Business Opportunity Rule, R511993

REBUTTAL TO COMMENTS OF THE DIRECT SELLING ASSOCIATION IN CONNECTION WITH THE REVISED PROPOSED BUSINESS OPPORTUNITY RULE

PART 2 OF 2

Submitted by Gail Aird

In addition to statements in DSA comment letter in connection with the Revised Proposed rule, the following DSA Comments are subject to Rebuttal:

1. *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. (Emphasis added)

By and thru its reference to its [DSA] “initial comments and rebuttal” wherein the DSA “explained how the previous NPR might have adversely affected direct sellers” its [DSA] comments and rebuttal are incorporated [by reference], including but not limited to DSA statements [that explained] its position [in its initial comments and rebuttal] in connection with the proposed earning disclosure requirements in the NPR; therefore are subject to Rebuttal.

2. DSA's mission is… "[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…conducts an independently administered code of ethics program that protects both customers and salespeople…

DSA statement that its mission is "[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**." is subject to Rebuttal. DSA statement that it “conducts an independently administered code of ethics program **that protects both customers and salespeople** is subject to Rebuttal.

DSA Comments

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…More than 200 companies are members of the association…

Update to the above: In 2007 DSA had 285 members providing MLM compensation to their distributors ("MLM members"). 13.3 million distributors were affiliated with its MLM members; and, collectively DSA MLM members sold $27 billion in products. http://www.dsa.org/pubs/numbers/#COMPSTRUC

UNDISPUTED FACTS:

A. If the FTC includes an absolute exemption under which DSA members will qualify in a final Rule; the FTC will have provided exemption for 13.3 million distributors, affiliated with DSA MLM members, selling MLM Business Opportunities in the US.

B. The FTC determined [that] it is in the best interests of consumers to propose a Business Opportunity Rule in an effort to deter the widespread fraud engaged in, against consumers, by Business Opportunity sellers.

C. In the original proposed Rule the FTC identified earnings claims as the act that its law enforcement history demonstrates "underlies virtually all fraudulent business opportunity schemes". (Part 1 of DSA Rebuttal beginning on page 9.)

Contrary to DSA statements in its comment letters and rebuttal letter; the earnings claims disclosure requirement in the NPR is applicable to MLMs.

When deciding whether to amend a rule, the Commission engages in a multi-step inquiry. Initially, the Commission requires evidence that an existing act or practice is legally unfair or deceptive. The Commission then requires affirmative answers, based upon the preponderance of reliable evidence, to the following four questions:

EARNINGS CLAIMS:

(1) Is the act or practice prevalent?

YES: As admitted by the FTC, its historical experience demonstrates that the making of False or Deception earnings claims is the most prevalent UNLAWFUL unfair or deceptive practice engaged in by all business opportunity sellers. (See part 1 Rebuttal to DSA Comments pages 9-10)

(2) Does a significant harm exist?

YES: As admitted by the FTC, the most significant harm caused to Business Opportunity purchasers is the harm that flows from false or deceptive earnings representations, which according to the FTC is [the] *"single most decisive factor"* in a consumers decision to purchase all Business Opportunities.

(3) Would the rule provisions under consideration reduce that harm?

YES. An earnings claims disclosure document would substantially reduce, if not extinguish the harm that according to the FTC is caused by the making of false or deceptive earnings claims [that] "underlies virtually all fraudulent business opportunity schemes".

(4) Will the benefits of the rule exceed its costs?

BENEFITS: Protecting consumers from the unlawful act the FTC determined "underlies virtually all fraudulent business opportunity schemes" will provide massive benefits to consumers.

COSTS: There are no significant costs [to a Business Opportunity seller] to create an earnings disclosure document.

