



DIRECT SELLING ASSOCIATION

December 13, 2022

VIA ELECTRONIC SUBMISSION: WWW.REGULATIONS.GOV

Ms. Amy DeBisschop
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., N.W.
Washington, DC 20210

Re: Comments of Direct Selling Association--Notice of Proposed Rulemaking: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (Docket No. WHD-2022-0003)

Dear Ms. DeBisschop:

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking (“NPRM”) regarding classification of independent contractors under the Fair Labor Standards Act (“FLSA”). Our association represents more than 7.3 million active direct sellers and 44.6 million preferred customers and discount buyers that contributed \$42.7 billion in sales to the American economy in 2021. Sales increased 6.4% from 2020-2021 and have grown almost 22% since 2019.¹

For more than a century, the Direct Selling Association (“DSA”) has served as the national trade association for companies that offer entrepreneurial opportunities to individuals who market and sell products and services, typically outside of a fixed retail establishment. The association serves to police, promote and protect direct selling through advocacy, networking and education for member executives and salesforce.

DSA appreciates the opportunity to comment on the NPRM. We agree with the stated intention of the rule to eliminate misclassification and support independent earning opportunities. However, the proposed rule would threaten income sources for direct sellers and millions other Americans it seeks to help if the rule is finalized as written.

¹ Direct Selling Association 2022 Growth & Outlook Study. Available at <https://www.dsa.org/statistics-insights>

The NPRM creates standards under the economic realities test that are confusing, ambiguous and inconsistent with modern business practices. The proposed rule would go against the stated intentions of providing clarity and would provoke litigation while creating uncertainty for many legitimate industries such as direct selling.

The Department of Labor has an opportunity to provide clarity for millions of direct sellers in the United States if existing statutory recognitions of direct sellers as independent contractors are included in a final rule.

The Economic Impact Could Exclude Direct Sellers, Resulting in a Large Underestimate of Individuals Impacted by the Rule

The Department concedes counting the number of independent contractors in the United States is difficult. Thus, it is hard to precisely quantify how many individuals this regulatory change would truly impact. Based on the statistical survey information presented, over 7 million direct sellers could have been left out of the Department's estimate of economic impact.

The NPRM says a lower bound estimate would be the Current Population Survey Contingent Worker Supplement, which calculates the number at 10.6 million independent contractors. The second control question asks "last week, were you working as an independent contractor..."

One of the benefits of being an independent salesperson in a direct selling company is having the flexibility to work when and where you want. If an individual did not engage in direct selling activities for one week due to their personal choice, they would not be counted in this survey.

Because of the huge economic impact on industries that were potentially excluded from the Department's economic impact calculation, additional analysis should be conducted before proceeding with a rule. DSA would gladly work with the Department to ensure that direct sellers are accurately counted as the business is a sizeable count in this calculation.

Direct Selling Has a Positive Impact in the United States Utilizing Independent Contractors

Direct selling is a significant business model that serves Americans who desire flexibility and prefer personal relationships to purchase products and services. These individual sellers are respected by their peers, consumers, and customers. The Department can view personal testimonials by real direct sellers who enjoy the flexibility provided by the business and has allowed them to work the business while providing for their family, being there in times of need and providing a low-cost business open to Americans regardless of age, education, or ethnicity.²

Direct selling provides a low-cost path to starting a flexible, part-time business in the United States. For the 7.3 million United States direct sellers, 6.8 million only work the business on a part-time basis to earn modest extra income on the side.³ This allows individuals to engage in

² Real Direct Sellers, <https://www.dsa.org/advocacy/real-direct-sellers>

³ Direct Selling Association 2022 Growth & Outlook Study.

their own business as much or as little as they want depending on their schedule and individual financial goals. Direct selling is overrepresented compared with the United States population by women (76%) Hispanics (23%).⁴ So, creating a confusing standard that could jeopardize these independent earning opportunities could have a negative impact on the underserved communities the rule seeks to help.

Fifty-nine percent of direct sellers cite flexibility as a reason for joining and sixty-one percent cite flexibility as a reason they stay in a direct selling business.⁵ Seventy-nine percent of Americans have a favorable opinion of direct selling and see the business as an attractive option for entrepreneurship. These perceptions have remained stable for the last decade.⁶ Perception has remained high with the growth of technology that has allowed direct sellers to establish and grow their businesses with an online presence.

