

The Future of the MLM Exemption From the Business Opportunity Rule Is at Risk

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The Business Opportunity Rule is up for its scheduled 10-year review, and the results could have a dramatic impact on the direct sales channel. MLMs fought hard for, and received, an exemption from the Rule when it was implemented in 2011. But this review process has given the FTC the perfect opportunity to reassess the scope of the Rule with respect to MLMs. FTC Commissioner Rohit Chopra has expressed his intent to “seek restitution and penalties against multilevel marketers...” by advocating for removal of the MLM exemption from the Rule.^[1] Without the exemption, all MLMs will become subject to disclosure requirements that are simply impracticable for them to implement.^[2]

But time is ticking on Commissioner Chopra’s ability to carry out this plan himself. He is poised to leave the FTC pending the Senate’s confirmation of his nomination as the Director of the Consumer Financial Protection Bureau. The Senate has not yet confirmed his nomination, but it could happen as soon as next month. For the moment, Chopra’s successor is unknown. However, Lina Khan, Chopra’s apparent protégé, has just been appointed as Chair of the FTC. Khan served as a fellow at the FTC for Commissioner Chopra and co-authored an article with Chopra regarding the FTC’s rulemaking authority.^[3] Chopra has remarked that Khan “will be instrumental in helping the commission chart a new course grounded in rigor...”^[4] Until Chopra’s new position is confirmed, and he steps down, Khan’s appointment gives Democrats a 3-2 majority and Chopra a leg up in advancing his plan. Given their similar ideologies, Chair Khan may very well continue to pursue Chopra’s plan.

Even so, no substantive changes can be made until the Rule makes it through the lengthy FTC review process. The FTC must publish three separate notices of proposed rulemaking in the *Federal Register*, send notices to several House Committees, solicit public comments, allow for responses and participation of interested persons, and may have to hold informal hearings and oral arguments regarding proposed changes. Only after all of these steps are taken can any substantive change be codified.

This lengthy process will give consumers, business professionals, and MLMs’ ample opportunity to oppose Chopra’s proposed removal of the MLM exemption. The avid participation that saved MLM’s from being swept into the Rule 10 years ago may again be necessary to defend against this initiative. There is no set timeline for this process, but given these requirements, there is unlikely to be any substantive change in the Rule, if any, until at least well into 2022.

¹³ Fed. Trade Comm'n, Statement of Comm'r Rohit Chopra Regarding the Business Opportunity Rule, Comm'n File No. P924214 (June 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591046/statement_of_commissioner_rohit_chopra_regarding_the_business_opportunity_rule.pdf

¹² See Business Opportunity Rule, 76 Fed. Reg. 76,816 (December 8, 2011).

¹³ Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 *Univ. of Chicago L. Rev.* 357 (2020).

¹⁴ Fed. Trade Comm'n, Statement of Comm'r Rohit Chopra On the Senate's Vote to Confirm Lina Khan (June 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591122/chopra_statement_on_confirmation_of_lina_khan.pdf

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