Business Opportunity Rule, R511993

REBUTTAL TO COMMENTS OF JEFFREY A. BABENER IN CONNECTION WITH THE REVISED PROPOSED BUSINESS OPPORTUNITY RULE

Submitted by Gail Aird

Notes: The statements Babener presents in support of his request to exclude distributor websites sold on an at-cost basis [from the required payment provision of the Proposed Rule] contains an admission against interest as it flows to his request.

Babener Comments

(1) …The proposed rule is triggered by an offeror who "provides outlets, accounts, or customers, including, but not limited to, Internet outlets… In today's direct selling world, it is not uncommon for direct selling companies to offer…**replicating websites for distributors** that are fed by company web and other media promotion…. (Page 4, Emphasis added)

(2) The prospective purchaser must make a required payment: …Often, today, MLM/Direct Selling companies also **mandate a replicated website**, back office access for commission analysis and reports and internal communication, typically "at cost"…. (page 4, Emphasis added)

Babener states MLM/Direct Selling companies ("SELLERS") often mandate that their distributors purchase websites at a price that is "typically" at cost. Therefore, by his own admission, some Sellers sell their distributors mandated websites on a for-profit basis. Based on my personal knowledge and belief, a common practice of Sellers is to sell distributors websites on a for-profit basis. Given Babener's involvement with the MLM/Direct Selling industries and the DSA for "almost 25 years" (as stated in his comment letter) it is reasonable to assume that he is well aware of this common practice.

Babener prefaced his statement regarding the sale of websites on an at-cost basis as being "typical"; as opposed to stating that Sellers sell these websites "on

an at-cost basis" because he knew the falsity of such statement could be easily proven.

Additionally, a very disturbing element in connection with selling (as opposed to providing at no charge) distributor websites is that these websites provide the Seller with a significant financial benefit. Specifically, as admitted by Babener, these websites allow the Seller to transmit commission analysis, reports and internal communications to distributors via these websites; as opposed to having to incur the substantial costs (including postage) associated with "paper" transmittal of this information to distributors.

DSA member Pre-Paid Legal (which Babener admits has retained his firm for legal counsel in the past) sells its distributors websites on a for-profit basis.

Pre-Paid's Annual Reports (10K's) filed with the Securities & Exchange Commission ("SEC") reveal that in the 5 years ending December 31, 2007 Pre-Paid distributor self-replicated website purchases (which the Company refers to as "e-Service") **totaled $52 million** (2003 $8.4 million; 2004 $7.6 million; 2005 $10.8 million; 2006 $12.8 million; and 2007 $12.4 million). Giving Pre-Paid the [absurd] benefit that it employed 40 full time employees, each making $50,000 a year to operate and maintain distributors websites; Pre-Paid created **$50 million** profit on its sale of websites to its distributors in the 5 years ending December 31, 2007.

Pre-Paid Legal's practice of selling distributors websites on a for-profit basis is the norm, not the exception. Babener's false and misleading statement that Sellers "typically" sell websites to distributors on an at-cost basis was presented in an effort to influence the FTC's decision in connection with his request.

Babener's statements create the [false] allusion that the sole purpose of distributor websites is to provide back office support to allow the Seller to transmit commission analysis, reports and internal communications to distributors. Babener glaringly omits the material fact that distributors use these websites to market their products; services and business opportunities to consumers. In short, a distributor website is [what is commonly called] a sales & marketing tool. I hereby incorporate by reference the section addressing Sales & Marketing tools sold to distributors in Part 1 of Aird's Rebuttal to DSA Comments, beginning on page 23 http://www.ftc.gov/os/comments/bizoprevised/535221-00081.htm

Babener Comments

A Constructive Critique of the FTC Revised Proposed Business Opportunity Rule (beginning on page 2)

Excerpts:

(1) In no uncertain terms, the FTC opined that its intent was, in redrafting the Proposed Business Opportunity Rule, that traditional MLM/Direct Selling/Network Marketing Companies should be exempted from coverage of the new Proposed Business Opportunity Rule.

(2) This Comment addresses the definitional elements of the Revised Proposed Business Opportunity Rule to suggest further approaches to achieve the FTC's stated intent to exempt traditional MLM/Direct Selling programs from coverage of the Revised Proposed Business Opportunity Rule.

(3) In fact, no less than ten references are set forth by the FTC with respect to its intent to exclude application of the RPBOR to MLM/Direct Selling companies…

The Revised Rule does not state, imply or even allude to the proposition that the FTC's intent was to exempt all MLMs; Direct Sellers; and Network Marketing Companies from the Rule. Additionally, it is curious that Babener included "Network Marking Companies" when describing the entities the FTC purportedly intended to exempt from a final Rule, especially given the fact that Babener does not even identify what constitutes a Network Marketing Company for purposes of the Rule.