The Proposed Rule Fails to Acknowledge the Modern Economy and Forces a Choice Between Consumer Protection and Independent Contractor Status

We appreciate the Department of Labor’s goal to eliminate misclassification in the United States economy and protect workers. The Department says the proposed rulemaking is not intended to disrupt the business of independent contractors who are, as a matter of economic reality, in business for themselves.⁷ Additionally, according to the NPRM, other proposals were ruled out because they would create years of appellate litigation in different Federal Courts to sort out and would result in more uncertainty.⁸

The proposed rule runs contradictory to these principles. Although on its face the proposed rule appears to revert to the existing economic realities test as articulated under the FLSA, the NPRM goes further and creates more confusion that will result in marketplace uncertainty, and litigation.

Direct selling is one of the longest standing business models that utilizes independent contractors. We have embraced technology to grow our businesses that millions of Americans have elected to participate in for a low cost of entry and exit. The Department says that women and people of color are overrepresented in low wage positions that can result in misclassification.⁹

As previously mentioned, women and Hispanics are overrepresented in direct selling as a proportion of the United States population. The Congressional Black Caucus Institute has also recognized direct selling as an accessible path to entrepreneurship, describing the business as “a

⁴ Women are 50.8% and Hispanics are 18.5% of the United States population according to the most recent Census data, <https://www.census.gov/quickfacts/US>

⁵ Direct Selling Association 2019 National Salesforce Survey

⁶ 2020 DSA/IPSOS Consumer Attitudes & Entrepreneurship Study, https://www.dsa.org/docs/default-source/research/dsa-ipsos-2020-consumerattitudesinfographic2-27.pdf?sfvrsn=68ddfa5_2%27

⁷ FR 62218

⁸ FR 62219

⁹ FR 62230

viable solution, presenting meritocratic part-time, flexible opportunity for all Americans no matter their race, ethnicity, gender, or background.”¹⁰ The Department should instead view the overrepresentation of these populations as potential diminished income sources if the rule goes forward as written because it would potentially foreclose direct selling as a flexible income earning source.

As discussed in further detail below, the NPRM would force direct sellers to make a choice between consumer protection and providing a low cost of entry business for millions of Americans, especially and including women and Hispanic populations. The Department should consider the conflict of laws and regulations between federal agencies carefully before proceeding with a rule.

Direct Sellers' Independent Contractor Status Has Long Standing Recognition and the Final Rule Should Recognize that Status

We discuss in detail below how new analytical factors in the proposed rule fail to recognize the market reality of direct sellers in specific contexts and could therefore undermine the longstanding recognition of direct sellers as independent contractors. Because of our longevity in the United States economy, direct sellers have been specifically recognized as independent contractors for many years.¹¹

The NPRM states that there are a variety of bonafide independent contractor relationships that need to be adequately addressed by the rule. The Department has numerous references to Fact Sheet 13: “Employment Relationship Under the Fair Labor Standards Act” but does not mention Fact Sheet #17F: “Exemptions for Outside Sales Employees Under the Fair Labor Standards Act.” Direct sellers generally qualify under such exemption because their primary duty is making sales away from the corporate entity’s place of business.

There is important historical context that the Department has not addressed regarding professions that are exempted from the FLSA. The current outside sales exemption language has been included in the FLSA since 1940. It was suggested at that time that “improvements can be made in light of actual experience.”¹²

Although the Department stated they cannot pursue a rule that would harmonize classification of independent contractors under the common law control test as articulated in the Internal Revenue Code, there could be specific examples and businesses cited as statutory non-employees under the FLSA that could be recognized.

