

**Before the
FEDERAL TRADE COMMISSION
Washington, DC**

Business Opportunity Rule, R511993

COMMENTS OF GARY D. HAILEY, VENABLE LLP

Introduction

On April 12, 2006, the Commission published a revised notice of proposed rulemaking for a new trade regulation rule governing the sale of business opportunities. Our comments on the initial proposed rule ("IPBOR") highlighted what we believed was a fundamental flaw in the proposed rule: its overly broad definition of "business opportunity." As we pointed out, this definition appeared to encompass authors of publications on how to make money in real estate or in the stock market or on eBay, and many other legitimate sellers of informational and educational products and services who should not be lumped in with sellers of work-at-home scams and pyramid marketing schemes.

We are pleased to see that the Commission's revised proposed rule ("RPBOR"), which was announced on March 18, 2008, contains a revised definition of business opportunity that excludes "advising or training" as a form of assistance that would trigger application of the rule. However, we believe that the Commission should either expressly exempt sellers of informational and educational products and services from the proposed rule altogether, or at the least revise RPBOR §437.1(1), which could be read in such a way as to undercut significantly the Commission's intended exclusion of sellers that offer business assistance only in the form of "advising or training" their customers.

The Commission Should Make It Clearer That the Proposed Rule Does Not Apply to Sellers of Publications or Training Merely Because They Truthfully Represent That Those Publications or That Training Includes Information or Advice About How to Obtain Customers

The IPBOR would have applied to sellers who offered to provide "business assistance," which was defined generally as "the offer of material advice, information or support . . . in connection with the establishment or operation of a new business." That language – as well as a subsequent statement in the definition of "business assistance" that said that term included "[a]dvising or training, or purporting to advise or train, the purchaser in the promotion, operation, or management of a new business" -- has been deleted from the RPBOR.

But the RPBOR continues to provide that sellers who "[assist] the prospective¹ purchaser in obtaining his or her own locations, outlets, accounts, or customers" may be subject to the rule's requirements. Read out of context, that language appears to be quite broad, and would seem to apply to the provision of advice or training concerning how to find customers for a new business.

The IPBOR defined "providing locations, outlets, accounts, or customers" not only to cover sellers who directly furnished purchasers with existing or potential locations, outlets, accounts, or customers, but also to apply to sellers who engaged in "*training* or otherwise assisting" the purchaser in obtaining his or her own locations, outlets, accounts, or customers. [Emphasis added.] The RPBOR deletes the word "training" from that definition, which we read as an indication that the Commission intended to distinguish the act of providing customer names directly from the act of

¹ It is not clear to us why the term "prospective purchaser" is used in §437.1(l) but "purchaser" is used in §437.1(c)(3). (Perhaps this was inadvertent.)
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providing education concerning techniques that can be used by a new businessperson to locate and secure customers.

Footnote 178 of the revised notice of proposed rulemaking ("RNPR") introduces some doubt on this point. At first, the note says that the elimination of the word "training" here was intended to prevent the definition from "inadvertently sweeping into the ambit of the rule . . . educational institutions." But the note goes on to say that the elimination of the word "training" was not intended to undercut the staff's long-standing position that the term "location assistance" in the FTC's Franchise Rule may reach circumstances where a seller "instructs investors on how to find their own profitable locations" (citing Staff Advisory Opinion 95-10).

In other words, while the Commission has deleted the word "training" from the RPBOR, it seems to be saying that "assisting" may encompass certain types of training. Does that mean the offering of "training" no longer triggers the RPBOR's requirements – except when it does?

Staff Advisory Opinion 95-10 notes that the Franchise Rule is a "pre-sale disclosure Rule," and that "post-sale offers of assistance are not included in determining Rule coverage." Likewise, the RPBOR does not apply to all sellers who provide information about how to find locations, outlets, accounts, or customers as long as they do not *represent* that they will provide such information. It's not the post-sale assistance that is the issue, but the pre-sale promise of assistance.

We believe that this distinction, while helpful, is not sufficient. It is unclear to us why a seller should be discouraged from truthful representations that it will provide training or advice of any kind. We believe, therefore, that the RPBOR should distinguish representations by a seller that it will provide locations, outlets, accounts or customer

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names directly from a representation that it will provide information or education concerning techniques that can be used by a new businessperson to locate and secure locations, outlets, accounts, or customers. The Commission's deletion of "training" from §437.1(l) was, in fact, intended to make that distinction. But the RNPR (especially the discussion in footnote 178) muddies the waters, and that ambiguity needs to be cleared up before a final rule is promulgated.

It would be possible to clarify this point without revising the RPBOR – for example, by inserting some discussion in the statement of basis or purpose. But we believe the best approach would be to delete the final clause of §437.1(l). Catch-all language like "otherwise assisting" is inherently overbroad. We are unable to provide any examples of unfair or deceptive practices that would be addressed by this clause but not addressed by other language in the RPBOR. If the staff has specific practices in mind here, they should state them rather than relying on such vague language.

The Commission Should Make It Clearer That the Proposed Rule Does Not Apply to Sellers of Publications or Training Merely Because They Truthfully Represent That They Will Provide Purchasers With the Names of Consumers or Businesses Who Meet Certain General Criteria That May Be Relevant to Purchasers

The RPBOR states that sellers who represent that they will "provide . . . customers" to purchasers will usually be subject to the rule's requirements. §437.1(l) further defines that term to include "furnishing the prospective purchaser with existing *or potential* . . . customers." [Emphasis added.]

