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May 9, 2013

Mr. Douglas Bell  
Chair, Trade Policy Staff Committee  
Office of the United States Trade Representative  
600 17<sup>th</sup> Street, N.W.  
Washington, DC 20508

**Re: Comments on the Transatlantic Trade and Investment Partnership**

Dear Mr. Bell:

In response to the April 1, 2013 *Federal Register* notice (78 *Fed. Reg.* 19566), Herbalife International of America (“Herbalife”) is pleased to submit the following comments in support of the negotiation of a Transatlantic Trade and Investment Partnership (TTIP) agreement with the European Union (EU).

Herbalife believes that a TTIP agreement would bolster its competitiveness in the EU, where it currently faces services and standards barriers that should be addressed in the upcoming negotiations. Herbalife furthermore supports the United States’ goal in pursuing a TTIP agreement: namely to achieve a substantial increase in transatlantic trade and investment.

**About Herbalife**

Herbalife is a global nutrition company that has helped people pursue an active, healthy life since 1980. Our products, which include protein shakes and snacks, energy and fitness drinks, vitamins and nutritional supplements, and a complete bath and body care line, are available exclusively through our independent distributors in more than 80 countries.

- Herbalife achieved net sales of \$4.1 billion in 2012.
- Herbalife believes the quality of its products and the effectiveness of its distribution network, coupled with geographic expansion, have been the primary reasons for our success throughout our 33-year history.
- Herbalife pursues profitability and growth to increase shareholder value.

### **Direct Selling and a Transatlantic Trade and Investment Partnership agreement**

Herbalife is a direct selling company, which means that its products are marketed and sold by independent distributors, person-to-person, away from a fixed retail location. Herbalife employs a multi-level marketing (MLM) compensation plan, through which its direct sellers earn compensation not only on their own sales but on the services provided in support of sales by other individuals.

An estimated 16 million people are involved in direct selling in the United States and more than 80 million worldwide. Most are women, though nearly a third are men or two-person teams. They are micro-entrepreneurs whose purpose is to sell the product and/or services of the company they represent. The industry is growing. U.S. sales totaled nearly \$30 billion in 2011, with more than 74% of the American public having purchased goods or services through direct selling. Worldwide sales are also strong, reaching \$132 billion in 2011.

Due to a lack of familiarity with direct selling, confusion between legitimate direct selling and fraudulent activities such as illegal “pyramid” scheme sales is common. Such confusion has resulted in restrictions on direct selling companies in some countries and, as a result, has limited the growth of legitimate direct selling companies in some cases.

For Herbalife, international rules governing services trade are especially important because direct selling businesses would potentially be impacted by disciplines that govern the distribution services sector. More specifically, Herbalife sees the TTIP as an opportunity to expand the legal protections for direct selling companies and MLM, potentially opening distribution channels in EU Member States.

### **Draft Services Annex**

Herbalife would support the inclusion of language specifically related to direct selling, such as in an annex in the services chapter of the agreement. The Direct Selling Association (DSA), of which Herbalife is a member, has proposed such language as a means to clarify the commitments countries have undertaken in trade agreements. Following is a model for a Direct Selling Annex.

### **ANNEX [XX] DISTRIBUTION SERVICES**

#### **Direct Selling**

1. Direct Selling or Direct Sales refers to a sales system through which companies engage independent contractors to provide sales and sales-support services away from a fixed retail location. Direct Selling is distinguished from catalog and other direct marketing operations, as well as by sales in fixed locations, by its reliance on personal demonstration and sales. Direct Selling includes wholesale and retail trade activities. Direct Selling typically includes compensation to independent contractors based on their

own personal sales and sales by those independent contractors who are recruited, trained and otherwise supported by the initial direct seller based on the value of products sold. These payments recognize the value of the marketing and sales support services of independent contractors as measured by product sales.

2. As such, direct selling is a recognized type of distribution system, and products sold through this sales system should be provided the same market access as provided to these products when sold through any other sales system. The type of sales system should not be a basis for discrimination.

3. In contrast, this commitment in no way limits a Party from imposing restrictions on fraudulent sales systems, including but not limited to: Pyramid Schemes (in which participants give consideration for the opportunity to receive compensation that is derived primarily from the introduction of other participants into the scheme); Inventory Loading Schemes (in which companies induce participants to purchase goods that cannot be resold or returned to the company); and, Subscription Churn Schemes (in which the company earns funds primarily from entry fees paid by subscribers who do not stay in the business and not from product sales).

4. If a Party considers that the other Party is not maintaining its market access commitments, it may request consultations. The other Party shall afford adequate opportunity for consultations and, to the extent possible, shall provide information in response to inquiries regarding the level of access and any related matter.