Specifically, incorporating 26 USC § 3508 into the final rule would provide much needed clarity where the rule might otherwise cause confusion. By defining direct sellers as statutory non-

¹⁰ Congressional Black Caucus Institute 21st Century Council 2022 Annual Report. Available at <https://www.cbcinstitute.org/21stcenturycouncil>

¹¹ *Electrolux v. Danaher* 128 Conn. 342 (1941); *Sarah Coventry, Inc. v. Caldwell* 243 Ga. 429 (1979)

¹² FR 4077 (Oct 15 1940). The 1940 regulations were informed by what has come to be known as the Stein Report. See “Executive, Administrative, Professional...Outside Salesman.”

employees under the IRS Code in 1982, Congress recognized the need for this specific recognition.¹³ If the Department seeks to increase clarity, the agency should use this rule as an opportunity do so. The legislative intent¹⁴ and interpretations of this statute¹⁵ have applied to a variety of direct sellers over the years. It would also be consistent with current bi-partisan support in Congress¹⁶ and recognition in 43 state statutes.¹⁷

If the Department wants to protect bonafide independent contractor relationships and promote clarity in a rule, they should consider incorporating by reference in the rule 26 USC § 3508 and recognizing Fact Sheet #17F to protect these work arrangements. Including these current and longstanding statutes and regulations is the easiest way to protect these relationships and provide clarity.

Analysis of Proposed Economic Realities Test and Factors Specific to Direct Sellers

For the Department's review, we would also like to analyze the rule and relevant case law as it applies to direct sellers. Overall, we believe the Department of Labor and courts looking at the actual business practices of direct sellers will determine that they are independent contractors. However, certain analytical factors in the proposed rule do not fit neatly with true economic realities in our business and should not be considered as part of a final rule.

¹³ U.S. Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982*, JCS-38-82 (Dec. 31, 1982), at 382-383

¹⁴ See HR Conf Rep No. 97-760, at 1421 *reprinted* in 1982 USCCAN 1190 (1982)

¹⁵ See e.g. Proposed Treas Reg § 31.3508.1; IRS Audit Technique Guide for Retail Industry, IRS Pub Bo. 4751G (re Feb. 2009); Independent Contractor or Employee? IRS Training Materials No. 3320-102 (Oct. 1996)

¹⁶ H.R. 5038: 117th Congress

¹⁷ Ala Code Sec 25-4-10(b)(23); AK. STAT. Sec. 23.20.526(a) (21) (1995); ARIZ. REV. STAT. ANN. Sec. 23- 617(22) (1983); Arkansas Code § 11-10-210(f)(24)(A); CAL. UNEMP. INS. CODE Sec. 650; Colorado Rev Stat Sec 8-70-136; DEL. CODE ANN. tit. 19, Sec. 3302(11)(N); FLA. STAT. ANN. Sec. 440.02 (15)(d); O.C.G.A. § 34-8-35; HAW.REV. STAT. Sec. 383- 7(21) (1995); IDAHO CODE Sec. 72-1316A (20); ILL. ANN. STAT. ch. 820 Sec. 405/217; IND. CODE ANN. Sec. 22-4-8-3(23); IOWA CODE ANN. Sec. 96.19 (18)(g)(9)(b); Kansas Statues Sec. 44-703(i)(4)(v); KY Rev. Stat. Ann. Sec. 341.055(21); LA. REV. STAT. ANN. Sec. 23: 1472 (12)(H)(XVIII); Maine Revised Statutes §1043 11(F)(28); MD. CODE ANN. 8-206(b); MICH. COMP. LAWS Sec. 421.43 (r); MINN. STAT. ANN. Sec. 268.035 Subd. 20(30); MISS. CODE ANN. Sec. 71-5-11(l)(15)(p); MO. ANN. STAT. Sec. 288.034 (12)(17); MONT. CODE ANN. Sec. 39-51-204(1)(i); NEB. REV. STAT. ANN. Sec. 48-604(6)(t); NEV. REV. STAT. ANN. Sec. 612.144; N.H. REV. STAT. ANN. Sec. 282-A.9(IV)(s); N.J. STAT. ANN. Sec. 43:21-19 (i)(7)(O); N.C. Gen Stat. Sec 96- 1(b)(12)(b)(4); OHIO REV. CODE ANN. Sec. 4141.01(B)(3)(g); OKLA. STAT. ANN. tit. 40, Sec. 1-210(15)(u); OR. REV. STAT. Sec. 657.087; Penn. Stat. Title 43. § 753 (l) (4) (20); R.I. Gen. LAWS Sec. 28-42-7; South Carolina Code of Laws, Section 41-27-260 (18); TENN. CODE ANN. Sec. 50-7-207 (c) (12); TEX. LABOR CODE Sec. 201.070(2); UTAH CODE ANN. 35A-4-205(1)(p); VT. STAT. ANN. tit. 21, Sec. 1301(6)(C)(xxi); VA. CODE. ANN. Sec. 60.2- 219(20); WASH. REV. CODE ANN. Sec. 50.04.235; West Virginia Code Sec. 21-51-4 (a)(5); WIS. STAT. ANN. Sec. 108.02 (15)(k)(16).