Any argument by the DSA that providing a one page earnings disclosure document is costly to its members (whose 2007 collective revenue was $27 billion) therefore, should not be required must fall on deaf ears. In order the accept the proposition that the cost to DSA members exceeds benefits to consumers, we would have to accept, *as true*, the proposition that permitting DSA members to engage in the unlawful act that "underlies virtually all fraudulent business opportunity schemes" is justified by the alternative, which is to cause these business opportunity sellers to spend a miniscule portion of their billions of dollars in annual revenue to abide by the law.

Based on the above, the FTC properly included a proposed provision [for inclusion in a final Rule] that business opportunity sellers must give the required earnings disclosure statement to all consumers before they are allowed to pay monies to purchase the business opportunity offered by the seller.

The FTC's law enforcement history demonstrates that the making of earnings claims underlies virtually all fraudulent business opportunity schemes. However, notwithstanding this fact, and for reasons known only to the FTC, it proposes to

exempt MLMs (which would exempt 13.3 million distributors affiliated with DSA members) from the earning claims disclosure requirement.

Question for determination: How did the FTC determine that it was in the best interests of the public to propose to exempt 13.3 million MLM distributors from the earnings disclosure requirements of the proposed Rule?

The Revised Rule

The following excerpts show the FTC's strong belief that the earnings claim disclosure requirement is paramount to protect consumers. (Revised rule beginning on page 63.)

(1) Narrowing the definition of "earnings claims" could ***weaken protections on the most salient feature of the sales presentation*** by allowing sellers to avoid disclosing the numbers of people who, for example, earned enough money to "buy a Porsche," or earned the top level of compensation on an earnings matrix.

(2) Earnings claims lie at the heart of business opportunity fraud, and are typically the enticement that persuades consumers to invest their money.

(3) If the RPBOR were to create opportunity for a potential loophole on this critically important issue, certainly unscrupulous business opportunity sellers would be very quick to exploit it, to the great detriment of consumers.

The Revised Rule

<u>Proposed Section 437.4: The Earnings Claim Document</u>

On its own initiative the Commission ……requires sellers who make earnings claims to disclose the "beginning and ending dates when the represented earnings were achieved," and …disclosure of the "number and percentage of all purchasers during the stated time period who achieved at least the stated level of earnings." The revision clarifies a potential ambiguity: the purchasers who must

be counted are all those who purchased the business opportunity before the ending date when the represented earnings were achieved, not just individuals who purchased the business opportunity during the stated time period…the seller must disclose: “The number and percentage of all persons who purchased the business opportunity prior to the ending date who achieved at least the stated level of earnings.” (Emphasis added)

The Revised Rule

Imposing the earnings disclosures that consumer groups suggest on MLMs is fraught with problems and complexity (beginning on page 46)

Notes: The unedited version discussing the earnings claims document (page 77) omits any reference to the earnings made by distributors on “retail sales” and to purchases made by distributors for personal consumption (not for retail). Therefore the FTC, after reviewing the record, including all comment and rebuttal letters, determined that consideration of “retail sales” and purchases made by distributors for personal consumption (not for retail) was properly excluded from consideration in designing the Earnings Disclosure document.

Reading the entire section it becomes obvious that the FTC disagreed with commenters suggestions that the FTC include retail-based earnings of active and inactive participants (after deducting the costs distributors paid in connection with their distributorship) in an Earnings Disclosure document. The FTC’s reasons for rejecting these commenters’ suggestions are well grounded in fact.

Revised Rule: Retail Sales

Arguments presented by DSA in its comment letters and Rebuttal letter:

1. Consumer advocates advanced a requirement to disclose the retail-based earnings of active and inactive participants, deducting the costs distributors paid. Further complicating the problem are the practical considerations of whether MLMs could, using an industry-wide format, gather reliable information on retail earnings.

2. It may be difficult to determine retail income. While an MLM firm may provide distributors with products, the MLM may not be able to verify the extent to which a distributor has resold the product at retail, is warehousing the product, or bought the product for his or her own personal consumption.

3. Indeed, the potential collusion between MLM companies and distributors to fake the true level of retail sales would undermine the utility of an earnings disclosure based on retail income.