5. Goods normally sold on an “over-the-counter” basis shall be permitted through the direct selling channel. This includes: food products (such as food and nutritional supplements, in tablet, powder, liquid capsule form); vitamins, minerals, or other biologically active substances which are intended to support the healthy function of the human body and not intended to cure or treat a disease; cosmetics; common consumer products for which medical expertise is not required, such as cotton swabs; and other hygiene and cleaning products.

#### **Current Barriers to Services Trade**

Regrettably, Herbalife faces restrictions that inhibit its ability to pursue its direct sales model in several EU Member States. Following are examples of barriers to direct selling that should be addressed in the course of the TTIP negotiations.

## **A. Restrictions on Direct Sales of Nutritional Supplements and Meal Replacements in the European Union**

Several EU Member States including **Austria, Belgium, Bulgaria, Cyprus, France, Greece, Hungary, Luxembourg, Malta and Portugal** restrict Herbalife distributors from selling its food supplements and meal replacement products via the direct sales model. Such restrictions are the main type of distribution barrier faced by Herbalife in the EU. These restrictions inhibit the ability of Herbalife to operate in the Member States in question. One Member State, Austria, also restricts the sale of cosmetics via direct selling.

Clear rules that are specifically designed to provide consumers with protection in direct sales transactions already exist in the EU. Directive 2011/83/EU on consumer rights<sup>1</sup>, adopted in 2011, further reinforces the protection afforded to consumers in direct sales transactions. The restrictions cited in this submission on the sale of food supplements, meal replacement products and cosmetics through direct selling provide no additional protection to consumers but unnecessarily hamper trade. There are clearly no safety concerns that justify restricting the sale of these products through direct selling. The fact that such products are sold via direct selling without problem in other EU Member States reinforces the fact that there is no justification for maintaining the current restrictions.

**Austria** - There is a prohibition on the sales of food supplements and cosmetics through direct selling enshrined in national law in Austria.

**Bulgaria** - In implementing the EU Hygiene Regulation (852/2004)<sup>2</sup>, Bulgaria added a national restriction for the sale of food supplements and health food products limiting distribution to pharmacies and specialized stores.

**Cyprus** - In implementing the EU Food Supplements Directive (2002/46/EC)<sup>3</sup>, Cyprus restricts the sale of food supplements to pharmacies and specialized stores.

**Greece** - In implementing the EU Food Supplements Directive (2002/46/EC)<sup>4</sup> and the Energy Restricted Diets Directive (96/8/EC)<sup>5</sup>, Greece restricts the sale of both food

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<sup>1</sup> DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, published in the Official Journal L304/64 on 22 November 2011.

<sup>2</sup> CORRIGENDUM TO REGULATION (EC) No 852/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the hygiene of foodstuffs, published in the Official Journal L226/3 on 25 June 2004.

<sup>3</sup> DIRECTIVE 2002/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements, published in the Official Journal L183/51 on 12 July 2002.

<sup>4</sup> See Footnote 3.

supplements and protein-based meal replacement products to pharmacies and specialized stores.

**Hungary** - The national legislation governing direct selling in Hungary contains a provision that restricts the door-to-door selling of foodstuffs to two categories – fruits and vegetables. This provision, though not actively enforced, could potentially create significant difficulties for Herbalife.

**Malta** - The government in Malta has a provision in national law which stipulates that 'Food supplements may only be dispensed by a pharmacist, doctor or a person with other suitable qualifications as may be laid down by the Food Safety Commission'. A part-time course intended for Health Food Stores personnel is offered by the Food Safety Commission. Those who complete the course may be approved by the Food Safety Commission to dispense food supplements.

### ***B. Payment Bans and Other Limits on Direct Sales Transactions in the European Union***

In addition to the restrictions outlined above, some EU Member States limit when payment can be collected in direct sales transactions, limit the value of goods that can be purchased via direct selling, or have banned direct selling entirely. The TTIP agreement should preclude the use of such restrictions by participant countries.

A number of EU Member States (**Belgium, Greece, France and Portugal**) have restrictions in place on when payment can be collected in direct sales transactions. These restrictions are extremely problematic, as they oblige direct sellers to make multiple trips to the home of a customer to present/demonstrate products/services, to deliver them, and subsequently to collect payment. In comparison to in-store retail, this places direct sellers at a clear disadvantage. Directive 2011/83/EU on consumer rights<sup>6</sup> further complicates the situation as it provides for a 14-day cooling off period in which a consumer can choose to withdraw from a direct sales transaction. At present the length of the cooling off period is set at national level. The Directive must be implemented by June 13, 2014. It remains to be seen if Member States with payment bans will set the period of the payment ban to 14 days so that it runs parallel with the cooling-off period. Combining the requirement of a 14-day cooling-off period and a payment ban,

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<sup>5</sup> COMMISSION DIRECTIVE 96/8/EC of 26 February 1996 on food intended for use in energy restricted diets for weight reduction, published in the Official Journal L55/22 on 6 March 1996.

