



Tupperware
Brands

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Federal Trade Commission
Office of the Secretary
Room H-135
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Business Opportunity Rule, R511993

Dear Commissioners:

Tupperware has watched closely as the FTC has worked to update regulations to protect consumers from fraudulent business opportunities. Tupperware previously filed initial and reply comments on July 17, 2006 and September 29, 2006 concerning the original version of the Business Opportunity Rule published in the Federal Register on April 12, 2006. In addition, Tupperware testified in November 2007 before the U.S. House of Representatives Small Business Committee regarding the accompanying analysis required under Regulatory Flexibility Act.

In prior comments, Tupperware expressed significant concerns with the NPRM noting that the initial draft of the regulation would penalize legitimate businesses such as Tupperware that do not hold the potential for consumer harm of the type that the FTC has announced it is trying to eliminate through this rulemaking. Tupperware welcomes the large number of constructive changes made by the FTC in releasing the Revised Notice of Proposed Rulemaking (RNPRM)(73 Fed. Reg. pp. 16109-16138, March 26, 2008).

We understand from the RNPRM that the Commission does not intend to issue regulations covering Tupperware and comparable multi-level marketing companies (MLMs). The fourth page of the Federal Register Notice lists two changes identified by the FTC as "significant":

- "It narrows the scope of the proposed Rule to avoid broadly sweeping in sellers of multi-level marketing opportunities, while retaining coverage of those business opportunities sellers historically covered by the FTC's original Franchise Rule (and by the FTC's interim Business Opportunity Rule), as well as coverage of sellers of work-at-home schemes;
- It cures a potential overbreadth problem that may have inadvertently swept in companies using traditional product distribution arrangements;"

We appreciate the FTC's desire "to avoid broadly sweeping in sellers of multi-level marketing opportunities." However, Tupperware is concerned that the regulations do not clearly exempt the company from the BOR regime due to some unclear definitions and

requirements that the Commission needs to modify in order to achieve its goal. The primary concerns focus on the definitions of phrases that are used to define “business opportunity” in §437.1 (c). The three step test of §437.1 (c) to determine whether a business opportunity exists is the core test of whether or not a company is covered by the proposed Business Opportunity Rule.

I. Background of Tupperware

Tupperware is a publicly traded (NYSE: TUP), global direct seller of premium innovative products. Product brands and categories include design-centric preparation, storage, and serving solutions for the kitchen and home through the Tupperware brand and beauty and personal care products through the BeautiControl brand. Tupperware brand products carry a lifetime warranty. Tupperware is found in over 90% of American homes today.

Today, Tupperware’s products are distributed worldwide primarily through “direct selling” under which products are sold to consumers outside traditional retail store channels. The system facilitates the timely distribution of products to consumers and establishes uniform order entry, delivery, and payment practices. Independent contractor consultants comprise the vast majority of the sales force. Consultants also recruit and train other consultants. Currently, Tupperware has an average active salesforce of approximately 158,000 sales consultants in the United States, representing the Tupperware or BeautiControl brands.

Tupperware relies primarily on the “party” method of sales, which is designed to enable the purchaser to appreciate through demonstration the features and benefits of Tupperware® products. Demonstrations, which are sometimes referred to as “Tupperware parties,” are held in homes, offices, social clubs and other locations. The BeautiControl sales force reaches customers in group settings and through home demonstrations called Spa ESCAPEs. Tupperware® products are also promoted through brochures mailed to persons invited to attend Tupperware parties and various other types of demonstrations. Sales of Tupperware® products are supported by Tupperware through a program of sales promotions, sales and training aids, and motivational conferences for the sales force.

New Tupperware consultants are recruited by existing Tupperware consultants, typically at a demonstration or party. During the recruiting process, the recruit generally is provided with information about the income he or she may earn depending on how many parties are hosted per month; this information is based on the retail dollar value of products sold at Tupperware parties expressed as a national party average. To become a consultant, the recruit must simply sign a Consultant Agreement with Tupperware that registers the individual with the company, establishes terms and conditions under which Tupperware® products will be sold and under which the consultant will be compensated, and makes arrangement for the purchase of a starter Business Kit. Often, this Agreement is signed at the demonstration attended by the recruit.

