

## Don't Let Your Guard Down: The Limited Impact of the AMG Capital Decision

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The AMG Capital decision was certainly a win for the direct sales channel, removing the primary tool the FTC has used over the past several decades to win money on behalf of consumers in court, § 13(b) of the FTC Act. Many of our clients are wondering if they can now let their guard down as far as FTC scrutiny goes, and perhaps even direct their precious compliance resources elsewhere. The short answer is: No, do not let your guard down. The FTC continues to have several avenues to cause you pain, and the agency is by no means taking the *AMG Capital* decision lying down.

Some of those other avenues include creating new rules defining what the FTC considers to be an unfair or deceptive trade practice and punishing direct sellers it believes are violating those rules with civil penalties of up to \$43,792 per violation. The FTC can also formally order a direct seller to cease-and-desist an action that it considers to be an unfair trade practice, and if the direct seller violates that order, the FTC can seek the same civil penalty as well as other injunctive relief. Crucially, the FTC can also penalize direct sellers or corporations *other than* the recipient of the cease-and-desist order who engage in the same prohibited conduct. And, once the FTC obtains a cease-and-desist order or promulgates a formal rule, the FTC can bring a civil lawsuit in court on behalf of consumers against a direct seller, and possibly win monetary damages, the refund of money, or the return of property for consumers.

But these other avenues are not without downsides. They involve lengthy and burdensome administrative processes, a heightened standard of proof in a civil action (requiring that a reasonable person would have known the conduct was dishonest or fraudulent) and a short, three-year statute of limitations.

Despite these downsides, direct sellers must keep their guard up, as the FTC has made clear it intends to put up a fight in the wake of *AMG Capital*. The agency recently announced a new rulemaking committee with the goal of centralizing rulemaking activity—passing more rules more efficiently, and opening up more direct seller activity to possible civil penalties. The agency has also indicated it intends to ramp up the issuance of formal cease-and-desist orders, despite the lengthy administrative process. And members of Congress, with support from the FTC, recently introduced the Consumer Protection and Recovery Act with the goal of explicitly amending § 13(b) to reinstate the FTC's authority to seek monetary damages in court without the administrative limitations. The proposed text would give the FTC even greater power to reach past actions by companies, not just recent or current ones.

While the agency works to get the above enforcement remedies operative, direct sellers must remember that the FTC has enforcement mechanisms that they can *immediately deploy* against companies, causing them a lot of pain in the process. For one, the FTC can serve civil investigative demands (CIDs) on direct sellers they believe are violating the FTC Act, forcing them to gather, review, and produce mountains of information. These CIDs are invasive, often result in formal litigation, and companies spend millions of dollars and tons of resources responding to them. The FTC also used warning letters during the COVID-19 pandemic as a means of policing direct sellers, and the agency has made clear that it intends to continue doing so. And now, thanks to the COVID-19 Consumer Protection Act, the FTC can immediately punish direct sellers who engage in deceptive practices associated with the treatment, cure, prevention, or diagnosis of COVID-19 by hitting them with a \$43,792 penalty for each misleading claim identified, circumventing the lengthy administrative rulemaking process.

In sum, although *AMG Capital* created a hurdle for the FTC to obtain formal *monetary redress* against direct sellers, the agency is not going to take the decision lying down. Whether by way of sending costly CIDs and warning letters, formally amending the FTC Act, passing a new rule, or issuing a cease-and-desist order, the FTC will continue to target those it believes are in violation of its rules. Direct sellers must remain vigilant, doing all they can stay off the FTC's radar.

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