<sup>6</sup> DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, published in the Official Journal L304/64 on 22 November 2011.

regardless of the approach taken, will make concluding transactions unnecessarily burdensome for direct sellers.

**Belgium** - Belgian national legislation prohibits payment being collected during the cooling off period. This results in direct sellers having to wait for eight days after concluding a transaction before collecting payment. This can, in many cases, involve having to physically return to the home of the consumer in order to collect payment.

Belgian national legislation places a €250 limit on the value of goods that can be retailed to a consumer at his/her home via direct selling. This restricts the quantity of products that Herbalife distributors can retail to customers. Existing EU and national legislation already provides sufficient consumer protection for direct selling and regulation of the products sold via this sales channel. The European Commission is currently pursuing legal action against the Belgian government to secure the removal of the €250 transaction limit on the basis that it violates Directive 2005/29/EC on unfair commercial practices<sup>7</sup>. The Belgian government should be encouraged to completely eliminate this transaction limit.

**Greece** - Greek national legislation on consumer protection contains a provision prohibiting the collection of payment during the cooling off period. Though exceptions to this prohibition are provided for, these are quite vague and create a level of legal uncertainty that should be clarified.

**France** - French law prohibits the acceptance of any payment, or promise of payment, within the first seven days after a direct sales transaction. This results in direct sellers having to wait until the eighth day after concluding a transaction before being allowed to collect payment. This can, in many cases, require sellers to physically return to the home of the consumer in order to collect payment.

**Portugal** - Portuguese national legislation provides a general prohibition on the acceptance of payment in advance of the consumer taking delivery of the product/service covered by the direct sales contract. This inconveniences direct sellers as it unnecessarily complicates the process for collecting payment.

**Luxembourg** - Direct selling is prohibited under Luxembourg law.

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<sup>7</sup> DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), published in the Official Journal L149/22 on 11 June 2005.

### **C. Greece – Draft Labor and Tax Laws Could Disadvantage Direct Sellers**

Herbalife has recently become aware of several new draft laws in Greece that may penalize direct sellers. A draft labor law in Greece indicates that an individual's income will be taxed as salaried income if any individual entrepreneur: (1) provides services to three or fewer persons; or (2) provides services to more than three persons, but 75% of revenues is generated from one client. An obligation on the direct selling companies to treat independent direct sellers as employees would make the direct selling business model unsustainable in Greece.

A draft tax law in Greece appears to apply a discriminatory tax rate of 26% on direct sellers, with no tax reliefs recognized, whereas entrepreneurs are taxed at 21% with appropriate tax reliefs recognized. This discriminatory proposal unfairly penalizes a group who pays the appropriate tax, but does not technically qualify as entrepreneurs.

The United States should seek clarification from Greece on these draft laws. Further, TTIP should offer protections to legitimate direct selling companies against such discriminatory laws.

### **Standards Barriers Affecting Food Supplements and Health Food Products**

#### **Product Registration/Labeling (Denmark, Estonia, Hungary, Latvia, Lithuania and the Slovak Republic):**

In implementing the EU Food Supplements Directive (2002/46/EC)<sup>8</sup>, these countries instituted their own system of registration consisting of submission of a detailed, technical dossier followed by a comment period, regardless of whether the formula contains approved vitamins & minerals (Annex II, Directive 2002/46/EC) or other substances with physiological effect. Member States are encouraged to require only the label notification foreseen in Article 10 of the Directive when products are being placed on the market. These Member States should be encouraged to respect the label notification system provided for in the Food Supplements Directive.

**Testing Requirements / Labeling Regulations (Denmark):** Companies are required to conduct tests on nutrition products for content on a set schedule that does not take into consideration Hazard Analysis Critical Control Point (HACCP) principles utilized. This testing schedule is not required in other EU countries. The tests must be analyzed by the Danish Veterinary and Food Administration (DVFA) or EU-accredited laboratory. Because U.S. laboratory testing is not accepted, these requirements add significant costs to U.S.-origin nutritional products. An agreement between the European Union

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<sup>8</sup> DIRECTIVE 2002/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements, published in the Official Journal L183/51 on 12 July 2002.