The starter Business Kits include products that can be used as demonstration models at a party hosted by the consultant. The products are the property of the consultant, and thus may be used for personal use as well. The Tupperware starter Business Kits, for example, can include a variety of space-saving containers, “Quick Chef” choppers,

spatulas, and other items, all with lifetime warranties. The retail value of the products in these starter Business Kits far exceeds the price paid by the consultants; the price paid by consultants also is below wholesale value. For example:

- Tupperware consultants may choose either a \$79 or \$129 starter Business Kit. The retail values of these kits are approximately \$350 and \$550, respectively.
- BeautiControl consultants may choose a \$99 starter Business Kit. The retail value of this kit is approximately \$400.

Starter Business Kits are shipped by Tupperware to consultants within 72 hours of the signing of the Consultant Agreement. During this time, individuals may attend a New Consultant Training class, led by an experienced Tupperware consultant. The training classes are not mandatory, but attendance is encouraged by Tupperware in order to make Tupperware consultants more successful. Consultants may also begin scheduling and planning their first Tupperware parties prior to receiving their kits.

As a general matter, Tupperware consultants do not purchase or carry inventories. Instead, consultants place customer purchase orders with Tupperware, which then ships products either directly to the customer, the party host or to the consultant, who then arranges for product delivery. Tupperware ships products only after the customer has made payment to the consultant. Tupperware charges consultants 75 percent of the retail price paid by customers; the remaining 25 percent is the consultant's profit. In the event that a consultant wishes to return sales aids (or other products), Tupperware will repurchase such items (provided they were purchased within the last 12 months and are still able to be sold) at 90 percent of the consultant's cost.

Consultants are compensated under a multi-tier system. Under this model, consultants are compensated not only on the basis of their own sales, but also receive commissions on the basis of the sales of consultants they have recruited and other "downline" recruits. Consultants receive no commissions for the mere recruitment of other consultants or the purchase of starter Business Kits. Rather, consultants are paid only on the basis of actual product sales to customers. Tupperware consultants have no territorial recruiting or sales protections or restrictions.

In addition to training and orientation sessions, Tupperware provides its consultants with substantial business assistance. For example, Tupperware provides on-line training aids, product ordering assistance, consultant access to the company's Internet-based sales portal, party planning organizational materials, marketing materials (e.g., catalogs, flyers), party favors, incentive gifts for party hosts, and other assistance designed to help consultants achieve sales success.

Tupperware sales consultants become consultants in order to earn a target amount of income (e.g., vacation funds) or to supplement their income during difficult economic times where additional income is needed to pay for higher living costs, mortgages, or to help replace income in the event of a job loss in the family.

II. The Need for Clarity

The preamble to the RNPRM indicates that the FTC wants to exempt legitimate companies from the RNPRM. The FTC has instead indicated its intention to use its existing authority under Section 5 of the FTC Act to pursue fraudulent activity by companies that would be exempt from the Revised Business Opportunity Rule. Tupperware supports this goal.

However, it is unclear that Tupperware and other legitimate companies would actually be exempt from the revised Business Opportunity Rule. The focus of Tupperware's comments is on the need for a bright line to understand the definition of a business opportunity, or in the alternative, safe harbors to stay within. All companies need regulatory certainty in order to build their businesses. In Tupperware's case, the risk of such uncertainty is extreme in a billion dollar business. Black and white certainty of what is acceptable and what is not acceptable is far preferable to interpreting shades of grey.

III. Analysis of the RNPRM

There are three tests that must be met for a business model to be considered a business opportunity under proposed §437.1(c). Tupperware's business model appears to meet §437.1(c)(1), but it is unclear if the tests in §437.1(c)(2) or (3) would be met, despite the FTC's comments in the preamble that imply that Tupperware would be exempt from the rule, and therefore implicitly not meet one or both of these two remaining tests.

A. The §437.1(c)(2) test – Required payment

The definition of a required payment listed in §437.1(o) of the RNPRM is unclear as to whether payments for purchases by consultants for display or personal purposes would be considered a required payment. The current text of §437(o) is:

Required payment means all consideration that the purchaser must pay to the seller or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the business opportunity. Such payment may be made directly or indirectly through a third-party. A required payment *does not include* payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease.

