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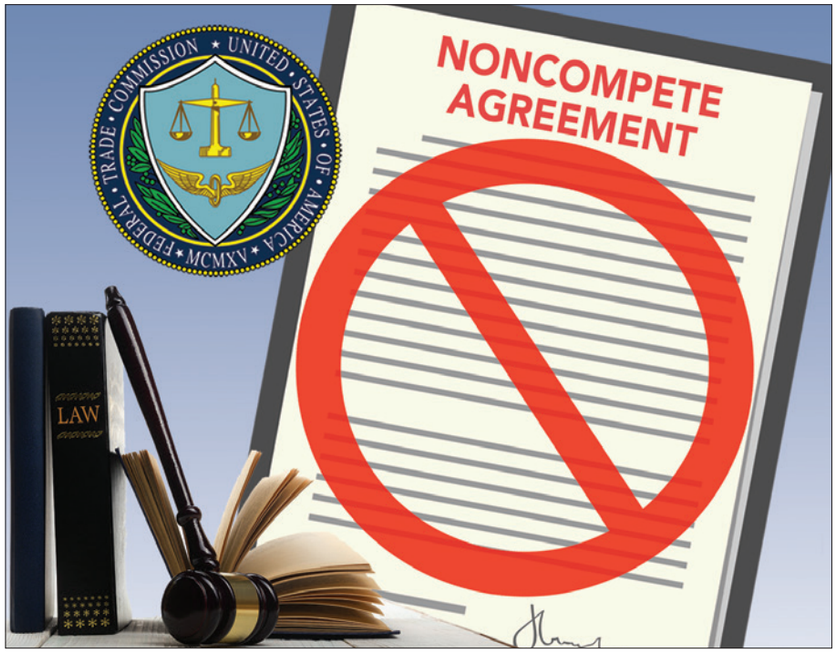
MAY-JUNE 2024

FTC Bans Noncompetes in Landmark Move



Rule faces legal pushback as industries and associations brace for change

The Federal Trade Commission (FTC) has enacted a sweeping ban on noncompete agreements nationwide, a measure aimed at enhancing labor market competition and promoting worker mobility. In an April 23, 2024, announcement, FTC Chair Lina Kahn said that the rule is intended to eliminate barriers that prevent employees from moving between jobs, potentially fostering innovation and encouraging the formation of new businesses.

According to Khan, the prohibition of noncompetes could catalyze the creation of approximately 8,500 new startups each year by removing constraints that currently inhibit economic activity.

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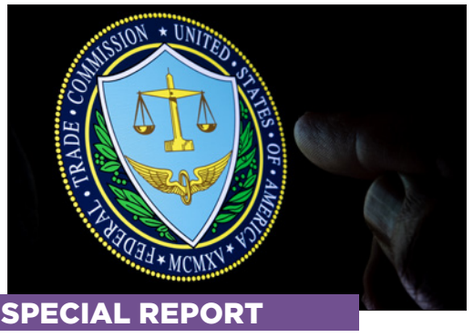

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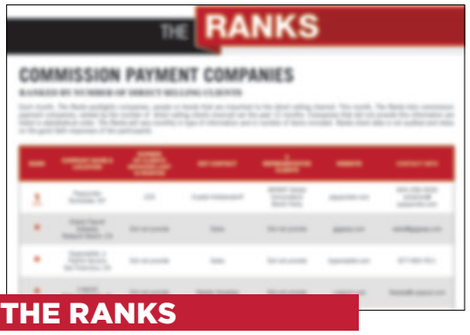

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Preparation Meets Opportunity: *Transforming Unexpected Events into Business Triumphs*

Hello friends!

There is an old adage that has always resonated with me—"chance favors the prepared mind." Many great opportunities that I have been fortunate enough to capitalize on were not the result of meticulous planning but rather came from being well-prepared to act when the unexpected presented itself.

This timeless wisdom is particularly relevant in the fast-paced worlds of business and direct selling, where agility and adaptability are crucial. Companies that cultivate a culture of continuous learning and strategic foresight are better positioned to recognize and leverage new opportunities, turning unforeseen events into significant achievements.

Consider the stories of two prominent companies faced with unexpected discoveries. One turned a serendipitous moment into an iconic product, exemplifying innovation. The other became a cautionary tale about the consequences of failing to embrace change.

In 1968, Dr. Spencer Silver, a scientist at 3M, was attempting to develop a super-strong adhesive. Instead, he accidentally created a high-tack, low-adhesion reusable pressure-sensitive adhesive. For several years, the invention seemed without practical application—no one at 3M knew what to do with it.

Six years later, another 3M scientist, Art Fry, attended one of Silver's seminars and learned about the adhesive. Fry sang in a church choir and was frustrated that his bookmark kept falling out of his hymnal. He realized that Silver's adhesive could be used to create a non-damaging, reusable bookmark. He used the adhesive to coat these bookmarks, which led to the development of the Post-it Note.

3M encouraged its researchers to spend 15% of their time pursuing speculative innovations, which created the perfect environment for Fry to see the potential in Silver's adhesive.

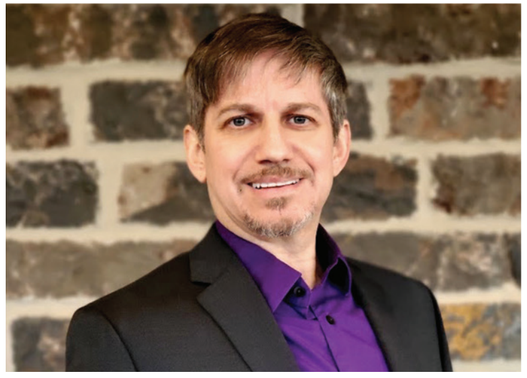
In contrast, consider the story of the Eastman Kodak Co.'s response to the digital photography revolution; In the mid-1970s, Kodak engineer Steve Sasson invented the first digital camera, a device that captured images using electronic sensors instead of film. While this innovation had the potential to revolutionize the photography industry, Kodak was hesitant to advance a technology that threatened its film-based business model.

As digital technology continued to advance and consumer interest shifted, other companies eagerly stepped into the space that Kodak had hesitated to embrace. By the time Kodak acknowledged the significance of digital photography and attempted to adapt, it was too late; the company had lost its competitive edge.

In the direct selling channel, the necessity of remaining open to change is especially crucial. As marketing technology, consumer habits and FTC guidelines continue to rapidly evolve, businesses must stay agile and adaptable. Recognizing that opportunities might arise unexpectedly, and diligently preparing to seize them with strategic foresight and swift action, will undoubtedly elevate industry leaders, their companies, and the entire channel.

