FEDERAL TRADE COMMISSION
Project No. R511993

REBUTTAL COMMENT
of
PRIMERICA FINANCIAL SERVICES, INC.
on the
REVISED NOTICE OF PROPOSED RULEMAKING
on the
BUSINESS OPPORTUNITY RULE
R511993

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Peter Schneider, Esq.
Alexis Ginn, Esq.
Suzanne Loomis, Esq.
Primerica Financial Services, Inc.
3120 Breckinridge Boulevard
Duluth, GA 30099
(770) 381-1000

Timothy J. Muris, Esq.
J. Howard Beales, III, Consultant
O'Melveny & Myers, LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

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I. INTRODUCTION AND SUMMARY OF REBUTTAL COMMENT

The comments in the record of this Rulemaking – including the massive number of comments submitted in response to the original Notice and the much smaller number of comments submitted in response to the Revised Notice of Proposed Rulemaking – demonstrate that the Commission's decision to narrow the original rule's coverage, as reflected in the Revised Proposed Business Opportunity Rule (RPBOR), was both sound and indeed compelled by the evidence in the record. Primerica submits this Rebuttal Comment to reinforce this point and to demonstrate why the handful of commenters who disagree with the Commission's decision have failed to provide any credible evidence to support their position. This Rebuttal Comment addresses the need to make slight changes to the language of the RPBOR to implement unambiguously the Commission's intent to narrow the proposed Rule's coverage. Even among advocates of the RPBOR, commenters proposed many language changes in response to the Revised Notice to achieve this objective. The bottom line remains, however, that the record of this Rulemaking, taken as a whole, establishes that the Rule should not cover legitimate multi-level marketing companies. The draconian costs to the millions of Americans who participate in such businesses far outweighs any potential benefit to consumers.

II. THE RULEMAKING RECORD SUPPORTS THE EXCLUSION OF MULTI-LEVEL MARKETING

Even though the Revised Notice of Public Rulemaking elicited comparatively few public comments, the comments received in response to the original Notice remain part of the record of this Rulemaking. Those comments provide overwhelming evidence that the Rule should not cover multi-level marketing opportunities. The approximately 17,000 comments on the original

proposal make clear that a *very* large number of individual participants in multi-level marketing opportunities feel their participation is both personally and financially rewarding, and wanted the Commission to know it.[1]

In contrast, an *extremely* small number of commenters have advocated covering multi-level marketing businesses, both in response to the original Notice and the Revised Notice. Most of these comments are from self-appointed "advocates," not participants in direct selling businesses. We discuss the flawed logic and lack of evidence supporting these comments below, but the undeniable fact is that thousands of participants in multi-level marketing opportunities wrote to the Commission, and overwhelmingly opposed any Rule that would cover multi-level marketing. These numbers speak for themselves: this is not an industry in need of new and burdensome regulation.

The record also establishes other critical facts that support the narrowed coverage of the RPBOR:

- Multi-level marketing companies are frequently large, long-lived, and well-established businesses;[2]
- Multi-level marketing companies provide an entrepreneurial opportunity to millions of Americans who wish to work part-time or cannot work in a traditional employment setting;[3]

[1] *See also* DSA Comment 522418-12055 at 10-15 (providing statistical and anecdotal evidence of the contribution of multi-level marketing opportunities to participants' lives).

[2] *See* DSA Comment 522418-12055 at 9.

[3] *See* Primerica Comment 522418-11929 at 8-10; DSA Comment 522418-12055 at 10-15.

- The costs of covering multi-level marketing opportunities under the Rule as originally proposed would have been staggering, both for the companies that offer those opportunities and the individuals who derive income from participating in them;[4]
- The original Proposed Rule would have imposed disproportionate burdens on the largest, longest-lived and most accountable multi-level companies, with little or no disclosure burden on short-lived "fly by night" scams, who would not likely comply with the Rule in any event.[5]

No credible evidence in the Rulemaking record challenges these facts. Certainly those few comments on the RPBOR that advocate expanding the Rule to cover multi-level marketing provide no evidence that could even approach the record supporting the Commission's conclusion that multi-level marketing opportunities should not be covered. Taking the Rulemaking record as a whole, there is still only one rational conclusion that can be drawn: the Rule should exclude multi-level marketers.

III. THE COMMENTS PROVIDE NO CREDIBLE EVIDENCE OR REASONING TO SUPPORT A BROADER RULE

In stark contrast to the facts and evidence offered by both multi-level marketing companies and their participants, the small number of commenters who continue to argue for the inclusion of multi-level marketing companies in the RPBOR (or the abandonment of the Rule altogether if the Commission does not agree with their agenda) offer nothing but assertions and speculation. They ask the Commission to *assume* widespread fraud in the multi-level marketing industry, without offering evidence, and then suggest that the Commission should further *assume*

[4] *See* Primerica Comment 522418-11929 at 14-15 & 27-30; DSA Comment 522418-12055 at 20-36.

[5] *See* Primerica Comment 522418-11929 at 15-27.

that countless victims do not voice their complaints. These assertions are based on undisclosed "research" and therefore fail to provide any record evidence to support revisiting the Commission's decision to exclude multi-level marketing.[6]

For example, one commenter asserts the Commission should assume that, for every complaint it has received about multi-level marketing, there are 500 additional injured consumers who have not complained.[7] The sole support for this assumption is the commenter's undisclosed research.[8] Speculation about the existence of such "victims" is not evidence. The Commission has correctly disregarded such assertions in reaching its conclusions; their reassertion provides no reason to revisit or revise those conclusions.