Tupperware consultants often purchase products for their personal or family's use, although they are not required to do so. Consultants may also purchase products, either as part of the starter Business Kit or as an additional purchase, for use as display items to demonstrate the quality of our products. Again, Tupperware consultants are not required to maintain display items or inventory, but we are aware that this does occur. In some cases, potential consultants purchase the starter Business Kit and do nothing else with no intention of selling any additional product.

If the phrase "for resale or lease" modifies "inventory," Tupperware would appear to fall under the definition of a required payment and therefore be subject to the proposed rule since not all required payments are used for inventory for resale or lease – personal use, family use, display items, etc... The Commission should redraft the sentence: "A

required payment does not include payments for the purchase of reasonable amount of inventory at bona fide wholesale prices for resale or lease” to make the meaning clearer.

In addition, potential consultants do not always decide to proceed with becoming a consultant even after purchasing a starter Business Kit. Those who do not wish to become a Tupperware consultant after purchasing the starter Business Kit have the option of keeping it or returning it within 12 months for a refund of 90% of the purchase price, if the item is in usable, saleable condition. Tupperware keeps 10% of the purchase price to cover administrative costs of inspecting returned items and processing the refunds.

Option One for a revised §437(o):

Required payment means all consideration that the purchaser must pay to the seller or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the business opportunity. Such payment may be made directly or indirectly through a third-party. A required payment does not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices which may be used for resale, lease, or display; or where the bona fide wholesale price of the inventory is not less than the payment made by the purchaser.

Option Two for a revised §437(o):

Required payment means all consideration that the purchaser must pay to the seller or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the business opportunity. Such payment may be made directly or indirectly through a third-party. A required payment does not include:

1. Payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices, which inventory may be used for resale, lease, or display;
2. Payments for products for personal use by the purchaser; or
3. Payments for products to be used for marketing or promotional purposes.

B. The §437.1(c)(3) test (page 108-109) – Significant assistance

Tupperware understands that the FTC has attempted to define “providing locations, outlets, accounts or customers” in the RNPRM to cover situations in which business opportunities furnish, or claim to furnish, specific types of assistance that would enable purchasers of business opportunities to quickly begin operations such as lists of customers, accounts of customers, specific locations or lists, and/or lead generators. Tupperware does not provide such services to potential or current consultants. However, Tupperware does provide general business advice and training about how consultants can develop their own customer base.

Tupperware is concerned about the interpretation of the last clause in the definition of “Providing locations, outlets, accounts, or customers” in addition to the reference in the explanatory text to the RNPRM that references the Informal Staff Advisory Opinion 95-

10. This Advisory Opinion focuses on a vending machine issue and is dated December 8, 1995. For Tupperware's business model, the opinion offers little assistance to the understanding and applicability of this last clause to Tupperware.

One could argue that Tupperware or other legitimate MLMs do "otherwise assist the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers" by providing general consultant training and education since one of the key determinants of what constitutes sufficient assistance to prospective purchasers is "the significance of that assistance to the prospective purchaser" (page 67). This test of what is considered "significant" is an incredibly subjective test.

For example, Tupperware highlights to its prospective consultants via its website and through printed materials the support it will provide new consultants. For prospective consultants who have never run their own business, they may view any Tupperware assistance on running their businesses as significant. Other consultants with previous independent business experience may not view such assistance as significant. Some objective parameters must be identified for legitimate companies to be knowledgeable about as they conduct their business. A clear safe harbor for legitimate business assistance would be preferable such as either:

1. The addition of the clause "The provision of no cost marketing materials or business advice to purchasers on developing their own locations, outlets, accounts, or customers is not covered by this definition."; or
2. The addition of the clause "beyond routine marketing and business advice" and the addition of a new definition as follows: "Routine marketing and business advice means the provision of marketing materials, business training, and product information to prospective purchasers at no cost."

