundtables-small-businesses>.

industry, including multi-level marketing, we have tried to stay away from a one-size fits all regulatory approach. For example, multi-level marketers were originally included within the proposed ambit of the FTC's Business Opportunity Rule.⁵ But in response to that proposal, we received comments from both industry groups and consumers suggesting that the Rule was inadequate for such a diverse industry as multi-level marketing. Industry further argued that the Rule's provisions would impose devastating burdens on multi-level marketers.⁶ Based on those comments, the FTC decided that it was not practicable or sufficiently beneficial to consumers to apply the provisions of the Business Opportunity Rule to the multi-level marketing industry at large.⁷ Instead, the FTC determined that it would continue to use the FTC Act to challenge unfair and deceptive acts within that industry.

Any effective oversight framework should ensure that consumers are protected, while still allowing innovation to flourish. The best frameworks for accomplishing these goals will be ones that are nimble, transparent, and incremental. An example of one such framework, when applied effectively, is industry self-regulation, backstopped by government enforcement.

Self-regulation can mean several different things and take several different forms. But broadly speaking, it is the actions of an industry to improve marketplace behavior for the benefit of consumers.⁸ Self-regulation can include, among other things, certifications, complaint resolution, and professional conduct standards. Effective self-regulation benefits everybody. Let me explain.

⁵ See Statement of Basis and Purpose, Business Opportunity Rule, 76 Fed. Reg. 76816, 76818 (Dec. 8, 2011).

⁶ See *id.*

⁷ *Id.* at 76819.

⁸ See Chairman Deborah Platt Majoras, *Self-Regulatory Organizations and the FTC* (April 11, 2005) available at http://www.ftc.gov/sites/default/files/documents/public_statements/self-regulatory-organizations-and-ftc/050411selfregorgs.pdf.

Of course, it benefits the industry that is self-regulating. By applying their boots-on-the-ground knowledge, industry members are able to provide guidance that addresses problems in the marketplace, and in a manner consistent with actual industry practices.⁹ In addition, when compared to more traditional legislative or rulemaking efforts, self-regulations are also easier to reconfigure in response to changes in the marketplace.¹⁰ An industry is thus less likely to be bogged down by rules that no longer accurately reflect industry practices.

An effective system of self-regulation can also improve an industry's reputation in the marketplace. Benjamin Franklin noted that "the rotten apple spoils his companion."¹¹ And as unfair as it may be, the actions of a few bad apples can cast an entire industry in a negative light. Through effective self-regulation, an industry can weed out the bad apples in an efficient and cost-effective way.

Effective self-regulation is also valuable to government agencies like the FTC. The DSA estimates that in 2016, 20.5 million people were involved in direct selling in the United States.¹² In contrast, the FTC has a headcount of approximately 1,160 people. Our employees are hard-working and dedicated to their mission, but if effective self-regulators can help us cover more ground, we welcome it. We can then focus our attention and resources on the more egregious conduct that causes significant consumer harm.

Most importantly, effective self-regulation benefits consumers by having additional protections in the marketplace. For example, if an effective self-regulator is able to identify and

⁹ See Joel Timmer, *Television Violence and Industry Self-Regulation: The V-Chip, Television Program Ratings, and the TV Parental Guidelines Oversight Monitoring Board*, 18 Comm. L. & Pol'y 265, 275-76 (2013).

¹⁰ *Id.* at 276.

¹¹ Benjamin Franklin, *Poor Richard's Almanack* (1736).

¹² Direct Selling Association, *Direct Selling in 2016: An Overview*, available at <http://www.dsa.org/benefits/research/overview>.

address bad practices early on, consumers are better off. Likewise, if effective self-regulation can lower compliance or regulatory costs, those savings may be passed along to the consumer. These and other benefits of effective self-regulation are why the FTC has a long-standing tradition of support.¹³

The key to these benefits, however, is that the self-regulation must be effective. Ineffective self-regulation can cause more harm than good. Poorly structured or wrongly motivated self-regulatory frameworks can create serious problems for consumers and the marketplace. So let me share some of the characteristics I see of effective self-regulation contrasted with characteristics of ineffective self-regulation.

First, an effective self-regulatory framework must be adequately funded and maintain sufficient independence from the industry members. Self-regulation becomes less effective when it is overly dependent on its member firms' financial influence or if it is simply the alter-ego of the entities it is supposed to be regulating. In these circumstances, the self-regulation becomes, as some commentators have put it, the fox in charge of the hen house.¹⁴

Second, an effective self-regulatory framework produces principles that are clear, meaningful, and fair, and employs effective enforcement mechanisms to back up those principles. Rules or principles that are insufficiently rigorous or are too indefinite do not provide any actual protections for consumers. Likewise, without an effective enforcement mechanism, a self-regulatory framework is in danger of becoming toothless.¹⁵

¹³ See, e.g., Federal Trade Commission, *Cross-Device Tracking*, at 11 (2017) available at <https://www.ftc.gov/reports/cross-device-tracking-federal-trade-commission-staff-report-january-2017>; see also Majoras, *supra* note 8.