and the U.S. should be reached on the mutual recognition of laboratory testing standards. Denmark has introduced national legislation that deems indicating calorie content on front of pack (FOP) labeling as a “low” or “reduced” calorie content claim. This goes beyond the requirements of Regulation (EC) No 1924/2006 on nutrition and health claims on foods<sup>9</sup> and is inconsistent with Regulation (EU) No 1169/2011 on food information to consumers<sup>10</sup>. While it is reasonable to consider indications such as “contains X% less calories” a nutrition claim, it is not reasonable to consider simply stating calorie content on front of packaging labeling as a reduced calorie content claim. This requirement makes it overly problematic to provide basic and easy to understand information to consumers on labeling. Denmark should be encouraged to accept that the EU regulations referenced above provide sufficient consumer protection from misleading labeling and additional national rules are not required.

**France:** In 2006, France, without any justification, established a maximum level for vitamins and minerals in food supplements. This requirement is not aimed at protecting the public health and conflicts with the Codex Vitamin and Mineral Guideline (adopted with the support of the French delegation to Codex, July 2005) and the European Commission Food Supplements Directive (adopted May 2002)<sup>11</sup>. Though the maximum levels for certain vitamins and minerals have since been withdrawn following court action, the levels set for certain nutrients remain in place. The French Decree is a major non-tariff measure aimed at limiting the sale of higher-potency food supplements to pharmacies. The European Commission has been empowered to set maximum levels for vitamins and minerals for food supplements in all EU Member States since 2002 through Article 5 of the Food Supplements Directive. The European Commission should be encouraged to bring forward a proposal for the harmonization of maximum levels. This would counteract attempts by national governments to set unduly low levels and contribute to the creation of a genuine single market for food supplements.

**Germany:** Statements by Germany that the government is responsible for ensuring nutritionally optimal nutrient intakes and protecting consumers against harmful effects of excessive intakes should not justify the use of risk-benefit analysis that could easily be misinterpreted to demand a zero risk standard for nutrients. Terms and phrases such as “avoidance of any risk,” “multiple sources,” “specific nutrients,” and “reasonably low levels” are vague and are not useful without valid examples. Germany should accept the

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<sup>9</sup> CORRIGENDUM TO REGULATION (EC) No 1924/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 December 2006 on nutrition and health claims made on foods, published in the Official Journal L12/3 on 18 January 2007.

<sup>10</sup> REGULATION (EU) No 1169/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, published in the Official Journal L304/18 on 22 November 2011.

<sup>11</sup> See Footnote 8.



conclusions reached by the European Food Safety Authority (EFSA) and other experts that indicate that there is not an adequate conceptual basis or scientific data to support direct risk/benefit analysis for nutrients. Germany should give consideration to Upper Level (UL) values set by the European Commission (EC) scientific groups (e.g. EFSA), but should recognize and use UL values from other sources when EC values are not available. Separate maximums for fortified foods and food supplements, decided on a nutrient-by-nutrient basis, should be set at EU level, which would obviate the need for the risk-benefit approach espoused by Germany.

**Testing Requirements for GMOs (Croatia):** Though not yet a member of the European Union, Croatia is scheduled to join the EU in July 2013. The Croatian customs authorities require that each batch of food products imported into the country is tested to ensure adventitious contamination from genetic material does not exceed 0.9%. The 0.9% level reflects the requirements of Regulation (EC) No 1829/2003 on genetically modified food and feed<sup>12</sup>. However, the requirement that each batch be tested is excessive and goes beyond standard practice applied in the European Union. This requirement makes it extremely problematic and expensive to import food products into Croatia and has consequently led to reduced sales in this market. Croatia should be encouraged to apply a more pragmatic and targeted approach to testing imports. This would involve taking into account previous positive test results by allowing compliant importers to test less frequently.

### **Conclusion**

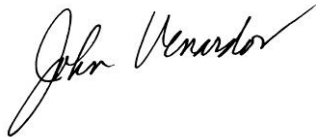
Herbalife supports the United States' negotiation of a Transatlantic Trade and Investment Partnership agreement with the European Union as a means to promote U.S. international competitiveness, jobs and economic growth. The United States should seek an agreement that is comprehensive in its coverage and includes specific provisions to ensure that direct selling companies' ability to operate in the EU is protected. Further, these negotiations must address the existing services and standards barriers maintained by EU Member States that impede the flow of goods and services trade.

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<sup>12</sup> REGULATION (EC) No 1829/2003 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 September 2003 on genetically modified food and feed, published in the Official Journal L268/1 on 18 October 2003.

Thank you for your consideration of these requests. We would be pleased to speak with you further about any aspect of this submission.

Sincerely,



John Venardos  
Senior Vice President  
Worldwide Regulatory & Government Affairs