The Earnings Disclosure document does not require disclosure of earnings created on retail sales. Therefore, any problems that may have been created by the disclosure of earnings from retail sales for DSA members; DSA members' 13.3 million distributors; or direct sellers is no longer relevant. Consequently, the FTC has no basis on which it can rely to grant exemption [from the earnings disclosure requirements for any individual or entity based on retail sales.

Revised Rule: Purchase of products for personal consumption/not for retail

Arguments presented by DSA in its comment letters and Rebuttal letter:

1. A meaningful earnings claim disclosure likely would require different disclosures for different levels of participation in the company. For example, how

should such a disclosure treat inactive participants who have joined merely to purchase product for their own use as opposed to active participants.

3. How would one identify participants who are inactive because they only wanted to obtain access to the product at wholesale prices.

4. In addition, many commenters point out that MLM participants use their membership to *purchase products at a discount* for their own personal consumption.

5. Footnote 145: The issue of inactive participants who are only interested in obtaining product at wholesale prices appears to be unique to MLMs. As far as the Commission is aware, this complication does not arise in other forms of business opportunities.

The purchase for personal consumption is a widespread industry practice of all Business Opportunities; MLMs; DSA members and direct sellers (including direct sellers that use a single-level compensation model). Any reliance by FTC that this practice is “unique to MLMs” is ungrounded in fact; therefore, is no longer relevant. The earnings disclosure document does not address these purchases or require any disclosures in connection thereto. Therefore, the FTC has no basis on which it can rely to grant exemption [from the earnings disclosure requirements] for any individual or entity based on purchases made for personal consumption and not for retail.

The Revised Rule

Additional “problems and complexity” with the MLM industry the FTC cites in support of its decision to exclude 13.3 million distributors from the earnings disclosure requirements of the Rule.

Arguments presented by DSA in its comment letters and Rebuttal letter:

1. How long after a participant's last sale should he or she be considered "inactive"?

The FTC has already considered, and reject the above in connection with the earnings disclosure requirements when it included the following in the Earnings Disclosure requirements: "the purchasers who must be counted are all those who purchased the business opportunity before the ending date when the represented earnings were achieved, not just individuals who purchased the business opportunity during the stated time period"..

2. MLM companies often have complicated compensation schedules that offer greater compensation for greater sales volume.

The source of earnings such as through "greater sales volume" derived through a "complicated compensation schedule" is not relevant to the determination of if an earnings representation is false or deceptive; therefore, is not relevant to the decision to include or exempt 13.3 million distributors from the earnings disclosure requirements of the Rule.

3. Because there likely is an earnings disparity between new MLM recruits and distributors who have well-established down-lines…

By the very nature of being a new recruit there will be an earnings disparity between the new recruit and distributors who have either established a base of customers or established a base of downline recruits. This applies to all

Business Opportunities; MLMs; DSA members and direct sellers, including sellers that provide a single level compensation model. Therefore, it cannot be used as a reason in support of exempting 13.3 million distributors from the earnings disclosure requirements of the Rule.

If the FTC is concerned by the likely earnings disparity, instead of exempting 13.3 million distributors from the earnings disclosure requirements of the Rule; the FTC has a simple solution at its disposal, which is to add the following (part 2) to the Earnings Disclosure document:

The Earnings Disclosure document "requires sellers who make earnings claims [based on override commissions or bonuses received as the result of their direct and indirect recruits purchase of products] to disclose the "beginning and ending dates when the represented [override] earnings were achieved,"; include the total number of direct and in-direct recruits in the downline of the person making the earnings representation; and, disclosure of the "number and percentage of all purchasers during the stated time period who achieved at least the stated level of [override]earnings."

4. More broadly, a number of issues would make it difficult to craft an industry-wide rule on a proper earnings disclosure, as proposed above. A meaningful earnings claim disclosure likely would require different disclosures for different levels of participation in the company.

