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HOW PENDING LEGISLATION COULD AFFECT YOUR COMPANY'S COMPLIANCE STRATEGY

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When it reversed 40 years of appellate precedent by ruling that Section 13(b) does not authorize the Federal Trade Commission to seek monetary relief, the Supreme Court relied not only on the language of Section 13(b), but also on the presence of other provisions in the FTC Act, which expressly allow the FTC to obtain monetary relief for consumers. The Court, in its unanimous April 22, 2021, opinion in *AMG Capital Management v. Federal Trade Commission*, pointed to Section 5 and Section 19 of the FTC Act, which provide for awards of restitution and monetary penalties. But the FTC Act conditions such an award on various administrative procedures that the FTC has characterized as inadequate and cumbersome.

Sections 5 and 19 Set Time Limitations

Section 5(l) provides for monetary relief against repeat offenders who violate commission orders; Section 5(m) provides that the FTC can seek monetary relief in federal court after it engages in a formal rulemaking process; and Section 19 provides that the FTC can seek monetary relief in federal court if there is a violation of a final cease and desist order issued by an administrative law judge. Each of these alternative avenues contain significant due process protections for defendants, which ordinarily include substantial, and sometimes time consuming, administrative comment periods, hearings, adjudications, decisions, and appeals.

Notably, in addition to containing these procedural requirements, Section 5 also contains a three-year statute of limitations. Section 19 applies only where the Commission begins the Section 5 process within three years of the underlying violation and seeks monetary relief within one year of any resulting final cease and desist order. Compare this to the now emasculated Section 13(b) which, because the statute's language only addresses injunctive relief, does not contain any statute of limitations or other time constraints relating to the period for which a court can order restitution or disgorgement.

New Bill Would Strengthen 13(b)

Anticipating a loss before the Supreme Court, the FTC, in August 2020 testimony before the Senate Commerce Committee, asked for legislation to "clarify the agency's statutory authority to obtain complete equitable monetary relief." This year, just days before the *AMG Capital* decision was handed down, H.R. 2668, the Consumer Protection and Recovery Act, was introduced, subsequently passing the House on a largely party-line vote. The legislation, which has been criticized by the U.S. Chamber of Commerce and the Direct Selling Association, will very possibly undergo substantial modifications when it is considered by the Senate. The legislation currently adds to Section 13(b) express authority for the FTC to seek both injunctive and monetary equitable relief, including restitution and disgorgement. But for the first time, the bill would add a time limitation provision to Section 13(b), providing that a court may not order equitable relief for any violation occurring more than 10 years before the date suit is filed. (It is worth noting that House Republicans offered an unsuccessful amendment in committee to change this time limitation period to five years, an attempt that will likely be made again when the bill is considered in the Senate.)

Though denominated as a "statute of limitations," the proposed statutory language does not resemble a normal statute of limitations because it does not address the date when an "unfair or deceptive" practice in violation of the FTC Act occurred. Rather, it addresses the scope of the monetary remedy, i.e., how far back a court can go in deciding how much restitution or disgorgement to include in its monetary judgment. Nothing in the bill would limit how far back the FTC can look to find a violation of the law. In other words, if a business has been found to have committed an "unfair or deceptive" business practice 15 years ago (or even longer), the court, under the language contained in H.R. 2668, can hold that there has been a violation of the FTC Act. The only limitation that would be imposed by H.R. 2668 is that the court could only order disgorgement of ill-gotten gains obtained by the defendant within the previous 10 years.

Senate to Consider Guardrails

The U.S. Chamber of Commerce has argued that the proposed law is overly broad, including the 10-year limitation period, advocating that there is no reason to depart from the three-year statute of limitations currently in effect for proceedings brought under Section 19. Sean Heather, senior vice president of the Chamber, argues that "10 years is an excessively long period of time for the court to calculate monetary relief," and he believes a three-year statute of limitations, with a five year disgorgement remedy, is more appropriate. No doubt, these arguments regarding the time limitations issue, and other appropriate guardrails constraining the FTC's broad authority, will be center stage when the legislation is considered in the Senate, and some further restrictions may find their way into the final version of the law.

The Internet Is Forever

So what does all of this mean for direct selling companies and their compliance efforts? As we painfully know, the internet is forever. Companies who receive inquiries and complaints from regulators, the Direct Selling Self-Regulatory Council, and consumer advocacy groups (such as Truth in Advertising) frequently find themselves on the receiving end of income and medical claims, some of which are quite "long in the tooth." For companies that use web monitoring services to identify possible policy violations, is it a reasonable business practice to limit the search parameters to only go back a certain number of years?

Common sense would dictate that newer and more recent social media and YouTube postings are a more serious and immediate problem for compliance departments than older postings. But that does not mean that older postings can or should be ignored, or that companies should use their filtering tools to only capture newer postings. Though, depending on the ultimate fate of the pending legislation, some time limitations might be written into Section 13(b), older posts can still become a trigger for a regulatory investigation and can still cause public relations and other problems. Moreover, older posts can serve the salutary purpose of assisting companies in identifying distributors not operating within the guidelines of permissible income and product claims. This, in turn, can give companies an opening to properly train those distributors in good business practices.

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