I thank you for reading and wish you all a successful (and innovative) month ahead!

Warmly,



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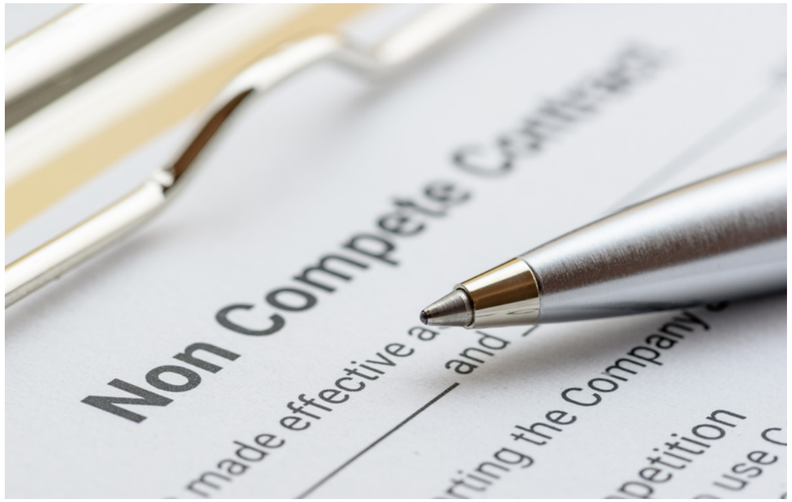
FTC BAN NONCOMPETES, CONTINUED FROM 1

According to FTC projections, the new rule is expected to offer substantial economic benefits. These include an average annual increase in worker earnings by $524 and a potential reduction in healthcare costs of up to $194 billion over the next decade. Additionally, the FTC estimates a significant boost in innovation, with an increase of 17,000 to 29,000 patents expected annually.

The rule also outlines specific provisions for the ongoing enforcement of noncompetes for senior executives and establishes a compliance framework for employers adapting to the new regulations.

FTC Chair Lina Khan said in a statement at the time the rule was first introduced, "The freedom to change jobs is core to economic liberty and to a competitive, thriving economy. Noncompetes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand."



Commissioners Vote Along Party Lines

The rule's enactment aligns with the Biden administration's broader economic objectives of enhancing labor mobility and encouraging fair market competition. The FTC's approval of the rule underscored the sharp partisan divide on the issue, as evidenced by the 3-2 party line vote.

Democrat Commissioners Rebecca Kelly Slaughter, Alvaro Bedoya, and Chair Khan supported the measure, aligning with the administration's policy goals. Republican Commissioners Melissa Holyoak and Andrew Ferguson dissented, reflecting deep divisions on the regulatory approach to employer-employee agreements and their impact on the economic environment.

Commissioner Holyoak firmly dissented from the Commission's decision, raising constitutional and authority concerns. She argued in an oral statement that the FTC's broad action oversteps the limited legislative powers delegated by Congress, which are meant for filling specific statutory gaps, not for expansive rulemaking. This, she contended, challenges the separation of powers.

Holyoak also questioned the FTC's authority under Sections 5 and 6(g) of the FTC Act, deeming the Commission's rulemaking interpretation as overly expansive and lacking historical or legislative support. She cited the Magnuson-Moss Warranty Act's strict requirements as indicative of the intended limits on the FTC's powers. Holyoak suggested that the FTC should instead focus on enforcing laws against specific anti-competitive noncompetes, rather than broad, potentially unauthorized rulemaking likely to face legal opposition.

> **Noncompetes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand.**
>
> *— Lina Khan, Chair, FTC*

Holyoak's Republican colleague Ferguson grounded his objections to the new rule in constitutional concerns and statutory interpretation. He argued that such rulemaking usurps Congress's legislative role and lacks explicit authorization to nullify contracts and override state laws. Emphasizing the major questions doctrine, his oral dissent contended that sweeping regulations with profound economic impacts necessitate clear congressional approval, which is not present.

Ferguson also questioned the constitutional validity of the FTC's expansive interpretation under the major questions doctrine and critiqued the rule as arbitrary under the Administrative Procedure Act. He argued that the rule fails to consider the diverse impacts of noncompete agreements and oversteps the FTC's authority, deeming the rule unlawful due to the lack of a direct congressional mandate.

Key Changes in Finalized Rule

The final rule retains the core elements of the initially proposed rule but incorporates several adjustments based on feedback received during the rulemaking process. One notable change is the substantial expansion of the "sale of business" exception. Originally, this exception was limited to scenarios where a seller/worker owned at least 25% of the business entity.

The revised rule broadens this to include noncompete agreements made in the context of a legitimate sale of a business entity, a person's ownership interest, or a significant portion of a business entity's operational assets. Despite this expansion, the FTC emphasizes that such noncompetes must still comply with applicable state laws and federal antitrust regulations.

Additionally, the final rule modifies the approach to noncompete agreements with senior executives. While the proposed rule considered whether such clauses should be evaluated differently due to the negotiated value they represent for senior employees, the final rule maintains existing noncompete clauses with senior executives but prohibits new ones moving forward.

Furthermore, the FTC shifted from requiring the rescission of existing noncompetes to simply mandating that employers notify employees subject to such agreements that they will no longer be enforced.

Existing Noncompetes

The final rule sets distinct guidelines for handling existing noncompete agreements based on the status of the employee. For senior executives, who are defined as those earning over $151,164 annually and holding policy-making positions, existing noncompete clauses will remain valid and enforceable. These executives account for less than 1% of the workforce.

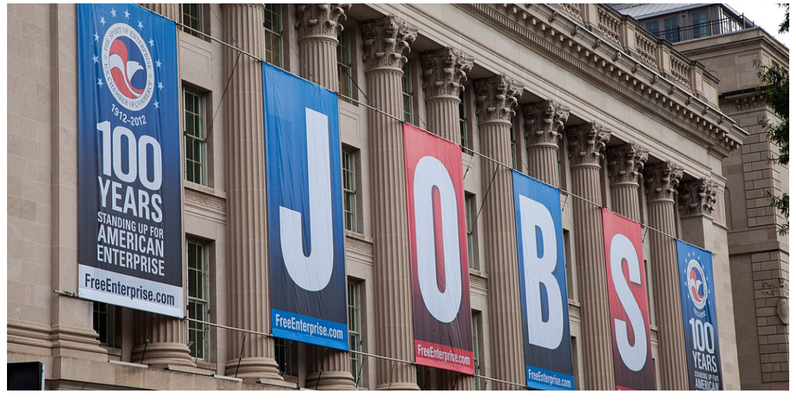
> **The most powerful tool in a company's arsenal, the ability to prevent a distributor from revealing or utilizing a company's trade secrets, remains unaffected by the new rule.**
>
> *— Larry Steinberg, Chair, Multilevel Marketing Industry Group, Buchalter*

The rule defines policy-making authority as "final authority to make policy decisions that control significant aspects of a business entity and does not include authority limited to advising or exerting influence over such policy decisions."

