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via Internet Submission and Overnight Mail

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Notice of Proposed Rulemaking; Business Opportunity Rule, 16 CFR Part 437

Dear Commissioners and Staff:

Herbalife offers the following response to the Comments lodged with FTC by Douglas M. Brooks on July 16, 2006 with regard to the present Rulemaking on Business Opportunity.

I. Herbalife Concurs with DSA's Rebuttal Comments

Herbalife concurs with and strongly supports the Rebuttal Comments filed by the Direct Selling Association ("DSA") in their entirety. We wish to emphasize the following items in particular, all of which are responsive to major themes running throughout Mr. Brooks' comments:

- The comments condemn multilevel direct sellers across the board as inherently deceptive organizations and effectively reject prior Commission analysis that distinguishes, on a case-by-case basis, the many legitimate companies from the few that have been found to focus improperly on recruiting while neglecting end-user sales.
- The comments ignore the fact that the proposed rule before the Commission is not a rule about the legitimacy of multilevel promotional, but rather a rule on disclosure(s).
- The comments repeatedly claim that 99% of persons that participate in a multilevel direct selling compensation plan lose money, but the claim itself is both unsubstantiated and unverifiable. He provides no information as to how this percentage was calculated, on what sources he relied, etc.



II. Earnings Claims

Mr. Brooks states that Herbalife Independent Distributors engage in extreme earnings testimonials, both in writing and orally, and that these alleged claims and the behavior itself are not only tolerated by the Company, but actually condoned.

But, let's look at the facts.

Herbalife is committed to the use of appropriate and truthful information to help prospects decide whether or not they are interested in promoting the use of its products and the business opportunity. Herbalife's encourages responsible earnings claims, and prohibits irresponsible earnings claims, as is made clear by its rules and policies for its Independent Distributors and its various promotional materials.

The Company publishes an earnings disclosure statement that is included in the materials every new Distributor receives and posted on its public information Web site and elsewhere.

Herbalife's Legal Department reviews and approves all corporate promotional materials for the United States and periodically trains the Company's promotional personnel on the appropriate types of earnings claims and testimonials. All earnings claims, even those which do not report dollar figures instead focusing on lifestyle improvements, are accompanied by the following disclaimer:

Incomes applicable to the individuals or examples depicted and not average. For average financial performance data, see the Statement of Average-Gross Compensation for US Supervisors at www.herbalife.com and www.myherbalife.com

On the rare occasion when high earnings claims appear in corporate promotional materials, the following disclaimer may be used in lieu of that recited above.

The incomes presented are those of persons within the top 1% of Herbalife Distributors

By rule, Herbalife requires that its Independent Distributors conform to the following general requirements when making any claims (e.g., opportunity or product)

- must be lawful, truthful and not misleading
- must have a reasonable basis in fact
- must have been substantiated in writing in advance
- must be consistent with claims made in current Herbalife promotional materials

By rule, Herbalife requires that its Independent Distributors conform to the following specific requirements when making earnings claims (including "lifestyle" claims not citing dollar amounts):



- must be accompanied by appropriate disclaimer
- must be fully compliant with the law(s) of every jurisdiction in which they are used

III. Distributor “Business Methods”

Some Herbalife Independent Distributors create and employ systems for promoting and doing the business. These “business methods” are typically comprised of a variety of different types of support tools, often with a common theme or phraseology, and these tools are promoted and provided to other Independent Distributors as a means of providing consistent, high quality training and helping them grow their individual businesses.

Mr. Brooks castigates one such business method, now defunct, suggesting that it involves high start-up and operational costs.

Again, let’s look at the facts.

Herbalife is committed to the use of appropriate and useful business methods. This is clear from its rules and policies for Independent Distributors and the material that is readily available on its public information Web site.

