

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

**Business Opportunity Rule, R511993**

**REBUTTAL COMMENTS OF GARY D. HAILEY, VENABLE LLP**

**Introduction**

On March 18, 2008, the Commission published a revised notice of proposed rulemaking for a new trade regulation rule governing the sale of business opportunities. Our May 27, 2008, comments on the Commission's revised proposed Business Opportunity Rule ("RPBOR") were generally supportive, but pointed out that there were still some problems with the RPBOR.

We have reviewed the comments on the RPBOR filed by other parties, and offer these rebuttal comments. We assume that the Commission will issue some kind of final regulation, and our focus is on certain comments filed by other parties that propose specific changes to the RPBOR. But it is far from clear that any rule is necessary or desirable. The reasoning behind the Commission's decision to address unfair and deceptive practices by MLM sellers through individual Section 5 enforcement actions would seem to apply with equal force to non-MLM business opportunities as well.<sup>1</sup>

---

<sup>1</sup> The comments of Planet Antares, Inc., are very persuasive on this and a number of other related points, and we urge the Commission to give careful consideration to those comments.

## **The Commission Should Not Reverse Its Decision to Narrow the Scope of the RPBOR So That it Does Not Apply to Multi-Level Marketers**

The vast majority of other commenters support the Commission's decision to narrow the scope of the RPBOR so that it does not apply to the multi-level marketing ("MLM") industry and to rely instead on Section 5 to challenge unfair or deceptive practices by MLM companies. But some commenters (e.g., Jon Taylor<sup>2</sup> and Reid Parrington) argue that deception and/or fraud is inherent in the MLM structure, or at least prevalent in the MLM industry, and that the RPBOR should apply to that industry generally.

We agree with the Commission's decision to narrow the RPBOR and the reasoning behind that decision. The initial proposed rule would have had a devastating effect on legitimate MLM companies and individual MLM distributors, but would have done little to stop fraudulent pyramid schemes. The arguments by some that most or all MLM companies are guilty of deception or fraud and that broader regulation would benefit consumers are not supported by the facts.

## **The Commission Should Make Certain Additional Revisions to the RPBOR**

While our May 27 comments generally supported the revisions incorporated in the RPBOR, we expressed some concerns about the RPBOR and suggested some additional revisions or clarifications. Other commenters also have proposed additional revisions to the RPBOR. We will briefly address some of those comments.<sup>3</sup>

---

<sup>2</sup> We would point out that commenters Jon Taylor and Robert FitzPatrick both purport to represent an entity named "Pyramid Scheme Alert." Assuming that this is a single entity, it would be more appropriate to treat those comments as a single comment on behalf of this entity instead of presenting them as two separate and distinct comments.

<sup>3</sup> In the interest of brevity, we have not addressed each and every comment that proposed additional revisions to the RPBOR. Our failure to comment on any such proposal should not be construed as either agreement or disagreement with that proposal.

The comments of the Direct Selling Association ("DSA") propose several specific revisions. In particular, they suggest that the Commission revise §437.1(c)(ii) and §437.1(l) of the RPBOR by deleting the words "potential" and "customers" from those provisions. While the DSA's proposed revisions are intended to address the concerns of MLM companies, they would also address some of the concerns of sellers of publications and training that were presented in our earlier comments. Therefore, we support those proposed revisions. We also support the DSA's proposed revision to §437.1(o).

Primerica's comments, which are thorough and well-reasoned, also suggest that the term "customer" be deleted from the definition of "business opportunity." Its discussion of this issue recognizes that it is of relevance not only to MLM companies but also to those who sell publications or training to new businesspersons. While Primerica offers three alternative revisions, it believes that the best alternative would be to delete the word "customers" from §437.1(c)(ii) and §437.1(l). We agree.

With regard to Tupperware's comments, they correctly question the meaning of the last clause of §437.1(l), and whether the provision of publications or training could trigger application of the rule. Tupperware understandably advocates "safe harbor" language that would be applicable to its particular business model, but we are concerned that their proposal would not address the concerns of other sellers. Exempting the provision of no-cost marketing materials or business advice might solve the problem they have identified for Tupperware and other MLM companies that sell goods, but what about companies whose business involves the sale of publications or training? A business that involves the sale of goods is closer to what we usually think of as a "business opportunity" than a business that involves the sale of educational or informational services, and it would be ironic if sellers of publications and training were subjected to regulation when sellers of goods were not. Any such "safe harbor" language should not be limited to no-cost marketing materials or business advice, but should include the provision of business advice generally. In addition, Tupperware argues that if the Commission is going to issue a rule, that rule should preempt all inconsistent state regulation – not just state regulation that is less restrictive than the RPBOR. We agree.

The comments of Pre-Paid Legal Services, Inc. ("PPLS"), also deserve careful consideration by the Commission. PPLS suggests that the Commission add a new

§437.1(c)(4) to the RPBOR to clarify that the provision of advice or training to new businesspersons does not meet the definition of "business opportunity." We support this proposal as long as the revisions to §437.1(c)(ii) and §437.1(l) that are discussed above are made. We also agree with PPLS that the RPBOR should make it clear that an offer to provide a money-back refund does not trigger rule coverage. (Obviously, a voluntary offer of a money-back guarantee by a seller should not be discouraged.)

## **Conclusion**

We appreciate the opportunity to offer these rebuttal comments, 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,

---

Gary D. Hailey, Esq.  
Venable LLP  
575 7<sup>th</sup> Street, N.W.  
Washington, DC 20004  
202.344.4997  
[ghailey@venable.com](mailto:ghailey@venable.com)