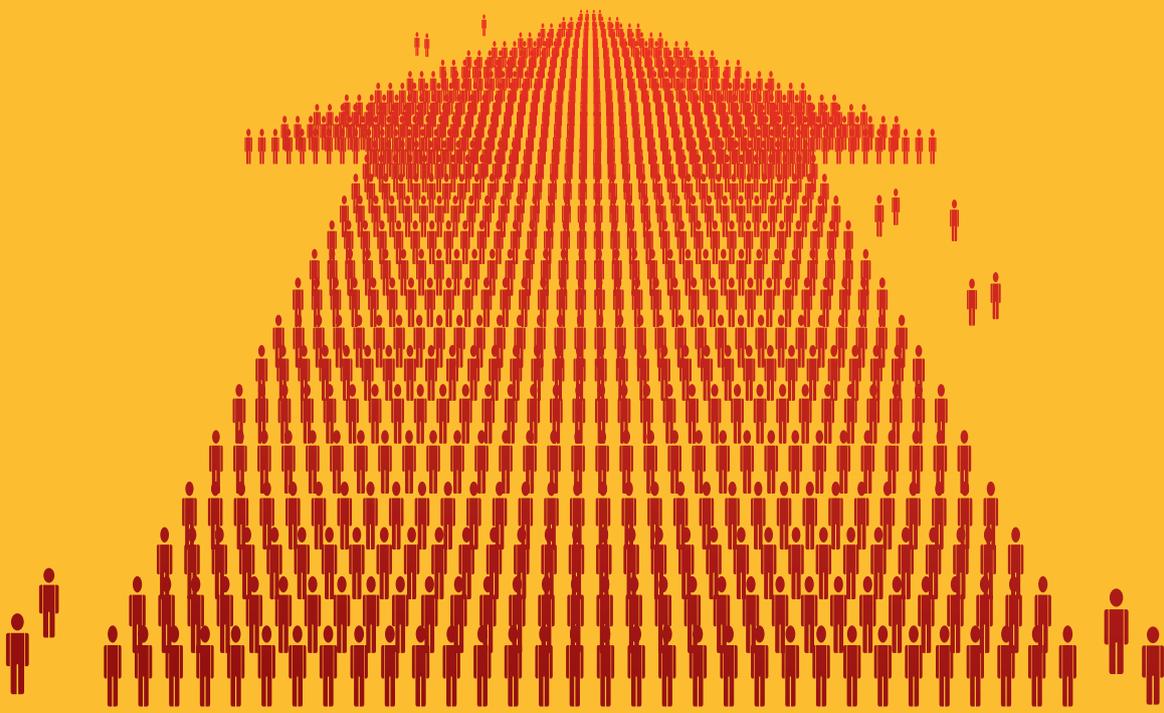




DIRECT 2018

Implementation of Direct Selling
Guidelines in States & Viewing the
Direct Selling Industry with a
Futuristic Lens





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Abstract

Opportunities and Challenges

Direct Selling is one of the oldest non-store based retail formats, involving a direct interaction between the seller and the buyer. Direct Selling has existed in many forms in India and has, over the past few decades, witnessed rapid growth. Today it is one of the fastest growing non-store based retail formats in India. It is a significant contributor to India's GDP and to the policy goals of the Government of India, as captured in its flagship schemes such as Skill India, Make in India, and Digital India.

However, Direct Selling in India continues to suffer significant legal and regulatory hurdles owing to the conflation of legitimate direct selling businesses with illegal chit funds, money circulation, pyramid or Ponzi schemes. Most advanced legal systems have enacted legislation that protects the interests of legitimate direct sellers as well as the public, while penalising fraudulent schemes. The sector is presently regulated by the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 which enacts a ban on schemes for the making of 'quick and easy money'. However, since 'quick and easy money' has not been defined in the Act and the breadth of the language leaves room for confusion and wrongful application of these provisions to legitimate direct sellers.

This ambiguity has caused mistrust of Direct Selling businesses amongst consumers and law enforcement agencies, and has adversely affected the growth of the industry. Industry associations in the field of Direct Selling have long since recognised the need for dedicated legislation and regulation in the field of Direct Selling.

It is against this background that, amidst several detailed inter-ministerial and stakeholder consultations spearheaded by the Department of Consumer Affairs, the Direct Selling Guidelines, 2016 were released.

Direct Selling Guidelines, 2016

The Direct Selling Guidelines, 2016 by the Central Government were the first formal recognition of the Direct Selling Industry. By defining terms relevant to the functioning of a Direct Selling entity, the Guidelines have reduced the ambiguity within the industry and enabled consumers and law enforcement to clearly distinguish between a Direct Selling entity and illegal and fraudulent schemes. The Guidelines regulate the setting up of a Direct Selling entity, including mandatory orientation programmes, conducting a direct selling business including record keeping, sharing of information with direct sellers, prohibition of misleading or deceptive practices, and several provisions for the protection of the Direct Seller and the Consumer.

The primary obligations imposed by the Guidelines on the State/UT Governments are laid down in Clause 9, and can be summarised as below:

- i. Appointment of a nodal department at the respective State Governments in the States;
- ii. Setting up of a mechanism to monitor/supervise the activities of Direct Sellers and Direct Selling entities regarding compliance of the Guidelines;
- iii. Assessment of undertakings by Direct Selling entities stating compliance with the Guidelines and other details as to its incorporation and functioning.