In contrast, for the vast majority of workers who are not senior executives, existing noncompetes will become unenforceable once the rule takes effect. This differentiation underscores a targeted approach in the regulation of noncompete agreements, prioritizing the retention of such agreements only for top-level executives.

Business Groups Plan to Fight New Rule

The finalized rule marks a pivotal shift in employment regulations, potentially reshaping the landscape for U.S. companies and their employees. As noted by the FTC, an estimated 30 million workers, or about one in five, are currently restricted by noncompetes, which limit their ability to seek better opportunities or start competing ventures.



Critics argue that these agreements have broadened in scope over the years, affecting not only high-level executives in sectors like technology and finance but also lower-wage workers in roles as varied as security personnel and food service employees.

However, the noncompete ban faces significant opposition and is expected to encounter legal challenges. Business groups, including the U.S. Chamber of Commerce (USCC), assert that the FTC's sweeping prohibition oversteps its regulatory authority and undermines state laws that have traditionally governed the enforceability of noncompete clauses.

The Chamber has announced plans to sue, arguing that the decision by three FTC commissioners to implement the ban disregards established legal norms and encroaches on what they consider legitimate business practices. This legal pushback highlights the contentious nature of the rule and the potential hurdles it faces in becoming a definitive law.

In a strongly worded statement, USCC President and CEO Suzanne P. Clark criticized the FTC, arguing that this action represents an unlawful extension of the Commission's powers and a detrimental overreach into business practices traditionally governed by state laws.

"The Federal Trade Commission's decision to ban employer noncompete agreements across the economy is not only unlawful but also a blatant power grab that will undermine American businesses' ability to remain competitive."

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FTC BAN NONCOMPETES, CONTINUED FROM 7

She further contested the authority of the FTC to regulate noncompete rules, stating, "Since its inception over 100 years ago, the FTC has never been granted the constitutional and statutory authority to write its own competition rules."

Highlighting her disapproval of the decision made by "three unelected commissioners," Clark declared that the USCC would take legal action: "The Chamber will sue the FTC to block this unnecessary and unlawful rule and put other agencies on notice that such overreach will not go unchecked."

Less than a day following the issuance of the final rule, the USCC, along with other stakeholders, initiated a lawsuit in the U.S. District Court for the Eastern District of Texas. They are seeking both a declaratory judgment and an injunction aimed at halting the enforcement of the new rule.

> **Companies should review their non-compete and non-solicitation clauses to see if they would survive scrutiny under this rule. The association has provided guidance to our members as well as been involved with coalition efforts raising legal concerns with the rule.**
>
> *— Brian Bennett, Vice President of Government Affairs and Policy, DSA*

DSA Raises Concerns

Brian Bennett, senior vice president, government affairs and policy for the Direct Selling Association (DSA), highlights the wide-reaching implications of the FTC's new rule banning noncompete agreements, emphasizing its extensive impact across various industries. He underscored the DSA's efforts to clarify non-solicitation clauses and advised businesses to reassess their existing agreements.

"This is a very broad sweeping rule that touches nearly every business and industry in the United States including direct selling. DSA filed comments on the Notice of Proposed Rulemaking that asked for clarity on non-solicitation clauses," Bennett says. "Unfortunately, the final rule did not provide that and potentially even broadened the impact.

"Companies should review their non-compete and non-solicitation clauses to see if they would survive scrutiny under this rule. The association has provided guidance to our members as well as been involved with coalition efforts raising legal concerns with the rule. As the advocate for direct selling, we remain actively engaged in this issue," Bennett says.

Effect on Direct Selling Companies

The effect of the new rule on direct selling companies, and in particular the restrictive covenants contained in many companies' policies and procedures, is uncertain but potentially far-reaching.

Such restrictive covenants vary widely from company to company. They can include explicit clauses prohibiting distributors from competing, which might be limited to competing products or broadly defined to cover any network marketing company. Non-solicitation provisions may also vary, sometimes forbidding any solicitation of a company's distributors while often allowing solicitation of those personally enrolled by a distributor.

Larry Steinberg, chair of the Buchalter law firm's Multi-level Marketing Industry Group, suggests that companies would be well advised to start preparing for a world where non-competition restrictions are the exception rather than the norm.

"Regardless of the ultimate fate of the FTC's new rule, there is a clear trend at both the national and state levels to restrict the scope and effect of non-competition agreements, particularly as they apply to persons who are not in policy-making positions."

Steinberg points out that companies have tools other than non-competition agreements that they can use to protect their businesses. The commentary that the FTC released along with the new rule explicitly states that the new restrictions do not apply to non-solicitation agreements unless they are so restrictive that they function to prevent a worker from seeking or accepting other work or starting a new business after their employment.

"The most powerful tool in a company's arsenal, the ability to prevent a distributor from revealing or utilizing a company's trade secrets, remains unaffected by the new rule," Steinberg concludes.

Noncompete Rule Faces Uncertain Future

With legal challenges to the noncompete ban already underway, the fate of the rule remains uncertain, signaling an ongoing debate over the balance between economic freedom and regulatory oversight in the labor market. While proponents argue that the rule will spur innovation, promote fair competition, and enhance worker mobility, critics raise concerns about the FTC's authority and the potential impact on certain business practices, including direct selling.

The court battles will likely shape the final outcome and set precedents for future regulatory efforts. As the controversy unfolds, stakeholders from various sectors will be closely watching to gauge how the new rule might redefine the employment landscape.

SSN

David Bland is the publisher of *Social Selling News*.

The Balancing Act of Noncompete Bans

FTC rule adds complexity to salesforce loyalty and mobility

By Brent Kugler, Guest Contributor

On April 23, 2024, the Federal Trade Commission (FTC) voted 3-2 to issue a Final Rule banning the use of noncompete restrictions to prevent workers from joining competing companies.

The FTC's action marks the first time in more than 50 years that the Commission has issued a rule mandating an economy-wide change in how U.S. companies operate.

