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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: Revised Proposed Business Opportunity Rule**
**Rebuttal to Comments of Direct Selling Association**

Dear Secretary Clark:

I am submitting this letter as a rebuttal to the Comments of the Direct Selling Association (DSA) on the Federal Trade Commission's March 26, 2008 Revised Notice of Proposed Rulemaking (RNPR) regarding Business Opportunities, amending 16 CFR Part 437.[1] My prior submission, dated July 16, 2006, in response to the Commission's April 12, 2006 Notice of Proposed Rulemaking (NPR), including my statement of interest, is incorporated by reference herein. I respectfully request the opportunity to be heard at any public hearing or public workshop the Commission may hold on this matter. I would expect to testify and cross-examine witnesses on the subjects set forth in my submissions in response to the NPR and RNPR.

Not content with gutting the Initial Proposed Business Opportunity Rule (IPBOR), the DSA now seeks to immunize from regulatory scrutiny some of the most egregious conduct of MLM promoters, involving the sale of "business materials".

I would first note that throughout its Comments, the DSA carefully substitutes the phrase "direct selling" for multilevel marketing or, as the Commission itself refers to it, "MLM." This point may seem trivial, but it goes to the heart of what motivated the sophisticated public relations and lobbying campaign engineered by the DSA and the MLM industry, which included inundating the Commission with thousands of cookie cutter "comments" by persons who have

[1] *See* Letter of Christine Varney dated May 27, 2008 (hereinafter "DSA Comments").

by now, two years later, probably dropped out of their respective MLM firms, having lost most of their investment of time and money pursuing a fruitless and fraudulent business "opportunity."[2] The reason the DSA avoids using the term MLM is that most American consumers have either themselves been burned, or know someone who has been burned, by participating in MLM, and cannot be enticed to a business opportunity meeting if they know it involves MLM. The term "direct selling", however, does not (yet) carry the imprimatur of failure. In its eagerness to control the vocabulary of this debate, the DSA has made some obviously false statements, i.e., "[t]he FTC ... clarified ... that the revised rule is not intended to cover direct sellers" and "the FTC has made clear that direct sellers are outside the scope of the RPBOR." DSA Comment at p. 3. There is absolutely nothing in the RNPR which supports the DSA's assertions that the Commission intended to exempt direct sellers from the RPBOR.

It should be noted that the RPBOR does *not* exempt all MLM firms. Many MLM firms, including prominent members of the DSA, will be subject to the RPBOR because (a) their "wholesale prices" are not "bona fide" and/or (b) the purchases required to ascend the various levels of the scheme exceed "reasonable amounts of inventory." I reference the comments of Pyramid Scheme Alert, Consumer Awareness Institute and Gail Aird, which deal with these issues in detail.

The DSA seeks to expand the scope of the "MLM exemption" by treating "business materials" in the same manner as "reasonable amounts of inventory at bona fide wholesale prices for resale or lease" in the RPBOR's definition of business opportunity. *See* DSA Comments at pp. 3-4. As discussed in my prior submission, the sale of promotional materials and techniques, sometimes referred to as "books and tapes", "business methods" or "lead generation systems," has become an increasingly important aspect of MLM business opportunities, and an increasingly significant cause of harm to MLM participants. *See* Brooks submission of July 16, 2006, at pp. 4-6. The DSA's effort to exempt business opportunities involving the sale of "business materials on a not-for profit basis" should be rejected. First, who determines whether the business materials at issue are truly being sold "at cost"? As explained in the comments submitted by Eric Scheibeler in response to the NPR, high level Amway/Quixtar distributors typically represented that they were selling books and tapes, and charging for attendance at

[2] My assertion is supported by documents and statistics which have been produced in half a dozen lawsuits against MLM firms subject to confidentiality orders, as well as interviews and communications with hundreds of former MLM distributors over a period of 15 years. My experience suggests that the vast majority of MLM distributors lose money and drop out within about a year. The DSA and the MLM firms which have submitted comments to the Commission have sole possession and control of the statistics concerning the performance of their distributors, and would presumably have produced this information if it refuted my statements. They have not done so.

motivational meetings "at cost" but were in fact making more profit in this part of their business than in the traditional MLM part of their business. *See also* Carter, Ruth, Amway Motivational Organizations: Beyond the Smoke and Mirrors (Backstreet Publishing, 1999).[3] A seller of business opportunity materials may easily shift "soft costs" on his or her income statement so as to create the appearance that the materials are being sold "at cost" when, in fact, the sale of such materials makes the difference between breaking even and earning a profit.

Second, for the consumer who purchases these materials, it is irrelevant whether the MLM company or high level distributor makes a profit or not; the fact is that unlike the purchase of products for resale, the consumer cannot recoup his investment by reselling the business materials.[4] While I respectfully disagree with the Commission's determination to exempt MLM firms from the RPBOR, the Commissions' justifications for this exemption do not apply to the sale of business materials.

The sale of business materials is also implicated in the DSA's proposed revision to the definition of business opportunity. DSA Comments at p. 5. The DSA asserts that the reference to assistance in furnishing "customers" in the definition may implicate MLM companies (or their high level distributors) who sell "business tools." There is no justification for broadening the MLM exemption. As discussed above, the sale of business materials to MLM distributors raises entirely different issues than the sale of the MLM products, since the products can be resold or consumed by the distributor. In addition, a MLM company or high level distributor who sells "business tools" whose only possible use is to promote an MLM "business opportunity" should not be heard to complain that this activity may subject them to a disclosure regulation. The sale of "business materials" inevitably involves express or implied earnings claims, and the purchaser should be entitled to disclosures sufficient to assess the value of the materials. Simply put, the purchaser is entitled to know whether distributors who purchase such materials gain more sales than distributors who don't.

Finally, I wish to address the DSA's assertion that the exemption of MLM businesses from the RPBOR is appropriate because "any inappropriate activity can be addressed through the FTC's investigatory and enforcement authority under Section 5." DSA Comments at p. 2. Sadly, as discussed in my July 16, 2006 submission, and as the Commission's own experience confirms, enforcement actions do not prevent harm to consumers. For instance, in the Equinox

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[3] *See also* RNPR at 16118 (discussing FTC's prosecution of Equinox, in which participants not only bought the MLM products but also were required to rent desk space, subscribe to a phone line, and attend costly trainings and seminars).

[4] Unless of course, the business materials are the primary product being sold. If this is the case, then the opportunity is undoubtedly a pyramid scheme, because the only persons who would buy MLM business materials are other MLM distributors; there are no consumers in such a system, and therefore none of the "retailing" which supposedly prevents an MLM firm from being a pyramid scheme.

action discussed in the RNPR, the Commission was eventually able to recover $50 million from the individual and corporate defendants. While substantial, this recovery constituted only about 15% of the net losses to consumers, which the Commission estimated as exceeding $330 million. RNPR at p. 16118 & n. 129. It should be noted that Equinox was a member in good standing of the DSA.

I appreciate the tremendous time and effort expended by the Commission and its staff in attempting to craft an effective regulation, especially given the aggressive and sophisticated lobbying and public relations effort orchestrated by the DSA and the MLM industry. I continue to believe that a regime of after-the-fact enforcement actions will not prevent the substantial losses suffered by MLM participants. A combination of pre-sale disclosures and substantive regulation of the compensation schemes of MLM companies will do far more to prevent consumer injury.

Respectfully submitted,

Douglas M. Brooks

DMB/s