Opportunity for Profit or Loss

This first and very important factor weighs strongly in favor of direct sellers being independent contractors under the context of the rule and case law. Direct sellers decide which clients to work with and when. Generally, no sales leads or information is provided by the company.

The primary source of marketing and advertising is conducted by the independent salesforce members to their customers and not by the company. An increasing part of independent salesforce members promoting their business is through social media, although they also utilize other means to sell and secure customers. It is their ability to use social media and develop expertise in this marketing strategy that ultimately dictates the success of each individual business. Their opportunity to maximize profits is not measured merely by the hours worked, but also by business acumen and demonstrating the superiority of the products and business.

DSA and our members pride ourselves that the opportunity for loss is minimized by low startup costs. Practically any individual can start for an average of \$82.50¹⁸, which enables them to grow a business on their own terms. This low investment to enter the business is coupled with a requirement in the DSA Code of Ethics that our members adhere to a 90% inventory repurchase agreement. The policy requires all DSA members to repurchase on reasonable commercial terms currently marketable inventory in possession of an independent salesperson within twelve months from the salesperson's date of purchase at not less than 90 percent of the salesperson's original net cost.¹⁹

According to the Bureau of Labor Statistics, 20% of small businesses fail in the first year.²⁰ Given this high failure rate, the proposed rule should allow businesses like direct selling to provide opportunities to individuals in the United States that decrease the chance of significant economic loss while still being independent contractors. Many direct selling companies and all DSA members are afforded a business that is a low cost of entry. And, in the event you've invested more into the business, you can recoup most of their cost when exiting. Creating these kinds of businesses in the United States should be applauded and not minimized as this proposed rule would do.

Comparing cases cited by the Department in the NPRM with business practices of direct sellers strongly indicates independent contractor status. Specifically, similarities can be drawn in the case of *Franze v. Bimbo Bakeries USA, Inc.* that the value of their delivery territories “primarily depended on their own business judgment and foresight in managing day-to-day costs, suggesting their bore the risks of their decision.” Direct sellers’ businesses are similarly situated.

Likewise, in *Saleem v. Transportation Group, Ltd.*, that workers “possessed considerable independence in maximizing their income through a variety of means” and their profits increased

¹⁸ DSA 2018 Evolving Marketplace Study, https://www.dsa.org/docs/default-source/research/dsa-ipsos-2020-consumerattitudesinfographic2-27.pdf?sfvrsn=68ddfa5_2

¹⁹ DSA Code of Ethics, Section A(7).

²⁰ *Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App'x at 76 (2d Cir. 2020)

through their initiative, judgment and foresight—indicating independent contractor status.²¹ Business judgment and foresight of operating individual businesses are both vital parts of a direct sellers' business.

These case law examples are analogous to a direct selling business, since the success of an individual business is dependent upon effective marketing and selling of products including who, where and when to market and sell them. Additionally, accounting for the costs they incur to promote their business, the factors would lead towards direct sellers being independent contractors based on the proposed rule.

Investment by Worker and Employer

The NPRM states that for the analysis to be in favor of independent contractor status that an investment made by the worker in the business needs to be capital or entrepreneurial in nature. This principle would disproportionately impact underserved communities that direct selling serves such as Hispanics. By requiring a large investment that many underserved populations cannot afford, it closes off the business for many individuals it could benefit.

As previously mentioned, practically any individual can start for an average of \$82.50²², which enables them to grow a business on their own terms. The Department is proposing a rule that would penalize this low-cost business by requiring a large investment to point towards being an independent contractor.

The proposed rule also states that costs borne to perform the job by the worker are not evidence of independent contractor status but point towards employee status. This could be at odds with direct selling because the benefit of buying from a direct seller is the personalized experience from a trusted individual who has personal experience with a product or service. This concept not only minimizes that benefit but could potentially be interpreted and used negatively against an individual.