In the almost two years since the issuance of the Guidelines, only eleven States have notified the Guidelines, while some others are reportedly gearing towards drafting and notifying the same. Furthermore, no State has as yet identified legitimate direct selling businesses in order to distinguish them from illegal businesses, as per the notified Guidelines. While the Central Government has released a provisional list of Direct Selling entities, which contains 327 entities as on 31.10.18, which categorises the cases into the following two categories: (i) the DSE in case of which a pending case/FIR with jurisdiction and year and (ii) the cases in which the details of cases / litigations arising out of the violation of new/ current regulatory guidelines as well as cases/ litigations prior to issuance of the guidelines against the DSEs are called for from the DSEs concerned. However, this information does not provide further guidance with respect to the implementation of the Guidelines by the States.

Identification of Issues

It is reasonable to assume that the slow uptake of the Guidelines by the States can be attributed partially to a lack of clarity on the roadmap for implementation of the Guidelines and on ensuring compliance with the Guidelines by Direct Selling entities. In order to establish a robust mechanism as provided for under the Guidelines, State and Union Territory Governments require clarity and technical assistance in establishment of Standard Operating Procedures to operationalise the Guidelines within the States.

The proposed Knowledge Paper drafted by PLR Chambers and Dr. Vijay Kumar Singh, HOD – Department of Law and Management, UPES School of Law intends to streamline these obligations through analysis of international and national best practices in the field of regulation of the Direct Selling industry and to enable state governments to implement the Guidelines, effectively and efficiently.

In furtherance of this objective, presented below is an indicative list of issues that find place in academic and industry discourse on the regulation of the Direct Selling industry. The issues merit discussion with respect to, *inter alia*,

- i. the adequacy of the existing legislative and regulatory framework to effectively address the issue;
- ii. amendments and mechanisms required to be instituted; and
- iii. other areas of law such as the Consumer Protection Act that need to work with existing regulation to address the issues.

a. **Appointment of Nodal Officer and/or Department**

With regard to the appointment of a nodal office and/or department, it is pertinent to note that the Department of Consumer Affairs has released a list of 21 nodal officers from States and Union Territories who are appointed under the Direct Selling Guidelines. The appointment of such nodal offices is instrumental in the effective operationalisation of the Guidelines, and is indicative of imminent action by those states.

The points for consideration may include the appropriate qualifications of the nodal officer, their functions and the limitations of their powers, training imparted to the nodal officer and/or department and the appropriate reviewing and appellate authorities.

b. **Substantive Assessment of Applications**

The process of scrutiny of applications received by the nodal officer and/or department shall involve quantitative and qualitative aspects, such as the adequacy of documents and information furnished and their subsequent legal and economic review. The points for consideration may include the identification of the documentation required such as inclusion of the affidavit, undertaking, response to standard questions and other additional information, metrics to be employed to undertake the review such as assessment of business operation of the entity vis-à-vis the Guidelines, cross-referencing other compliances such as BIS, FSSAI, GST etc.

c. **Procedural Considerations**

• ***Proforma for Applications:***

The applications submitted to the nodal officer and/or department should include a common minimum of prescribed documents such as an affidavit and Form/s including details for verification such as incorporation documents, business model, remuneration scheme, sample contracts between the entity and Direct Sellers etc.

• ***Establishment of Processes for Submission of Affidavits:***

It is imperative for the methodology adopted by the States and Union Territories to meet certain minimum thresholds with regard to ease of access, portals for application, process for evaluation, timelines for scrutiny and clearance of affidavits and applications, renewal etc. Points for discussion may include best practices for the same and proposed model framework for the States.

• ***Standard Operating Procedure for Post-Scrutiny of Application:***

This includes qualitative and quantitative review of the applications from legal and economic standpoint, identification of red-flags, remedies for substantive deficiency, remedies for procedural deficiency, and grounds for rejection of applications, process for re-application on rejection, validity of registration, process for renewal of registration etc.

- ***Standard Operating Procedure for Monitoring Post-Registration:***
This includes complaint specific monitoring and action, periodic reporting by Direct Selling entities, delineation of *suo-motu* cognisance and random checking of compliance with the Guidelines, the Prize Chits and Money Circulation Schemes (Banning) Act, the Consumer Protection Act and other applicable state legislations on aspects such as maintenance of Register of Direct Sellers, website of the entity, provision of training or demonstration materials or catalogues, etc. This also includes grounds for suspension and cancellation of registrations and institutional processes for forward to appropriate authorities for independent review and prosecution.
- ***Consultation of External Experts:***
Scrutiny of applications in the first instance and monitoring compliance post registration requires legal and technical assistance from experts including lawyers, economists, and other specialists with demonstrable expertise in the field of direct selling. The possibility of establishment of an expert panel, composition of the panel, qualifications, appointment and tenure of experts may be discussed.
- ***Grievance Redressal Mechanism:***
Grievances arising out of action by the nodal officer and/or department need to be addressed in a reasonable, transparent and efficient manner, in order to ensure effective regulation of the industry. The issues for consideration and discussion may include identification of the authority or body responsible for redressal of grievances, procedure to be followed, appropriate remedies for grievances, penalties for wrongful action etc.