Babener Comments

The prospective purchaser must make a required payment. …The only exemption is for "purchase of reasonable amounts of inventory at **bona fide wholesale prices**." The inventory exemption is of little assistance to MLM/Direct Selling companies in that **it is almost a "nonexistent" practice** for MLM companies to require inventory purchases… (Page 4, Emphasis added)

A. Babener's statement that the purchase of inventory at **"bona fide wholesale prices"** is almost a "nonexistent" practice" for MLMs is a true statement of a material fact.

In truth and fact, MLMs do not sell new recruits (purchasing their business opportunity) inventory [in reasonable amounts or otherwise] at bona fide wholesale prices.

I hereby incorporate by reference the section titled "**BONA FIDE WHOLESALE PRICES"** presented in Part 2 of Rebuttal to DSA Comments, beginning on page 18 http://www.ftc.gov/os/comments/bizoprevised/535221-00086.htm

B. Babener states [that] **it is almost a nonexistent practice** for MLM companies to require inventory purchases.

By his use of the phrase “it is **almost** a nonexistent practice”, Babener admits [another admission against interest] that some MLMs require its distributors to purchase inventory. Contrary to his statement that the purchase of inventory is “almost a nonexistent practice”; the purchase of products (inventory) as a condition requisite for commission entitlement is a common practice within the MLM industry. For example, DSA MLM members Herbalife and USANA require certain dollar amounts of monthly purchases (inventory) as a condition requisite for commission entitlement.

Babener Comments

Adopt an exemption for the purchase of “at cost” or “not for profit”…marketing support materials… (Page 6, Emphasis added)

Notes: The items Babener refers to as “marketing support materials” are commonly referred to as sales and marketing tools.

I hereby incorporate by reference the section addressing Sales & Marketing tools sold to distributors in Part 1 of Aird’s Rebuttal to DSA Comments, beginning on page 23 http://www.ftc.gov/os/comments/bizoprevised/535221-00081.pdf

Babener Comments

Recommended: Call Out the MLM/Direct Selling Exemption and Other Typical Exemptions:

In summary, the FTC’s stated intent, to exempt MLM/Direct Selling companies… has clearly moved the discussion in a direction much appreciated by the MLM/Direct Selling industry…to achieve the intent of the FTC…Specifically *call out the exemption for MLM/Direct Selling* in the Revised Proposed Business Opportunity Rule. (Page 5, Emphasis added)

> Direct selling is defined by the Direct Selling Association ("DSA") as the sale of a consumer product or service, person-to-person, away from a fixed retail location. www.dsa.org .

Direct selling broadly sweeps in every form of person-to- person selling that is conducted "away from a fixed retail location". Direct sellers would include individuals selling any products or services, including work-at-home schemes such as envelope stuffing and business opportunities promoting vending machine, rack-display, work-at-home, medical billing, and 900-number schemes, among others, as long as the sales were conducted away from a fixed retail location.

I hereby incorporate by reference the section titled: "**Will providing exemption from the earnings disclosure requirements of the Rule extinguish the FTC's jurisdiction over the exempt entities and individuals for violations of false or deceptive claims under Section 5?"** beginning on page 14 of Part 2 of Aird's Rebuttal to DSA Comments http://www.ftc.gov/os/comments/bizoprevised/535221-00086.pdf

Babener Comment

(2) Adopt a threshold exemption for required payments in the first six months, preferably $500, but perhaps as low as $200. (Page 6)

The FTC has already considered, and rejected, the argument by numerous commenters (mostly from the MLM industry) to provide a threshold dollar amount exemption before the Business Opportunity seller would be brought under the ambit of the Rule.

Revised Rule beginning on page 57:

A common theme…is that mandatory disclosures are not necessary…On the other hand, some commenters, such as the National Consumers League ("NCL") strongly support the proposal to drop the financial threshold to zero, as a means of closing gaps that would allow perpetrators of fraud room to avoid making disclosures.

> For example, NCL stated that the:
> $500 minimum investment . . . leaves many consumers without the disclosures and other protections that they need. Nearly one-third of the consumers who reported to the NFIC last year that they had lost money to fraudulent or deceptive business opportunities paid less than $500. . . . Whatever minimum amount might be set, fraudulent operators will price their services below it, and consumers will be victimized.

Conclusion:

Babener's position mirrors the positions taken by the DSA and DSA members that filed Comments in connection with both the Original and Revised Rule; which is that the FTC should provide an absolute exemption for all Direct Sellers; DSA members; DSA's 13.3 million distributors affiliated with DSA MLM members; MLMs [and the newly added] Network Marketing companies from the ambit of a final Rule. If the FTC grants the requested exemptions; the FTC will have issued a Business Opportunity Rule that has the potential to exempt [from the ambit of the Rule) every Business Opportunity seller in the US.

The FTC based its decision to craft the components of the Revised Ruled based on the record of this rulemaking process at the time such decision was made. Likewise, when a final Rule is crafted the FTC must base all decisions, including without limitation any decision to exempt any class of Business Opportunities

sellers (DSA members; MLMs: Direct Sellers or Network Marketing entities) from the ambit of a final rule –specifically on the record of this rulemaking process as it exists at the time the FTC determines the components of a final Rule.