

Nathan P. Moore
Senior Vice President,
General Counsel & Secretary

May 27, 2008

Via Electronic Submission

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex S)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

***Re: Business Opportunity Rule, R511993: Mary Kay Inc.'s
Comments on the Federal Trade Commission's Revised Notice of
Proposed Rulemaking Regarding Business Opportunities***

Dear Secretary Clark:

On behalf of Mary Kay Inc. ("Mary Kay") we are pleased to submit these comments on the Federal Trade Commission's ("FTC") Revised Notice of Proposed Rulemaking ("RNPR") regarding Business Opportunities, amending 16 CFR Part 437.

We believe the FTC has carefully considered all of the comments previously submitted on this matter and has taken a fair and representative view in the revised proposed Business Opportunity Rule ("RPBOR"). Our goal at this time is to continue working in concert with the FTC, as well as with other interested parties such as the Direct Selling Association, to ensure that the final Rule will protect consumers, as well as direct sellers, and also provide the FTC with the appropriate regulatory framework it needs to accomplish its mission.

Mary Kay Inc.
P.O. Box 799045
Dallas, TX 75379-9045
972-687-5770
Fax 972-687-1457
nathan.moore@mkcorp.com

Mary Kay Inc.

As the FTC is aware, Mary Kay is one of the largest direct selling skin care and color cosmetic companies in the world. The Company is headquartered in Dallas, Texas and was founded September 13, 1963, by Mary Kay Ash and her son, Richard R. Rogers. It maintains its principal manufacturing plant in Dallas, Texas. Mary Kay Inc. has more than 1.7 million Independent Beauty Consultants worldwide [with over 700,000 in the U.S.]. In 2006, worldwide sales reached \$2.25 billion at the wholesale level. Independent Beauty Consultants purchase Mary Kay® products directly from the company at wholesale and then resell those products to the ultimate consumer at a retail price determined by the Independent Beauty Consultant. A cornerstone of the Mary Kay business model is the fact that a Mary Kay Independent Beauty Consultant is an independent contractor, free to operate her Mary Kay business as she sees fit.

RNPR and Direct Selling

Our current comments are based in part on our assessment of the original Notice of Public Rulemaking (“NPR”), the comments and rebuttal comments submitted by interested parties to that proposal, and to our evaluation of critical definitions in the RPBOR. We believe that the previous NPR would have significantly impacted the Mary Kay Independent Beauty Consultant, by virtue of the overbroad definitions found in the original NPR, without providing an appropriate degree of consumer benefit.

The FTC recognized that issue, and thus clarified repeatedly in its commentary in this RNPR that the revised proposed rule is not intended to cover direct sellers such as Mary Kay Independent Beauty Consultants. The FTC realized that Section 5 of the FTC Act¹ provides a “flexible and effective weapon” against direct sellers that engage in unfair or deceptive practices,² and therefore any inappropriate activity by direct sellers can continue to be addressed through the FTC’s investigatory and enforcement authority under Section 5.³ In our view, this approach by the FTC, combined

¹ 15 U.S.C. §45.

² 73 Fed. Reg. at 16113.

with specific clarifying language in the RNPR, will result in a marketplace that is fair for all.