It is the earnings claims represented to potential distributor recruits that causes fraud upon consumers. The "level' [within the sellers' organization] of the distributor who makes earnings representations is not relevant to the determination of whether or not the earnings representation is false or deceptive.

Ironically, the most egregious and outlandish earnings and lifestyle claims are made by high level distributors (who have amassed significant downlines) without disclosure of the material fact that, absent the prospect's ability to recruit hundreds, if not thousands of consumers into their direct and in-direct downlines these consumers have no reasonable expectation of achieving the financial success achieved by the maker of the earnings representations.

Recruiting is the lifeblood of all Business Opportunity Sellers; MLMs; DSA members and Direct Sellers

There is no dispute as to the fact that all business opportunity sellers must continually recruit new distributors to replace those dropping out. Whether distributors drop out because they could not achieve the financial success they hoped for; earned their target income for a specific purpose; or, just decided that the opportunity was not right for their needs does not extinguish the fact that recruiting new distributors on a continual basis is the foundation upon which all Business Opportunity sellers' financial survival is built.

As the FTC correctly stated in its MLM definition it is "because they [distributors] earn a commission from the sales their recruits make, [that] each member in the MLM network has an incentive to continue recruiting additional sales representatives into their "down lines".

But for the fact that distributors earn commission from sales made by their direct and in-direct recruits (downlines) the incentive to use false or deceptive earnings claims that the FTC admits "*underlies virtually **all** fraudulent business opportunity schemes"* and are "highly relevant to consumers in making their investment

decisions and typically are the single most decisive factor in such decisions would be extinguished.

Revised Rule

The Revised Rule (page 51) admits that numerous commenters (which the record of this rule making process identifies as DSA members and distributors of MLMs and direct sellers): Made numerous “valid points about the direct cost of complying and the indirect cost of loss of recruitment”; “with a dwindled sales force, there would be a consequent drop in the sale of product”; and “the cost to one MLM, Primerica [a DSA member] would be $1 billion over ten years”.

The component of the proposed Rule that has the potential to cause a massive drop in recruitment is the earnings disclosure requirement.

In truth and in fact, if the 13.3 million distributors purposed for exemption were required to comply with the proposed earnings disclosure requirements they would be prevented from engaging in what the FTC’s law enforcement history proves to be the most significant harm caused to Business Opportunity purchasers, which is the harm that flows from false or deceptive earnings representations which is [the] *“single most decisive factor”* in a consumers decision to purchase all Business Opportunities.

The FTC’ proposal to create a “loophole” that will allow 13.3 million distributors exemption from the earnings disclosure requirements of the rule is in direct conflict with the FTC statement that:

> “If the RPBOR were to create opportunity for a potential loophole on this *critically important issue*, certainly unscrupulous business opportunity sellers would be very quick to exploit it, to the great detriment of consumers.

All of the reasons the FTC presents in support of its decision to propose exemption for MLMs (including DSA members and their 13.3 million distributors) [from the earnings disclosure requirements of the Rule] do not withstand scrutiny. Notwithstanding this, and all the facts provided herein, the FTC concludes the section with: In view of these difficulties, the Commission at this time believes it is more cost effective to challenge deceptive MLM practices through targeted law enforcement under Section *5.*

Will providing exemption from the earnings disclosure requirements of the Rule extinguish the FTC's jurisdiction over the exempt entities and individuals for violations of false or deceptive claims under Section 5?

If the FTC includes any provision in the final Rule that allows an absolute exemption for MLMs, including DSA members and their 13.3 million distributors, the FTC will have provided such exemption while in construct receipt of compelling evidence that the DSA knowingly and willingly allows its members to violate Section 5 of the FTC. (Part 1 of DSA Rebuttal beginning on page 11)

The following is based on the premise that the final rule provides an absolute exemption under which MLMs, including DSA members and their 13.3 million distributors, will qualify. The legal issues include, but are not limited to, anticipated defenses that could be brought by the entities and distributors qualifying for exemption under a final Rule. The legal issues are expressly limited to addressing a situation in which the FTC or private Plaintiffs file a federal action against an exempt entity or distributor alleging false or deceptive earnings claims under Section 5 of the FTC Act.