The following rules and policies are actively enforced:

- Independent Distributors who create or sell business methods must obtain an independent legal opinion from an experienced commercial law attorney with regard to their proposed business methods before those business methods may be put into circulation.
- Independent Distributors may not state or imply that there is any required purchase in order to become or succeed as an Independent Distributor other than the standard starter kit known as the International Business Pack (“IBP”) which currently retails for \$79.95, or the abridged version of that kit (“Mini IBP”) which currently retails for \$49.95.
- Independent Distributors must offer and honor a satisfaction guaranteed refund, on all business method components.
- Independent Distributors must provide a written and itemized receipt for business methods which includes, in part, the following disclaimer:

The products or services being purchased, while they may be a legitimate and helpful tool for building your business, are not required in order to pursue the income opportunity being offered. The Seller is solely responsible for the preparation and sale of these materials or services, and the Company that affords the income opportunity does not approve, endorse or guarantee these materials.



- Independent Distributors may not encouraging or require that persons incur debt in order to acquire business methods.
- Independent Distributors selling business methods must provide the *Business Methods Disclosure Statement and Arbitration Agreement* to all purchasers and review it with them; that document, which speaks plainly for itself, is attached to these comments.

IV. The Rulemaking Is About Improvement, Not Elimination

As stated so well in the rebuttal comments submitted by the DSA, Herbalife respects, appreciates, and shares in the Commission's long-standing shared effort and commitment to eliminate business opportunity fraud, while recognizing the direct selling industry as a pro-competitive and legitimate channel of distribution for goods and services.

We ask that the Commission consider the transparency of comments such those offered by Mr. Brooks, which clearly seek to impose draconian obligations consistent with his unsubstantiated belief that all direct sellers and MLMs, or at least the majority, are inherently deceptive and consistently engaging in fraud and abuse. The simple reality is that critics such as Mr. Brooks ignore the fact that most direct sellers and MLMs are "doing it right."

We join with the DSA in looking forward to the opportunity to participate in workshops the Commission might conduct to continue the dialogue about those factors in the proposed Rule that are problematic for Herbalife and other legitimate direct selling companies.

Respectfully submitted for Herbalife International of America, INC.

Brett R. Chapman

Attachment: Exhibit A; Business Methods Disclosure Statement and Arbitration Agreement

BUSINESS METHODS DISCLOSURE STATEMENT AND ARBITRATION AGREEMENT

Herbalife Independent Distributors are primarily engaged in the marketing and sale of Herbalife products for consumption. However, they may also promote the Herbalife income opportunity, and they are responsible for training those whom they sponsor. To assist in the latter process, some Distributors produce, sell and utilize merchandising aids and support services or materials, which are not produced, approved, endorsed, guaranteed, or offered by Herbalife. These materials and services are referred to, collectively, as "Business Methods." Business Methods include, but are not limited to books, magazines and other printed materials, audio and visual materials, software, telemarketing tools, Web sites, Internet services and other electronic media, rallies, meetings and educational seminars.

This Statement contains important information about buying or selling Business Methods, and advises as to your legal rights and responsibilities. Each person who chooses to sell or purchase Business Methods should sign this Statement prior to consummating any transaction. The Statement does not determine price, quantity or selection—these are individual decisions—but it does obligate Buyers and Sellers to obey the Rules applicable to Distributor conduct, particularly as they relate to the creation, sale and use of Business Methods.

IMPORTANT INFORMATION

You must carefully consider each of the following factors prior to purchasing Business Methods:

Not Herbalife Materials. Business Methods are not produced, approved, endorsed, guaranteed, authorized, or offered by Herbalife. Herbalife assumes no responsibility or obligation, and shall have none, with regard to their purchase, sale or use.

No Required Purchase other than the Mini International Business Pack. The only required purchase in order to become and progress as an Herbalife Independent Distributor is the Mini International Business Pack ("IBP") produced by Herbalife. In other words, to become an Herbalife Distributor, succeed in the business, advance in the Sales and Marketing Plan, or receive upline training and support, you are NOT required to buy any amount of materials, products or services, either those produced by Herbalife or by a party other than Herbalife, or to attend any seminars, meetings or events. You should buy Herbalife products for your own consumption and for resale to others, but only in amounts you independently determine you wish to consume or can resell in a reasonable amount of time. You should buy non-Herbalife products and business materials and services and attend events, only if you independently decide that they will assist you in building a more successful and profitable Distributorship. If you purchased any product, services or materials on the belief that you were required to do so, you may demand a full and unconditional refund within the refund period set out in this Statement, and if that demand is not promptly honored, contact Herbalife's Distributor Relations Department at 866-866-4744.