The problem with the provision is that everyone is a "potential" customer to some degree. We believe the Commission should make it clear that merely offering to provide a general list of consumers or businesses (or other entities) who meet certain demographic or other criteria that may be relevant to a new businessperson looking for

customers does not constitute a representation that the seller is providing the purchaser with "potential customers."

Staff Advisory Opinion 95-10, which is cited in footnote 178 of the RNPR, states that a seller "need not literally secure locations" for vending machine purchasers to meet the Franchise Rule's "location assistance" requirement. "[P]roviding [purchasers] with pre-qualified leads who are willing to have a machine on their business premises" satisfies that Rule's "location assistance" requirement. We understand why the Commission would take the position that something short of a promise to provide existing customers would be sufficient to trigger the Franchise Rule's application in such a situation – a seller might exaggerate how easily the "leads" it is providing can be converted into actual locations, which could mislead a prospective purchaser into thinking that his or her success was assured.

However, we assume that the Commission would not conclude that a seller who offered prospective vending machine purchasers access to a database or website that can be used to generate a list of all the office buildings, or gas stations, or other potential vending machine locations within a certain distance from the purchaser's address had provided "location assistance" as that term is used in the Franchise Rule. Providing that website is a convenience to the purchaser, and may save him or her considerable time and effort, but that is hardly the same thing as providing a list of locations "who have shown an interest in providing a site for a vending machine."

We also assume that the Commission would agree that it makes no difference whether the seller provides access to such a website so the purchaser could generate such a list, or the seller generates such lists itself and offers them to purchasers. In neither case is the seller really providing customers.

Sellers may utilize the many available public-record or other databases to provide prospective purchasers with lists of consumers or business who meet certain relevant criteria – whether those criteria are geographic (e.g., consumers or businesses located in a

certain defined area), or demographic (e.g., people in a certain age group with a certain marital status), or otherwise (e.g., consumers who have driver's licenses, or own a house). We believe that the Commission should make it clear that a seller who uses public-record or other databases to create a list of consumers who meet certain relevant criteria – either demographic criteria (e.g., they are a particular age or gender, or live in a particular zip code, etc.) or other criteria (e.g., consumers who have mortgages, are licensed drivers, etc.) – and offers those lists to businesspersons is not "providing customers" for purposes of the RPBOR.

We realize that the RPBOR clearly would not apply to sellers who provide such lists as long as they do not *represent* that they will provide such information. It's not the post-sale assistance that is the issue, but the pre-sale promise of assistance. But as noted above, it is unclear to us why a seller should be discouraged from truthful representations that it will provide such information. We believe, therefore, that the RPBOR should distinguish representations by a seller that it will provide potential customers in the form of a list of pre-qualified "near-customers" from a representation that it will provide a list of consumers or businesses who meet certain general criteria that can be used by new businesspersons as a starting point for soliciting potential customers.

The Commission Should Make It Clearer That the Proposed Rule Does Not Apply to Sellers of Publications or Training Merely Because They Truthfully Represent That Those Publications or That Training Includes Information or Advice About Locator or Lead-Generating Companies

We also question why sellers should be discouraged from representing that they will provide information about locator or lead-generating companies, or recommend certain such companies. Providing information about third parties who may be helpful to a new businessperson should be encouraged, not discouraged. If the seller is compensated by the third party for referred business or has some other material relationship with the third party, it might be appropriate to require the seller to disclose

that fact. But the current proposal is inconsistent with the Commission's usual belief that more information is better than less. The phrase "providing a list of locator or lead-generating companies" would appear to encompass even neutral references to third-party websites or publications that contain such a list. We recommend, therefore, that the Commission revise §437.1(l) by deleting the references to recommending, suggesting, or (in particular) providing a list of locator or lead-generating companies.²

Other Comments

Our 2006 comments made a number of other points concerning the IPBOR that also apply to the RPBOR. Rather than repeating our 2006 comments here, we are incorporating them by reference to the extent that they are still relevant.

We believe that most of our previous comments concerning earnings testimonials and the timing and contents of the disclosure document are still relevant. In particular, we continue to believe that the requirement to disclose the names, locations, and telephone numbers of previous business opportunity purchasers – and the prohibition against offering customers any sort of "opt-out" from that provision – is misguided.

Rulemaking Procedures

Compared to the IPBOR, we believe that the RPBOR represents a major step in the right direction. But there still are a number of important issues that we believe deserve further exploration and consideration before a final rule is promulgated. It is not clear to us whether it would be better to explore those issues in hearings with cross-

² Regulating sellers who merely provide a comprehensive list of locator or lead-generating companies for the purchaser's convenience but do not recommend or suggest that the purchaser use a particular company or companies is particularly ill-advised.

examination and post-hearing rebuttal submissions, as specified in Section 18(c) of the FTC Act, or in one or more informal public workshops, but we request that either hearings or workshops take place. The Commission staff has invested many years in the current proposed rule, and it is only appropriate that the Commission move deliberately and with great care before making a final decision of such significance.

If hearings (or workshops) are held in connection with this proposed rule, we request the opportunity to testify and otherwise participate in those hearings (or workshops) on behalf of our interested clients. These comments provide a summary of our expected testimony, but that testimony would also include our reactions to other relevant comments and contain additional information that would supplement these comments.

Conclusion

We appreciate the opportunity to comment on the proposed rule, and look forward to participating in any future rulemaking hearings or public workshop conferences in order to further explain our views and to comment on the views of other commenters.

Respectfully submitted,

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