



DIRECT SELLING ASSOCIATION

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June 15, 2009

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex S)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Revised Proposed Business Opportunity Rule (RPBOR), R511993; Direct Selling Association's (DSA's) Comments on the Federal Trade Commission (Commission) June 1, 2009, Public Workshop on the Business Opportunity Rule

Dear Secretary Clark:

On behalf of the Direct Selling Association¹ (DSA) and its member companies, I am pleased to submit these comments regarding the Federal Trade Commission's (Commission) June 1, 2009 proceeding on the Revised Proposed Business Opportunity Rule (RPBOR), amending 16 CFR Part 437. Neither DSA nor any of its member companies participated in the June 1 workshop because we have no opinions on the proposed disclosure statement; and we believe the Commission had previously made it clear that there was no application of the disclosure statement to direct sellers under the RPBOR. Nonetheless, we chose to submit additional written comment on the workshop proceedings because some of the issues raised in our previous comments were addressed by one of the panelists.²

¹ 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 2007 over 15 million individuals sold for direct selling companies as independent contractors with estimated retail sales of \$30.8 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.

² See written statement of June 1, 2009 by Maureen Morrissey, Assistant General Counsel, The Americas Tupperware Brands Corporation.

DSA is very appreciative of the deliberative and thoughtful process the Commission has employed in crafting this proposed trade regulation and of the professional and useful manner in which the workshop was conducted. DSA and its member companies also applaud the well reasoned conclusion reached by the Commission that the direct selling industry would not be specifically covered by the RPBOR³ and its stated preference to utilize existing consumer protection authorities under Section 5 of the FTC Act to address any potential concerns which may arise in the direct selling industry.⁴ DSA wholly endorses the Commission'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 Commission's earlier acknowledgment 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."⁵

As was also the case in the comments submitted by DSA on May 28, 2008, DSA and its member companies submit these comments to effectuate the intent expressed in the RNPR that the revised rule does not encompass direct sellers. In fact, DSA does not believe that direct selling should be or is included as a covered "business opportunity" under the proposed Revised Rule because direct selling companies do not "sell business opportunities." Instead, direct sellers sell products and services to ultimate consumers through more than 15 million independent contractor direct salespeople.

Accordingly, the suggested modifications set forth below are submitted to ensure that any subsequent interpretation of a Final Rule by either the courts or regulatory bodies is consistent with the intent articulated in the RNPR. These proposed modifications will not change the substantive intent the Commission has already articulated. Instead, as noted by one of the workshop panelists, the proposed modifications to the RPBOR will avoid any ambiguities or inconsistencies with the intent expressed in the RNPR to exclude multi-level opportunities and other direct sellers from the scope of the Proposed RNPR

³The Commission stated in its Revised Notice of Proposed Rulemaking on the Business Opportunity Rule, R511993, "At this time, however, the Commission believes that the proposed rule is too blunt of an instrument to cure fraud in the MLM industry." (p. 52)

⁴ The Commission specifically stated that its most recent rule revision "narrows the scope of the proposed Rule to avoid broadly sweeping in sellers of multi-level marketing opportunities, while retaining coverage of those business opportunities sellers historically covered by the Commission's original Franchise Rule (and by the Commission's interim Business Opportunity Rule), (p. 4). The Commission has therefore determined that it will use the flexibility inherent in Section 5 of the FTC Act to address particular frauds in the MLM industry.

⁵ Throughout these comments, DSA will refer to its members and others that engage in direct selling activities as "direct sellers." In the RNPR, the Commission 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.

and will not undermine the Commission's legitimate interest in pursuing business opportunity frauds which the RPBOR is intended to address.

Because of the Commission's conclusion that direct sellers are not covered by the Revised Proposed Business Opportunity Rule, neither representatives of DSA nor DSA member companies participated on the June 1, 2009, workshop panel. However, to help effectuate the Commission's intent not to cover direct sellers under the Revised Proposed Business Opportunity Rule, DSA avails itself of this opportunity to submit comments on the following matters discussed at the workshop:

- **“Required Payment”** As discussed at the workshop, “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.” 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. 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**)

With this simple modification, the Commission could underscore its previously expressed decision that initial not-for-profit business materials, supplies and equipment provided by direct selling companies and used for demonstration, administrative and/or educational purposes are not covered by the RPBOR.⁶

- A panelist suggested that purchases by direct salespersons should not be considered a “required payment” if subject to a buyback obligation. In its original comments on the Revised Proposed Business Opportunity Rule, DSA suggested a similar exclusion based upon its inventory repurchase requirements⁷.

⁵ 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.

⁷ Comments of the Direct Selling Association on the Notice of Proposed Rulemaking for the Business Opportunity Rule (Project No. R511993), p. 38, July 17, 2006.

DSA's Code of Ethics requires all member companies to repurchase goods from any salesperson who requests such a repurchase of any inventory purchased in the twelve months prior to the salesperson's departure from the company.

- **“Business Opportunity”** As discussed at the workshop, 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.

Without clarification, some activities of direct selling companies might be misconstrued as "providing outlets, accounts or customers."

As examples, customers of direct sellers who contact direct selling companies via the Internet or telephone 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 Commission in its RNPR. Deletion of "customers" in relevant sections of the Rule, as outlined previously by DSA in its May 28, 2008 comments to the Commission, would avoid this potential misapplication of the Rule.

- **“Buyback of Materials”** DSA reiterates its request regarding a minor revision to Subsection (c)(3)(iii) of the Revised Rule, concerning 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.⁸ 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 Commission's commentary, and also addresses one of the questions asked in the RNPR.⁹

Although direct sellers are not covered by the RPBOR, some of the points raised by DSA in its previous written comments on the RPBOR were discussed at the June 1 workshop by one of the panelists. Accordingly, DSA has taken this opportunity to once again reiterate its earlier suggested clarifications to the RPBOR. Please know that DSA, its member companies, and the 15 million individual direct sellers in the United States appreciate the opportunity to participate in this important rulemaking endeavor.

Sincerely,

Joseph N. Mariano
Executive Vice President
Direct Selling Association

⁸ As stated by DSA in its previous comments to the Commission, this buyback program is a cornerstone of the DSA's self-regulatory regime, and a valuable protection for individual direct sellers; the Commission should not want it to trigger coverage of the Business Opportunity rule. DSA's Code of Ethics requires of its member companies a buyback of all inventory, sales and training aids, and business support materials, that are commissionable or required.

⁹ See Question 1, 73 Fed. Reg. 16133