As expected, pro-business groups immediately filed lawsuits to prevent implementation of the Final Rule, which is set to take effect 120 days after issuance unless enjoined by a court.

Impact on Direct Sales Companies

The FTC's ban on noncompete restrictions is the latest complication for direct sales companies seeking to balance incentivizing salesforce loyalty and restrictions on salesforce mobility.

Salesforce mobility has long been, and remains, a unique issue (and concern) for direct sales companies. This is because, at one time or another, almost every direct selling company has experienced the disruption of a top leader leaving to join a competing company.

The disruption is magnified by downline consultants that follow the leader to the other company, or worse, the leader's solicitation of other consultants to join the other company.

Given the structure of a multi-level sales organization, a top leader's migration to another company can (and often does) create a severe business disruption that is unique to the network marketing and social selling industry.

Trends Influencing Workforce Mobility

With the continued evolution of the gig economy and influencer/social-media-driven opportunities, there is a clear trend that company and brand loyalty have become less important to today's workers, while flexibility and mobility have become more important.

According to a wide-scale study conducted by consulting firm Deloitte, 46% of polled Generation Z workers and 37% of Millennials said that they worked a second part-time or even full-time job in tandem to their main work.

Another study by financial services platform Bankrate.com calculated that 39% of employed American adults are currently working a second gig on the side and bringing in an extra $810 a month on average.

A second factor trending in favor of worker mobility is the ongoing attack on the independent contractor classification, as federal and state regulators seek to narrow independent contractor status and expand employee status to provide a safety net of benefits to the ever-growing population of gig economy workers.

In addition, a key criterion in independent contractor tests utilized by a number of states is the ability of the independent contractor to work for more than one company.

Strategies for Managing Salesforce Loyalty and Mobility

In light of these trends, how can a company effectively promote salesforce loyalty and at the same time prevent the disruption that occurs when a leader begins promoting another business opportunity?

A good starting point is for a company to first engage in self-evaluation of its product line and business opportunity. Is the business opportunity still competitive? How old is the compensation plan? Are products being constantly updated or reformulated to remain competitive?

In other words, a company should take an honest look at its business and ensure that it is providing a competitive business opportunity—one that will incentivize top leaders to not look elsewhere and also attract new generations of consultants.

Still, there are situations where the disruption caused by a leader's exit to another company—which often includes the solicitation of other consultants—is so great that the company has no choice but to pursue legal remedies to quell the disruption. This can also demonstrate to the company's other consultants that the company is taking action to protect its business interests.

Legal Challenges and State Variations

Even if the FTC Final Rule is stayed by a court, five states currently ban the use of noncompete clauses. This means that even if your company is located in a state that currently recognizes the validity of noncompete restrictions, you will likely be unable to enforce that restriction against a consultant that lives in one of the states where noncompete restrictions are unenforceable.

Moreover, even if a company's noncompete restriction is legally enforceable, it may still be problematic because the noncompete restriction may be viewed as a control factor suggestive of an employment relationship. This is something to keep in mind if your company imposes a noncompete restriction on consultants once they achieve a certain rank.

Consultants don't become less of an independent contractor as they advance to the upper levels of a company's comp plan. So even if your company can legally enforce a noncompete restriction, doing so may create a bigger problem than the one you are trying to prevent by restricting involvement in another company. If the FTC Final Rule survives legal challenge, a discussion of the pros and cons of utilizing noncompete restrictions becomes academic.

The best solution for companies to prevent disruption from a leader's exit is a non-solicitation restriction. Importantly, a non-solicitation policy does not prevent a consultant from working for another company. It does, however, prohibit a consultant from recruiting other consultants to leave for another company. Still, companies should proceed with caution in how they draft and enforce a contractual non-solicitation provision.

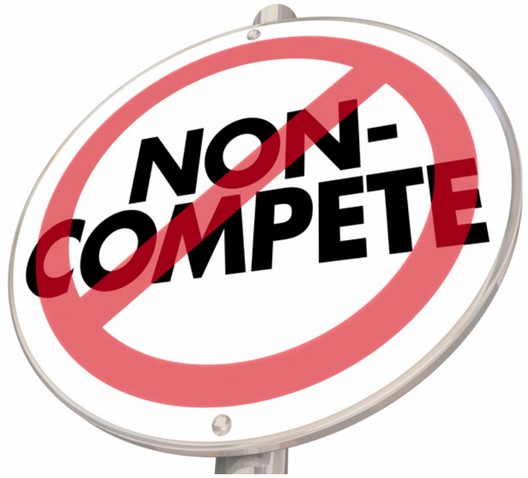
The restrictions imposed by the non-solicitation restriction must be reasonable. A reasonableness inquiry typically focuses on two things: (i) the scope of the restriction (i.e., does it apply to competing companies or all companies?); and (ii) the length of the restriction (i.e., does it only apply during the contract term, or does it extend for a period of time after the termination of the consultant agreement?).

Scope and Enforcement Challenges

Scope of the Non-Solicitation Restriction. Direct selling companies often "compete" with one another regardless of whether they market similar products or services. Indeed, several courts have recognized that in the multilevel business channel all multilevel-marketing companies compete with one another to develop and maintain an effective sales force. (See *PartyLite Gifts, Inc. v. MacMillan*, 895 F. Supp. 2d 1213 (M.D. Fla. 2012); *Pre-Paid Legal Services., Inc. v. Cahill*, 924 F. Supp. 2d 1281 (E.D. Okla. 2013); and *YTB Travel Network of Ill., Inc. v. McLaughlin*, 2009 WL 1609020 (S.D. Ill. June 9, 2009)).

For this reason, the non-solicitation provision should define "competitors" to include other direct selling, MLM, or network marketing companies in addition to companies that offer competing products or services.

Because the concept of direct sales companies competing with one another for successful independent salespersons may not be readily apparent to a judge or arbitrator, companies should broadly define their product and service offerings to expand the category of



companies that may be considered "competitors" on the basis of types of products or services sold.

Length of the Non-Solicitation Restriction. Depending on the state, a reasonable post-termination restrictive period is usually between six months and two years. However, in some states post-termination non-solicit restrictions are much more scrutinized. In California, several courts have recently held that post-termination non-solicitation provisions are not enforceable. (See *World Financial Group Insurance Agency v. Olsen*, 2024 WL 73056 (N.D. CA 2024); *Nulife Ventures, Inc. v. Avacen, Inc.*, 2020 WL 718122 (S.C. CA 2021)).