³ The FTC can also use Section 5 to bring enforcement actions against business opportunity schemes engaging in unfair or deceptive practices, as it did over 20 times between the release of the April 2006 NPR and the release of the March 2008 RNPR. *See, e.g., Mazoni & Son, Inc. dba EDI Healthclaims Networks, et al.*, FTC File No. 062-3033 (2008), <http://www.ftc.gov/os/caselist/0623033/0623033.shtm>; *Holiday Enterprises, Inc., et al.*, FTC File No. 062-3106 (2008), <http://www.ftc.gov/os/caselist/0623106/index.shtm>; *Prophet 3H, Inc., et al.*, FTC File No. 062-3050 (2007), <http://www.ftc.gov/os/caselist/0623050/index.shtm>; *Fidelity ATM, Inc., et al.*, FTC File No. 062-3210 (2007), <http://www.ftc.gov/os/caselist/0623210/index.shtm>; *Wholesale Marketing Group, et al.*, Civil Action No. 05-C-6485 (N.D. Ill. 2007), <http://www.ftc.gov/os/caselist/c6485/index.shtm>; *Universal Advertising, Inc., et al.*, FTC File No. 062-3228 (2007), <http://www.ftc.gov/os/caselist/universaladvertising/index.shtm>; *Business Card Experts, Inc., et al.*, FTC File Nos. 062-3180, X070011 (2007), <http://www.ftc.gov/os/caselist/0623180/index.shtm>; *Cornerstone Marketing, LLC, et al.*, Case No. 9:06-cv-01899-PMD (D. S.C. 2007), <http://www.ftc.gov/os/caselist/906cv01899PMD/index.shtm>; *Group C Marketing, Inc., dba HBG Publications, et al.*, Civil Action No. CV 06-6019-GHK (JCx) (C.D. Cal. 2007), <http://www.ftc.gov/os/caselist/hbgpublications/index.shtm>; *The Results Group, L.L.C., et al.*, FTC File No. 062-3205 (2007), <http://www.ftc.gov/os/caselist/0623205/index.shtm>; *Route Wizard, Inc., et al.*, FTC File No. 062-3195 (2007), <http://www.ftc.gov/os/caselist/0623195/index.shtm>; *Thomas E. Richardson, dba Mid-South Distributors*, FTC File Nos. 062-3221, X070014 (2007), <http://www.ftc.gov/os/caselist/md-southdistributors/index.shtm>; *John Stefanichik, et al.*, FTC File No. 022-3246 (2007), <http://www.ftc.gov/os/caselist/0223246/0223246.shtm>; *World Traders Association, Inc., et al.*, Case No. CV 05-591 AHM (CTx) (C.D. Cal. 2007), <http://www.ftc.gov/os/caselist/wta/wta.shtm>; *Elite Designs, Inc., et al.*, Civil Action No. CA 05-058 (D. R.I. 2006), <http://www.ftc.gov/os/caselist/elitedesigns.shtm>; *Network Services Depot, Inc., et al.*, FTC File No. 042-3188 (2006), <http://www.ftc.gov/os/caselist/0423188/0423188.shtm>; *Sun Ray Trading, Inc., et al.*, Civil Action No. 05-20402 CIV-Seitz (S.D. Fla. 2006), <http://www.ftc.gov/os/caselist/sunraytrading/sunraytrading.shtm>; *USA Beverages, Inc., et al.*, Civil Action No. 05-61682-CIV (Lenard) (S.D. Fla. 2006), <http://www.ftc.gov/os/caselist/0561682/0561682.shtm>; *Internet Marketing Group, Inc., et al.*, FTC File No. 042-3035 (2006), <http://www.ftc.gov/os/caselist/0423035/0423035.shtm>; *Success Vending Group, Inc., et al.*, FTC File No. X000039 (2006), <http://www.ftc.gov/os/caselist/successvend/successvend.shtm>.

We understand the FTC's intent to exempt direct sellers in this RPBOR. Therefore, in these comments we note certain language contained in the definition of a "business opportunity" that may inadvertently encompass typical direct sales activity. These may appear to be minor issues, but in light of the FTC's stated premise, we thought it worthwhile to note these discrepancies so these inconsistencies can be addressed. If these minor changes are implemented, we believe Mary Kay Independent Beauty Consultants and other direct sellers will not be improperly subject to the RPBOR.

RNPR Definitions: Overall Business Opportunity Definition

As proposed, the RNPR definitions section §437.1 may unintentionally incorporate non-business opportunity activities.⁴ The definition of required payment expressly excludes "payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease." §437.1(o).

For some direct sellers (including Mary Kay), the initial sales kit is not considered inventory and is not to be re-sold or leased; in our case, it is to be used by the Mary Kay Independent Beauty Consultant to demonstrate product to her customers so they will be encouraged to buy those Mary Kay® products from her. The initial sales kit remains the property of the Independent Beauty Consultant and is typically used for product displays, or to demonstrate product use to a prospective customer. This is a cornerstone element of the Mary Kay business and is another feature that distinguishes our method of direct sales from a business opportunity.

Therefore, to make that distinction clear, we recommend modifying the language referring to required payment exclusion as follows:

"payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease, **or payments for business materials, supplies and equipment sold on a not for profit basis.**" (changes noted)

⁴ 73 Fed. Reg. at 16134.

With this slight modification, the Mary Kay sales kit (and others like it) would clearly not be covered by the RPBOR. Additionally, other initial not-for-profit business materials, supplies and equipment provided by direct selling companies and used for demonstration and/or educational purposes would clearly not be covered by the RPBOR. This modified exclusion is also consistent with the FTC's stated intent in the RNPR commentary. This issue is most important to Mary Kay, due its potential impact on whether Mary Kay's operations fall within the definition of business opportunity.