¹⁴ See Timmer, *supra* note 9, at 277.

¹⁵ See *id.* at 278-79.

The final point I'll discuss today, although this certainly is not a complete list, is that an effective self-regulation framework is motivated by protecting consumers. We must recognize that self-regulators may have mixed motives. They may want a weak self-regulatory framework, one that simply serves as cover if trouble arises. In that circumstance, the self-regulation is nothing more than window dressing.¹⁶

Effective self-regulation, of course, takes commitment and buy-in from the industry. But the FTC also has a role it can play in building up effective self-regulation. In particular, there are three actions the agency can employ to ensure that industry, the government, and consumers all benefit from self-regulation.

First, the most effective frameworks are those backstopped by robust, yet judicious, use of government regulatory powers.¹⁷ When there is a viable threat of government intervention, more companies are likely to join and adhere to self-regulatory principles.

A robust, yet judicious, application of government oversight also ensures that self-regulation is more than just window dressing. Self-regulators are more likely to take their responsibilities seriously if they know the government is watching and willing to act.

You may have noticed I emphasized that the use of the government enforcement powers should be both robust *and* judicious. Over-zealous government involvement can diminish industry members' participation in the self-regulatory system, which reduces the system's

¹⁶ *Id.* at 277-78; *see also* Jodi L. Short, *Self-Regulation in the Regulatory Void: "Blue Moon" or "Bad Moon"?*, 649 *Annals Am. Acad. Pol. & Soc. Sci.* 22, 24 (2013).

¹⁷ Short, *supra* note 16, at 25-26.

effectiveness. Businesses that believe government action is inevitable will not participate or invest in self-regulation.¹⁸

This issue raises an important question for the FTC about where we should draw the line between robust and judicious. Continuing the use of our case-by-case enforcement process, which we have been using for a hundred years now, is a good starting point. This *ex post* enforcement generally addresses specific misconduct causing specific harm. Such a practice limits the potential unintended consequences that can result from one-size-fits-all regulatory action.

My second action item for the FTC is to communicate with self-regulators. Consumers are best served when the FTC and self-regulators work closely to share concerns and priorities, as well as to identify emerging problems in the market that may harm consumers.¹⁹ Such discussions will protect consumers and ensure that self-regulatory principles are complying with the FTC's guidance and viewpoints.

The FTC and the DSA have a good working relationship, and for that, I thank you. We'll continue to cultivate that relationship because the better we understand each other's positions, the better we will be able to serve consumers.

In furtherance of that goal, I would like to provide some clarity on three questions relating to multi-level marketing that have arisen lately. First, as you are no doubt aware, the FTC has recently reached well-publicized settlements with some multi-level marketing operations. One question we have been getting is whether the orders arising from those settlements apply to the entire industry. The answer to that question is no. Orders arising from

¹⁸ *Id.*

¹⁹ *See id.* at 24.

FTC settlements are binding only on the entities and individuals identified by the order. The orders may, of course, provide industry participants with additional data points on, for example, business structures that the FTC believes comply with the law. But that's not to say the structures outlined in those orders are the *only* way the FTC believes companies can comply.

A second question is whether the FTC assumes or believes that every multi-level marketing company is a pyramid scheme. The answer to that question is also no. As I noted earlier, we recognize the direct selling model has a lot to offer the marketplace and consumers. Most companies are honest and want to comply with the law. Our goal, one that I think we share jointly with the DSA, is to weed out the bad actors so the direct selling industry can thrive in an open and efficient market.

That leads to the final question I wanted to touch on today – what the characteristics of a pyramid scheme are in the FTC's eyes. At the risk of getting into too much legalese, the FTC described an unlawful pyramid scheme in our case against Koscot Interplanetary Inc. back in 1975. Most courts have adopted that description and it's the description we have used in our recent cases. Under that description, unlawful multi-level marketing structures 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.”²⁰

I fully understand that there are a lot of nuances packed into that description. As many of you are aware, I have instructed FTC staff to meet with various stakeholders, including the

²⁰ *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1180 (1975).

DSA, to discuss those nuances. We anticipate applying the information we've gained to issue future guidance, as well as to guide future law enforcement decisions.

My final action item for the Commission is that the FTC can encourage the development of effective self-regulation. In that spirit, I thank you for giving me the opportunity to speak on this topic today and I am delighted to know that this session of your conference is dedicated to exploring that goal. Let me challenge you, and encourage you, to continue finding ways to improve and strengthen your self-regulation for the benefit and protection of consumers.

Thank you.