

May 27, 2008

*Via Electronic Submission*

Mr. Donald S. Clark  
Secretary  
Federal Trade Commission  
Room H-135 (Annex S)  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

***Re: Business Opportunity Rule, R511993: Direct Selling Association's Comments  
on the Federal Trade Commission's Revised Notice of Proposed Rulemaking  
Regarding Business Opportunities***

Dear Secretary Clark:

On behalf of the Direct Selling Association<sup>1</sup> ("DSA") and its member companies, we are pleased to submit these comments on the Federal Trade Commission's ("FTC") Revised Notice of Proposed Rulemaking ("RNPR") regarding Business Opportunities, amending 16 CFR Part 437.<sup>2</sup> DSA is especially appreciative of the FTC's dedication and attention to crafting a trade regulation rule governing business opportunities. The thoroughness and thoughtfulness of the FTC's analysis regarding the revised proposed Business Opportunity Rule ("RPBOR") and the preceding April 2006 Notice of Proposed Rulemaking ("NPR") demonstrate the seriousness with which the FTC considered the views of legitimate direct sellers who were concerned about the scope of the original proposed rule. This well-reasoned conclusion was premised not only on sound analysis but also by the fact that the

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<sup>1</sup> DSA is the national trade association of the leading companies that manufacture and distribute goods and services sold directly to consumers by personal presentation and demonstration, primarily in the home. More than 200 companies are members of the association, including many with well-known brand names. In 2006 over 15 million individuals sold for direct selling companies as independent contractors with estimated retail sales of \$32.18 billion. DSA's mission is "[t]o protect, serve and promote the effectiveness of member companies and the independent business people they represent" and "[t]o ensure that the marketing by member companies of products and/or the direct sales opportunity is conducted with the highest level of business ethics and service to consumers." DSA addresses federal and state legislative and regulatory issues; conducts an independently administered code of ethics program that protects both customers and salespeople; serves as a clearinghouse for information; develops executive educational seminars, conferences, and workshops; conducts industry research; develops advocacy programs; and provides industry leadership in addressing issues of public concern.

<sup>2</sup> The RNPR is available at 73 Fed. Reg. 16110 (March 26, 2008).

FTC already possesses authority under Section 5 of the FTC Act<sup>3</sup> to prosecute business opportunity fraud in any area in which it may arise.

DSA endorses the FTC's stated intention of narrowing "the scope of the proposed rule to avoid broadly sweeping in sellers of multi-level marketing opportunities," as well as the FTC's acknowledgement that "the [April 2006 proposed rule] would have unintentionally swept in numerous commercial arrangements where there is little or no evidence that fraud is occurring [and that] the [proposed rule] would have imposed greater burdens on the MLM industry than other types of business opportunity sellers without sufficient countervailing benefits to consumers."<sup>4</sup> In order to avoid any unintended misinterpretation of the proposed Business Opportunity Rule, DSA has a few brief comments regarding the RPBOR. These comments are provided for the sole purpose of effectuating the intent expressed in the RNPR that the revised rule not include direct sellers. DSA's suggestions are made for the exclusive purpose of making clear in the text of the Rule itself what is stated in the RNPR, *i.e.*, that direct sellers are not covered by the Revised rule. Without such modifications, the language of the revised rule might be interpreted in a manner inconsistent with the FTC's stated intent.

DSA's suggested modifications are intended to ensure that any subsequent interpretation of the Final Rule by either courts or the FTC itself is consistent with the intent articulated in the RNPR. DSA believes that the Rule itself should be modified to avoid any such ambiguities or inconsistencies with the intent expressed in the RNPR, while not undermining the FTC's legitimate interest in pursuing business opportunity frauds. As the FTC noted – and as DSA wholeheartedly concurs – Section 5 of the FTC Act provides a "flexible and effective weapon" to prosecute unfair or deceptive practices,<sup>5</sup> and therefore any inappropriate activity can be addressed through the FTC's investigatory and enforcement authority under Section 5.<sup>6</sup>

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<sup>3</sup> 15 U.S.C. §45.

<sup>4</sup> Throughout these comments, DSA will refer to its members and others that engage in direct selling activities as "direct sellers." In the RNPR, the FTC refers to these types of businesses as "multi-level marketing" opportunities. 73 Fed. Reg. 16113, n. 34. The term "direct sellers" may be more accurate, in that many direct sellers do not have multiple tiers of marketing or compensation activities, and there may be different interpretations of what "multi-level marketing" entails. For clarity, DSA will simply refer to this industry and its members as "direct sellers." Direct sellers are defined specifically and precisely under federal law, *see* 26 U.S.C. §3508.

