

**FEDERAL TRADE COMMISSION
Project No. R511993**

**COMMENT
of
PRIMERICA FINANCIAL SERVICES, INC.
on the
REVISED NOTICE OF PROPOSED RULEMAKING
on the
BUSINESS OPPORTUNITY RULE
R511993**

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I. INTRODUCTION

Primerica Financial Services, Inc. (“Primerica”) submits this comment on the Commission’s Revised Notice of Proposed Rulemaking (“NPRM”). First, we congratulate the Commission for its decision to exclude multi-level marketing opportunities from the proposed Rule. As staff’s analysis of the very large number of comments received in response to the original Proposed Business Opportunity Rule makes clear, the decision to exclude multi-level marketing from the Revised Proposed Business Opportunity Rule (“RPBOR”) is well-grounded. The comments make an overwhelming case that the costs of covering multi-level marketing arrangements far exceed any possible benefit. The small number of comments supporting application of the rule to multi-level marketers simply did not provide persuasive arguments or evidence to the contrary. Indeed, the record lacks any real evidence of a need for such a rule in the multi-level marketing context, and, as the revised NPRM recognizes, the Commission has an effective tool to prosecute any instance of fraud that may occur under Section 5 of the Federal Trade Commission (“FTC”) Act. The lack of any need for a new rule, particularly when weighed against the extreme cost to the vast number of individuals whose livelihoods depend on multi-level marketing opportunities, amply justifies, and indeed compels, the Commission’s decision to modify its proposal to exclude multi-level marketing, thereby better aligning benefits and costs.

Second, Primerica suggests three modifications to the RBOR, to better assure that the regulatory language actually achieves the clear intent of the Revised Notice that the Rule exclude multi-level marketing opportunities like those offered by Primerica and by many members of the

Direct Selling Association. Primerica believes that each of these changes retains the Proposed Rule's efficacy against the types of arrangements intended to be covered by the RPBOR, while making it clear that multi-level marketing opportunities are not covered by the Proposed Rule.

It is important for the Rule's text be clear in this regard, because a variety of actors within both the federal and state governments will have the opportunity to interpret the Rule once it becomes final. Federal courts play an obvious role in the interpretation and application of federal laws, including the Commission's regulations. Moreover, because the Commission's regulations are frequently relevant under state unfair and deceptive trade practices statutes, state courts and state regulatory agencies also may have the opportunity to interpret and apply the final rule. Although the message in the Revised Notice is loud and clear that the Commission does not intend to cover multi-level marketing opportunities, the text of the RPBOR itself leaves some room for argument to the contrary. The Commission specifically requested comment on this issue (*see* Revised Notice, 73 Federal Register 16110 at 16133 (March 26, 2008) (requesting comment on the definition of assistance: "Will it result in the inclusion of multi-level marketing relationships that would otherwise not be covered?")).

Primerica believes that several small adjustments to the RPBOR will make it clear that multi-level opportunities are not covered by the Rule without interfering with the applicability of the Rule to the types of schemes that the RPBOR seeks to cover, such as work-at-home schemes, vending machine schemes, and the like.

II. PROPOSED REVISIONS TO THE RPBOR'S DEFINITIONS

Since Primerica's suggested revisions seek to clarify the coverage of the RPBOR, all of its proposals are directed to the definitions contained in section 437.1 of the Rule. Although

each revision is discussed in the text of this Comment, for convenience, all three proposed revisions (including three separate alternatives for the first proposed revision) are contained in the Appendix to this Comment.

A. Eliminating or Modifying “Customers”

One portion of the RPBOR that may inadvertently sweep in the multi-level marketing opportunities that are intended to be excluded is the inclusion of “customers” in sections 437.1(c)(3)(ii) and 437.1(l). Section 437.1(c)(3)(ii) defines a covered “business opportunity” to be one in which the business opportunity provider (or “designated person”) represents that it will “[p]rovide outlets, accounts, or customers ... for the purchaser’s goods or services.” Section 437.1(l) defines the phrase “provide outlets, accounts, or customers” in the following way:

furnishing the prospective purchaser with existing or potential locations, outlets, accounts, or customers; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies; collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers.