Basis of argument: By and thru the exemption granted from the Rule the FTC relinquished both its personal and subject matter jurisdiction over the exempt individuals and entities for violation of Section 5 of the FTC Act as it flows to False or Deceptive earnings claims.

REVISED RULE: Footnote 153: Regardless of whether it is covered by the proposed rule, if a business makes earnings claims, including through the use of testimonials, such claims must be truthful and must be substantiated, under Section 5 of the FTC Act.

Note: DSA members and distributors affiliated with a DSA member are referred to as "DSA Member".

Anticipated Arguments of DSA Member:

(1) Defendant is a member of the Direct Selling Association ("DSA").

(2) The earnings claims and testimonials made by Defendant are truthful; the Defendant possesses substantiation that the earnings claims appearing in the subject testimonials represent the actual earnings made by the maker of the statement; and, the earnings claims and testimonials made by Defendant comply with the DSA Code of Ethics, Section 8 (Earnings Representations).

(3) The rulemaking record in connection with the Business Opportunity Rule includes, but is not limited to, notice to the FTC that the DSA's Code of Ethics, Section 8 (Earnings Representations) provides that the DSA does not determine the validity or lack thereof of earnings claims by and thru the ample legal

precedent in the form of FTC decisions or as enumerated in Section 5 of the FTC Act.

(4) All information contained in the record of rulemaking (including without limitation the material information in number 3 above) was information known to [and considered by] the FTC at the time the final Rule was authorized and issued, which final Rule included an exemption from the ambit of the Rule under which the Defendant qualified.

5. The FTC, with full knowledge of the fact that DSA members are not required (under DSA Code of Ethics Section 8) to abide by the terms and conditions as enumerated under Section 5 of the FTC Act in connection with earnings representations provided the exemption [in the Rule] under which Defendant qualified.

Based on the above, the FTC does not possess jurisdiction over the Defendant or the subject matter of the Complaint.

DSA Comments

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**…it is important to modify the definitions set forth in §437.1 of the proposed rule to avoid any possible ambiguity. (Emphasis added)

The DSA realized that although it prevailed in convincing the FTC to provide exemption for MLMs, the pressure exerted on the FTC by its lobbyists fell short of its goal to convince the FTC to provide an absolute exemption for DSA members and their 13.3 million distributors. Each of the subsequent requests in

its comment letter are made to accomplish what its lobbyist couldn't---which is to convince the FTC to provide absolute exemption for DSA members and their 13.3 million distributors

DSA Suggested Clarifications

In its initial comments and rebuttal …DSA explained how the previous NPR might have adversely affected direct sellers…without commensurate benefit to consumers. The FTC recognized that danger, and thus clarified repeatedly… that the revised rule is **not intended to cover direct sellers….**DSA seeks a limitation on what constitutes a "required payment" under the definition of business opportunity…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… (Emphasis added)

The FTC, wisely and appropriately did not propose exemption for "direct sellers" Direct selling is defined as the sale of a consumer product or service, person-to-person, away from a fixed retail location. www.dsa.org . The exemption of all direct sellers would have wrecked havoc on the FTC and would have literally extinguished the FTC's authority to bring an action against any Business Opportunity seller; MLM; Direct Seller and any entity whatsoever that conducts sales away from a fixed retail location.

DSA Comments

Business Opportunity Definition: …several elements…may unintentionally include **non-business opportunity activities…** 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 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" regard ing buybacks of materials. (Emphasis added)

Required Payment

…A "business opportunity" as defined by the proposed rule requires a prospective purchaser to "make a required payment." 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. (Emphasis added)

Re: Bona fide wholesale price

A “bona fide wholesale price” is the lowest price charged by the company to a member of its salesforce. In truth and in fact, the right to purchase a company’s products at “bona fide wholesales prices” is expressly limited to the distributors who have reached the very top of the compensation structure (distributors that earn the highest percentage of commissions as well as receive the highest allowable bonuses, royalty overrides, etc.) on their personal purchases (single level compensation model) and on their personal purchases and on the purchases made by their direct and in-direct downline recruits (MLM compensation model).