<sup>5</sup> 73 Fed. Reg. at 16113.

<sup>6</sup> The FTC can also use Section 5 to bring enforcement actions against business opportunity schemes engaging in unfair or deceptive practices, as it did over 20 times between the release of the April 2006 NPR and the release of the March 2008 RNPR. *See, e.g., Mazoni & Son, Inc. dba EDI Healthclaims Networks, et al.*, FTC File No. 062-3033 (2008), <http://www.ftc.gov/os/caselist/0623033/0623033.shtm>; *Holiday Enterprises, Inc., et al.*, FTC File No. 062-3106 (2008), <http://www.ftc.gov/os/caselist/0623106/index.shtm>; *Prophet 3H, Inc., et al.*, FTC File No. 062-3050 (2007), <http://www.ftc.gov/os/caselist/0623050/index.shtm>; *Fidelity ATM, Inc., et al.*, FTC File No. 062-3210 (2007), <http://www.ftc.gov/os/caselist/0623210/index.shtm>; *Wholesale Marketing Group, et al.*, Civil Action No. 05-C-6485 (N.D. Ill. 2007), <http://www.ftc.gov/os/caselist/c6485/index.shtm>; *Universal Advertising, Inc., et al.*, FTC File No. 062-3228 (2007), <http://www.ftc.gov/os/caselist/universaladvertising/index.shtm>; *Business Card Experts, Inc., et al.*, FTC File Nos. 062-3180, X070011 (2007), <http://www.ftc.gov/os/caselist/0623180/index.shtm>; *Cornerstone Marketing, LLC, et al.*, Case No. 9:06-cv-01899-PMD (D. S.C. 2007), <http://www.ftc.gov/os/caselist/906cv01899PMD/index.shtm>; *Group C Marketing, Inc., dba HBG Publications, et al.*, Civil Action No. CV 06-6019-GHK (JCx) (C.D. Cal. 2007), <http://www.ftc.gov/os/caselist/hbgpublications/index.shtm>; *The Results Group, L.L.C., et al.*, FTC File No. 062-

### **DSA Suggested Clarifications**

In its initial comments and rebuttal to the April 2006 proposed rule, DSA explained how the previous NPR might have adversely affected direct sellers by virtue of its overbroad definitions and scope, without commensurate benefit to consumers. The FTC recognized that danger, and thus clarified repeatedly in its RNPR commentary that the revised rule is not intended to cover direct sellers.<sup>7</sup> To that end, DSA suggests refinements to the text of the proposed rule in several areas. Most importantly, DSA seeks a limitation on what constitutes a “required payment” under the definition of business opportunity, and additionally, seeks clarifications as to the meaning of the triggering events of “providing, outlets, accounts or customers” and “buy[ing] back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides . . . .”

DSA notes that definitions in the RPBOR may inadvertently encompass some direct seller activities. While the FTC has made clear that direct sellers are outside the scope of the RPBOR in its RNPR commentary, it is important to modify the definitions set forth in §437.1 of the proposed rule to avoid any possible ambiguity.

### **Business Opportunity Definition**

As proposed, several elements within the §437.1 RNPR definitions may unintentionally include non-business opportunity activities.<sup>8</sup> The proposed RNPR definition of business opportunity has three elements:

- 1) a solicitation to enter into a new business;
- 2) a “required payment” made to the seller; and
- 3) a representation that the seller will provide assistance in the form of locations, outlets, security accounts, or buying back certain materials.<sup>9</sup>

Of paramount concern to DSA is the possibility that “required payment” might be construed inappropriately to include payments for the purchase of certain materials on a not-for-profit

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3205 (2007), <http://www.ftc.gov/os/caselist/0623205/index.shtm>; *Route Wizard, Inc., et al.*, FTC File No. 062-3195 (2007), <http://www.ftc.gov/os/caselist/0623195/index.shtm>; *Thomas E. Richardson, dba Mid-South Distributors*, FTC File Nos. 062-3221, X070014 (2007), <http://www.ftc.gov/os/caselist/md-southdistributors/index.shtm>; *John Stefanchik, et al.*, FTC File No. 022-3246 (2007), <http://www.ftc.gov/os/caselist/0223246/0223246.shtm>; *World Traders Association, Inc., et al.*, Case No. CV 05-591 AHM (CTx) (C.D. Cal. 2007), <http://www.ftc.gov/os/caselist/wta/wta.shtm>; *Elite Designs, Inc., et al.*, Civil Action No. CA 05-058 (D. R.I. 2006), <http://www.ftc.gov/os/caselist/elitedesigns.shtm>; *Network Services Depot, Inc., et al.*, FTC File No. 042-3188 (2006), <http://www.ftc.gov/os/caselist/0423188/0423188.shtm>; *Sun Ray Trading, Inc., et al.*, Civil Action No. 05-20402 CIV-Seitz (S.D. Fla. 2006), <http://www.ftc.gov/os/caselist/sunraytrading/sunraytrading.shtm>; *USA Beverages, Inc., et al.*, Civil Action No. 05-61682-CIV (Lenard) (S.D. Fla. 2006), <http://www.ftc.gov/os/caselist/0561682/0561682.shtm>; *Internet Marketing Group, Inc., et al.*, FTC File No. 042-3035 (2006), <http://www.ftc.gov/os/caselist/0423035/0423035.shtm>; *Success Vending Group, Inc., et al.*, FTC File No. X000039 (2006), <http://www.ftc.gov/os/caselist/successvend/successvend.shtm>.

