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Federal Trade Commission
Office of the Secretary, Room 113-H
Annex S, 600 Pennsylvania Ave, NW
Washington, DC 20580
(submitted electronically)

Re: Comments on the Staff Report on the Business Opportunity Rule

Dear Sir or Madam:

I am an Ohio attorney whose private practice focuses on franchise law matters. I've been a member of the American Bar Association's Forum on Franchising since 1989, and I am a member of a subcommittee of the Ohio Bar Association which is currently drafting proposed amendments to Ohio's Business Opportunity Law. However, the comments in this letter reflect only my personal views.

I commend the Staff for their thoughtful and well written report, and I support the proposed Rule in most respects. However, I am writing to state my objections to one aspect of the proposal. Specifically, I do not believe the newly proposed definition of "material" should be included in the Rule. My reasons for deleting this definition are provided below.

## I. The Proposed Definition is Unduly Limiting and Confusing, and May Inhibit Enforcement.

New section 437.1(i) provides as follows: "Material means likely to affect a person's choice of, or conduct regarding, goods or services."

The implication of this definition is that a requirement cannot be regarded as material unless it is the sort of requirement or disclosure that is likely to affect a buyer's decision to invest. It follows that if a seller violates a significant requirement of the Rule, the seller could nonetheless argue that no violation occurred, because the requirement was not the sort that could generally be expected to affect a buyer's choice. The term "material" appears in the Rule in many

places and different contexts, and in other forms (such as "materially different"). For example, the term appears in Sections 437.2, 437(a), 437.3(a)(4), 437.6(i), and 437.7. Section 437.2 uses the term in prefacing the basic obligation to disclose, as follows:

> "…it is a violation of this Rule…for any seller to fail to furnish a prospective purchaser with the material information required by Sections 437.3(a) and 437.4(a)…"

One could imagine various scenarios in which a seller failed to satisfy aspects of the disclosure obligations, but in ways in which the FTC could not demonstrate would have been likely to affect a purchaser's choice. For example, assume a seller failed to include the requisite number of references required by section 437.3(a)(5). The Commission has generally limited its enforcement actions in the franchise and business opportunity area to cases involving significant actual or potential harm to buyers, and presumably the Commission would not choose to bring a future enforcement action based on merely technical violations, without actual or potential harm to buyers. However, no benefit to buyers is achieved by creating this possible defense for non-complying sellers.

If the Commission decides to retain the proposed definition of "material", it should also include the following new language in a footnote to the Rule, in a spirit of full disclosure regarding sellers' obligations under the rule:

> "Even though this Rule imposes various requirements for specific disclosures, sellers are permitted to dispense with any disclosures which would not be likely to affect a buyer's choice of, or conduct regarding goods or services."

## II. The Proposed Definition is Unnecessary

Countless laws, rules and regulations employ the term "material" without deeming it necessary to also include a specialized definition. Notable among these is the FTC Franchise Rule ("the Rule"). The Rule includes a definition section, but does not include a definition for the term "material". Despite the absence of a specialized definition, the Rule employs the term "material" or a variation of the word at least 15 times. Left to their own devices to provide a definition for purposes of the Rule, affected parties would likely turn to a dictionary. They would find definitions for "material" such as the following: "Important; more or less necessary; having influence or effect; going to the merits; having to do with the matter, as distinguished from form." (Black's Law Dictionary, 1951). They would not find the more restrictive definition now proposed for addition to the Business Opportunity Rule. However, if the proposed definition was included in the Business Opportunity

Rule, affected parties would have a basis for arguing that this more restrictive definition should also apply, by inference, to the FTC Franchise Rule.

## III. The Proposed Definition Would Adversely Affect Enforcement Under State Laws and Regulations

Many states have their own laws and regulations relating to franchises or business opportunities. While the Rule and the proposed Business Opportunity Rule can be enforced only by the Commission, many state laws create a private right of action by purchasers of franchises or business opportunities. Over the years the Commission has rarely acted to enforce the Rule, and injured franchisees have been forced to resort to state laws for redress. State legislators for their part, have recognized the need for their laws to permit the use of standardized disclosure documents, so that sellers are not required to prepare different documents for each state. As a result, most state laws have specific exemptions for transactions which comply with federal requirements. Thus, a private plaintiff in Ohio is essentially required to show that his seller did not comply with applicable federal requirements.

If the proposed definition of "material" is included in the FTC Business Opportunity Rule, it would therefore effectively be incorporated into many state laws. This could provide sellers defending state law claims with a basis for arguing that no violation occurred at all, under circumstances where a disclosure document failed to comply in ways that could not be shown to have affected the purchaser's decision. This would further hamper buyers' ability to obtain private redress, under circumstances where no other remedy was available to them. Such a result is neither necessary, nor appropriate. State legislators should be able to decide for themselves whether to impose such limitations on their buyers' private actions, and such limitations should not be permitted to creep into their protective laws through the back door, by the stroke of an FTC attorney's pen.

For all of the above reasons, I believe the proposed definition for "material" should not be included in the Business Opportunity Rule.

Respectfully submitted,

Stanley M. Dub