

OUR REF DTM/SHARED/DTM

YOUR REF

maclay murray & spens LLP

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex S)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

23 May 2008

Dear Sirs

### **Business Opportunity Rule, R511993**

We are writing in response to the publication of the revised proposal for Business Opportunity Rule, R511993 ("the RPBOR") on 26 March 2008. As previously stated, we are a primarily UK-based commercial law firm. The comments below have been prepared by our European, Competition & Regulatory department who have wide experience of advising clients in relation to distribution agreements.

The present submission does not repeat the comments made in our letter of 17 July 2006 relating to the initial proposal for Business Opportunity Rule, R511993 ("the IPBOR") published on 12 April 2006, but rather focuses on the narrower question posed by the Commission as to whether the limitations to the RPBOR's coverage are sufficient to keep the rule from covering traditional distributor relationships.

#### **1. AIMS OF THE COMMISSION**

We welcome the Commission's acknowledgement that the IPBOR may have inadvertently caught some companies using traditional product distribution arrangements and also the Commission's determination that such arrangements should not be covered by the RPBOR. We strongly agree that this is a correct objective to pursue and will be welcomed by legitimate companies involved in such business arrangements.

#### **2. DEFINITION OF BUSINESS OPPORTUNITY**

The definition of "business opportunity" in section 437.1(c) of the RPBOR retains three definitional elements, albeit altered from the drafting in the IPBOR. We consider that the definition of "business opportunity" in the RPBOR is much improved from the earlier draft and now excludes the majority of traditional product distribution arrangements. However, there remains potential for the definition to impact on some traditional product distribution arrangements. We appreciate the difficulties facing the Commission in this regard and the understandable reluctance to draft exceptions from the scope of the RPBOR which could cause some arrangements of concern to be excluded from the RPBOR's application.

##### **2.1 Solicitation of a potential purchaser to enter into a new business**

GLASGOW

EDINBURGH

GLASGOW

LONDON

BRUSSELS

We note that this remains unchanged from the IPBOR.

## 2.2 Required Payment

We welcome the exclusion of *bona fide* inventory purchases from the definition of required payment. We would reiterate that it is unusual, but not unknown, for a distributor involved in traditional product distribution arrangements to make a payment at the outset to obtain the distribution rights for a particular brand. However, when the definition of "business opportunity" is viewed in the round, and particularly when the third (and cumulative) definitional element is taken into account, we envisage that the number of traditional product distribution arrangements affected by the RPBOR will be minimal.

## 2.3 Seller Representations

That the provision of business assistance has been dropped from the third definitional element of "business opportunity" in favour of targeting a more limited range of representations by the seller is a substantial improvement on the drafting in the IPBOR. We particularly welcome that the provision of training has been dropped entirely as an element of the definition and also that the issue of earnings claims has been decoupled from the very notion of a business opportunity. We believe that these changes will assist with avoiding the problem whereby arrangements not targeted by the IPBOR, may have been inadvertently affected.

## 3. OTHER COMMENTS

In the light of the substantial improvements to the definition of a business opportunity, the issues previously raised in sections 3-5 of our letter of 17 June 2006 are now of considerably less concern to us and will not be reiterated here.

Yours sincerely

David McGowan  
Associate  
For Maclay Murray & Spens LLP