The problem is created by the very expansive language in section 437.1(l) that includes “otherwise assisting the prospective purchaser in obtaining his or her own ... customers.” This language could be argued to encompass any type of training or advice about how to succeed in a new business venture, such as how to identify potential customers, how to make effective presentations to them, and the like. As such, the broad reach of this language threatens to sweep in a number of types of relationships that the Revised Notice stated the RPBOR did not intend to cover, such as educational offerings, traditional distribution arrangements, and multi-level marketing opportunities. Indeed, although Primerica does not provide lists of customers to its agents and makes it clear that agents are responsible for developing their own customers, it does

provide advice to agents about how to accomplish this task. Based on our knowledge of the businesses of other members of the Direct Selling Association (DSA), we believe that most DSA member firms provide similar general advice or training to their sales force members. In addition, any advertising done by a multi-level marketing company for the purpose of promoting that company's products or services could be argued to represent "assistance" to a salesperson affiliated with that company in developing customers. None of these examples was the sort of promises of assistance that motivated the Business Opportunity Rule in the first place, and none of them can be used as characteristics to identify the types of schemes the Rule is intended to cover. Nevertheless, the broad language of § 437.1(l) arguably includes all of these types of activities and therefore threatens to make the scope of the Rule far broader than was intended or is necessary.

As noted above, the Commission had overwhelming reasons to exclude multi-level marketing, educational opportunities, and traditional distribution arrangements from the Business Opportunity Rule. As the Commission correctly concluded, the benefits of including these types of relationships are minimal or nonexistent, and the costs to the persons affected and the American economy would be tremendous. The magnitude of the impact of this issue, however, counsels in favor of making sure that the final Business Opportunity Rule is completely clear on the exclusion of these types of business relationships, so it does not provide uncertainty or a vehicle for mischief.

The Commission recognized this potential issue in the Revised Notice, specifically requesting comment on it as follows:

2. The definition of "providing locations, outlets, accounts, or customers" includes "otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers." Does this language

adequately cover all of the business opportunity arrangements that should be within the scope of the rule? Why or why not? Will the inclusion of “otherwise assisting” in the definition cause traditional product distribution arrangements, educational institutions, or how-to books to be subject to the proposed Rule? *Will it result in the inclusion of multi-level marketing relationships that would otherwise not be covered? Why or why not? How could the language be refined to achieve the proper scope?*

Revised Notice, 73 Federal Register 16110 at 16133 (March 26, 2008) (emphasis added).

Primerica proposes three alternatives for resolving this problem: (1) simply eliminate the word “customers” from the two sections, (2) add a new phrase to the end of § 437.1(*I*) to make it clear that advertising or generalized training or advice on customer and business development is not included within the definition of “providing ... customers,” or (3) limit the “customers” provision to the work at home opportunities in which it is most likely to have some utility. We discuss each alternative in turn below.¹

Option 1: Eliminate “Customers.”

The easiest way to resolve this issue (i.e., the way that involves the least change to the language of the RPBOR) would be to delete the word “customers” from § 437.1(c)(3)(ii) and § 437.1(*I*). Doing so would solve the problem of inadvertently covering multi-level marketing opportunities, educational institutions, how-to books, and traditional distribution arrangements, all of which could include general advice or training about how to find or develop customers in the context of building a business.

The Business Opportunity Rule still would effectively cover the types of schemes that the Rule intends to cover, however, through the continued presence of the words “outlets” and “accounts” in §§ 437.1(c)(3)(ii) and (*I*). For example, a work-at-home scheme that promised to

¹ We have not proposed eliminating the “otherwise assisting” language from § 437.1(*I*) because we believed that the Commission wanted an expansive “catch-all” to help prevent business opportunities from being structured in a way that would evade coverage under the Rule.

provide participants with a channel through which to sell products fabricated by the participant at home would be covered because it would be providing one or more “outlets” or “accounts” to the participant. “Outlets” and “accounts” connote existing or ongoing relationships that the business opportunity participant is promised access to, and the more general term “customers” does not connote these relationships. The Rule would therefore sweep in what it intends to cover (schemes that promise a ready, pre-defined market for the participant’s products or services) and would exclude what the Revised Notice sought to exclude – situations in which general advice on how to find and develop customers is offered by multi-level marketing opportunities, educational institutions, and how-to books, or situations in which advertising to the general public occurs. Primerica believes this is the clearest, most effective way to ensure that the final Rule serves its intended purposes without the threat of collateral damage to other types of business relationships.

Option 2: State That General Training and Advice is Not “Providing Customers.”