The proposed rule also says if the worker's investment does not compare favorably to the employer's investment, it suggests economic dependence and that of an employee of the employer. Again, large investments should not be a factor indicative of employee status. Direct sellers have the unique benefit of being able to create independent businesses and provide great products and services to their friends, family and customers that have been meticulously researched, manufactured and produced. Although the corporate entity invests more in the products that are sold than the independent salesforce member, this should not be used as a negative in determining independent contractor status.

Despite case law, the example provided by the Department is inconsistent with the discussion. It demonstrates that a graphic designer who purchases software, rents an office and spends money

²¹ *Saleem v. Corporate Transp. Grp., Ltd.*, 854 F.3d 143-144 (2d Cir.2020)

²² DSA 2018 Evolving Marketplace Study, https://www.dsa.org/docs/default-source/research/dsa-ipsos-2020-consumerattitudesinfographic2-27.pdf?sfvrsn=68ddfa5_2

to market their services would be an independent contractor. These are all tools used to do the job and don't appear to be higher cost items. The example and discussion appear to be at odds.

The Department should not proceed with a rule that necessitates large investments that many underserved communities cannot afford or secure. The requirement of large investment cuts off an important source of income for underserved communities. Requiring a comparable investment by the independent worker also results in a difficult choice for many underserved communities the rule seeks to serve.

Degree of Permanence of Work Relationship

Among all factors analyzed in the NPRM, the discussion and analysis of the degree of permanence of the relationship also would unfairly penalize direct selling and its independent contractor salesforce.

Because of the high satisfaction and minimal potential for loss, many Americans engage in direct selling for years or even decades. As previously mentioned, 93% of independent salespeople work the business part time. Individuals can stay involved with companies as salespeople and work the business as much or as little as they want for many years. They can stay involved for a minimal financial investment and keep open the possibility for sales as their time and desire dictate.

The NPRM saying that indefinite or continuous relationship is consistent with an employment relationship does not recognize modern businesses such as direct selling where individuals can engage in businesses as their schedule allows throughout the course of many years. In direct selling, people can start and stop selling with minimal burdens. This flexibility to work a part time business and earn supplemental income should not be an indicator against independent contractor status.

Direct sellers could find some comfort in the NPRM saying that permanence may be inherent in certain jobs, specifically mentioning temporary or seasonal work. In direct selling, individuals could choose to work the business more during certain times of year such as holidays or summer breaks because that is when they need supplemental income and customers are looking for products. However, if they have a positive experience in the business they can continue as they see fit during other times of year. It is concerning that the Department does not embrace this point fully and says that it is not necessarily an indicator of independent contractor status.

The Department needs to recognize that in direct selling and many other businesses, many independent salespeople desire to only work with one company. The inherent part time nature of the business allows them to have full time jobs or pursue other businesses to earn the bulk of their income. A final rule should recognize this common market reality.

Nature and Degree of Control

As previously mentioned, direct sellers generally have no sales territories, or quotas, and corporate entities do not provide sales leads or any other customer information. Independent salespeople make their own schedules and are generally responsible for the means and marketing of their businesses to sell products and services. The direct selling business contains virtually none of the control aspects in the cases cited in the proposed rule that defined territories and leads for sales.²³

However, the analysis by the Department under this factor is the most illustrative that the regulation as proposed would force businesses such as direct selling into a choice between laws, regulations and guidelines of other regulatory agencies intended to protect consumers. The corporate entity's compliance with regulations from a federal agency (e.g. the Federal Trade Commission) other than the Department of Labor should not be indicative of "control" for purposes of this rule.

For decades, DSA and its member companies have developed a variety of compliance activities to ensure independent salesforce members follow regulatory guidelines from other federal agencies. These mechanisms have proven to be effective and can be backstopped by government enforcement action for the most egregious actions.

The DSA's organizational structure supports self-regulation not only for DSA members, but the entire direct selling business model. Understanding the importance of investing in self-regulation, the association also funds an independent entity for that purpose, the Direct Selling Self-Regulatory Council ("DSSRC"). The DSSRC is operated by the BBB National Programs.

To meet this responsibility, DSA members have robust compliance programs and departments variable with company size. Independent salesforce members are educated on relevant laws and guidance when talking about the business or products. The proposed rule would force direct sellers into a choice between consumer protection and preserving the independent contractor status of salespeople. To comply with these obligations to ensure fair and accurate representations in the marketplace, many companies use technology to monitor the actions of independent salespeople in the marketplace.