<sup>7</sup> See, e.g., *id.* at 16114-16116, 16120-16121.

<sup>8</sup> 73 Fed. Reg. at 16134.

<sup>9</sup> Definition §437.1(c)(1-3), as summarized in 73 Fed. Reg. at 16121.

basis. Additional concerns relate to the lack of clarity regarding what might constitute representations about providing locations, outlets, accounts, and customers; and the use of the term “provides” regarding buybacks of materials.

### *Required Payment*

A “business opportunity” as defined by the proposed rule requires a prospective purchaser to “make a required payment.”<sup>10</sup> Notably, this definition of required payment expressly excludes “payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease.”<sup>11</sup> However, the required payment element of the business opportunity definition could still inadvertently sweep in certain direct selling relationships that are clearly not intended to be covered by the revised rule. Direct sellers routinely purchase – on a not-for-profit basis – certain materials for demonstration, display, or otherwise to be used to encourage or facilitate the sale of products to consumers. The *not-for-profit* sale by the company of these materials is another feature that distinguishes direct selling from business opportunities and business opportunity frauds that seek up-front investments on a *for-profit* basis. Therefore, the exclusion for the purchase of reasonable amounts of inventory sold at bona fide wholesale prices should be amended to also include payments for the purchase of business materials on a not-for-profit basis. To that end, DSA recommends modifying the required payment exclusion as follows:

payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease, **or payments for business materials, supplies and equipment sold on a not-for-profit basis.**  
(Suggested new language in **boldface and underscored**)

This minor change would also make the definition consistent with many state business opportunity statutes.<sup>12</sup> With this simple modification, initial not-for-profit business materials, supplies and equipment provided by direct selling companies and used for demonstration, administrative and/or educational purposes would clearly not be covered by the RPBOR. This modification is also consistent with the FTC’s stated intent in the RNPR commentary and does not undermine the objectives of the proposed rule to address business opportunity fraud.

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<sup>10</sup> §437.1(c)(2).

<sup>11</sup> §437.1(o).

<sup>12</sup> See, e.g., ALASKA STAT. ANN. § 45.66.220; FLA. STAT. ANN. § 559.801; 815 ILL. COMP. STAT. ANN. 602/5-5.10; IND. CODE ANN. § 24-5-8-1; IOWA CODE ANN. § 551A.4; KY. REV. STAT. ANN. § 367.807; LA. REV. STAT. ANN. § 51:1821; ME. REV. STAT. ANN. tit. 32, § 4691; MD. CODE ANN., BUS. REG. § 14-104; NEB. REV. STAT. ANN. § 59-1718.01; N.C. GEN. STAT. ANN. § 66-94; OHIO REV. CODE ANN. § 1334.01; OKLA. STAT. ANN. tit. 71, § 803; S.C. CODE ANN. § 39-57-20; TEX. BUS. & COM. CODE ANN. § 41.003; UTAH CODE ANN. § 13-15-2; VA. CODE ANN. § 59.1-263; WASH. REV. CODE ANN. § 19.110.040.