The majority of MLMs, including DSA members, have what is commonly referred to as a 2-tier compensation mode. Tier-1 commissions are paid on the distributors personal purchase volume from the company. Tier-2 commissions (the highest commission payouts) are paid on the distributors personal purchase volume and the purchase volume of its direct and in-direct downline distributors. Tier-2 commission also include bonuses; royalty overrides, etc. Therefore, it is literally impossible for a new distributor recruit (a consumer purchasing a

Business Opportunity) to qualify to receive the lowest price charged (purchase price less applicable percentage of commission) by the company to a member of is salesforce, i.e., to purchase reasonable amounts of inventory at bona fide wholesale prices. I am not presenting this information to dispute the reasonableness of this practice.

In its most recent comment letter, the DSA agrees that the FTC properly excluded [from the required payment provision] the purchase of inventory at bona fide wholesale prices. However, DSA members do not sell products to new recruits at bona fide wholesale prices. If the FTC retains the bona fide wholesale purchase exemption [from the required payment provision] in a final Rule, DSA members will continue selling new recruits inventory at a price in excess of bona fide wholesale prices and the FTC will be powerless to stop this practice.

DSA's version of a bona fide wholesale price is a reduction of the price by the percent of commission granted to new recruits, which is typically the lowest commission [price reduction] paid to any distributor; with the remaining available commissions (difference between lowest commission paid and highest commissions paid (including bonuses and royalty overrides) being paid [out of the new recruits purchase price] to her/his upline distributors.

DSA members and MLMs do not allow new recruits to purchase at bona fide wholesale prices and there is no way the FTC can scrutinize Business Opportunity sellers to determine if they established a bona fide wholesale purchase provision. Therefore, I respectfully request that the FTC remove the purposed exemption for purchases at bona fide wholesale prices from a final Rule.

DSA Comments continued…the required payment element …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…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…

Rebuttal to the above is presented, at length, in Part 1 of this rebuttal beginning on page 23. Encapsulated: DSA allows its members to sell "the certain materials" referenced above to distributors on a for-profit basis.

DSA like its members, create profit on various products and services purchased by its members and their distributors. Specifically, DSA has 243 approved vendors that provide every conceivable product and service to its members and their distributors. DSA members deal directly with DSA vendors; therefore, DSA has no involvement in [or costs in connection with] purchases made by their members. Vendors pay DSA substantial amounts of money for the right be an approved DSA vendor. I am not disputing the legitimacy of this practice. http://www.dsa.org/forms/CompanyFormPublicSuppliers/search?action=find

DSA Comments
Providing Locations, Outlets, Accounts or Customers

Under the proposed rule…an offer is a business opportunity if the seller… 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.

…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...direct selling companies may give consumers contact information about local individual direct sellers …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. (Emphasis added)

IF IT WALKS LIKE A DUCK AND QUACKS LIKE A DUCK—IT'S A DUCK!

The majority of DSA members have what is commonly referred to as "Company" leads. It is a relatively common practice for consumers to call a specific company to inquire about its products; its business opportunity or to find a distributor in their area. Since by contacting the company (either via the internet or telephone) these consumers have expressed an interest in the company's products or business opportunity these leads are considered the "hottest customer/recruiting leads in the industry". Contrary to DSA's statement that "Individual direct sellers do not expect or rely on these *ad hoc* referrals when they decide to participate in direct selling" it is a common practice of Business Opportunity sellers; MLMs; DSA members and direct sellers to inform potential distributor recruits that have an opportunity to receive a portion of these leads. The reality, however, is that in many cases the company gives these leads ('the hottest customer/recruiting leads in the industry") to its more senior distributors.

DSA Comments

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.