Trusted vendors offering monitoring software and webcrawlers that can quickly scan thousands of social media posts daily as well as manual monitoring are the most common strategies used by companies. The use of technology is essential because of the relatively large scale and scope of claims being made daily. Technological tools also must be used because many businesses of direct sellers are conducted on the internet and social media platforms. The use has only increased in the last two years.

²³ *Cornerstone Am.*, 545 F.3d at 343–44.

Additionally, the FTC is currently considering a rule regarding Earnings Claims²⁴ that says direct selling corporate entities are responsible for claims made by salesforce members online and especially in social media.²⁵ Regardless if the Department’s rule moves forward, there is sufficient FTC guidance that corporate entities are responsible for the claims made by independent salesforce members. This rule would be contradictory to that guidance and likely any forthcoming rule regarding earnings claims.

By proposing that the use of technology is indicative of employee status, the NPRM ignores the shift towards technology that has been made by businesses that has increased exponentially over the last two years. The Department also does not cite any case law or previous guidance that supports this principle that supervising through technology indicates employee status. While independent salesforce members of direct selling companies are generally free to market and sell products how they want, they need to follow relevant FTC guidelines. Direct selling companies should not be threatened with monitoring independent salesforce members in accordance with Federal Trade Commission guidance. Modern work arrangements should not be penalized.

Extent to Which the Work Performed is an Integral Part of the Employer’s Business

The rule framing this factor as whether work is an integral part of an employer’s business could create uncertainty for direct selling companies and independent salesforce members. Additionally, the Department’s analysis of this factor is inconsistent with legal precedent. This factor is usually one of the more confusing ones for many sectors and has been framed under a variety of tests for independent contractors.

The Department suggests that the focus should be placed “on whether the work is critical, necessary, or central to the employer’s business.”²⁶ This is not consistent with legal precedent, which focuses the analysis on the worker and not the services provided. *Rutherford Foods* ruled that when analyzing economic dependence, a court should assess whether the worker is part of an “integrated unit of production.”²⁷ Although the Department attempts to discount this language from *Rutherford* as a “rigid reading”²⁸ that “no court uses,”²⁹ this is inconsistent with the law.

Multiple courts, consistent with *Rutherford*, have looked to whether the worker is part of an integrated unit of production, and not simply to whether his work is important to the business.³⁰ If

²⁴ 87 Fed. Reg. 13951 (March 11, 2022)

²⁵ DSA has worked with the FTC for many years and agreed to this legal responsibility. Our comments on the ANPRM said a rule was not necessary because there is adequate guidance already in place and self-regulation and compliance mechanisms have proven effective.

²⁶ *Id.* at 62254.

²⁷ *Rutherford Food Corp v. McComb* 331 U.S. 722 (1947)

²⁸ 87 Fed. Reg. at 62254.

²⁹ *Id.* at 119.

³⁰ See, e.g., *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547, 550 (8th Cir. 1952) (analyzing whether haulers and wood workers were “an integrated part of defendant’s production set-up”); *Green v. Premier Telecom. Servs., LLC*, No. 1:16-CV-0332-LMM, 2017 U.S. Dist. LEXIS 213542 (N.D. Ga. Aug. 14, 2017) (finding as evidence of independent contractor status that, “[w]hile certainly Plaintiff performing his job was integral to [defendant’s] bottom-line, unlike in *Rutherford*, Plaintiff did not perform one step in an integrated system”).

the court ruled that the focus should be placed on importance to the business rather than the worker, the *Rutherford* Court would not have spent time analyzing how the workers fit into the employer's production process itself.

Another flaw in the Department's analysis is practical. A core question that needs to be answered in the "integrality" context is what is the employer's business? The answer can seem simple in some cases but has layers of complexity that could cause confusion lead and result in years of litigation.

Direct selling companies provide a product or service to the marketplace. Like any business, one of the earliest decisions they must make once they have a product or service is how they are going to go it to market. Direct selling companies choose to get their product through the market through independent salespeople because the model has proven effective for over a century and has the potential to create thousands of micro-entrepreneurs.