There are other subtle changes which could be made to the business opportunity definition (§437.1(c)), that would further clarify what is included or excluded. The "required payment" element of the definition is discussed above and can be clarified with the suggested language. However, in our opinion the third element may be unintentionally overbroad and should be modified to ensure that Mary Kay Independent Beauty Consultants are not adversely impacted.

The third element of the business opportunity definition involves three factors. An offer is a business opportunity if:

(3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will: (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices, on premises neither owned nor leased by the purchaser; or (ii) Provide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser's goods or services; or (iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home.⁵

Factors i and ii are defined the same way, namely that providing locations, outlets, accounts, or customers is "furnishing the prospective purchaser with existing or potential locations, outlets, accounts, or customers; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies;

⁵ §437.1(c)(3)(i-iii), 73 Fed. Red. At 16134.

collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers.” §437.1(l).

We assert that the scope of element 3 of the business opportunity may be over-inclusive. For example, application of each of factors i, ii, and iii are disjunctive, meaning that a seller has to engage in only one of the three factors in order to qualify as a business opportunity. As detailed below, this may improperly impact a Mary Kay Independent Beauty Consultant who might not otherwise qualify as a business opportunity. One way to mitigate that prospect is to make the application of factors i, ii, and iii conjunctive rather than disjunctive. In this way, a seller would have to meet all three factors – or at least two factors, since factors i and ii are defined the same way -- in order to be considered a business opportunity.

Providing Locations, Outlets, Accounts, or Customers

Additionally, the “providing locations” definition in §437.1(l) is overbroad for several reasons. First, it combines two factors of the business opportunity definition – (3)(i) and (3)(ii), thus removing one of the three disjunctive elements. Second, in defining the provision element, it is unclear whether “existing or potential” modifies just locations, or also modifies outlets, accounts, or customers. Third, the final phrase -- “or otherwise assisting a prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers” – is overbroad.

One option that the FTC could consider is to strike “or potential” from the provision definition in order to clarify its scope. For example, Mary Kay may provide reference information about its Independent Beauty Consultants upon request by a prospective consumer, by providing an Internet-search capacity of Independent Beauty Consultants on the Mary Kay website. In this case, the consumer is “potentially” seeking out the opportunity to purchase products, or may be seeking information about becoming a Mary Kay Independent Beauty Consultant. The information provided in these circumstances is contact information and is very similar to phone book information.

The audience that receives this information could be considered “potential customers” in that they have conducted a search on the Mary Kay website. To a certain extent, all residents of the United States could be considered “potential customers” of Mary Kay® products in one way or another. The people who search the Mary Kay website seeking information on an Independent Beauty Consultant in their area may or may not eventually become customers of that independent beauty consultant – they merely are interested parties who searched for information just as one would do via a Google search engine, or in the telephone directory.

Merely providing this search functionality on its website should not trigger the “providing locations” factor of the business opportunity definition. Even if the FTC does not strike “or potential,” the FTC could make clear in commentary that the mere provision of promotional information about purchasers, such as telephone directory services or contact information online, would not qualify for the “providing locations” factor.

Buy Back Provision

Mary Kay recommends a minor revision to Subsection (c)(3)(iii) of the RPBOR, dealing with representations regarding the buyback of materials. That section reads:

The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:

...

(iii) buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, *or provides*, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser’s home.

The inclusion of “provides” is likely intended to be a catch-all phrase, but it expands this definition too broadly and might cause confusion about its meaning. If “or provides” were struck from the buy back provision, that element of the business opportunity definition could not be misconstrued to inappropriately include direct sellers who agree to buy back inventory at the purchaser’s request.⁶ Clearly, this provision was not intended nor should apply to the repurchase of products from individuals who elect to end their

⁶This buy back program is a cornerstone of the Direct Selling Association’s self-regulatory regime, and is a great consumer service that the FTC should not want to be covered by the business opportunity rule.[Type text]

direct selling activities and take advantage of this consumer/salesperson protection. The modification to Subsection (c)(3)(iii) proposed by MKI is as follows:

(iii) buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, assemble or modifies, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home."

Conclusion

Once again, we appreciate the opportunity to share our specific comments on this important Rule with the FTC. We believe these comments and those of the Direct Selling Association, will help clarify certain language in this Rule and ensure that the intent of the FTC is upheld. Furthermore, we believe these changes will protect American consumers without inadvertently burdening legitimate companies, or those who wish to become direct sellers. We hope that the FTC will consider Mary Kay's comments in the supportive and collaborative manner in which they are submitted and are available to answer any questions the FTC may have.

Nathan P. Moore
Senior Vice President, General
Counsel and Secretary
Mary Kay Inc.