Non-solicitation restrictions that apply during the term of a consultant agreement have generally been upheld, including in California. (See *Youngevity International Corp. v. Smith*, 2021 WL 1041712 (S.D. CA 2021)).

Enforcement of Post-Termination Non-Solicitation Restrictions. If the solicitation activity is by a former salesforce member (and the non-solicitation restriction applies for a period of time after termination of the agreement) then the only option for enforcement is to seek injunctive or interim relief from a court or arbitrator. This is usually an expensive process, and it requires the company to have solid evidence that the consultant is actually soliciting other consultants.

The fact that other consultants have also migrated to the other company is not evidence of solicitation, and this fact alone is usually not sufficient to obtain injunctive or interim relief.

Courts in some states are more likely to enforce a post-termination non-solicitation restriction if the violation involves the improper use of a company's confidential information or trade secrets.

In some states, courts are authorized to reform or modify restrictions in a non-solicitation provision that are deemed to be unreasonable (i.e., modifying a two-year post-termination restriction to one-year post-termination restriction).

In other states, courts do not have discretion to modify a non-solicitation provision to make it enforceable.

Enforcement of an In-Term Non-Solicitation Provision. If the violation of a non-solicitation restriction is by a current consultant, a company has three options: (i) it can seek an injunction to enforce the non-solicitation restriction; (ii) it can elect instead to terminate the consultant based on the violation of the non-solicitation provision; or (iii) the company can pursue both options. As with noncompete restrictions, state laws impact the extent to which companies can rely on a non-solicitation provision.

Courts in some states, such as California, may be less likely to enforce a non-solicitation provision by injunction but more likely to affirm a company's termination of a consultant based upon the consultant's breach of a valid non-solicitation provision.

Today's workforce is demanding increased mobility. Contractual restrictions on consultant movement or involvement with other companies are increasingly more scrutinized. The FTC has declared war on noncompete restrictions. At the same time, states are rewriting their statutes to narrow the definition of "independent contractor."

Given the unique nature and structure of direct selling companies, it is critical to have enforceable contractual provisions to prevent the severe disruption that can occur when a top leader solicits other consultants to leave for another company, while also allowing consultants to work multiple business opportunities.

Companies should regularly update their independent salesforce agreements to ensure that they reflect today's economic reality as well as comply with changes in the law and recent court rulings.

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Brent Kugler is a partner at Scheef & Stone, LLP.

The Moving Target of FTC Guidelines

In a post-Neora landscape, regulatory risk remains a primary concern

By Jenna Lang Warford

In the wake of a federal court decision favoring data-driven analysis over subjective judgments in the ***Neora*** *vs. Federal Trade Commission* case, the FTC appears to be intensifying its campaign to overhaul direct selling practices and multi-level compensation structures.

FTC staff issued two letters on March 15, 2024, regarding a change in their interpretation of its evaluation of pyramid schemes (the Koskot definition) and income disclosure statements.

The letters, which were addressed to the Direct Selling Association (DSA) and the Direct Selling Self-Regulatory Council (DSSRC) of the BBB National Programs, underscore the FTC staff's determination to recreate how the channel operates, despite a previous court ruling that rejected such a standpoint—upheld in a Federal court district in Texas.

Brent Kugler, a partner at Scheef & Stone LLP, says, "[Associate Director] Lois Griesman's March 15 letter disavowing the Commission's 2004 guidance is the latest example of the FTC's attempt to expand the definition of an illegal pyramid so that it can cast an even wider net over otherwise compliant business practices.

"While the Koscot definition of an illegal pyramid scheme remains the law of the land, the FTC in recent years has applied its own interpretation to Koscot to conclude that several (multilevel-marketing) companies were operating as illegal pyramid schemes, primarily by focusing on the recruiting aspect regardless of whether rewards paid to participants were tied to product sales," Kuglar continues.

"MLM companies and legal experts have challenged the FTC's position on this issue, arguing that FTC is attempting to impermissibly 'fence in' the MLM industry by expanding the definition of illegal pyramid beyond the parameters established by Koscot."

He adds, "The Koscot definition, after all, expressly allows for a participant to receive rewards for recruiting other participants if those rewards are related to the sale of products or services to ultimate users."

Peter C. Marinello, vice president of DSSRC, adds, "While the letter certainly underscores an area of concern, you have to remember that it doesn't represent formal FTC guidance or codified rules and regulations from the agency."

He continues, "Nevertheless, we take any communication from regulatory authorities very seriously, and we use information to inform our ongoing efforts to really provide this clear guidance to direct selling companies and their sales force members."

Companies reacting to these letters by enacting policies that lean on arbitrarily strict guidelines to appease the FTC may find growth unnecessarily compromised.

"You have to make your own decision about what you're willing to risk," Deborah Heisz, Co-CEO of Neora, says. "But you have to know right now that there is nothing that you can do to successfully run a direct selling business that will keep the FTC from potentially knocking on your door. Nothing. We followed the law, we proved in court that we followed the law, and we didn't keep them off our doorstep. So you just have to acknowledge there's a business risk."

Innovation, rather than ignoring risk, may be the better answer.

Heather Chastain, former chair of the Ethics and Self-regulation

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Committee for the DSA states that the channel is used to keeping a watchful eye on ever changing legislation.

"We've always been impacted by outside regulatory influences and internal compliance questions, guidance from the DSA," Chastain says. "But I don't view anything from the FTC as a barrier to innovation whatsoever, and I think any company that's using that as a reason not to innovate just isn't trying hard enough."

Jonathan Gilliam, founder and CEO of compliance management firm Momentum Factor, points to the outdated concerns that regulators have about the channel.

He explains, "At the core of regulator concerns is the sense that direct selling companies tend to over-promise and are not upfront about our opportunities and products. Many of the conditions that bred that concern are relics of the pre-internet past, yet the concerns still linger. This was highlighted in the overreaching charges against Neora."

Gilliam advises that the best practice of any direct seller in the modern age is to be honest and transparent in messaging, and to be sure this translates to the field with consistent training, care and enforcement.

> **At the core of regulator concerns is the sense that direct selling companies and their salespeople tend to over-promise. Many of the conditions that bred that concern are relics of the pre-internet past, yet the concerns still linger.**
>
> *— Jonathan Gilliam, Founder and CEO, Momentum Factor*

"The field's behavior is a primary risk to a knock on the door from the FTC," he says. "True, compliance starts at the top, but its risks come from the thousands out there making false claims, even when they believe what they are saying is true."

What might compliance to the law look like, post-Neora?