The above is addressed in Part 1 of this Rebuttal beginning on page 26. Encapsulated: Short and simple--distributor websites are used to recruit consumers into MLM business opportunities.

Additionally, a significant portion of DSA members require its distributors to purchase and pay a monthly fee for a distributor website as a condition requisite to (1) place product orders via the internet; (2) submit recruitment applications to the company over the internet; and (3) to access their distributor reports (including purchase volume; commissions pending; volume and override commission as the result of their direct and in-direct distributors purchase and recruiting activity). I am not challenging the legitimacy of this practice; I offer this information to enable the FTC to understand the issue.

Let’s see, what else does the DSA believe might bring its members and their 13. 3 million distributors under the ambit of the Rule (contrary to the FTC’s expressed intent)?

DSA Comments

Buy Back Provision

DSA suggests a minor revision to…the Revised rule, regarding representations on the buyback of materials….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….Accordingly, DSA proposes a slight modification…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~~

Why would the DSA be concerned by the words "or provides"?

One example jumps to the forefront---many DSA members either directly thru the Company, Company approved lead vendors, or its distributors market and sell [provide] "customer leads" to their salesforce. Leads are sold on a non-refundable basis. The "leads" business is quote robust. Some distributors believe that purchasing leads is a great investment and have success turning the leads into purchasers or recruits. On the other end of the scale, there are distributors who believe the leads purchased were worthless.

Pre-Paid Legal, a DSA member, provides a membership retention service ($5.95 for each US membership and $6.95 for each Canadian membership) for each customer (a consumer who purchases a Pre-Paid Legal membership plan) to have Pre-Paid employees communicate with the plan purchaser in an effort to

keep the purchaser happy with her/his purchase; thus retaining the membership longer. These fees, like the fees paid to purchase leads, are non-refundable. http://www.newmexicoppl.com/documents/MASRegistration.pdf

A pattern is unfolding and I hope the FTC takes strict notice. The DSA attacks component after component of the propose Rule under the [false] proposition that the FTC's intent was to expressly exempt DSA members and their 13.3 million distributors from the ambit of the Rule.

The question that must be asked: Is it the intent of the FTC to provide absolute exemption from all provisions of a final Rule, including without limitation from the earning disclosure requirements proposed, for DSA members and their 13.3 million distributors?

Does the DSA engage in acts or practices in direct violation of Section 5 of the FTC act?

According to the DSA its mission includes ensuring that the marketing by member companies of products and/or the direct sales opportunity is conducted with the highest level of business ethics and the cornerstone of the Association's commitment to ethical business practices is its Code of Ethics. http://www.dsa.org/about/

FACTS: The FTC's law enforcement history demonstrates that the making of earnings claims underlies virtually all fraudulent business opportunity schemes. In the FTC's experience, such claims are highly relevant to consumers in making their investment decisions and typically are the single most decisive factor in such decisions.

DSA knowingly and willingly allows its members to make false or deceptive earnings representations in direction violation of Section 5 of the FTC Act. Given this fact, there is no theory that could support the proposition that DSA members conduct their business enterprises with the “highest level of business ethics”. (Details and supporting proof is found beginning on page 11 in Part 1 of this Rebuttal)

The cost to become a DSA member includes the payment of an initial fee plus the payment of a percentage of each member’s sales revenue on an annual basis. In 2007, for example, the DSA received an unknown percentage of the $27 billion of products sold by its members.

There is no disagreement that recruiting new distributors is the lifeblood of DSA members. All other arguments notwithstanding, the DSA must protect its members from being brought within the ambit of the earnings disclosure requirements, as currently proposed.

If DSA members are forced to present the earnings disclosures [as currently proposed] to potential distributor recruits its members’ recruiting will severely diminish. The DSA’s financial survival is dependent upon receiving a percentage of its members’ sales revenue on an annual basis. Since diminished recruiting equates to diminished sales revenue, the DSA has a direct financial interest in protecting its members from the earning disclosure requirement.

