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June 30, 2008

*Via E-Mail*

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex S)  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: **Business Opportunity Rule, R511993 (Rebuttal Comment)**

Ladies and Gentlemen:

This letter is submitted as a rebuttal comment regarding the FTC's Revised Notice of Proposed Rulemaking (16 C.F.R. Part 437) dated March 26, 2008 (the "RNPR"). This letter addresses the comment letter dated May 23, 2008 from the Scottish law firm Maclay, Murray & Spens, LLP ("Maclay").

My practice emphasizes the law of product distribution and of franchising. From years of experience I can attest that it is important for the FTC to strike an appropriate regulatory balance in this rulemaking. I appreciate the opportunity to participate in the process.

Like Maclay, I welcome the FTC's recognition that the initial proposed Business Opportunity Rule<sup>1</sup> was overly broad. I agree with Maclay, and the FTC, that traditional product distribution arrangements should not be deemed business opportunities. Those arrangements are important to our economy, and no evidence has been presented that they are connected with fraudulent or abusive practices in a way that calls for regulation as business opportunities.

The rule proposed in the RNPR (the "2008 Proposed Rule") is much improved with regard to scope of coverage. Despite that improvement, as Maclay's letter states, "there remains potential" for coverage of traditional product distribution arrangements under the 2008 Proposed Rule.<sup>2</sup> My disagreement with Maclay relates to the possible extent of that coverage. Maclay anticipates the number of traditional distribution arrangements affected will be "minimal."<sup>3</sup> However, without further clarification by the FTC, there is a risk that many such arrangements will be subject to possible regulation as business opportunities.

<sup>1</sup> 71 Fed. Reg. 19053, April 12, 2006

<sup>2</sup> Maclay letter at 1.

<sup>3</sup> Maclay letter at 2.

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The 2008 Proposed Rule's definition of "business opportunity"<sup>4</sup> consists of three elements: (1) the "enter a new business" element, (2) the "required payment" element, and (3) the "seller representations" element. Here is an explanation of how those elements could potentially apply to a traditional product distributorship:

(1) New Business: Often a distributorship is a new business. Therefore this element would often be present.

(2) Required payment: Generally, the predominant payments from a distributor to a product supplier<sup>5</sup> are payments for inventory. The 2008 Proposed Rule, unlike the initial proposal, does not deem such payments to be "required payments." This was an important change that helps in excluding traditional product distributorships from coverage.

However, some interpretational issues remain regarding the required payment element. Some language in the RNPR could potentially be read as calling into question the FTC's longstanding policy regarding payments made to unaffiliated third parties. (See 73 Fed. Reg. 16110, 16122, footnote 162.) Payments to third parties are common in traditional distribution arrangements—indeed, they are common in almost all business arrangements. A change in the FTC's policy here could potentially sweep in many legitimate distributorships.

(3) Seller Representations: This element is broad. Consider, for example, how this element could apply to a supplier of a well-established product with wide market acceptance. A supplier of such a product who meets a potential distributor might reasonably wish to explain that existing customers already buy the product. However, by doing so, the supplier risks representing to the potential distributor that it will "provide" customers, thus creating the risk of being deemed to have satisfied this element.<sup>6</sup>

Accordingly, there is a legitimate concern that the 2008 Proposed Rule could potentially be construed to cover a substantial number of traditional distribution arrangements. Such coverage would conflict with the FTC's stated goal. To avoid that result:

(i) The Commission should make clear that it maintains its historic policy regarding payments to unaffiliated third parties. It should reiterate that such payments are deemed not to be "required payments" unless they are remitted to the supplier or to an affiliate of the supplier.

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<sup>4</sup> 2008 Proposed Rule, Section 437.1(c)

<sup>5</sup> The "seller" in the language of the 2008 Proposed Rule.

<sup>6</sup> Ironically, a supplier of a new, untested product does not face this dilemma.

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(ii) The Commission should restore a "minimum payment" exemption to the Business Opportunity Rule. A reasonable minimum payment exemption would permit de minimis payments for product samples or other items.

These changes will reduce the risk of the "required payment" element being applied inappropriately to many traditional product distributorships. With these changes, if the only substantial payments received by the supplier are bona fide wholesale prices for inventory, the supplier can be assured that it is not receiving the type of "required payment" that would result in coverage under the Business Opportunity Rule.

Very truly yours,

LEWITT, HACKMAN, SHAPIRO,

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By:

David Gurnick

DG:cc