Chastain says, "I think the Neora ruling is our very best guidance we have right now. With the staff letters, the FTC is deliberately unclear in their guidance. This ruling is the first clear indicator we have regarding how the courts are interpreting the FTC guidelines.

"The common thread through it is that it is about the data," she continues. "You have to understand what's actually happening in your business. We're not going to worry about what it looks like on paper. We're going to look at what's happening in reality. What does your data show? Depending on your company, that is the most positive or negative thing that could have come out of that? I believe that is where the energy should be spent."

John Sanders, partner at Winston Strawn, says, "Effectively addressing compliance today is really simply doing what my firm and others have been saying all along. You need a demand for your products and a really good compliance system that basically takes your field to task when people make misleading income and lifestyle and product claims.

"If you can show that there are real sales to retail customers and that your field is not out there making misleading claims, you're going to be okay," he says.

> **…you have to know right now that there is nothing that you can do to successfully run a direct selling business that will keep the FTC from potentially knocking on your door. Nothing.**
>
> *— Deb Heisz, Co-CEO, Neora*

The Two Keys to Compliance

Risk tolerance assessment is the first key; the second is having a strong compliance department.

"When it comes to risk tolerance, do what we did," Heisz says. "Take a look at the guidance. Take a look at the law, at the former court cases. Take a look at our case and the numbers that are reflected in our case and say, 'Okay, they won. Can we meet those numbers?'

"At Neora we have 80% sales to customers outside the comp plan," she elaborates. "If you've only got 20%, that should be a red flag. Do you have a legitimate opportunity for people to make money purely by selling product and not having to recruit a whole lot of people?

Now, if they recruit a whole lot of people who sell product, yes, they'll make more money. But do you have a legitimate opportunity where someone who just wants to sell product to their friends can make money doing that? That's a demand for your product outside of people who enrolled just to be part of your company."

Heisz continues, "When we talk about customers, these are people whose social security numbers we don't have, they don't get a check from us. Do you have true customers? Because what true customers show you is we have true product demand.

If everybody is only buying the product so that they get a commission check, that isn't true product demand. So take a look at our case, and if you can meet this standard, you're going to be in the same place we are, which is, we're doing it right. And we can and will defend ourselves."

Chastain further defines risk tolerance. "Addressing risk tolerance as an open topic of conversation is really important. The idea that there are solutions on a spectrum isn't really how many compliance decisions are made in companies. I would encourage executives to introduce this idea of a range of solutions based on the risk you want to take."

She continued, "Too often compliance departments, and also frankly the leadership levels within the compliance, are (too technical) about how they issue guidance. 'Yes, you can say that. No, you can't say that.' If compliance heads and legal teams start to frame all discussions around compliance with the lens of risk tolerance, then it becomes a more productive conversation."

Categories for Risk Tolerance

Chastain elaborates, "I believe it begins with C-suites really engaging in an initial session on 'Let's identify what our risk tolerance is going to be in this category.' Product claims tend to be more straightforward. Then there's documentation risk, the level of risk tolerance within the training documentation we require for our fields. Companies can vary greatly in their approach, from lax to highly regulated.

> **The idea that there are solutions on a spectrum isn't really how many compliance decisions are made in companies."**
>
> *— Heather Chastain, Founder, The Bridgehead Collective*

"Then, we need to consider risk tolerance for income opportunity claims, including imagery," she says. "What level of risk are we willing to accept in terms of imagery used? How committed are we to ensuring our fields engage in proper training and internal monitoring? How do we address issues outside our risk profile with our fields? And what is our tolerance for field monitoring?"

Field monitoring, as the Neora and **AdvoCare** cases proved, is crucial, and can require a significant amount of time when done manually. Software programs and platforms can be an important part of the process.

"We use our field monitoring software heavily," Heisz says. "For us, it's a huge savings as opposed to having 20 people in the building. And a lot of our compliance effort is put into education.

"One of our main compliance strategies is to educate our field first, as opposed to discipline our field. So having third-party software partners identifying violations of policy helps us to react."

She continues, "Outsourcing monitoring tasks to a specialized group is advantageous because developing expertise in monitoring software internally isn't our priority. Having external experts craft queries and manage this process on a global scale for our industry is more efficient than handling it in-house.

"However, we collaborate closely with this team, particularly during product launches or promotions where keyword issues may arise, to enhance our search capabilities.

CONTINUED ON PAGE 16

THE MOVING TARGET, CONTINUED FROM 15

Ultimately, this approach ensures that our staffing remains optimal and focused on core tasks."

> **Companies should expect the FTC to learn from the mistakes it made in the Neora case.**
>
> *— Brent Kugler, Partner, Scheef & Stone, LLP*

Chastain agrees. "I think monitoring software is 100% a requirement," she says. "There are fantastic solutions in our space designed specifically for direct sellers, which is really important.

"They can integrate the training aspects along with ensuring quality enforcement of policy. Without Internet monitoring software of some kind, it's a huge gaping hole in your risk protection."

Consumer Advocacy Group TINA

Sanders is onboard with this type of monitoring as well. "A monitoring platform is incredibly important. And it's a push-pull, because these programs are generating lots of hits for you to investigate.

"The problem becomes if you don't have it configured to provide more results than regulators require, then you have organizations like Truth in Advertising (TINA) who will find them and take you to task complaining loudly that you're pulling punches and you don't have a true desire to find them."

Heisz shares that Neora is proactive. She says, "We'll work with the DSSRC for anything they find. TINA has its own agenda. There's just no other way to put it. And I think the more you try and work with them and appease them, the more you open up the opportunity for them to have an opinion."

Marinello acknowledges that while it's not possible to quantify the impact consumer advocacy organizations, such as TINA, have compared to the recent past, "We recognize the role that they play in highlighting potential concerns, and they do serve as a reminder to companies to maintain high standards of integrity and transparency within their marketing practices."

Effective Compliance Departments

Sanders said the FTC staff letters and TINA's involvement are an opportunity for companies to look at their compliance procedures, their policies, and their data to make sure compliance teams have what they need to do their jobs and policies and procedures are actually being enforced.

Chastain believes one of the toughest ideas to communicate to field leaders and members is why their own personal experience might not be compliant. "Messages like 'I quit my job in nine months, why can't I say that?' are the common field complaints," she says.

"Again, I think that's where the monitoring software is really absolutely critical," Chastain continues. "I do, however, believe a more relaxed, casual and friendly touch on the notifications and communications can be helpful." She agrees with Heisz that the goal is education.

Companies should keep in mind that while the guidance from the FTC should be considered, the overarching goal is to comply with the law, keeping in mind the FTC will most likely change the tactics it used with Neora.