The analysis under this factor in the proposed rule of integrality is so expansive that any individual conducting work for a business could be considered an employee. By examining if a business "could not function" or "their work depends on the existence of the employer's business" is extremely broad and could be interpreted widely by courts. It would also result in courts having to address the core question of whether a business is a manufacturer or products or a method of product distribution.

The proposed factor and subsequent analysis is another example that the proposed rule creates a legal and regulatory environment that could cause more confusion and litigation. Although only one factor, an overly expansive interpretation could harm many true independent businesses the Department is seeking to help.

Skill and Initiative

This factor can be broken down into two distinctive parts—a specialized skill and initiative. An individual could not have a specialized skill, but still take the initiative of an independent business or vice versa. If the rule were to go forward as proposed, and each factor pointed in different directions, there could be confusion as to where a ruling may come down on this one factor.

A major benefit of direct selling is that it does not require what many would describe as a specialized skill. The business does not discriminate between age, class, sex or require any formal training. However, direct selling businesses can be successful because an individual salesperson implements a successful marketing system to potential business partners and customers to build a business. Although it does not require a specialized skill or formal training, not everyone is guaranteed to be successful in direct selling. The salesperson is also exercising business judgment by deciding what who and by what means to sell their products.

The examples cited by the Department also do not provide additional clarity as to when skill and initiative point in different directions. Both examples cite the individual as a highly skilled

welder—presumably a specialized skill. The distinction drawn is the welder’s ability to market a business. It does not cite an example where there is no specialized skill, but the ability to independently market a business.

Additional Factors

DSA agrees with the Department’s retention of the 2021 IC Rule that additional factors may be considered if they are relevant to the ultimate question of economic dependence. The Department should also preserve the primacy of actual practice in its analysis as well as give deference to recognition of independent contractor status under other statutes.

The 2021 IC Rule provided that the actual practice of parties involved is more relevant than what may be contractually or theoretically possible. This has been confirmed by Department guidance stating that “ordinarily, a definite decision as to whether one is an employee or independent contractor under the [FLSA] cannot be made in the absence of evidence as to his actual day-to-day working relationship with his principal.”³¹

The Department states it would delete this aspect of the rule because it is “overly mechanical and does not allow for appropriate weight to be given to contractual provisions” and the approach taken in the proposed rule is less prescriptive. The Department could include this as another factor but clarify that it is not given absolute weight in deciding. This recognizes the legitimacy of the argument without giving it the outsized influence the Department fears.

Although the Department says it does not wish to define other factors that should be considered, it does cite the specific example of a business license. Depending on the cost of a license, this could be a cost prohibitive factor for engaging in direct selling because a license could require a large investment in time and money. The Department should seek to support low cost of entry businesses like direct selling.

To provide consistency, an additional factor that could be cited is the recognition of independent contractor status for businesses under other statutes, such as the Internal Revenue Code and numerous state statutes as cited previously. The analysis for each statute could be different, but recognition is a factor that could be important in determining if an individual is an independent contractor or employee.

A Final Rule Should Provide Clarity and Recognize Similar Standards Under the IRS Code, State Statutes and Other Department Guidance

The Department states that it rejected other alternatives because it would create confusion and result in endless litigation. DSA believes the rule as proposed would have this same effect. A totality of the circumstances analysis combined with additional factors proposed in the rule would create more confusion than clarity and create an unstable and controversial regulatory

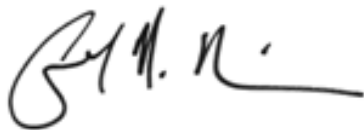
³¹ WHD Op. Ltr. (June 23, 1949)

environment for years to come. The proposed rule does not adequately recognize modern businesses and obligations put in place by other government agencies.

Direct sellers and other businesses need clarity to continue providing important income earning opportunities to millions of Americans. As the Department has opened the independent contractor classification issue with this rulemaking, it can provide this clarity by incorporating 26 USC § 3508 into a final rule to clearly define direct sellers as independent contractors and provide deference to the outside sales exemption.

Thank you for the opportunity to comment. We would be pleased to answer any questions or provide further information as the Wage and Hour Division and Department of Labor sees fit.

Sincerely,

A handwritten signature in black ink, appearing to read "J. N. Mariano". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joseph N. Mariano
President
Direct Selling Association