*Providing Locations, Outlets, Accounts or Customers*

Under the proposed rule (assuming there is a solicitation to enter into a new business, and that a “required payment” has been made to the seller) an offer is a business opportunity if the seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:

[furnish] the prospective purchaser with existing or potential locations, outlets, accounts, or customers; require[e], [recommend], or [suggest] one or more locators or lead generating companies; [provide] a list of locator or lead generating companies; [collect] a fee on behalf of one or more locators or lead generating companies; [offer] to furnish a list of locations; or otherwise [assist] the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers.<sup>13</sup>

Without clarification, the activities of direct selling companies might be misconstrued as “providing outlets, accounts or customers.” For example:

- Customers of direct sellers who contact direct selling companies via the Internet or toll-free telephone numbers might be directed by those companies to individual direct sellers. There are no representations that the contacts will actually purchase products. Additionally, direct selling companies may give consumers contact information about local individual direct sellers when consumers request product information or make purchases directly from a direct selling company. The information provided in these circumstances is similar to listings in telephone directories. Individual direct sellers do not expect or rely on these *ad hoc* referrals when they decide to participate in direct selling. Nonetheless, recipients of this information could be misinterpreted as “potential customers” under the proposed rule.
- Similarly, some direct selling companies offer optional business tools to individual direct sellers. These tools include website templates or links to corporate websites and are intended to maintain brand uniformity and promote effective customer service. The availability of these tools to individual direct sellers, on an optional basis, should not be construed as “providing locations, outlets, accounts, or customers” or otherwise trigger the application of the proposed rule to direct sellers in a manner inconsistent with the stated intent of the FTC in its RNPR.

Deletion of “customers” in relevant sections (as set forth in Attachment A) would avoid this potential misapplication of the rule.

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<sup>13</sup> §437.1(l); *See also* §437.1(c)(3)(i-iii), 73 Fed. Reg. 16134, “An offer is a business opportunity if: (3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will: (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices, on premises neither owned nor leased by the purchaser; or (ii) Provide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser’s goods or services; or (iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser’s home.”

*Buy Back Provision*

DSA suggests a minor revision to Subsection (c)(3)(iii) of the Revised rule, regarding representations on the buyback of materials. That section reads:

The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:

...  
(iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, *or provides*, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home. (*emphasis added*)

The inclusion of "provides" is likely intended to be a catch-all phrase, but it expands this definition too broadly and might cause confusion about its meaning. If "or provides" were struck from the buy back provision, that element of the business opportunity definition could not be misconstrued to inappropriately include direct sellers who agree to buy back inventory at the purchaser's request.<sup>14</sup> Clearly, this provision was not intended to nor should it apply to the repurchase of products from individuals who elect to end their direct selling activities and take advantage of this consumer/salesperson protection. Accordingly, DSA proposes a slight modification to Subsection (c)(3)(iii) as follows:

(iii) buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, or modifies, ~~or provides~~, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home."  
(Suggested additions **boldface and underlined**, suggested deletions ~~struck through~~)

This proposed minor change is also consistent with the FTC's commentary, and also addresses one of the questions asked in the RNPR.<sup>15</sup>

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<sup>14</sup> As stated by DSA in its previous comments to the FTC, this buy back program is a cornerstone of the DSA's self-regulatory regime, and a valuable protection for individual direct sellers; the FTC should not want it to trigger coverage of the Business Opportunity rule.

<sup>15</sup> See Question 1, 73 Fed. Reg. 16133.

**Conclusion**

DSA has proposed several amendments to the proposed rule which would address the issues raised in this correspondence. Those suggestions are included as Attachment A. DSA has provided these brief comments and suggested modifications in an effort to continue our productive dialogue with the FTC on how best to protect the American public without inadvertently burdening legitimate direct selling companies.

We trust that the FTC will consider DSA's comments in the supportive and collaborative manner in which they are intended. We would be happy to provide additional information or answer any questions if the FTC would find that useful.

Signature

Attachment





## Attachment A Suggested Amendatory Language

### 437.1 Definitions.

The following definitions shall apply throughout this part:

(c) *Business opportunity* means:

- (1) A commercial arrangement in which the seller solicits a prospective purchaser to enter into a new business; and
- (2) The prospective purchaser makes a required payment; and
- (3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:
  - (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices, on premises neither owned nor leased by the purchaser; or
  - (ii) Provide outlets, **or** accounts, ~~or customers~~, including, but not limited to, Internet outlets, **or** accounts, ~~or customers~~, for the purchaser's goods or services; or
  - (iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, **or** modifies, ~~or provides~~, including but not limited to providing payment for such services as, for example, stuffing

(l) *Providing locations, outlets, accounts, or customers* means furnishing the prospective purchaser with existing ~~or potential~~ locations, outlets, accounts, or customers; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies; collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, **or** accounts, ~~or customers~~.

...

(o) *Required payment* means all consideration that the purchaser must pay to the seller or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the business opportunity. Such payment may be made directly or indirectly through a third-party. A required payment does not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease **or payments for business materials, supplies and equipment sold on a not-for-profit basis.**

(Suggested additions **boldface and underlined**, suggested deletions ~~struck through~~)