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June 16, 2008

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 appreciates the opportunity to submit additional comments in reply to some of the comments the Commission has received concerning the Business Opportunity Rule proposal.<sup>1</sup> In our initial comments, Tupperware expressed appreciation for the effort by the FTC and its staff to narrow the scope of the proposed rule. After reviewing the initial comments filed by other interested parties, Tupperware notes that many of the remaining concerns that other parties have are similar to those raised by Tupperware in our May 27, 2008 letter. These concerns focus on the definitions of certain 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 and clarity with respect to all of its phrases is critical.

#### I. Background on Tupperware

Although a more detailed background of Tupperware Brands is included in our initial filing, several key pieces of information are critical to understanding how Tupperware operates.

Tupperware relies primarily on the "party" method of sales, which enables the consultant to demonstrate the features and benefits of Tupperware® products. Tupperware supports sales of its products through a program of sales promotions, sales and training aids, and motivational conferences for the sales force.

Existing Tupperware consultants recruit new Tupperware consultants, typically at a demonstration or party. To become a consultant, the recruit must simply sign a

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<sup>1</sup> Tupperware previously filed initial comments concerning the Revised Notice of Proposed Rulemaking (RNPRM) (73 Fed. Reg. pp. 16109-16138, March 26, 2008) on May 27, 2008. Tupperware also filed comments on July 17, 2006 and September 29, 2006 in response to 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 to the original Business Opportunity Rule proposal that was required under Regulatory Flexibility Act.

Consultant Agreement with Tupperware and purchase a starter Business Kit. The Consultant Agreement 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 and delivery of a starter Business Kit.

The starter Business Kit includes products that can be used for demonstration at a party presented by the consultant. The products are owned by the consultant, and thus may be used for personal use as well. The Tupperware starter Business Kits can include a variety of space-saving containers such as "Quick Chef" choppers, spatulas, and other items, all with limited lifetime and quality 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 is also 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.
- BeutiControl consultants may choose a \$99 starter Business Kit. The retail value of this kit is approximately \$400.

Tupperware ships starter Business Kits to its new 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 Tupperware encourages attendance in order to make Tupperware consultants more successful. Tupperware does not charge for new consultant training.

As a general matter, consultants do not carry inventory of Tupperware® products. Instead, consultants place customer purchase orders with Tupperware, which then ships products directly to the customer, to 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 a consultant 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 the starter Business Kit (or other products), Tupperware will repurchase such items at 90 percent of the consultant's cost (provided they were purchased within the last 12 months and are unused). . The 10 percent fee is for restocking purposes. This one year return policy vastly exceeds typical retail return policies of only 30 to 90 days.

In addition to training and orientation sessions which they can take at their convenience, Tupperware provides its consultants with 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. Many consultants rely upon this training to make them a more proficient consultant.

## **II. The Need for Clarity and Suggested Modifications to the RNPRM**

In our initial filing, we expressed the need for great clarity in the rulemaking and made several suggestions in order to accomplish this. We stand by these comments and note

that several other commentators have expressed the same concerns. Slight modifications to the operative text of the BOR would alleviate such concerns and we urge the FTC to make such modifications.

There are three tests that must be met for a business model to be considered a business opportunity under proposed §437.1(c). The test of §437.1(c)(1) of a commercial transaction is clear, but the tests in §437.1(c)(2) or (3) are not.

#### 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, at best, as to whether payments for purchases by consultants for display or personal purposes would be considered a required payment. Many MLMs, including Tupperware, offer starter kits that new consultants are required to purchase before becoming a consultant. 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.

With the amount of consideration able to be as little as a penny to give rise to various BOR requirements, understanding the exact words and meaning of the last sentence of the 437(o) is key for all legitimate MLMs. As noted in our initial comments, 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 inventory, but we are aware that this does occur. In some cases, potential consultants purchase the starter Business Kit and do nothing else without any intention of selling any additional product.

If the phrase "for resale or lease" modifies "inventory," Tupperware would arguably 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.. In addition, potential consultants do not always decide to become consultants 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.

Similar concerns about the treatment of starter kits under the BOR have been expressed in initial comments by Avon, the Direct Selling Association (DSA), many of the individual members of the DSA, Mary Kay, and Pre-Paid Legal:

- An exemption for starter kit materials provided on a "not for profit" basis has been suggested by DSA, its individual members, and Mary Kay
- Avon urges an exemption for materials provided "at-cost"

- Babener & Associates suggests an exemption for either “not for profit” or “at-cost” items.