An alternate proposal for dealing with the problem of the broad inclusion of “otherwise assisting” a person in “obtaining his or her own ... customers” would be to add a statement to § 437.1(l) that makes it clear that this “catch-all” phrase is not intended to cover advertising and generalized training in customer and business development. Under this proposal, § 437.1 would be modified to read as follows:

(l) *Providing locations, outlets, accounts, or customers* means furnishing the prospective purchaser with existing or potential locations, outlets, accounts, or customers; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies; collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers, provided that advertising and general advice

about business development or training shall not be “providing locations, outlets, accounts, or customers.”

(The underlined portion is the proposed addition to the language.)

Primerica believes this change would be sufficient to alleviate the problem of the overbreadth of the RPBOR as it currently stands, but there are potential pitfalls from this approach that the Commission should consider. Having a general phrase that “otherwise assisting” someone in “obtaining his or her own ... customers” and then an exclusion for advertising, “general advice,” and training raises the question of what “otherwise assisting” is intended to cover that is not excluded by the proviso. It might also be difficult in certain marginal cases to draw a line between “general advice” or “training” and some other sort of “assistance” that would result in coverage of a business opportunity by the Rule. We believe that these interpretive difficulties may create problems in some enforcement situations for the Commission, but the Commission could retain the word “customers” in the Rule, if it believed that the flexibility created by doing so would make the final Rule more useful. In weighing the benefit of retaining “customers” against the interpretive problems created by the necessity of excluding generalized advertising and training, Primerica believes that eliminating customers is the better alternative. This alternative, however, would prevent interpretations of the Rule that would apply it to a vast universe of arrangements it is not intended to reach, if the Commission ultimately decides that having “customers” in addition to “outlets” and “accounts” in the Rule is critical to the Rule’s effectiveness.

Option 3: Limit “Providing Customers” to Work-At-Home Business Opportunities.

A third way to avoid the difficulties that including “providing customers” potentially creates is to narrow the provision to apply only in the cases where it might be most useful,

namely, in work-at-home opportunities. In traditional business opportunity cases, there is no indication that the “outlets, locations, or accounts” approach of the existing rule has created enforcement difficulties or opportunities for evasion. That language, however, may be more limiting as applied to work-at-home schemes, in which the distinction between an “account” and a “customer” could be difficult.

To narrow the coverage of business opportunity sellers who assist by “providing customers,” the Commission could eliminate “customers” from § 437.1(c)(3)(ii), and modify § 437.1(c)(3)(iii) to read as follows:

(iii) Buy back or provide customers for any or all of the goods or services (other than selling) that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser’s home.

(The underlined portion is the proposed addition to the language.)

The parenthetical (other than selling) is necessary because “services” could be read to include the service of selling, which would recreate the same problems as the current definition. The broad definition in § 437.1(l) could remain unchanged, because the “customers” component would apply only to business opportunities in which the customer is making the product or providing the service. Although the issues of general training and advertising as “assistance” would remain, it is not clear that they are relevant to the work-at-home business opportunity.

B. Clarifying “Designated Persons”

To further ensure that the final Rule will not include multi-level marketing opportunities, Primerica’s second proposed revision seeks to clarify what constitutes a “designated person” under § 437.1(d). The concept of a “designated person” is an important one in the RPBOR, because the offer of “assistance” that can cause a relationship to be classified as a “business

opportunity” can be made by either the “seller” of the business opportunity or a “designated person.” *See* Proposed § 437.1(c)(3). The definition of “designated person,” however, is overbroad in a way that again threatens to cover many multi-level marketing opportunities under the Rule.

“Designated person” is defined as “any person, other than the seller, whose goods or services the seller suggests, recommends, or requires that the purchaser use in establishing or operating a new business.” This definition potentially creates problems because of the relationships among participants in a multi-level marketing business. For example, as discussed in Primerica’s original comment, Primerica agents have “uplines” (that is, persons above them in the sales hierarchy) and “downlines” (persons below them). Primerica expects uplines to provide support and assistance to their downline agents. This is especially true for Primerica’s Regional Vice Presidents, who are required to maintain offices for the use of their downline agents. Regional Vice Presidents and Offices of Supervisory Jurisdiction within the Primerica sales force are also required to exercise compliance oversight functions with respect to downline agents, because such compliance monitoring is required by the regulatory environment in which Primerica operates.