Focusing on Retail. Your primary focus as an Herbalife Distributor must always be the promotion and sale of Herbalife products for consumption.

Limiting Expenditures. You must carefully monitor what you spend on Business Methods so expenditures do not become unreasonable or excessive. These costs must be justified by the benefit to your business. You must only purchase items or attend events that provide information helpful to you in selling products or sponsoring others to do the same.

Limiting Time Commitments. You must decide how much time you need to spend attending events or working with materials associated with a given Business Method. You must carefully consider the impact of this time expenditure (if any) on your primary occupation (if not Herbalife), your Herbalife-related activities and your family.

Compliance with Herbalife's Rules of Conduct & Distributor Policies and the Law. The Rules applicable to Distributor conduct contain important provisions affecting your potential decision to purchase, sell or use Business Methods. They are included in the International Business Pack ("IBP") that contains the Herbalife registration materials and are available at www.Herbalife.com and at www.MyHerbalife.com. They may also be requested by phone through Herbalife's Distributor Relations Department at 866-866-4744.

Right of Refund. The Seller of any tangible materials constituting a Business Method must offer in writing at the time of the sale, a full 180-day refund for the cost of those tangible materials, including shipping and handling. The Seller must issue the refund within seven business days of receipt of the returned materials. The 180-day period begins when the tangible materials were received by the Buyer.

No Guarantee of Results. Herbalife does not make or approve any representations about how much income anyone will earn as an Herbalife Independent Distributor, and no one is authorized or permitted by Herbalife to make such representations. Your success as an Herbalife Distributor will depend on your own efforts and skill. HERBALIFE'S CURRENTLY PUBLISHED "STATEMENT OF AVERAGE-GROSS COMPENSATION OF U.S. SUPERVISORS" is available on www.Herbalife.com and www.MyHerbalife.com or by calling Herbalife's Distributor Relations Department at 866-866-4744.