IV. Other Options for the FTC to Consider

Tupperware has identified several other options for the FTC to consider in advancing the RNPRM. First, the FTC should pre-empt conflicting state business opportunity rules. The FTC has nationwide jurisdiction and should therefore set a national standard for business opportunities. Enforcement of a nationwide standard by both the FTC and State Attorneys General is far preferable to a patchwork series of laws and regulations.

Second, the definition of "required payment" includes consideration the purchaser must pay to the seller or an affiliate, either directly or indirectly through a third party. Tupperware uses an alternative payment mechanism for some consultants who do not have credit cards. Tupperware's process is distinguishable from the types of third party payments used by fraudulent vending machine salesmen and others targeted by the Commission. Tupperware pays for this service to be made available to its consultants. The FTC should include in the explanatory text accompanying the new regulations that there is no "required payment" when there is an alternative payment mechanism provided by the seller and they receive no consideration from the third party.

V. Alternative Options for the FTC to Consider to Limit the Scope of the Rule

Tupperware continues to urge the FTC to consider an exemption from the BOR for business opportunity sellers that are publicly traded companies. In light of Sarbanes-Oxley requirements, brand protection pressures, concerns about litigation, and other sensitivities, publicly traded companies are not likely to engage in the type of deceptive or fraudulent business practices targeted by the proposed BOR.

As an additional exception, Tupperware is aware that many legitimate MLM's offer 90% return policies when items are returned within 12 months of the purchase date and items are in an unused, saleable condition. Such return policies significantly limit the exposure of potential purchasers of any business opportunity. Tupperware encourages the FTC to recognize this by creating an exemption from the definition of required payment for companies that offer such policies. In addition to more narrowly targeting fraudulent offers, this exemption would also encourage greater availability of return policies and lower the effective at-risk amount to a maximum of \$50.00. Specifically, the BOR should exempt from coverage any business opportunity where –

(1) the business opportunity purchaser's required investment does not exceed \$500 and such purchaser receives, in return for such investment, merchandise whose retail value is equal to or greater than the required investment, and

(2) the business opportunity seller agrees to buy back from the business opportunity purchaser any unused inventory (within 12 months of purchase) at 90 percent of such purchaser's cost.

Adoption of such a rule may induce many business opportunity sellers today to adopt these policies (in order to meet the safe harbor), which could only have a positive impact on business opportunity purchasers. Tupperware would recommend that the \$500 amount be tied to any future changes in the threshold investment amount for a franchise.

VI. Regulatory Flexibility Act

Tupperware had significant Regulatory Flexibility Act (RFA) concerns with the initial NPRM and testified before Congress about these same concerns. Although Tupperware testified before Congress on this very issue last November, the uncertainty about the meaning of certain key terms in the RNPRM requires us to raise these concerns again. Tupperware viewed the initial RFA analysis (IRFA) as fundamentally flawed for not recognizing the impact upon individual consultants.

If under the RNPRM, Tupperware and its consultants are exempt from the proposed regulations, we do not have continuing concerns regarding the IRFA. If the final version of the RNPRM does not exempt Tupperware and other legitimate MLMs from the new regulations, then Tupperware continues to believe that the agency did not fully abide by the RFA since the estimated number of entities impacted by the BOR will climb far above what the initial RFA has estimated. This would result in a flawed IRFA that would need to be corrected before the RNPRM should proceed.

VII. Public roundtable in connection with the RNPRM

Tupperware requested a hearing with the right of cross examination in its reply comments in 2006. Tupperware does not do so at this time, but is likely to ask for a public roundtable to be held this summer in its reply comments. The purpose of the roundtable should be for the FTC to learn from legitimate companies of the assistance that they provide and for legitimate companies to learn from the FTC of what types of activity meet the definition of certain key terms in the RNPRM such as "reasonable assistance." This information should then be used by the FTC to develop safe harbors and/or objective definitions for acceptable actions by legitimate companies like Tupperware to follow.

Tupperware thanks you for your consideration of our views. We are proud of our business and the opportunities we provide to our hard-working consultants, and we hope to continue to be able to offer these opportunities in the future. In that regard, we commit to work with you, and to be a resource, to ensure that any federal regulation of business opportunities will effectively target identified abuse and avoid impeding legitimate business opportunities.

Secretary

Legal Officer &