



U.S. Department of Justice

Civil Division

Washington, D.C. 20530

January 14, 2011

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Business Opportunity Rule, R511993

Dear Mr. Secretary:

The Office of Consumer Litigation of the United States Department of Justice submits these comments on the Federal Trade Commission's Staff Report on the Business Opportunity Rule. The Commission made the Staff Report public last October, and sought comments through January 18. We appreciate the opportunity to comment on the Staff Report and the current proposed rule.

As you know, we previously commented on a version of the proposed rule in a letter dated June 15, 2006, and I participated as a panelist in the Commission's June 1, 2009 Workshop where a revised proposed Disclosure Document was discussed. I appreciate the attention that FTC staff has given to this effort, and the responsiveness to suggestions we have provided in the past. Overall we continue to be extremely pleased with the work of Commission staff on this project, and look forward to having in place a Business Opportunity Rule, such as that discussed in the Staff Report, that is both tailored to the needs of consumers considering purchasing a business opportunity, and the needs of those of us who will be enforcing the rule against unscrupulous sellers who seek to profit through sales of worthless opportunities dressed up to look like profitable ventures.

My June 15, 2006 letter suggested inclusion of language in what is now Section 437.1(m) of the rule defining "providing locations, outlets, accounts, or customers[.]" That suggestion was designed to clarify the definition to include providing a list of locators, or offering to do so. Those suggestions have been accepted in the current draft rule. Responding to comments from others that the "otherwise assisting" portion of that definition was too broad, Commission staff resisted some suggested changes, such as deleting "customers" from the definition, but added a proviso which states that "advertising and general advice about business development and training" is outside of the definition. Staff Report, pp. 52 - 53.

We strongly agree that "customers" should remain in this definition. The allure of a

business opportunity is the ready availability of cash flow to the purchaser, and this cash flow can come from locations or customers, depending on the nature of the opportunity being offered, as the Staff Report discusses. We also agree with Commission staff that the proviso staff suggests should satisfy any legitimate objection to the definition without unduly narrowing the coverage of the definition. We would object to any broader exemption from coverage, however, as long experience with fraudulent business opportunity purveyors teaches that any loophole will be vigorously exploited. The "advertising and general advice" exception appears narrow enough so as to not be unduly problematic.

The Staff Report recommends a new proposal to require sellers to provide the Disclosure Document and other required disclosures to potential purchasers in the same language as the seller uses to market the business opportunity. Staff Report, pp. 101 - 03. We applaud this initiative. We have seen business opportunities pitched to the Spanish community, and other frauds often prey on specific ethnic groups. The Disclosure Document is a simple document, and other required disclosures are essential to create a meaningful frame of reference for what often are exaggerated earnings claims. It is not asking much of a business opportunity seller to make these essential disclosures as comprehensible to would-be buyers as is the sales pitch.

The Staff Report seeks comments on certain aspects of the requirements regarding earnings claims. Staff Report, pp. 96 - 97. In particular, the Staff Report inquires as to the necessity of including a proposed requirement that all who purchased the opportunity before the ending date of a time period for which a representation is made be included in the statistics provided in the earnings claim document. In reality, many business opportunities begin and end in a short period of time, constantly reinventing themselves to avoid association with previous failures. Requiring inclusion of all purchasers who purchased before the ending date in any statistics in an earnings claim document is necessary to force the seller to have the document be at all representative of the business as a whole. Any wiggle room in this regard will be exploited to create a document based on non-representative sellers. If a business opportunity is not engaged in this sort of "evergreen" behavior, its customer base would be large enough to minimize the impact of low sales numbers arising from recent buyers. Moreover, nothing prevents the seller from explaining a "low" average earnings number by pointing out a large number of recent entrants. The information required by the proposed rule effectively curtails data manipulation which harms potential buyers.

I hope you find these views helpful. If you have any questions, do not hesitate to contact me.

Sincerely,

Kenneth L. Jost
Deputy Director
Office of Consumer Litigation