

Mr. Robert Pitofsky, Chairman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Petition for compliance analysis or enforcement review regarding In re Amway, 93
FTC 618 (1979), Docket
9023

Dear Chairman Pitofsky:

I served as an Assistant Attorney General for the State of Wisconsin for 30 years, until retirement in 1997. During this period I litigated a significant number of pyramid cases – including extensive litigation against Amway(1) in the early 1980's and cases against Koscot Interplanetary, Bestline, and Holiday Magic in the early 1970's. These actions were pursued with the direct co-operation of Commission staff. My most recent pyramid case, against Fortune In Motion, was successfully concluded in 1997. I recite this history only in the hope that it will lend credence to what follows.

I direct this letter to you because you drafted the Commission's Amway opinion in 1979. The opinion appears to hold that (a) "a pyramid distribution scheme should now be condemned even without the demonstration of its economic consequences. The Commission has studied the effects of such 'entrepreneurial chains' and seen the damage they do and a per se rule should be used." [ALJ finding at par 107] and (b) that Amway would have been one of those "chains" but for(2) the existence, and enforcement, of the "buy back rule", the "70% rule" and the "10 customer" rule [93 F.T.C. 618, 716-17 (1979)].

These exculpatory rules have now become boilerplate in the hundreds of pyramid offerings that have surfaced since 1979. In my 1997 case, Fortune In Motion sought dismissal because it had incorporated the "Amway" rules into its marketing plan.(3) In *Webster v. Omnitrition*, 79F.3d 776, 782, 784 (9th Cir, 1996), the 9th Circuit reversed summary judgment in favor of the defendant, granted by the district court on the basis it used the "Amway" rules. "Our review of the record does not reveal sufficient evidence as a matter of law that Omnitrition's rules actually work."

Since investments in pyramid type offerings have resulted in billions of dollars in losses over the years, I believe it critical that the Commission, initially, determines whether in fact Amway currently enforces its rules to the extent that they produce the results the Commission anticipated in its decision.

The Commission may also want to consider, on a going forward basis, whether it is good policy to declare a practice per se illegal and then permit operation if certain exculpatory "rules" are incorporated in to the business plan. The attractive, but illegal, aspects of a pyramid proposal will continue to permeate a promoter's offering and recruiting efforts

notwithstanding the theoretical dampening effect of the "rules." The economic motivation of a company utilizing a pyramid concept is in direct conflict with the exculpatory "rules" it promulgates.

There also exists the question, from an enforcement standpoint, whether these exculpatory factors can be effectively evaluated in time to prevent losses to the consuming public. When a pyramid, or "multi-level", company begins business operations there is no direct evidence if its "rules" are enforced or not. The time period between startup and detection is all some pyramids need. Fortune In Motion obtained over \$4 million from Wisconsin residents during its short life and before we commenced litigation. The "buy back" rule was of no value since the company left the state and returned to its home offices in Canada. Does the enforcement agency bear the burden of proving that the "rules" are not enforced or is it an affirmative defense on the part of the pyramid company? Are all "multi-level" companies presumed to be pyramids until they prove their rules are effective in the manner contemplated by the Commission?

The contacts I have had with Amway, and other, distributors over the years indicates that the "rules" upon which the Commission based its decision are given, at best, token recognition and are not broadly implemented or enforced. I have attached some unedited Amway distributor statements to simply give a flavor of their views on these issues. One such statement comes from a high level "Emerald" distributor. Determining the actual practices of Amway and its distributors in this respect would seem to be uniquely within the domain of the Commission. To this end, I will be asking some ex-distributor organizations to contact their members for comment to the Commission on this point, pro or con.

I decided to submit this petition for enforcement review because it seems that most distributors, after failing in what they thought was a valid business enterprise, are not motivated to complain or seek redress. They have, in many instances, been conditioned to believe that any failure was their fault. Many such distributors have lost life savings, stable jobs and their marriages. After having spent most of my career dealing with these companies from an enforcement standpoint, and witnessing the damage first-hand, I feel some obligation to these victims to make this effort on their behalf.

As indicated in Omnitrition, previously cited, and my Fortune In Motion case, the FTC Amway decision has created a good deal of uncertainty in respect to private and public legal efforts to deal with the abuses of pyramid plans. This will only increase with the onset of marketing over the Internet and the Globalization of this type of proposal.

I urge the Commission to make initial inquiry of Amway on the question of enforcement and enforceability of its rules. Documentation of compliance with the Commission's decision, and of the beneficial effects it anticipated, should be readily available from Amway and its distributors. I also urge the Commission to re-evaluate, in general, the efficacy of its "rules" in preventing the abuses it has documented in connection with pyramid marketing. The premise of "multi-level vs. pyramid" marketing may well represent a distinction without a difference.

If I can be of further assistance in any efforts of the Commission, or in clarifying matters stated herein, please feel free to contact me. I appreciate your taking the time to review this matter.

Sincerely,

Bruce A. Craig – Department of
Justice, State of Wisconsin
(Retired).
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Of Counsel, Lawton & Cates, S.C.

c. Ms. Joan Z. Bernstein, Director, Bureau of Consumer Protection, FTC
James E. Doyle, Attorney General -- Wisconsin
Prof. Gerald J. Thain, University of Wisconsin Law School

1. This litigation was based on income misrepresentations. Documented evidence, from tax returns, disclosed that Wisconsin Amway Direct Distributors (the top 1%) had annual net incomes of minus \$900.
2. Some language in the opinion, pp. 716, 717, refers to the absence of inventory loading, "the purchase of a large amount of nonreturnable inventory" and the fact that an entry level Amway distributor makes no investment. However qualifying for the Direct distributor position does require mandatory monthly purchases, whether returnable or not depending on effective enforcement of the "buy-back" and other rules. The existence of the entry level distributor is not relevant to a pyramid analysis, the pyramid begins when the new distributor seeks to become a Direct. See *Omnitrition* 79 F.3d776, 782.
3. Wisconsin's pyramid rule, Ch. ATCP 122, Wis. Adm. Code does not contain the exculpatory "rules". It has been upheld by the Wisconsin Supreme Court.