DSA’s financial stake in the outcome of a final Rule creates an overwhelming conflict [of interest] in connection with its dealing with the FTC in connection with the proposed Rule.

The influence of the DSA permeates the Revised Rule to the point where an argument could be made that the DSA created the argument (thru its comment and rebuttal letters) the FTC presented in support of its proposed threshold MLM exemption and its decision to exclude MLMs from the earnings disclosure requirements of the proposed Rule.

As presented earlier in this Rebuttal each argument [provided by the DSA] cited by the FTC in support of exempting DSA members from the earnings disclosure requirements of the Rule, as proposed, does not withstand scrutiny.

My personal belief is that the DSA and its lobbyists bombarded the FTC with purported facts and data that , given the FTC's confidence in the integrity of the DSA was relied upon by the FTC, to its determinant to represent a true and accurate presentation of the facts and data presented.

DSA, is a non-profit tax exempt organization. In the past some non-profits have successfully used their tax-exempt status to block FTC enforcement actions.

The lack of FTC authority over nonprofits drew the attention of Senators Daniel Inouye (D-HI) and Byron Dorgan (D-ND). In an effort to grant the FTC absolute authority over nonprofits, Senators Inouye and Dorgan have introduced S.2831 ("THE BILL") the "FTC Reauthorization Act of 2008".

The Bill seeks to expand the FTC's authority to regulate non-profits for Unfair or Deceptive acts or practices by, among other things, expanding the definition of "corporation" to include tax code Section 501(c)(3) and 501(c)(4) organizations.
http://commerce.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=4585a51b-530e-4d5a-8c95-a627b52d1573&Month=4&Year=2008

I believe this Rebuttal (parts 1 and 2) presents a compelling set of facts and circumstance that give rise to the conclusion that the DSA engages in Unfair and Deceptive practices as enumerated under Section 5 of the FTC. Act. Others, including the FTC may disagree with my beliefs.

I respectfully ask the FTC to investigate all claims made within the four corners of the entire Rebuttal to determine:

A. If (assuming the Bill is passed, as proposed) the results of such investigation supports my belief that an action against the DSA for Unfair and Deceptive practices, as enumerated under Section 5 of the FTC, is warranted.

B. If it is appropriate for the FTC to allow the DSA to participate in any workshops or meetings that may be held [by the FTC] in connection with the Proposed Rule.

C. If it is appropriate for the FTC to strike any or all DSA statements presented in its comment and rebuttal letters, or any other communication of any kind or nature whatsoever (including communications by and between the FTC and DSA lobbyists) from the record of this rulemaking process.

I know the DSA used the full force of its power, including the power of its lobbyist and their access to senior politicians to convince the FTC to exempt its members and their 13.3 million distributors from a final Rule. I also know that the FTC, out of necessity, includes political considerations in their decisions.

In the course of researching the proposed Rule I read all DSA comments and rebuttals and numerous other comments and rebuttals (both pro and con). This process revealed that the FTC is dead-on regarding its position that False or Deceptive earning representations are the bedrock upon which Business Opportunity fraud is built.

There is only one way the FTC can protect consumers from the False or Deceptive earnings representations upon which Business Opportunity is built—which is to remove the proposed MLM exemption from a final Rule and include a clear statement that all business opportunities; MLMs; and Direct Sellers are brought under the ambit of a final Rule.

It is past the point in time, given the information included in the record of this rulemaking process (including, but not limited to parts 1 and 2 of this Rebuttal) where the FTC's support of any exemption under which DSA members and their 13.3 million distributors will qualify can withstand scrutiny.

The FTC does not have to continue to let its staff be subjected to pressure from the DSA; its lobbyists and their high level political contacts. The FTC can easily remove itself from these pressures by a simple statement to the DSA:

> **In the past the FTC was inclined to provide the exemption you requested; however, as the record of this rulemaking expanded we determined that, as a matter of law, we are unable to grant your request at the present time.**