Similarly, one comment reiterates five purported "red flags" set forth in to identify that an arrangement is a pyramid scheme, but offers no response to the criticisms of these "flags" presented in the rebuttal comments on the original proposal. These "flags" ask whether a person is required to "pay to play" to participate in the arrangement,[9] participants are rewarded solely for recruiting, and compensation is greater for recruiting than it is for selling products to retail customers.[10] As noted in its rebuttal comment on the original proposal, Primerica agrees that these are relevant elements of a pyramid scheme, but they do not apply to Primerica or many other direct selling companies. Rather than address the evidence, the comment simply reasserts

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[6] *See* Comment 535221-00006 at 1 (reference to unspecified "14 years of research"); Comment 535221-00006 at 2 (reliance on undisclosed "years of research, including consultation with the top experts in the field"); Comment 535221-00057 at 2 (relying on unspecified "recent research").

[7] *See* Taylor Comment 535221-00006 at 1.

[8] *Id.*

[9] As noted in Primerica's original comment, this notion of "pay to play" is considerably narrower than the original proposed Rule's concept that *any* consideration creates a covered business opportunity. *See* Comment No. 522418-11929 at 40-41.

[10] *See* Comment No. 522418-12585.

the flags are red, and adds the new and unsupported assertion that they apply to Primerica. As Primerica's original comment makes clear, however it does not require any payments for the *right* to be an agent, and its compensation system is based entirely on sales of insurance and financial products.

As noted in Primerica's rebuttal comment, the "five red flags" include arbitrary and unsupported criteria involving the number of levels of an organization (more than five levels is a red flag) and the relationship between commissions to the distributor making the sale and others in the organization (more total commissions to higher levels than to the agent who makes the sale is a red flag). There was no basis for these "criteria" in the original comment, and none is offered now. Entirely conventional organizational forms have substantially more than five levels of employment relationships. A manufacturer who sells to a wholesaler who sells to retailers may appear to involve three levels. But the manufacturer has (at least) a CEO, a manager, an assistant manager, and a production worker. The distributor and the retailer have a similar structure. If the different levels are revealed explicitly – as they are in the contracts that organize a multi-level marketer – there could be at least 12 levels between the top of the organization and the consumer.

The red flag based on commissions faces similar problems. It would be highly unusual for the retail clerk who makes the final sale in a conventional distribution arrangement to earn a commission that exceeded the total payments to his or her "upline" – the higher levels of the economic organization. Again, what is commonplace in multilevel marketers also exists in other organizational forms. There is no basis whatsoever for the Commission to second-guess these organizational arrangements simply because multi level marketers are organized through contracts rather than employment relationships.

More fundamentally, a compensation system is not "pyramid-like" if the reward for making a sale is greater than the reward for recruiting a new participant. Again, with respect to Primerica, no money is earned simply by recruiting a new agent. In Primerica, regardless of the number of levels of override commissions or the aggregate total of those commissions, an individual agent *always* will earn a greater commission if she sells an insurance policy or other product herself than if she recruits a downline agent (for which she is paid nothing) or if a recruited agent makes the identical sale, for which the recruiting agent receives only a percentage of the commission. Downline agents are only attractive if they *increase* sales – a result that is good for Primerica, good for the recruiting agent, and good for consumers as well.

Those few comments criticizing the Commission's decision to exclude multi-level marketing opportunities from the RPBOR are rich in speculation, but provide nothing in the way of supporting evidence. The absence of such evidence, coupled with the overwhelming support provided by participants in multi-level marketing for the exclusion of such opportunities from the Rule, shows that there is no need for the Commission to reverse that decision.

IV. PROPOSALS REGARDING LANGUAGE CHANGES TO THE RPBOR

In its original comment on the Revised Notice, Primerica addressed whether the text of the RPBOR was still too broad and threatened to sweep in multi-level marketing or other types of companies that the Commission did not intend to cover. As Primerica's comment noted, the language of the RPBOR should be adjusted to implement the intent expressed in the Revised Notice with less ambiguity. Several other comments, submitted by the Direct Selling

Association, other multi-level marketing companies,[11] and representatives of other industries such as the sellers of educational materials[12] or independent bakeries[13] have expressed the same concerns. Based on the comments, some adjustment to the definition of "business opportunity" is needed to ensure that the coverage of the final Rule is limited to the arrangements the Commission wishes to cover.

Primerica continues to believe that its suggestions are the most workable way to exclude multi-level marketing companies and other industries from the proposed Rule, but it does not oppose any language change that accomplishes the same result. It is the Commission's obligation to adopt language that will ensure that the rule covers the types of arrangements it seeks to cover without sweeping too broadly. Nevertheless, the comments clearly establish that the RPBOR can be read to sweep more broadly than the Commission intended, and that some revision to resolve this concern is needed.

V. CONCLUSION

We appreciate the Commission's continued approach to considering and weighing the entire Rulemaking record and adjusting the proposed Rule accordingly. As noted in Primerica's comment in response to the RPBOR, we do not believe hearings or a workshop are necessary in this Rulemaking proceeding, but if either occurs, we would like to participate. Primerica's original comment on the RPBOR, and this rebuttal comment, represent its expected testimony.

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[11] *See, e.g.*, Comments of Direct Selling Association, 535221-00050; Mary Kay, 535221-00041; Pre-Paid Legal Services, Inc., 535221-00049; Tupperware Brands, 535221-00031.

[12] *See* Comment of Gary Hailey, Venable, LLP, 535221-00024.

[13] *See* Comment of Independent Bakers Association. 535221-00027.