Although Tupperware suggested the use of the phrase “bona fide wholesale prices” in its initial comments, the use of either “not for profit” or “at-cost” would equally address Tupperware’s concerns. Tupperware therefore modifies its two suggested options in its initial comments as follows:

**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 / not for profit / at-cost} prices which may be used for resale, lease, or display; or where the {bona fide wholesale / not for profit / at-cost} 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 / not for profit / at-cost} 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.

Tupperware is similar to many businesses, including MLMs, in providing general business advice and training about how consultants can develop their own customer bases. Tupperware and other legitimate MLMs want their consultants to succeed. Tupperware’s success and profits are directly tied to the success and profits of its consultants. To empower its consultants to succeed, it is in Tupperware’s own economic interest to provide such training. However, if providing such training runs the risk of vastly greater regulation and disclosure documents, Tupperware and other MLMs will face the perverse incentive of not offering training that would boost the income of its consultants in order to avoid greater regulation. With the focus of the revised BOR on reducing consumer losses

from fraudulent operators, it would be unwise to move forward with unclear language that also lowers the chances of economic success from those participating in legitimate MLMs.

Avon, the DSA, Pre-Paid Legal, Primerica, and Venable (on behalf of its client) all have expressed similar concerns in their initial comments. The universal concern was that routine activity that occurs today to increase the likelihood of consultant success will rise to the level that MLMs would be subject to the full requirements of the BOR and various suggestions were made:

- Primerica suggested the addition of the clause “provided that advertising and general advice about business development or training shall not be “providing locations, outlets, accounts, or customers”” to the underlying definition.
- Pre-Paid Legal has suggested the addition of a safe harbor in a new 437.1(c)(4).
- DSA suggested the deletion of the last use of the word “customers” in 437(c)(1) to address its concerns.
- Avon suggested the inclusion of a clause to exclude referral services and website capabilities from actions that would sweep business opportunities under the rule.

In our initial comments, Tupperware urged the inclusion of a clear safe harbor for legitimate business assistance 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.”

Tupperware continues to urge the FTC to add clarifying language to the Rule and in the explanatory text, rather than in the explanatory text alone, to ensure that certain types of training are excluded. A 1995 staff opinion focused on vending machines issues is too distant in terms of timing and similarity to most MLMs to be relevant to interpreting the BOR.

Should the FTC prefer alternatives to the two options that Tupperware provided in its initial comments, Primerica’s suggestion to add “provided that advertising and general advice about business development or training shall not be “providing locations, outlets, accounts, or customers”” to the underlying definition would also address Tupperware’s concerns.

### **C. The Treatment of Return Policies**

In our initial comments, we did not raise concerns expressed by several others that a return policy could be viewed as a buy back of goods. Tupperware does not believe that the FTC or its staff intended to discourage the widespread availability of generous return policies. Since Tupperware consultants do not make, produce, fabricate, grow, breed, modify or provide items, the initial language of the BOR did not raise our concerns. Tupperware does not object to the suggestion of several commentators to strike the word “provides” from the definition or, in the alternative, a specific exclusion for return policies.

Tupperware does not believe, however, that the FTC should require the adoption of any specific return policy. Tupperware would not object to any FTC refund requirements or mandatory disclosures related to return policies for home assembly businesses. The FTC may wish to consider the existence of a generous return policy an additional reason to exclude the entity from coverage under the BOR.

Tupperware discloses that it does not accept returns of used items such as food storage containers or cosmetics for sanitary reasons and that is likely the case at other MLMs that distribute consumer products. If the FTC decides to clarify how return policies and returned items are treated under the BOR, Tupperware urges the FTC to recognize that there are some valid reasons for MLMs to refuse the return of certain used items.

#### **IV. Public roundtables or hearings in connection with the RNPRM**

Tupperware requested a hearing with the right of cross examination in its reply comments in 2006. Tupperware requests that the FTC hold a public roundtable 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." The FTC should then use this information to develop safe harbors and/or objective definitions for acceptable actions by legitimate companies like Tupperware to follow.

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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.

Thomas M. Roehlk  
Executive Vice President, Chief Legal Officer &  
Secretary