RESOLUTION PROVISIONS

1. **Herbalife Only a Third Party Beneficiary.** This Dispute Resolution Agreement ("Agreement") is made between Seller and Buyer (the "Parties"). Herbalife is an intended third party beneficiary of this Agreement only for purposes of Herbalife's ability to elect the dispute resolution provisions contained herein, and to share in the benefit of the private statute of limitations and choice of law provisions in Paragraph 2 below. The Parties acknowledge that nothing contained herein is intended to create any involvement by, or responsibility of, or liability for, Herbalife with respect to any dealings between Seller and Buyer, and the Parties further acknowledge that nothing contained herein shall be argued by either of them to constitute any waiver by Herbalife of any defense which Herbalife may otherwise have concerning whether it can properly be made a party to any dispute between the Parties.
2. **Mandatory Mediation, then Arbitration.** With respect to any claim by Buyer which arises out of, or relates in any way, in whole or in part, to the Business Methods (as defined in the preceding "Disclosure Statement"), including without limitation the creation, sale, purchase, content, functionality, value, use or consequences of use of Business Methods, or to this Agreement, or the breach thereof, including without limitation, any tort claim, including fraudulent inducement of this Agreement or the dispute resolution provisions contained herein ("Claim"), the parties agree:
 - a) first, to try in good faith to settle the Claim by good faith negotiations;
 - b) then, if such negotiations are not promptly successful, to try in good faith to settle the Claim by mediation administered in Los Angeles, California, by the American Arbitration Association (AAA);
 - c) and, finally if such mediation does not result in a settlement, then Buyer, Seller or Herbalife may demand, as the sole and exclusive means and forum to resolve the Claim, binding arbitration by a single arbitrator, such arbitration to be conducted in Los Angeles, California, and administered by the AAA. The arbitrator may be the person who previously served as mediator, but only with the consent of all parties to the arbitration.
3. **Federal Arbitration Act ("FAA") and Conduct of Arbitration.** The parties acknowledge that this Agreement evidences a transaction involving interstate commerce, and that the FAA and, to the extent not inconsistent, the AAA's Commercial Arbitration Rules and Mediation Procedures ("AAA Rules"), as such AAA Rules exist as of the time this Agreement is executed, shall govern the interpretation, enforcement and proceedings pursuant to this mediation and arbitration clause, except as otherwise provided in these Resolution Provisions. In the case of arbitration:
 - a) The parties agree that no Claim shall be adjudicated, in an arbitration or in any judicial proceeding, as a Class Action, and that no arbitration conducted pursuant to this Agreement shall allow class claims, or consolidation or joinder of claims or parties.
 - b) The arbitrator shall be a practicing attorney having at least 15 years experience with commercial litigation matters or with commercial distribution matters.
 - c) The arbitrator's award, if any, shall be made within six (6) months following the filing of the notice of intent to arbitrate and the arbitrator shall agree to comply with this schedule before accepting appointment.
 - d) Any award by the arbitrator shall be a reasoned written award reached only by applying strict rules of law to the facts, and limited to actual monetary damages (e.g., shall exclude consequential, indirect, punitive and exemplary damages).
 - e) The arbitration of any Claim will be governed by the discovery and summary judgment provisions in the Federal Rules of Civil Procedure (Rules 26 through 37 and 56) and the Federal Rules of Evidence shall be applicable to all presentations of evidence, provided however, that discovery will be limited to matters which are directly relevant to the issues in the arbitration.
 - f) Each party shall bear its own costs and expenses, including legal fees and an equal share of the arbitrator's fee and the administrative costs of the arbitration during the arbitration provided, however, that the prevailing party in the arbitration shall be awarded all such fees and costs upon prevailing in the arbitration.
 - g) The Parties consent and submit to the exclusive personal jurisdiction and venue of the Superior Court and the United States District Court, both located in the County of Los Angeles, State of California, to compel arbitration of a Claim in accordance with this Agreement, or to enforce any arbitration award granted pursuant to this Agreement.
 - h) All arbitration proceedings will be closed to the public and confidential, and all records relating thereto will be permanently sealed, except as necessary to obtain court confirmation of the judgment of the arbitrator or as necessary to give effect to res judicata and collateral estoppel, in which case all filings with any court shall be sealed to the extent permissible by the court. Nothing herein is intended to, or shall, preclude a Party from communicating with, or making disclosures to, its lawyers, tax advisors, auditors and insurers, as necessary and appropriate or from making such other disclosures as may be required by law.
 - i) If any one or more of the provisions contained herein shall for any reason be found by a court of competent jurisdiction or an arbitrator to be invalid, illegal, or unenforceable in any respect, such invalid, illegal or unenforceable provisions shall be ineffective, but shall not in any way invalidate or otherwise affect any other provision. However, if any portion of Paragraph 3(a) is found to be invalid, illegal or unenforceable, then either Party or Herbalife shall have the right, but not the obligation, to require that a Claim be resolved in a judicial proceeding in either the Superior Court or the United States District Court, both located in the County of Los Angeles, State of California, rather than through arbitration.
4. **Private Statute of Limitations and Choice of Law.** Notwithstanding any statute or other legal or equitable doctrine or authority to the contrary, no Claim shall be brought more than eighteen (18) months after the first purchase of any "Business Methods." For purposes of determining enforceability, this Agreement shall be governed by and interpreted in accordance with the Federal Arbitration Act ("FAA"), and shall otherwise be governed by and interpreted in accordance with the domestic law of the state of California without the application of conflict of law principles. The Parties further agree that the permissible scope of any Claim will be determined in accordance with the domestic law of the State of California without the application of conflict of law principles. Understood and agreed,

Seller (print) Seller's Signature Date

Buyer (print) Buyer's Signature Date