Kugler expands on this. "Companies should expect the FTC to learn from the mistakes it made in the Neora case. Judge [Barbara] Lynn's Opinion provides a step-by-step deconstruction of Neora's pyramid scheme analysis.

"The FTC will revise its strategy and analysis to overcome the fallacies pinpointed by Judge Lynn. The next company targeted by the FTC will likely face a very different litigation strategy."

He continues, "There are, however, some key takeaways for companies in the aftermath of Neora, including not emphasizing the purchase of higher priced enrollment bundles, not imposing minimum purchase requirements, maintaining evidence that a significant percentage of rewards are generated from sales to non-participant consumers, removing structures and language in the compensation plan that can be construed as incentivizing recruiting, and considering reclassifying non-earning participants to preferred customers."

Sanders says that this last process is handled by his firm through working with an economics expert, who can take all of the business intelligence data from a company.

"We run models that allow us to identify the income plan participants that are not truly compensation plan participants but are simply consumers.

"Companies have data about the economic conduct of their participants—the volume that they're doing, how much they're paying, how much they're being paid, how often they're buying. That data allows us to work with an expert to identify the compensation plan participants who are truly volume purchasers at a discount."

SSN

Jenna Lang Warford is a *Social Selling News* Contributor.

COMPLIANCE: PUTTING THE PIECES TOGETHER

Remove structures and language in the compensation plan that can be construed as incentivizing recruiting over selling.
– BK

Don't impose minimum purchase requirements.
– BK

Monitoring software generates lots of "hits" to investigate but helps establish that you're being proactive.
– JS

Consider compliance a means of first educating the field, rather than disciplining them.
– DH

Maintain evidence that a significant percentage of rewards are generated from sales to "real" consumers.
– BK

A Compliance Dept needs to be independent; it can't be told to treat high volume/high ranking field members as exceptions.
– GS

Look at the totality of a claim, including words, images and context – even include other social media posts to determine what that net impression is.
– PCM

Compliance departments should have a focus of continuous improvement and ongoing progress.
– HC

Don't overly emphasize the purchase of higher priced enrollment bundles by new consultants.
– BK

Remember that Truth in Advertising (TINA) is a consumer advocacy group that communicates with the FTC, but they don't make or enforce law.
– GS

Compliance departments should be visible, internally.
– HC

Determine what risk levels your company accepts for each category, such as images published by the field or product claims backed by studies.
– HC & JS

Compliance should be embraced by the C suite.
– HC

Pay attention to new guidance, and modify policies as it comes out.
– DH

Compliance cannot be a separate department; it needs to be integrated into everything that we do.
– HC

BK= Brent Kugler
HC= Heather Chastain
JS= John Sanders
PCM= Peter C. Marinello
DH= Deb Heisz
GS= General Summary

COMMISSION PAYMENT COMPANIES

RANKED BY NUMBER OF DIRECT SELLING CLIENTS

Each month, *The Ranks* spotlights companies, people or trends that are important to the direct selling channel. This month, *The Ranks* lists commission payment companies, ranked by the number of direct selling clients invoiced over the past 12 months. Companies that did not provide this information are listed in alphabetical order. *The Ranks* will vary monthly in type of information and in number of items included. *Ranks* client data is not audited and relies on the good faith responses of the participants.

COMPANY NAME & LOCATION	NUMBER OF CLIENTS INVOICED LAST 12 MONTHS	KEY CONTACT	3 REPRESENTATIVE CLIENTS	WEBSITE	CONTACT INFO
Payquicker Rochester, NY	225	Crystal Holtzendorff	MONAT Global Immunotech Bomb Party	payquicker.com	844-258-3006 solutions@payquicker.com
Global Payroll Gateway Newport Beach, CA	Did not provide	Sales	Did not provide	gpgway.com	sales@gpgway.com
Hyperwallet, a PayPal Service San Francisco, CA	Did not provide	Sales	Did not provide	hyperwallet.com	877-969-7411
i-payout Fort Lauderdale, FL	Did not provide	Natalia Yenatska	Did not provide	i-payout.com	Natalia@i-payout.com
Propay Lehi, UT	Did not provide	Sales	Did not provide	propay.com	866-573-0951

CORRECTION *In the April edition of The Ranks, featuring companies that provide apps, we reported a client count for Rallyware of 214. The company has since corrected this count to 128 based on a clarification of the criteria used to define clients as individual direct selling companies. This correction did not change the order of the rankings.*

People on the Move

TROY HICKS, HERBALIFE

Herbalife Ltd. has promoted **Troy Hicks** to chief operating officer. Joining Herbalife in 2013 as vice president, supply chain planning, Hicks recently served as executive vice president, worldwide operations. He succeeds Frank Lamberti, who will move to chief commercial officer. For over 20 years, Hicks has guided improvements for underperforming global supply chains.

LEO PAREJA, EXP REALTY

EXp Realty has appointed **Leo Pareja** to CEO. Joining the company in 2022, Pareja most recently served as chief strategy officer. In that role, he guided eXp Realty through launching successful strategic initiatives. Pareja has over 20 years of real estate experience, starting at age 19, and also co-founded Washington Capital Partners.

JOHN DESIMONE, HERBALIFE

Herbalife Ltd. has named **John DeSimone** as chief financial officer (CFO), succeeding Alex Amezquita, who will remain with the company. Having been with Herbalife for 17 years, DeSimone was most recently special advisor to the CEO. Before that, he served as president and co-president (2018-2022) as well as CFO from 2010-2018.

EXECUTIVES, EXP REALTY

EXp Realty announced key leadership appointments as the realty landscape evolves. **Renee Kaspar** has been named executive vice president and chief human resources officer. **Seth Siegler** was named chief information officer. **Sumanth Kamath** will now serve as chief technology officer. **Felix Bravo**, as vice president of global growth, will lead global expansion.

SIMON DAVIES, ISAGENIX

As part of its strategic transformation, **Isagenix International** has appointed **Simon Davies** as chief financial officer. Davies has over 20 years' experience with wholesale and retail consumer products, travel, and direct sales, including time at **Herbalife**, **Fortune Hi-Tech Marketing**, and **WorldVentures**.

CHRIS REID, PLEXUS WORLDWIDE

Chris Reid, chief legal officer (CLO) of **Plexus Worldwide**, has been elected board treasurer of the Council for Responsible Nutrition (CRN). Reid has served as a CRN board member for three years. Having over 40 years' legal experience, Reid has expertise in enterprise compliance, FDA compliance, advertising, intellectual property, and transactional law.