Thus, in a sense, a new Primerica agent is recommended or required to use “services” provided by his or her upline Regional Vice President, such as the use of office space, supplies, and computers; general advice about how to succeed in the business; and the regulatory compliance supervision mentioned above. The new Primerica agent does not pay for any of these “services” – Primerica pays additional commissions to the upline agents to compensate them for assisting and supervising their downline agents. But, nevertheless, because there are

benefits flowing from the upline agent to the downline agent, the upline could be argued to be a “designated person” under the RPBOR.

This phenomenon is not unique to Primerica. Most multi-level marketing companies ask upline sales representatives to assist and advise downline agents in some way, and reward the upline agents for doing so by paying them some form of commissions on sales of products or services made by their downline agents. Thus, because many forms of assistance listed in § 437.1(c)(3) of the RPBOR could be given by upline agents to their downline recruits in a variety of multi-level marketing companies, a definition of “designated person” that would include upline agents has the potential to expand vastly the coverage of the Rule beyond what the Revised Notice intends.

Fortunately, there is an easy and logical way to resolve this problem. The definition of “designated person” should be modified to include a requirement that the purchaser of a business opportunity make some sort of payment to the “designated person” for the services that the business opportunity seller “suggests, recommends, or requires” that the purchaser use. This will exclude most or all multi-level marketing companies, since most of them (like Primerica) prohibit upline agents from imposing fees on their downlines. The definition, even with a payment component added, will still capture schemes in which a business opportunity seller is cooperating with some other party to sell an opportunity based on a promise of business assistance as discussed in § 437.1(c)(3) of the RPBOR, like an account list or a lead generating service. Invariably the “designated person” is paid for such a service by the business opportunity purchaser. Indeed, the “designated person” provision is only necessary because of the possibility that payments go to the designated person, not directly to the business opportunity seller. If there is no payment, then there is no risk or harm to the business opportunity purchaser relating to the

suggested or required use of the designated person's services, and hence no reason to use the designated person's assistance as a triggering event for a relationship to be covered by the Rule.

In order to exclude upline agents in multi-level marketing opportunities from being "designated persons," Primerica proposes the following change to § 437.1(d):

(d) Designated person means any person, other than the seller, whose goods or services the seller suggests, recommends, or requires that the purchaser use in establishing or operating a new business and to whom the purchaser makes payment for such goods or services.

(The underlined portion is the proposed addition to the language.)

C. Clarifying "Equipment"

One final aspect of the language of the RPBOR also has the potential to be interpreted to include multi-level companies under the Rule's coverage, despite the contrary intent expressed in the Revised Notice. Section 437.1(c)(3)(i) defines one form of assistance to be "[p]rovid[ing] locations for the use or operation of equipment, displays, vending machines, or similar devices, on premises neither owned nor leased by the purchaser." As in the existing Business Opportunity Rule, this language seeks to cover vending machine, display rack, pay telephone, and similar schemes in which a purchaser buys the equipment based on the seller's promise to provide physical locations for its operation – hence the language that the locations are those "neither owned nor leased by the purchaser."

Again, however, this language, as it currently stands, could be interpreted to include upline agents in multi-level marketing companies. As noted above, Primerica Regional Vice Presidents maintain office space for themselves and their downline agents, and that office space can be (and is) used by the downline agents for meeting with clients, maintaining records, attending training sessions, and the like. It is common for the office to include computers owned

by the Regional Vice President for the downline agents to use in doing their work and communicating with the Primerica home office. There may also be a satellite TV system, again owned by the Regional Vice President, used for downline agents to view broadcasts from the Primerica home office.

We believe that similar situations may exist in connection with other multi-level marketing companies, including some members of the Direct Selling Association. Any time an upline agent maintains an office and allows his or her downline agents to use a computer in that office, a situation exists in which the downline agent arguably could be providing a “location” in which to use “equipment” (i.e., the computer or other items within the office), by the upline, who arguably would be a “designated person,” because he or she provides advice and support to the downline agent.

We do not believe the Commission intended such activity to trigger coverage under the Rule. Rather, this portion of the Rule seems to be directed toward schemes in which a purchaser buys or leases vending machines, telephones, or other similar devices and the locations for the retail operation of those pieces of “equipment” are provided by the seller or a “designated person.” Therefore, in order to allow the Rule to cover such arrangements, while excluding a multi-level marketing sales representative’s use of his or her upline’s office computer, Primerica proposes that § 437.1(c)(3)(i) be clarified to specify that the “equipment, displays, vending machines, or similar devices” be owned, leased, or controlled by the purchaser. The section, including this suggested revision, would read as follows:

- (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices owned, leased, or controlled by the purchaser, on premises neither owned nor leased by the purchaser; or

(The underlined portion is the proposed addition to the language.)

