

TINA.org Lobbies FTC to Use Penalty Offense Authority against Direct Sellers

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TINA.org continues to aggressively beat the enforcement drum. Today, its leaders sent a [letter](#) to Acting Director of the Bureau of Consumer Protection Samuel Levine encouraging the FTC “to implement a penalty offense program targeting the direct selling industry and its market-wide practice of utilizing deceptive earnings representations and false health claims.”

As we discussed in detail [here](#), FTC Commissioner Rohit Chopra and his then attorney advisor Levine last year released a paper advocating for the Commission to resurrect the Penalty Offense Authority, which authorizes civil penalties where the following three conditions are met:

- a final cease and desist order has been entered against a party in an administrative proceeding under Section 5(b) of the FTC Act;
- there is a Commission determination that a specific practice is unfair or deceptive, as part of that order; and
- a party with actual knowledge that the practice is unfair or deceptive has engaged in that practice after the order became final.

The letter argues that the Commission has issued “numerous final cease and desist orders following fully adjudicated administrative proceedings” that could be used as a predicate for an action under the Penalty Offense Authority. Despite that assertion, the letter attaches only two orders: (1) the 1975 *Koscot* decision that established the standard for an illegal pyramid scheme under the FTC Act; and (2) a 2013 order against POM Wonderful LLC, which is not a direct selling company, but that involved allegations of misleading health claims for a food product. While the FTC has indeed brought many enforcement actions and settlements against direct selling companies, the challenge that TINA and the FTC face in seeking to revitalize the Penalty Offense Authority is that its use requires a final order after an administrative proceeding. Because the FTC for years relied almost exclusively on settlements and/or 13(b) litigated matters for enforcement, there are not many final orders after an administrative proceeding to rely on.

Undeterred by this limitation, the TINA.org letter also provides a list of 660 direct selling companies with contact information “to assist the FTC in providing notice.” The organization’s efforts are the latest in a series of efforts that explore how the FTC can obtain money through enforcement in novel ways in the wake of the Supreme Court’s unanimous *AMG Capital Management* decision. For example, two weeks ago, the FTC [filed](#) an amended complaint against RCG Advances seeking civil penalties under the Gramm-Leach-Bliley Act under a new legal theory. Before that, the FTC brought an action against [MoviePass](#) seeking civil penalties under the Restore Online Shoppers’ Confidence

Act (ROSCA), again under a novel theory of statutory interpretation.

The Commission has also signaled that it may seek to amend the Business Opportunity Rule to cover direct sellers and others in the “gig economy.” The takeaway here is clear: even as the battle in Congress to pass legislation continues, the FTC and others are continuing to consider other methods to obtain money through enforcement.