AMBER OLSON ROURKE, NEORA

Neora has promoted **Amber Olson Rourke** to president. Rourke, a co-founder, previously served as chief sales and marketing officer. In her new role, Rourke will continue to oversee Neora's marketing and sales efforts but will also help to guide its strategic vision and lead its plans for global growth and expansion.

STACY SOVA, THERMOMIX

Thermomix has named **Stacy Sova** as head of U.S. sales. Sova has over 23 years in direct selling, starting as a consultant for **Southern Living At Home**. As a field trainer and corporate leader, she has worked with **Norwex**, **Jamberry**, and **Tastefully Simple**. Now, Sova will lead sales initiatives and oversee regional teams.

People on the Move

DARRYL GREEN, STEMTECH

Stemtech Corp. has appointed board member **Darryl Green** as head of its rebranding project. Green is a veteran specialist in branding and nutraceuticals and previously served as president of GNC's Global Franchising Division. In his new capacity, he will help revitalize Stemtech's digital presence, driving innovation and delivering a refreshed brand identity.

DELPHINE JOUANDOUDET, PARTNER.CO

Delphine Jouandoudet has joined **Partner.Co**'s Wellness Council. Jouandoudet has worked in the pharmaceutical industry for more than 15 years. As a quality control manager, she has focused on the development and control of products, including marketing authorization, pre-clinical studies, and routine control of finished products.

TROY HILTBRAND, PARTNER.CO

Partner.Co has named **Troy Hiltbrand** as senior vice president of digital product management and analytics. Hiltbrand has spent 20 years leading technology and analytics for **Amare Global**, **Kyani** and **USANA**. In this new role, Hiltbrand will prioritize creating consistency in global pricing and promotions and work on developing digital tools.

KIRIKOS LAZAROU, QUIARI

QuiAri has hired industry veteran **Kirikos Lazarou** as field development director for Europe, the Middle East and Africa. Lazarou lives in Athens, Greece, and has decades of direct selling leadership experience, having served as general director and in international business and compliance within the markets he will cover in his new role.

PATRICIA CASAS, PARTNER.CO

Partner.Co has added **Patricia Casas** to its Wellness Council. As a nurse technician, Casas has spent over 20 years working in the ER, intensive care unit, and with gynecology and obstetrics. She specializes in naturopathy with a focus on female hormonal balance. Based in Spain, she advocates for the deaf community.

WHAT'S NEW ▶▶

Gregg Renfrew Buys Back Beautycounter from Carlyle Group

Gregg Renfrew, founder and CEO of **Beautycounter**, has bought the company back from the Carlyle Group. Renfrew had recently rejoined the clean beauty brand as CEO after exiting in 2023. The latest move comes after the brand was in foreclosure. Carlysle had purchased a majority stake in the company in April 2021 for an estimated $1 billion. However, per Carlyle, the brand had faced "significant market and channel headwinds." Even though there had been attempts to increase marketing spend, expand the portfolio and build out its omnichannel strategy, Carlyle claims that "the business continued to lose ground." The business is now winding down with Renfrew to bring the brand's name, assets and products under a brand-new company, G2G. In May, Renfrew announced that launching the new company will take longer than anticipated and encouraged consultants to explore a business opportunity with Arbonne in the meantime. The company is evaluating the best way to support "a connected community" and have a sustainable business moving forward, but it's unclear whether it will remain in the direct selling channel. Renfrew aims to launch in late 2024.

Mannatech Opens Operations in Thailand

As **Mannatech Inc.** continues with its expansion efforts throughout the ASEAN (Southeast Asia) region, the company has launched in the Thailand market. Planned for June 17, the official launch and soft opening will provide an opportunity for new Mannatech Associates to register while the company also releases its K-Beauty line, Luminovation, according to Mannatech. It has been a number of years since the company has opened a new market, but with market research, Thailand showed it would be a good fit for Mannatech products as well as the direct selling business model. Launch efforts will be led by Roh Jae-hong, Mannatech Korea's general manager. Thailand has a population of 70 million with a direct sales market of approximately $3.1 billion and a dietary supplement market of $3.9 billion. The opening will bring Mannatech's global presence to 26 markets. The launch comes at a time when the ASEAN region is the U.S.'s fourth-largest trading partner. It is made up of Brunei Darussalam, Burma, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, and Vietnam.

Young Living Contributes to Bee Diversity Research with Its Lavender Fields

Young Living Essential Oils has released a study in scientific journal Diversity, offering a comprehensive survey of the bee species visiting its lavender fields at Mt. Nebo Botanical Farm and Distillery in Utah. The survey is reportedly the first in North America focused on bees engaging with lavender. The results of the study showed the significant impact the lavender plant had in supporting a diverse community of bees. In addition, it revealed how beneficial the lavender plants and responsible agricultural practices can be when it comes to bees and biodiversity. Documenting bee varieties at the farm during May through October 2022, Young Living collected a total of 566 bees with the study showing they represented 68 distinct species. Also, lavender, in particular, was "a bee magnet" and served as the primary attractant for bees. Further revealed was the important role agricultural lands play for pollinators, and how impactful pollinator-friendly practices, such as diversifying crops, pesticide-free pest control, and land conservation is to bee diversity and health.

DSSRC Makes Inquiry into Trades of Hope Earnings Claims by Salesforce

The **Direct Selling Self-Regulatory Council (DSSRC)** of BBB National Programs has recommended to **Trades of Hope LLC** that it discontinue particular earnings claims salesforce members made on Facebook and YouTube. DSSRC chose to look into Trades of Hope, a multi-level direct selling company that specializes in goods such as jewelry and coffee, during the council's routine monitoring of the direct selling industry. Some of the earnings claims in question included: "start earning an income immediately!"; "Want to earn extra income?"; and "...financial freedom." As stated in DSSRC's Guidance, some words can have a "high risk of being misleading to consumers." After DSSRC informed Trades of Hope of its concern, the company quickly removed several of the Facebook posts and had others modified to remove the offending language. Still, one of the Facebook posts did not have a sufficient disclosure, and an additional Facebook post and YouTube video discussing career and team earnings remained online and unmodified. DSSRC recommended that Trades of Hope take additional steps to have the post and video removed.

THE SUPPORTERS ▶▶

MEET OUR PARTNERS

Below is a listing of all of the suppliers who placed display advertising in this month's issue. We are grateful for their participation and support in bringing news and information to the social selling channel.

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sales@nex.io
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