III. CONCLUSION

Primerica appreciates the time and effort spent by the Commission and its staff in analyzing the host of issues raised by the numerous comments submitted in response to the original Proposed Rule. That number of comments resulted both from the very broad scope of the original Proposed Rule and the severe economic consequences of covering legitimate business relationships. Now that the Revised Notice has limited the Rule's application to the kind of business opportunity schemes where fraud is a demonstrated problem, the remaining task is to ensure that the Rule's language reaches no further than intended, and avoids sweeping in the large segments of the American economy that were threatened by the original Proposed Rule. Primerica believes that the three modifications to the Rule's language contained in this Comment will eliminate the possibility that the Rule ever could be interpreted to cover multi-level marketing opportunities, educational institutions, how-to books, and traditional distribution arrangements without impeding the utility of the Rule as a weapon for the Commission to use against fraud perpetrated in connection with business opportunity schemes. We thank the Commission and its staff in advance for its consideration of these proposed revisions.

At this point in the proceedings, Primerica does not believe that either a hearing or a workshop is necessary. The record is clear, and written comment on the revised proposal should suffice to address any remaining issues, such as the ones we have raised. If the Commission determines to hold either a hearing or workshop, however, Primerica would be interested in participating.

APPENDIX

I. Option 1 -- Removing “customers”

(c) *Business opportunity* means:

- (1) A commercial arrangement in which the seller solicits a prospective purchaser to enter into a new business; and
- (2) The prospective purchaser makes a required payment; and
- (3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:
 - (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices owned, leased, or controlled by the purchaser, on premises neither owned nor leased by the purchaser; or
 - (ii) Provide outlets or accounts, ~~or customers~~, including, but not limited to, Internet outlets or, accounts, ~~or customers~~, for the purchaser’s goods or services; or
 - (iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser’s home.

(d) *Designated person* means any person, other than the seller, whose goods or services the seller suggests, recommends, or requires that the purchaser use in establishing or operating a new business and to whom the purchaser makes payment for such goods or services.

(1) *Providing locations, outlets, or accounts ~~or customers~~* means furnishing the prospective purchaser with existing or potential locations, outlets, or accounts, ~~or customers~~; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies; collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, or accounts, ~~or customers~~.

II. Option 2 -- Retaining “customers”

(c) *Business opportunity* means:

- (1) A commercial arrangement in which the seller solicits a prospective purchaser to enter into a new business; and
- (2) The prospective purchaser makes a required payment; and
- (3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:
 - (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices owned, leased, or controlled by the purchaser, on premises neither owned nor leased by the purchaser; or
 - (ii) Provide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser’s goods or services; or

(iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home.

(d) *Designated person* means any person, other than the seller, whose goods or services the seller suggests, recommends, or requires that the purchaser use in establishing or operating a new business and to whom the purchaser makes payment for such goods or services.

(l) *Providing locations, outlets, accounts, or customers* means furnishing the prospective purchaser with existing or potential locations, outlets, accounts, or customers; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies; collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers, provided that advertising and general advice about business development or training shall not be "providing locations, outlets, accounts or customers."

III. Option 3 -- Moving "customers"

(c) *Business opportunity* means:

(1) A commercial arrangement in which the seller solicits a prospective purchaser to enter into a new business; and

(2) The prospective purchaser makes a required payment; and

(3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:

(i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices owned, leased, or controlled by the purchaser, on premises neither owned nor leased by the purchaser; or

(ii) Provide outlets or accounts, ~~or customers~~, including, but not limited to, Internet outlets ~~or~~ accounts, ~~or customers~~, for the purchaser's goods or services; or

(iii) Buy back or provide customers for any or all of the goods or services (other than selling) that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home.

(d) *Designated person* means any person, other than the seller, whose goods or services the seller suggests, recommends, or requires that the purchaser use in establishing or operating a new business and to whom the purchaser makes payment for such goods or services.

(l) *Providing locations, outlets, accounts or customers* means furnishing the prospective purchaser with existing or potential locations, outlets, accounts, or customers; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies; collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers.