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FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION)
WORKSHOP ON:)
BUSINESS OPPORTUNITY RULE) Docket No. R511993
ROUNDTABLE)
-----)

MONDAY, JUNE 1, 2009

Conference Center
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20580

The above-entitled workshop was held, pursuant
to notice, at 9:00 a.m.

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1 P R O C E E D I N G S

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3 PANEL 1:

4 FTC STAFF:

5 KATHLEEN BENWAY, Moderator, FTC

6 LOIS GREISMAN, FTC

7 ALAN HILE, FTC

8 CRAIG TREGILLUS, FTC

9 PANELISTS:

10 DALE E. CANTONE, Maryland Attorney General's Office

11 KENNETH L. JOST, U.S. Department of Justice

12 WILLIAM C. M3, U.S. Department of Justice

1 Kathleen Benway, who is heading this initiative for the
2 bureau.

3 MS. BENWAY: Thanks Lois. Good morning,
4 everyone. As Lois said, I'm Kathleen Benway. I'm a
5 staff attorney in the Division of Marketing Practices
6 here at the FTC, and I'll be facilitating our meeting
7 here today. As Lois said, we're on the record. We're
8 meeting here in Washington, D.C. it's June 1, 2009, and
9 this is a workshop to discuss the Business Opportunity
10 Rule, and specifically the proposed business opportunity
11 disclosure form that was described in the March 28, 2008
12 revised notice of proposed rulemaking. The most recent
13 version of that form was also included in the April 24,
14 2009 Federal Register notice, announcing this workshop.

15 This meeting is open to the public, and to the
16 extent that members of the public here today wish to
17 offer their comments, time will be allotted at the end
18 for the purpose of that.

19 As you can tell, the meeting is being
20 transcribed by a court reporter. A transcript of the
21 meeting will be part of the public record, and we will
22 post an electronic copy of the transcript on our web
23 site at the business opportunity workshop web page.

24 I also want to remind you all that the FTC is
25 continuing to accept comments about the business

1 opportunity disclosure form until June 15, 2009.

2 I want to thank everyone for coming here today,
3 especially our panelists, and before we continue, I
4 would like each of the panelists to introduce themselves
5 for the record and state what organization, if any, they
6 represent, so I'll start over here on my left with
7 Maureen.

8 MS. MORRISSEY: I'm Maureen Morrissey. I'm
9 Maureen Morrissey, the assistant general counsel for the
10 Americas for Tupperware Brands Corporation, and I'm here
11 primarily to speak about some definitional aspects of
12 the proposed rule.

13 MR. MACLEOD: Hello. I'm William MacLeod from
14 Kelley Drye & Warren. I'm a partner at that law firm,
15 and I am here today representing Planet Antares, but I
16 should say at the outset, somewhat similar to an old

1 necessarily represent those of the Department of
2 Justice.

3 MR. TREGILLUS: I'm Craig Tregillus. I'm a
4 long-term FTC staff attorney that's been involved in
5 both franchise and business opportunity fraud cases.

6 MS. GREISMAN: I should add Craig currently
7 heads up the franchise rule enforcement program. Lois
8 Greisman, FTC.

9 MR. HILE: I'm Alan Hile, Assistant Director of
10 marketing practices, and I'm helping Kathleen to do this
11 project.

12 MR. CANTONE: I'm Dale Cantone. I'm an
13 Assistant Attorney General for the Maryland Securities
14 Division. I'm also the chair of the franchise and
15 business opportunity project group of the North American
16 Securities Administrators Association, and my comments
17 today are my own and not those of the Attorney General
18 of Maryland nor the North American Securities
19 Administrators Association.

20 DR. TAYLOR: My name is Jon Taylor, and I'm an
21 independent consumer advocate. I feel I need to take a
22 moment to explain my credentials and qualifications for
23 the record to speak for consumers nationwide.

24 I have a 40 year history of following the
25 business opportunity field, including in my doctorate --

1 my master's and doctorate studies on entrepreneurship
2 and direct selling. I was widowed and -- or divorced at
3 a very young age, left with two small children,
4 determined to work at home, and so I did a great deal
5 research.

6 This goes back 40 years and have identified the
7 whole -- studied the whole range of business
8 opportunities, including starting or assisting others to
9 start as a consultant over 47 home businesses.

10 I have researched, consulted and have observed
11 the gradual evolution of the home business opportunity
12 market from legitimate programs to what I feel are not
13 legitimate business opportunity chains, endless chains
14 of recruitment of business opportunity sellers.

15 I tested one of these programs for a year, and I
16 had remarried by this time. At the end of the years
17 time, my wife threatened to leave me. It was affecting
18 our relationships. I stepped back and looked at myself,
19 and I saw what had happened to me and looked at the
20 numbers.

21 I had been promised three quarters of a million
22 dollars a year with my background. In two years, I was
23 losing money, and I decided to go public with my
24 information.

25 MS. GREISMAN: Mr. Taylor? Thank you, sir.

1 We're just going to do brief introductions at this
2 point.

3 MS. BENWAY: Thanks to all of you for your
4 introductions. Inside the packet that we provided to
5 you is a copy of the agenda for the workshop today. The
6 first item on the agenda is background on the business
7 opportunity rule, which you're probably all familiar
8 with, but for the record, I would like to go over it.

9 In the 1970s, the FTC promulgated the Franchise
10 Rule which covered in a single CFR part two distinct
11 types of business offerings, both franchises and
12 business opportunities. As many of you know, the
13 Franchise Rule requires voluminous disclosures be made
14 to potential purchasers of biz ops and franchises.

15 During the review of the Franchise Rule during
16 the 1990s, the FTC determined that many of the
17 disclosures required of the Franchise Rule were not
18 particularly applicable or well suited to business
19 opportunities.

20 The FTC determined then to have a separate rule
21 tailored to business opportunities that would simplify
22 and streamline the disclosures that biz op sellers were
23 required to make; in other words, to reduce the burden
24 on businesses sellers to require only those disclosure
25 that based on our law enforcement experience would be

1 necessary to prevent abuses; and at the same time
2 provide potential purchasers with information that they
3 need to make an informed purchasing decision.

4 So where are we in that process? Well, in 2006,
5 the FTC published an initial notice of proposed
6 rulemaking, and after extensive analysis of the comments
7 we received in March of 2008, we issued a revised notice
8 of proposed rulemaking, and the FTC again sought
9 comments on those proposed changes.

10 The revised notice of proposed rulemaking also
11 included a proposed one page disclosure form that
12 sellers of business opportunities would be required to
13 provide to prospective purchasers, and that form, as you
14 know, is the primary focus of our workshop today.

15 The revised notice also announced that the
16 Commission had engaged a consultant with expertise in
17 document design and comprehension in order to evaluate
18 our proposed disclosure form and determine whether the
19 overall presentation of the form or any of the parts of
20 the form could be improved to make it more usable and
21 understandable.

22 The consultant completed that evaluation and
23 recommended some changes to the form. They also did
24 some copy testing of the form with consumers to ensure
25 that consumers were understanding the form the way we

1 thought they would. That revised disclosure form was
2 part of the Federal Register notice announcing this
3 workshop, and it's also included in the packet that has
4 been provided to you.

5 So what are the next steps in the rulemaking
6 process? Everyone wants to know: Well, when will the
7 final rule be in place. We have an idea of when that
8 will be, and I'll just go through briefly the steps with
9 you.

1 over a few rules of order. As Lois mentioned, we are an
2 intimate group of panelists, and at the start of each of
3 the sessions I'll give a brief introduction to the
4 session, and at least at the beginning, if you have an
5 interest in speaking, if one of the panelists has an
6 interest in speaking, then I would ask you put your
7 table tent upside ways, and I will recognize you in the
8 order that the table tents go up, and we'll determine
9 whether or not that's necessary as we go along.

10 As I mentioned, our audience here today will
11 also be given the opportunity to comment, and that will
12 take place at the conclusion of the workshop.

13 The last session of the day, as you will see
14 from the agenda, is titled "Other Issues", and panelists
15 will each be provided with up to 30 minutes to discuss
16 any other issues that they have. There's no requirement
17 that panelists use the entirety of their allotted time,
18 and indeed, we will request that the panelists use their
19 time to present new and relevant information rather than
20 repeat comments that are already on the public record as
21 those comments will already receive our consideration
22 under the rulemaking process.

23 With that, I think we can begin our first
24 session. The first session talks about the form and
25 language of the proposed disclosure form. As I

1 mentioned, we had published a proposed disclosure form
2 in the March 2008 revised NPRM and then engaged an
3 expert to copy test it, and we published our new
4 proposed form in April of 2009.

5 The consultant made a number of suggestions that
6 we thought made the form better, more usable, more
7 comprehensible, but we're certainly willing and hope to
8 get input from all of you in order to improve the form
9 even further.

10 So I guess I just want to first open it up to
11 the panel and see, first of all, whether any of the
12 other panelists have done any type of testing of the
13 form, if they've reviewed the form and then tested it in
14 any way.

15 MR. JOST: We haven't tested it at the
16 Department of Justice, but I would just like to comment
17 on the simplicity of the form, which I think is key to
18 it being successful. Our office, in the last 13 years
19 or so, has coordinated with the FTC on four different
20 law enforcement sweeps involving enforcement of the
21 Franchise Rule with respect to business opportunities,
22 and in those cases we have sued about 150 defendants, 80
23 individuals and the rest firms.

24 So we got a very rich experience with seeing

1 kind of misleading biz ops were out there if they
2 weren't completely fraudulent, and those cases always
3 focused on two things.

4 They focused on earnings claims, either directly
5 made by salespeople, or through advertising, and on
6 references. The list of references that the old rule
7 required gave rise to a great deal of ingenuity on the

1 name, we would have people sort through the language,
2 and there was an actual list of people and addresses,
3 all of whom would either be fictional or not quite
4 accurate names, so it's still hard to contact them even
5 after you went through that process.

6 I don't think that any fraudulent biz op could
7 continue to operate if it was giving out the names of
8 its real franchisees or biz op purchasers because those
9 people are all dissatisfied and would quickly dissuade
10 any prospective purchaser from doing business with the
11 organization.

12 In conducting those cases, we saw that -- I'm
13 using the word fraud, there's civil fraud and there's
14 criminal fraud, and we saw that a lot of the fraud was
15 downright criminal. One of the big divides for me
16 between civil and criminal was always the use of shills,
17 phony paid references in lieu of the genuine
18 franchisees, and many of the biz ops had short lists of
19 references that they gave to people who were just paid
20 she.

21 In addition to being criminal, those people were
22 very effective in selling the biz op because the
23 prospective purchaser when contacting these folks
24 thought they were talking to somebody who was just like
25 they were and not just another salesperson, and so they

1 believed what the shills to say.

2 Unfortunately, a lot of these shills turned out
3 to be people who had actually purchased the biz op.
4 They weren't making any money, and in response to their
5 complaints the business op owner would offer them an
6 opportunity to make money by serving as a reference, and
7 some people fell for that, and we prosecuted a number of
8 people who were in those shoes.

9 Beginning in about 2005, throughout the period
10 we've been involved with business ops, we've been
11 prosecuting criminally where appropriate, and where
12 there were any number of folks who violated civil
13 orders, we had obtained from Federal Courts in these biz
14 op Franchise Rule enforcements, we put people in jail
15 when they violated those orders, but just doing criminal
16 contempt wasn't dealing adequately with the problem.

17 Since about 2005 we've initiated criminal
18 prosecutions, felony prosecutions against over 100
19 individuals, and the federal prison system is bursting
20 with those folks to some extent. We've already
21 convicted 91 of them, and another may be pleading guilty
22 there morning, even though we had some people ready to
23 try a case starting today. That was one of the last
24 minute pleas, that's the worst of all worlds. Youof5pd000010 rg

1 So all of that being said, our office has
2 developed I think a comprehensive knowledge about how
3 these schemes work, and one of the things that we really
4 like about the new biz op rule is the simplicity of the
5 disclosure form, the multi paged thick document that the
6 old Franchise Rule required people to provide had a lot
7 of information in it which really wasn't particularly
8 germane to the biz op buyer, and enabled the seller to
9 hide the bad information, if there was any, deep in the
10 pages of the document.

11 Having a one page document that focuses on the
12 key issues such as legal actions, earnings, claims and
13 references will put the most important information in
14 the hands of the prospective purchaser, and I think the
15 FTC has done the public a great service by making it
16 just this simple.

17 I might also comment that the required by the
18 Federal Trade Commission rule and the cite to the rule
19 at the top is also a very good addition because a lot of
20 biz ops are generated by salespeople who just copy what
21 was done at the previous biz op, and even if they're
22 giving a disclosure form that is modeled after what the
23 firm where they learned the busy -- if it's modeled
24 after that, they didn't necessarily know it's required
25 by the rule.

1 For us to get civil penalties on the civil side
2 of enforcement, we have to be able to show knowledge of
3 the rule, and that's very helpful to have that at the
4 top of the document.

5 MS. BENWAY: Thanks, Ken, and the DOJ did
6 comment, had a very good comment in the earlier NPR
7 about the impact of the language on the form and your
8 ability to seek civil penalties, so we appreciate that
9 suggested change that we've made.

10 Dr. Taylor, did you want to speak next?

11 DR. TAYLOR: Yes. I observed 30 years ago the
12 use of shills, the term shills, and it's been mentioned
13 in the rule making, initial public biz op rule and also
14 you just mentioned it.

15 I remember it 30 years ago. How significant is
16 it today? I haven't see the use of shills in the last
17 few years, extremely rarely. I challenge that. I
18 wonder how significant it is today.

19 MR. JOST: It's been quite common. As I said
20 since 2005 our prosecutions have involved, I haven't
21 counted recently, but 15 or 20 different biz op
22 primarily operating out of south Florida, and all of
23 them were using shills.

24 DR. TAYLOR: So that's a small number out of
25 thousands. Just a handful you would say. I mean you're

1 talking about 15, 20?

2 MR. JOST: That's what I'm talking about, yes.

3 DR. TAYLOR: It's a small number, okay.

4 MS. BENWAY: Did any of the other panelists have
5 a general comment on the form? Bill?

6 MR. MACLEOD: Thank you. I would like to echo
7 some of Mr. Jost's remarks because I think he raised an
8 issue that is an issue that the FTC has struggled with
9 for at least now 25 and more years. The form that
10 appears today reminds me a little bit of the Used Car
11 Rule Form which the FTC promulgated back in the mid
12 1980s.

13 It tried to indicate to consumers that they had
14 work to do. It backed off a great deal from an earlier
15 initiative. The original Used Car Rule as it was at
16 least anticipated by the Federal Trade Commission was a
17 rule that would have considered imposing warranties and
18 imposing a great deal of additional terms and conditions
19 of the used car transaction. The rule that ultimately
20 emerged was a rule that basically indicated to consumers
21 whether or not there was a warranty and gave consumers
22 ideas of what kinds of things to check for.

23 This form does something similar. I also would
24 like to commend the Staff for engaging the services of
25 the consumer research experts because I found that the

1 report that you added to the record here to be a very
2 enlightening report, and the issue I think that merits a
3 good deal of discussion as we go through the parts of
4 the form today is the extent to which the form will
5 address some of the problems that Mr. Jost indicated he
6 has found in many of his cases.

7 Will the truly fraudulent business opportunity
8 offer be exposed or be more likely to be determined or
9 found by consumers with the use of this form? And then
10 secondly, does the form impose burdens on the legitimate
11 business opportunities that are unnecessary or at least
12 out of proportion to the remedial purposes that the form
13 otherwise achieves.

14 That is the fundamental question that disclosure
15 requirements and remedial requirements always raise, and
16 I look forward to exploring that question as the morning
17 goes on.

18 MS. BENWAY: Thanks, Bill. Dale?

19 MR. CANTONE: Thanks, Kathleen. I was just
20 going to mention based on the law enforcement experience
21 that we've had in the Maryland Attorney General's
22 office, and I've been there since 1990 enforcing our
23 Business Opportunity Act, I agree that one of the most
24 common elements of a business opportunity fraud is the
25 making of unlawful earnings representations. We also

1 see a lot of fly by night companies that just come into
2 existence, and they represent that they've been in
3 business for a long time.

4 I also agree that one of the major components of
5 business opportunity fraud is a refund offer, that if
6 somebody does not make money, they'll make the money
7 back. That does suck in a lot of people.

8 So I do think that in many respects, this
9 disclosure document does hit some of the most important
10 aspects after lot of business opportunity fraud. My
11 office did not make a comment, and I do appreciate that
12 we, we being the states, are not preempted from
13 requiring something more.

14 I would just mention in the context of
15 considering the appropriate business opportunity
16 disclosure statement, that in most of the United States,
17 if a business opportunity seller chooses to comply with
18 the law, and I will say based on my own business
19 opportunity experience, those are few and far between --
20 but if someone does choose to comply with the law, in
21 most of the United States they should also get a state
22 mandated business opportunity statement that will
23 require quite a bit more information than this one
24 pager.

25 Under the rule as I read it, these states are

1 not of course preempted from doing that, so as you
2 consider the business opportunity disclosure statement,
3 I ask that you also consider the fact that in many
4 cases, if somebody chooses to comply with the law,
5 they're going to get this other disclosure document

1 that, but in terms of the one page, I know there was
2 some discussion of whether the Commission should permit
3 additional optional information to be put on there as
4 required by a state, and I think the decision was made,
5 no, we want to keep the federal disclosure to one
6 simple, uncluttered document and as has been maintained
7 to date, and I think that's an important goal and should
8 be continued to be followed in that vein.

9 MS. BENWAY: Thanks, Ken. I guess some other
10 general questions that we would have about the
11 disclosure form is whether or not the panelists think
12 that the page is structured in a way that it's going to
13 guide the reader's attention to the most important
14 parts.

15 Is the wording and the sentence structure
16 appropriate? Could it be made simpler? Could it be
17 made better? Is the level of vocabulary that's used
18 appropriate to make the form understandable to consumers
19 that would likely receive there form?

20 Dr. Taylor?

21 DR. TAYLOR: In my doctoral studies, I actually
22 concentrated on information processing and applied
23 psychology. In my doctoral studies, my dissertation
24 concentrated on presenting information. It's an
25 information processing challenge and how information is

1 presented so people can understand it, and I was
2 impressed with what the consultants had done.

3 My initial impression when I saw that was, what
4 a waste of money. It's a simple form. It's adequate
5 the way it is, but when I read what the consultants had
6 done and how they had processed this to the point where
7 it's easy to understand and short and accomplishes its
8 purpose, I was impressed.

9 MS. BENWAY: Thank you. Anyone else? All
10 right. I think then we can move on to the second
11 session. Bill?

12 MR. MACLEOD: Just an additional comment on
13 that, something that I have learned both inside and
14 outside the Federal Trade Commission dealing with
15 advertising copy.

16 Even those of us who have, and I am not one of
17 them, degrees or expertise in interpretation of copy,
18 there is nothing that takes the place of actually
19 exposing copy to consumers. It is one of the things
20 that the Commission did in looking at this.

21 We can look at these, and the five of us might
22 even start taking votes around the table as to what
23 might be more or less an effective form, but I would
24 submit that that is probably as useless as flipping five
25 coins to determine whether or not something else might

1 be better.

2 I can remember many times thinking that I knew
3 exactly what an advertisement said or implied, and when
4 I then conducted some copy tests on it, consumer
5 disabused me of those notions, and those were notions
6 that many informed experts, including the experts taking
7 the copy tests or conducting the copy tests, were also
8 surprised to have disabused.

9 So all in all, I think that the simplicity of
10 the form is absolutely a benefit, and exactly how
11 consumers interpret the form is something that I think
12 that the Commission's test itself gave us at least a
13 good indication of how it might be perceived.

14 MR. HILE: Do you think the form that we have
15 now is better than the one we started with?

16 MR. MACLEOD: Oh, I think it is.

17 MR. HILE: My point is: It may not be the
18 perfect one?

19 MR. MACLEOD: It may not, and I think there are
20 a few things. As a matter of fact I noticed some
21 observations from the expert's reports that I think will
22 be worthwhile discussing later as to how consumers
23 reacted to this or that question. It's remarkable just
24 moving the yes or no boxes from one side to the other.

25 It's the sort of thing that we would never think

1 about as we were looking at a form, and when you
2 interview even a few consumers, you realize that they
3 see things in a different way in large part because of
4 course they're seeing a document for the very first time
5 or as you've been thinking about it and you've seen it
6 through various iterations, so I think it really is a
7 crucial insight.

8 MS. BENWAY: Thank you. I think we're going to
9 move on to session 2, which is we're going to look at
10 each of the individual sections of the disclosure form
11 to make sure that we got each of those sections right.
12 So the first one is the legal actions section, and the
13 business opportunity seller is required to disclose
14 whether the company or any of its key personnel have
15 been subject to a civil or criminal action involving
16 misrepresentation, fraud, securities law violation or
17 unfair or deceptive practices within the past ten years.

18 So the first thing that I would like to focus on
19 is the idea of the key personnel and whether or not
20 people -- I think we got that right. Key personnel
21 would include the seller, any affiliate or prior
22 business of the seller and any of the seller's officers,
23 directors, sales managers or any individual who occupies
24 a position or performs a function similar to an officer,
25 director or sales manager of the seller.

1 So that's how we're defining our key personnel,
2 and I'm hoping that people have comment on whether or
3 not they think we got that right. Excuse me. Dr.
4 Taylor?

5 DR. TAYLOR: I think it's just fine the way it
6 is. My initial impression as I analyzed this, and I
7 studied it very carefully, was that this is relatively
8 insignificant compared to the earnings claims, which is
9 the nemesis of consumers, consumer advocates who see
10 this as the key problem, so I asked: Why wasn't
11 earnings first and why was legal actions put first, and
12 the consultants answered that question.

13 I don't know how many of you picked this up, but
14 the basic reason this is here first is it's a warm up
15 question, and I see that as a valid answer to that
16 question.

17 This question is something that consumers easily
18 understand. It gets them thinking about what the form
19 is about as does the next one before we get to the real
20 issue, which is earnings.

21 MS. BENWAY: Ken?

22 MR. JOST: I like the idea of the yes no box for
23 legal actions because again going back to the old
24 disclosure document, we got a revised disclosure
25 document, and after we had gotten a consent decree from

1 somebody, and there was a question posed, has anybody
2 involved in the business been involved in any legal
3 actions in the last ten years, and I read the answer,
4 and the answer started, No officer of the corporation,
5 no salespeople, no this, no that, have been indicted or
6 charged.

7 It went on and on and on for most of the -- a
8 lot of fine -- an inch or two of small print saying all
9 the things that had not happened, and I was getting a
10 little bit excited thinking maybe they were violating
11 the order, and right at the very end they said, except
12 we had to enter this consent decree with the Department
13 of Justice, and they gave the case cite.

14 I thought what a great day way of burying what
15 should be the lead, and here, yes, the box has to be
16 checked, and you can't bury the lead, so I like that.

17 MS. BENWAY: Thanks. So what's required if the
18 yes box is checked, if there has been legal action? On
19 a separate form attached to the disclosure form the
20 seller has to include just this information, the
21 information being the full caption of each action
22 including the name of the principal parties, the case
23 number, the full name of the court and the filing date including the
24 and that's it.

25 I'm wondering whether people have a comment on it.

1 that, whether that's an adequate amount of information
2 or not, and maybe I can start with you, Ken, I think
3 your point being that the information that would be
4 presented is simple and would provide the consumer or
5 the potential purchaser with information that they could
6 then use to look further into the legal actions rather
7 than having pages and pages of information without
8 giving kind of these key pieces.

9 MR. JOST: I think that's right. A lot of the
10 people who fall prey to the fraudulent biz ops actually
11 do a fair amount of work before falling prey, and the
12 biz op is set up in such a way that the bad parts about
13 it are hidden, and if you give the consumers information
14 upfront, I think they will follow-up on it and get
15 additional information and you don't have to put it all
16 in the underlying document.

17 If the consumer is going to ignore the
18 information, the consumer will probably ignore it
19 whether it's there or not, so I think this is a good way
20 of handling it.

21 MS. BENWAY: Anyone else have a comment on that?

22 MS. GREISMe600 TD (18 information, the consu

1 have any sort of flip side of that concerns, that this
2 is too burdensome or raises fairness issues from the
3 perspective of the entity having to make the disclosure?

4 MS. BENWAY: Dr. Taylor?

5 DR. TAYLOR: The Federal Trade Commission
6 personnel, any of them could walk down the hall and deal
7 with the people or talk to the people who deal with
8 franchise disclosure documents, and we're talking
9 about -- this happens to be 162 pages. Some of them are
10 hundreds of pages as compared to a one-page form.
11 Pardon me. The notion of that being burdensome I
12 find -- I just don't see any validity in that argument.

13 MS. BENWAY: Bill?

14 MR. MACLEOD: Well, I think the burden depends
15 largely upon the sweep and the definitions, and I think
16 that's largely what your definition of key personnel
17 will ultimately be. When you're talking about owners
18 and principals, those kinds of personnel that it's a
19 relatively easy thing to do, and if the check is a no,
20 then there's nothing left to do.

21 If the check is a yes and the key personnel have
22 a number of actions in the last ten years, that's the
23 sort of thing that might start representing a burden,
24 but then that's the sort of burden that well may be

1 MR. HILE: Well, I think that it may be useful
2 information but not crucial, and what we were trying to
3 do was to boil this form down to the bare essentials,
4 and bankruptcies of course are required in the Franchise
5 Rule, but not here. If your comment is that we ought to
6 think about putting that back in, we'll certainly
7 consider it.

1 disclosure.

2 MS. BENWAY: Dr. Taylor?

3 DR. TAYLOR: Speaking from experience after I
4 lost my first wife, I was in serious financial
5 difficulty over medical bills, et cetera, and I was
6 literally forced into bankruptcy, and I would not want
7 to consider that as discrediting my ability because I
8 did start business opportunities after that and sold
9 them.

10 But having said that, I still believe that a
11 bankruptcy is an indication of ability to carry forth
12 and do what the person is promising. So in terms of
13 wording, you wouldn't group it with fraud. I don't
14 think it should be, no.

15 What I'm saying is it could be asked in such a
16 way that it would help the reader to discern whether
17 that person has the ability to fulfill his pledges: Has
18 Acme Products or any of its key personnel been the
19 subject of a bankruptcy or -- that should be inserted,
20 or a civil or criminal action, et cetera.

21 MS. BENWAY: And do you have an opinion as to
22 what Bill MacLeod said, which is that perhaps bankruptcy
23 isn't going to capture any business opportunity that
24 wouldn't already be checking the yes box? In other
25 words, do you think that there are business

1 opportunities that have filed bankruptcy but not
2 necessarily been the subject of civil or criminal
3 action?

4 Do you think that that information is necessary
5 to consumers in making their decision?

6 DR. TAYLOR: It's not essential, but it's
7 certainly an indicator of ability to fulfill pledges,
8 especially if multiple bankruptcies or if the amounts of
9 the bankruptcy -- in other words, you could even ask --
10 when you asked me for the details, legal actions, the
11 person could then find out the details of the
12 bankruptcy, and that could tell you a whole lot.

13 MS. BENWAY: Right, but the purpose of this form
14 is to provide very limited amounts of information to be
15 simplified and streamlined, and so if we were to add
16 bankruptcy, I think the way we would do that is to add
17 that same information that's required of a civil or
18 criminal action, Where was the bankruptcy filed, when
19 was it filed, in what court, and that's it.

20 DR. TAYLOR: Yeah, I think so. I think keep it
21 simple. Like I said, I don't think it should be grouped
22 with the fraud. I think it should be listed separately
23 and just a couple words. I don't think it's a big deal.

24 MS. BENWAY: Okay. Dale?

25 MR. CANTONE: Kind of a different track because

1 most of these biz ops had previously been considered a
2 franchise under the FTC's Franchise Rule, I would want
3 to make sure that this language would not allow someone
4 to not disclose a previous action by the Federal Trade
5 Commission brought under the Franchise Rule to the
6 extent there would be such an animal.

7 So I just would ask if this would cover a
8 previous action by the Federal Trade Commission against
9 the business opportunity seller brought under the
10 Franchise Rule, and if it doesn't, I would ask you to
11 consider adding that category.

12 MS. BENWAY: That's a good point.

1 MR. TREGILLUS: I wanted to mention, just as a
2 matter of background because I was involved in the very
3 first version of this draft thing, and the reason we did
4 not include bankruptcy at that point was in our
5 experience at that time, fraudulent business
6 opportunities did not bother to declare bankruptcy.
7 They simply closed their doors, walked across the

1 MS. BENWAY: Does anyone else have any comments
2 on the legal actions section generally?

3 All right. Then we can steam along to session
4 3, which is calculation or refund policy section, the
5 question being: Does the company offer a cancellation
6 or refund policy, and if the answer to that is yes, then
7 they must attach a statement describing the policy to
8 the form, and how do panelists feel about that required
9 disclosure?

10 MR. JOST: Again it's another form of putting
11 your lives in writing. That's always good to ask people
12 to do. And if they say no, then the consumer will know
13 that the stuff the salesperson is telling them over the
14 telephone is not something the company is willing to put
15 in writing so that's very helpful from I think both a
16 consumer protection and a law enforcement point of view.

17 MR. TREGILLUS: I can offer that the thing we
18 struggled with in the first go around was whether to
19 also require some indication of the company's net worth
20 to be able to honor a refund policy provided, and we
21 ultimately decided that it was probably not useful to do
22 that, but we may have been wrong, so I just wanted to
23 throw that out.

24 MS. BENWAY: So can you expand on that a little
25 bit?

1 MR. TREGILLUS: Sure. A refund policy is only
2 as good as your ability to collect the refund, and
3 assuming a legitimate refund policy, the question then
4 is: Does the company have the resources to pay the
5 refund? And especially in the type of business
6 opportunities that go in and out of business with some
7 regularity, the question is: Will the company be there
8 to pay a refund, number 1, and number 2, even if it were
9 still there, would it have the money to pay the refund?

10 MS. BENWAY: Anyone? Bill, is your tent just up
11 from before?

12 MR. MACLEOD: No. I wanted to respond to Ken's
13 comment because while I agree with it, I think that it
14 covers only a part of the rationale for listing a
15 cancellation or refund policy. This is very reminiscent
16 of the fundamental requirement of the Used Car Rule, and
17 that is if someone is making you a promise, have that
18 promise delivered in writing, and that's not so that
19 they will write down their lives.

20 Most of the promises are probably going to be
21 promises that will be kept, but it is very important for
22 those promises to be in writing so when it comes time to
23 enforce the promise, a consumer has the written version
24 of the undertaking, and that way just as there are far
25 more legitimate used car salesmen than there are

1 probably fraudulent sales folks out there, even if there
2 are far more, and I suspect the empirical basis would
3 demonstrate this, legitimate business opportunities
4 being offered out there, there is no reason why the
5 legitimate and the illegitimate, if they are making a
6 promise, shouldn't deliver that promise in writing.

7 MR. HILE: Did you say should deliver?

8 MR. MACLEOD: Should not have to deliver that
9 promise in writing. That was a double negative.

1 and a half percent. By that I mean 3 and a half percent
2 of the revenues is actually claimed as refund.

3 MS. BENWAY: Maureen?

4 MS. MORRISSEY: Speaking for Tupperware, and
5 really for I think direct sellers in general as an
6 industry, we try to focus on the view of the consumer,
7 and clearly legitimate business opportunity that's

1 protecting their brand name and their integrity.

2 For example, if we have someone that enters into
3 the business opportunity and elects to leave the
4 business after a period of time, we often have a vested
5 interest in recovering that inventory so that they're
6 not dumping it in a marketplace and perhaps hurting
7 other business opportunity owners, so that can actually
8 be leveraged from two standpoints: To protect not only
9 the particular business owner who may be dissatisfied
10 with the business opportunity, but other business owners
11 with the same opportunity who have a need to protect the
12 brand integrity and the integrity of the marketplace as
13 it relates to what I'll call gray or black market goods.

14 MS. GREISMAN: So if I can summarize for a
15 moment, I'm not hearing anyone disagree with the
16 proprietary of the disclosure on refunds and
17 cancellations, but perhaps picking up, Maureen, on what
18 you just commented on, do we need more specificity on
19 the rule requirement that currently says, states the
20 terms?

1 consumers. The FTC is not. The states are not. I'm
2 talking about specific guidelines.

3 I feel that's unfortunate, but that's the way it
4 is. I realize and I empathize with law enforcement
5 because you don't feel like you can go too far.

6 MS. BENWAY: Well, picking up on what you, Dr.
7 Taylor, have said and what Maureen has said, I actually
8 would like to read what the proposed rule requires be
9 disclosed, and then I would like to get some comment on
10 whether you think we need to be more specific based on
11 what -- based on what we've heard so far, and so what it
12 says is: "If the seller offers a refund or the right to
13 cancel the purchase, check the yes box. If so, state
14 the terms of the refund or cancellation policy in an
15 attachment to the disclosure document."

16 That's all it says, so do we need more? Do we
17 need to give biz op owners more guidance? For example,
18 should we include something like, I think as was
19 mentioned, state the refund period, the period of time
20 that you can request a refund or any other suggested
21 language?

22 MS. MORRISSEY: I know that the Direct Selling
23 Association and our Code of Ethics has a requirement as
24 it relates to member refund and cancellation policies,
25 and most member companies I think embrace that. They're

1 required to, and they're actually almost set forth
2 verbatim in either an agreement that the business
3 opportunity purchaser signs when purchasing the
4 opportunity or they're set forth on their web sites or
5 it's set forth in published policies and procedures that
6 persons would have access to.

7 It incorporates all of the elements that I think
8 are essential to understanding how to exercise your
9 rights to affect a cancellation or a refund and return
10 of goods. I think that that perhaps could provide some
11 guidance or model in terms of what ought to be included.

12 I guess if you're going to have a refund policy
13 or a refund program or cancellation program, it sort of
14 begs the question: Does it tell you how to do it? And
15 I would think presumptively on its face, if it doesn't
16 have those elements, one would have to question whether
17 or not they've actually complied with this requirement
18 in terms of attaching what the policy is.

19 MR. HILE: So your view is that the duration and
20 what you actually have to do to effectuate your rights
21 should be described?

22 MS. MORRISSEY: I think --

23 MR. HILE: Or required?

24 MS. MORRISSEY: I think if we're talking about
25 a consumer friendly document, that that again legitimate

1 cancellation and refund policies are going to have those
2 elements embedded in it, so I think it would be one
3 method for distinguishing between persons who have no
4 intention of honoring that commitment and persons who
5 are intending to.

6 MR. HILE: So it doesn't add a burden.

7 MS. MORRISSEY: Well, I don't believe this is
8 going to apply ultimately to me. I always view it -- we
9 kind of franchise background at Tupperware, so I'm
10 really acquainted with disclosures and how they can and
11 cannot be burdensome. This to me seems to be like
12 something that would not impose unduly on legitimate
13 businesses, no.

14 MR. HILE: Thank you.

15 MS. BENWAY: Jon Taylor?

16 DR. TAYLOR: The comment that was just made by
17 Ms. Morrissey I don't believe applies here simply
18 because as it stands, as the revised rule stands, 95 or
19 98 percent of the members of DSA are excluded from the
20 rules, and I don't think we can depend on the DSA Code
21 of Ethics in this case. I don't think -- you shouldn't
22 be referring to it.

23 MS. BENWAY: I think what Maureen was describing
24 though is just a place to start to look for
25 requirements, what should be required to disclose; is

1 that right?

2 MS. MORRISSEY: I think you could use the Code
3 of Ethics as an exemplar for what would describe or
4 define the rudimentary elements of a bona fide
5 disclosure in this arena.

6 MS. BENWAY: Thanks. Dale?

7 MR. CANTONE: I would also make a pitch for
8 requiring the details of the refund policy because I
9 know based on our experience, you might have said the
10 devil's in the details, and I agree with that. A lot of
11 the business opportunity fraud cases that I've
12 encountered that had a refund policy, the requirement to
13 get a refund are so onerous that as a practical matter,
14 no one would ever be able to apply, and that is not
15 necessarily stated.

16 I can give you an example of some of the details

1 Dr. Taylor thinks that there needs to be a disclosure of
2 the percentage of refunds actually issued?

3 DR. TAYLOR: Definitely.

4 MR. GREISMAN: Anyone else on that point?

5 MR. HILE: The percent of purchasers or percent
6 of persons who request one?

7 DR. TAYLOR: I think both would be relevant,
8 highly relevant.

9 MS. MORRISSEY: I would disagree with that most
10 profoundly. I think that that assumes a level of
11 dissatisfaction across the board universally with
12 persons purchasing business opportunities, and I don't
13 think that's the case.

14 MS. BENWAY: Do you want to expand on that a
15 little bit?

16 MS. MORRISSEY: Well, for example, let's say in
17 a universe of a hundred purchasers, 99 are satisfied, so
18 never make a request for a refund but the one person who
19 is dissatisfied does. If you're looking at it in the
20 universe of purchasers, you're going to show that
21 there's a 1 percent compliance with a refund policy, but
22 it's also 100 percent, so how is that relevant to a
23 consumer and how are they going to make those
24 distinctions?

25 I mean, information isn't useful if it doesn't

1 tell them anything, and I don't know in this case it
2 would be relevant or particularly enlightening.

3 DR. TAYLOR: I think Mr. Hile answered that in
4 his question, which is basically you asked what
5 percentage of those who applied asked for a refund, and
6 then of those who applied for a refund, what percentage
7 actually got a refund. I think that's answered by the
8 question.

9 MR. JOST: It wasn't clear to me what the
10 percentages we were talking about were, and I think both
11 of those numbers are important. If 50 percent of the
12 people who buy this thing want a refund, that's
13 important information, and if 2 percent of the people
14 who request a refund actually get one, that's pretty
15 good information too.

16 MS. BENWAY: Dale?

17 MR. CANTONE: Kathleen, I would just point out
18 that under many state business opportunity laws, I can
19 talk to Maryland, Maryland actually requires the names
20 and addresses of buyers who have requested a refund in
21 the last 12 months and the number of buyers who have
22 actually received a refund, so just for what it's worth.

23 MR. HILE: Is that typical of the state laws?

24 MR. CANTONE: I can't speak to all the state
25 laws, but I suspect that it is because they're very

1 similar to each other.

2 MS. BENWAY: Bill?

3 MR. MACLEOD: We are now having a debate that I
4 recall vividly, even though it was 25 plus years ago,
5 when the Commission was considering the Used Car Rule.
6 One of the questions was: How much information about
7 the warranty and the warranty performance should
8 consumers get? There is an easy way to avoid these
9 kinds of disclosures, and there's an easy way to change
10 your outcome on these kinds of disclosures.

11 The way to avoid them, if the requirement of
12 disclosure is too onerous, then companies are going to
13 abandon refund and cancellation policies. That is not
14 good for consumers. If the percentages start to
15 indicate some suspicion or some level of question about
16 a business, a company can change the refund policy to
17 make up the sort of policy that Dr. Taylor was talking
18 about that relatively few consumers will avail
19 themselves of.

20 What's the typical used car warranty that we see
21 today? I'm not sure what it is, but it's probably
22 something like 90 days. Is that good, bad or
23 indifferent? I don't know. If it turns out in 90 days
24 that most people have not yet requested a refund in a
25 business opportunity, does that mean that the fact that

1 few people have requested a refund is good or bad for
2 the business opportunity? I don't think we can say.

3 The real issue here is: Are we going beyond a
4 form that allows consumers simply to understand what the
5 opportunity is and what the policy is and are we
6 starting to ask on the form the obligation to start
7 describing the performance underneath that business
8 opportunity?

9 Those are two fundamentally different purposes,
10 the latter of which is a very difficult thing to
11 undertake.

12 MR. HILE: I think we have to keep it clear that
13 we're talking about two different things. One is what
14 has to be disclosed on the form, and the form requires
15 that you attach the statement of the cancellation policy
16 on a separate piece of paper, but I think your point is
17 still very trenchy as to whether requiring more will
18 create an incentive not to give cancellation policy at
19 all regardless of where the disclosure has to be,
20 whether it's on the form or whether it's on an
21 attachment.

22 DR. TAYLOR: For the record I would just like to
23 state that I don't think that it's an appropriate
24 comparison to compare used cars to business opportunity.
25 You can know that quick whether a car works or not, and

1 you can certainly know within three months if this car
2 has some defects in it.

3 A business opportunity, it takes months and
4 sometimes years, so I think a minimum of a year, but
5 that's not the purpose of the form. I just want to make
6 sure that for the record, a used car decision is not the
7 same as a decision for a business opportunity.

8 MS. BENWAY: Okay. I'm not sure that's the
9 point that was being made, and I'm also not sure that I
10 would have the information necessary to figure out in
11 three months if my car was good or bad, but you're
12 probably a better mechanic than I am.

13 Anyone else? Craig?

14 MR. TREGILLUS: I just wanted to mention, the
15 cleverness line that I ever heard from a business
16 opportunity seller was: When the consumer called to
17 complain within a three month period, gee, we can't
18 understand why you're having trouble, everybody else is
19 doing great, which immediately led each consumer, and
20 this was repeated among numerous consumers, to wonder
21 and think that they had done something wrong or they
22 weren't doing something right to make the business
23 successful, which succeeded in delaying their
24 recognition that they had been scammed.

25 Red among n7n I am.

1 something like that would be known.

2 MS. BENWAY: All right. I think that's right.

3 On this section it does appear that we should go

1 MS. BENWAY: Does anyone else have a comment on
2 that? Agree, disagree?

3 DR. TAYLOR: I would agree. I would agree with
4 what Dale just said.

5 MS. BENWAY: Anyone else.

6 MR. HILE: How should we change it?

7 MS. BENWAY: Do you have a fix for us?

8 MR. CANTONE: I think the original language did
9 not have the similar problem, but....

10 MS. GREISMAN: I'll note for the record
11 literally during testing this changed, wording of it and
12 the phrasing of it changed. Jon?

13 DR. TAYLOR: I have a suggestion that might
14 resolve this. Since earnings is identified in the
15 announcement as well as in the revised rule, it is a key
16 element. It's not the most effective as stated over and
17 over. It is the most pronounced of all the
18 misrepresentations and the problems with the business
19 opportunity.

20 I suggest this box not be with the others
21 because the others are appropriately answered by the
22 seller. This one I think should be answered by the
23 prospective buyer, and therefore I would recommend that
24 this be a separate box, and so you have two -- you have
25 the table and you have a box below it dealing with --

1 and it be at the bottom because they will have gotten
2 used to answering the questions, and then there will be
3 an explanation that this one you must answer for
4 yourself.

5 MS. GREISMAN: Might it not then be used against
6 them?

7 DR. TAYLOR: Pardon?

8 MS. GREISMAN: Might it then be used against the
9 consumer who does not believe an earnings claims not be
10 filled out? In other words, the final prospective
11 purchaser, because I don't understand what is meant by
12 earnings claim or exactly what they've said to me, and I
13 choose to put an X in the no box? Then arguably that
14 precludes my ability to go after the business
15 opportunity.

16 DR. TAYLOR: I see your point. I see your
17 point. You're nodding over there.

18 MR. JOST: Well, I guess my interest in having
19 the seller check the box is it puts them on record,
20 particularly if they check no and it turns out that in
21 fact their salespeople or even the company itself and
22 other promotional material is making an earnings claim,
23 we have a clear contradiction that would be actionable.

24 DR. TAYLOR: Then can I suggest wording that
25 might resolve this?

1 MR. HILE: Let me throw one out. What if it
2 said if Acme Product or its salespeople discuss how much
3 money purchasers of this business opportunity can earn
4 or have earned, they must check the box marked yes and
5 attach a statement?

6 How about something like that where it's not the
7 company speaking but some other voice speaking about the
8 company, so there's not a confusion that it's either the
9 consumer, purchaser, or the seller that's being asked to
10 say yes or no.

11 DR. TAYLOR: Well, we've had three
12 recommendations here, if I may. We have had three
13 recommendations here on how the wording can be. I think
14 this is one that would need to be tested.

15 MR. HILE: You would suggest more testing?

16 DR. TAYLOR: I would suggest that we try two or
17 three of these different approaches that we just talked
18 about and test them.

19 MS. BENWAY: Anyone else have anything to add?

20 MR. JOST: Maybe add a little something to the
21 no box so it's not just simply no, no, Acme Product has
22 not made or implied any such earnings claim or whatever
23 language you want to come up with, but something just a
24 little bit more than just the no.

25 The yes in the substantive question, what occurs

1 to me that a lot of these biz ops make the
2 representation that you're going to earn your money back
3 within a year or within ten months or some similar
4 period of time.

5 I've got to think that a consumer should
6 understand that sort of a representation as an implied
7 specific level of sales, but that's something to
8 consider as well because often they don't -- the seller
9 doesn't say you're going to earn \$10,000 a year.

10 They'll say you'll get your money back within
11 ten months, and that's a very common exchange, so if you
12 are doing retesting, you might want to retest whether or
13 not people would understand that that sort of a earn
14 your money back in some period of time is captured by
15 this so that a no would be denying that they even said
16 that much.

17 MS. BENWAY: And you think that that should be
18 included in the language of the rule as well to make
19 that clear? Do you think that's necessary?

20 MR. JOST: It would be helpful to have that
21 language in the rule, yes. The danger with putting too
22 much in the form of course is it clutters it up and
23 undercuts the simplicity we talked about at the

1 industry generally or claims about the industry in the
2 aggregate, and at some point there is a difference
3 between the hallmark of the fraudulent business
4 opportunity that we have been talking about today and
5 the provision of general information about the kind of
6 business that is being discussed here.

7 In the original form, the idea was: Has the
8 seller or its representatives stated or implied a
9 specific level of sales, income or profit that you can
10 make? And the last version of the form was a much more
11 general: Has the salesperson discussed how much money
12 purchasers of this business opportunity can earn or have
13 earned?

14 When you look at the definitions in the rule, a
15 broad interpretation of those definitions would require
16 virtually everybody to check yes if any dollar amount of
17 any sort was mentioned during a sales presentation, and
18 that begins to diminish the earnings claim of any real
19 meaning as an earnings claim.

20 What is it that we are trying to accomplish
21 here? I think it is to put the promise, if there was a
22 promise, into some sort of specific and then allow that
23 specific to be enforced and the violation of that
24 specific to be a violation of the law.

25 It's hard for me to see how that mechanism will

1 work with the earnings claim defined as they are in the
2 rule and with the form being as -- and the disclosure
3 here being as vaguely worded as it is.

4 If it were to go back to something closer to its
5 original, then I think it would have some more meaning
6 to the consumer and more enforceability as a form, but
7 then it would start to depart from the provisions of the
8 proposed rule as I see them.

9 So this I think is still something that has a
10 work in progress element of it. I'm not quite sure how
11 it works, but I don't understand it now.

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230 ~~139 MR. TREGILLUS: Btil, ones of thI thingswed hav.~~

1 to get are far far less profitable, and you're lucky to
2 make \$5 per machine per month compared to the much
3 higher industry average.

4 So really the issue is: Are you saying that we
5 should just ignore that and just not try to worry about
6 it, or should we try to -- if I'm the biz op seller
7 saying this is the industry average, I am making a claim
8 that you think, as an untutored customer, is something
9 that you can make, and I haven't said that my company
10 makes that much or that my purchasers make that much?
11 And so the issue is really how to deal with that
12 situation, and I would be interested in any ideas.

13 MR. MACLEOD: I understand that point, and I
14 think the real issue here is how to identified when the
15 claim is made, and as anyone who has been involved in
16 advertising interpretation, which is of course what the
17 Federal Trade Commission does on a daily basis and
18 outside of the FTC a number of us do it a good deal as
19 well, it's not always easy to tell.

20 There are certainly clear examples of where a
21 claim is made, when it's expressed or merely expressed,
22 and there are examples where a claim may or may not be
23 made, and then there are examples where the claim very
24 likely is not made. The rule as I see it right now
25 covers potentially all of those subjects, and is there a

1 way to narrow it back down to say, if someone, for
2 example, is given an industry statistic and then
3 implied, that that statistic is something that you can
4 accomplish, bingo, you've got an earnings claim.

5 If they have given industries statistics and
6 said, but these are profitability locations, you're not
7 going to get these, so here is what you should be
8 focusing on, maybe that is not an honorary claim, and it
9 depends on what comes next.

10 That I think is the real challenge of writing a
11 rule in a prospective fashion because all of the vast
12 variety of claims that might be made will probably
13 sometimes be earnings claims and sometimes not be
14 earnings claims, sometimes might be context.

15 I think the way that the form lays it out now or
16 the rules lays it out now, things that are not earnings
17 claims would be called earnings claims, and that to me
18 represents a problem.

19 MS. GREISMAN: I'm not following the
20 discrepancies between the definition in the proposed
21 rule and what the form is presenting. I mean, from
22 models 1 through 4 there were a lot of changes in how
23 the earnings issue was teed up, the first two being
24 fairly unique listings, and I think the fourth effort is
25 one to make it more amenable to the person who is likely

1 to read it.

2 As I look at the proposed definition of the
3 earnings claims in the rule and I look at the one page
4 disclosure document, the relevant box here, I don't see
5 the tension between the two.

6 MR. MACLEOD: Well, I think the tension partly
7 it: What does the rule ultimately intend to capture?
8 If it is something as simple or as fundamental as what I
9 think a consumer would likely take away from the
10 question on the form, were you told or was it implied
11 what you would make? That is not what the form says
12 today. I think that's --

13 MS. GREISMAN: Let me push you on that, Bill.
14 It does say, in other words, that purchasers can earn a
15 specific level of sales, income or profit. Where is
16 there ambiguity or vagueness there, recognizing that any
17 claim -- as what you said the FTC does day in and day
18 out, it has to interpret and apply legal framework to
19 what is said and how it's perceived by consumers?

20 MR. MACLEOD: Is that a claim that is telling
21 the consumer what the consumer might experience? I
22 think of the reimbursement testimonial policies, for
23 example. And as a matter of fact, the rule has some of
24 the endorsements and testimonial policy philosophy in
25 it, and that is if you were, for example, to say how

For The Record 4 1 lbc, for example, to say how

1 much your best purchaser ever made, are you now implying
2 what the prospective purchaser might make?

3 Well, the answer under the testimonials is if
4 that is not typical, you say that is not typical. That
5 policy might even be changing further, but what is the
6 counterpart to what this consumer wants to understand?
7 What is the counterpart to the promise that is the
8 hallmark of fraud?

9 The counterpart is: What can you accomplish?
10 It is not what the industry does. It is not what other
11 purchasers have done. It is in the end what can you
12 accomplish so that promise, if it is dishonest, if it is
13 misleading, if it is a fraudulent -- that promise can be
14 checked relatively quickly and used on the form.

15 Right now, it is hard for me to know or hard for
16 me to predict how many business opportunities of any of
17 sort would be able to check this box no given the
18 language in the rule and indeed to some extent, given
19 the language in the question. So there may be a
20 consistency here. There may be a consistency but the
21 question itself is covering the rule.

22 My difficulty is seeing when is a no check
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1 make a certain amount per month so checking the amount
2 no was an immediate red flag for the consumers.

3 How do we distinguish between that and between
4 the example where consumers have gotten some general
5 background about the business but have not heard an
6 earnings claim?

7 MS. GREISMAN: I think that issue is the
8 quintessential issue we're then confronted with in
9 business opportunity law enforcement.

10 MR. JOST: And the question on the disclosure
11 document is: Have they stated or implied that the
12 purchaser will earn a specific level of income or
13 profit, but if the box is checked no, the consumer knows
14 whatever discussion was had wasn't supposed to
15 accomplish that, and if in many cases the yes box has to
16 be checked by the biz op, that's entirely appropriate.

17 They're talking to the consumers about the
18 vending industry or whatever the industry is that the
19 biz op is selling presumably because it's germane to the
20 consumer's potential for earnings. They're not talking
21 about something completely unrelated. They're talking
22 about something that the consumer should use as a basis
23 for making a decision about this business opportunity.
24 So I think what they're saying is there can be a fine
25 line, but I think we're better off erring on the side of

1 calling them earnings claims.

2 Getting back to the question earlier, the
3 regulation does include earn your investment back within
4 one year as an example of an earnings claim that's in
5 section 437.1 F 2. So earn your investment back in a
6 given period of time is already in the definition of
7 earnings claim in the rule.

8 The only issue I was raising was whether or not
9 consumers understand that that type of claim is an
10 earnings claim, but the rule is clear to that for the
11 biz op that it is an earnings claim.

12 DR. TAYLOR: As an individual who has started
13 and promoted business opportunities and evaluated
14 literally hundreds of them, I can tell you that every
15 business opportunity seller is making an earnings claim.
16 Just the very fact that they're presenting a package
17 business opportunity as a business opportunity is an
18 earnings claim.

19 Here's this opportunity for you to lose money.
20 Now, how often do you hear that?

21 MR. JOST: Only when you read between the lines.

22 DR. TAYLOR: I would like to carry that a step
23 further. In the wording here, it says have they stated
24 or implied. I guess what I'm saying is it may be
25 inappropriate for this to be a yes no answer.

1 The very fact of being presented as a business
2 opportunity is an earnings claim by itself, and I know
3 of no exception to this, and I'm an individual that
4 communicates with people all over the world on these,
5 and I've evaluated hundreds of them. I see no
6 exception. I see no business opportunity seller not
7 implying a profit, some profit.

8 So I think that it would be much better to
9 say -- to get this out of the yes no category and just
10 say what -- let's see. What earnings claims have been
11 made and what support can be made for those claims, and
12 that just be demanded in every case.

13 MS. BENWAY: Does anyone have a response to
14 that?

15 MR. MACLEOD: We're more or less eliminating
16 this as a meaningful component of the rule of the
17 disclosure, aren't we? We are basically saying that --
18 if we are saying that a business opportunity is per se a
19 claim of earnings, then why have this box at all and why
20 have the question as to whether or not an earnings claim
21 is being made?

22 If this is the -- if the purpose of this form is
23 to get the sellers on the record with enforceable
24 promises, there needs to be something more specific
25 than, Here is the claim. There needs to be something

1 more specific than: Because an opportunity was
2 recommended to you, this is therefore an enforceable
3 earnings claim.

4 DR. TAYLOR: Could I respond to that?

5 MS. BENWAY: Sure.

6 DR. TAYLOR: I think that's easily resolved but
7 instead of a yes no question, it could just simply be,
8 we are supplying our support of any earnings claims real
9 or implied, yes or no.

10 MR. JOST: I like the yes no boxes because it
11 gives the biz op opportunity to say no, we didn't make
12 any earnings claims, and I think many of particularly
13 questionable biz op would do so, and that alerts the
14 consumers to the fact that whatever the consumers view
15 from the conversations with the salespeople, the
16 company's not willing to stand behind, and if the yes
17 box is checked, then the meaningful disclosures about
18 the percentage of people who are making this kind of
19 money have to be made.

20 So I think the format that it's in really
21 addresses the real world situation where bad guys are
22 not going to provide an earnings disclosure document
23 that's meaningful if instead of a question here, there's
24 just a direction to do something, to supply some
25 meaningless gibberish that will confuse the situation

1 whereas if they deny clearly by checking the no box that
2 they said anything to the consumers about earnings, that
3 should alert the consumer to think further about what
4 the consumer may have drawn from the conversation.

5 DR. TAYLOR: Again I would just reiterate that
6 my opinion is that -- and this is based on extensive
7 experience, I'm not just throwing out opinion here --
8 that every business opportunity is making an earnings
9 claim, just the fact that they're presenting it as a
10 business opportunity, and the yes or no should be
11 whether or not they supplied support, whatever earnings
12 representations they've made, real or implied.

13 MS. BENWAY: Jon, can I ask you to -- a couple
14 times you've alluded to your extensive experience, and
15 can you just describe that a bit for us, please?

16 DR. TAYLOR: All right. First of all, at the
17 beginning of course you didn't have the time for me to
18 go into this. I have taught entrepreneurship. I've
19 taught business ethics. I have started or helped to
20 assist in starting over 47 home businesses. I have on
21 my web site received feedback and another web site --
22 I'm associated with literally tends of thousands of
23 people have visited our web site every month, and not
24 just myself, but others I've been working with have
25 communicated with literally thousands of people by

1 Email, almost all by Email and have heard the stories
2 and so many of them come down to earnings
3 misrepresentations. It's just a danger in the business
4 opportunity field.

5 MS. BENWAY: And in your experience with the
6 thousands of consumers, have you done surveys of those
7 consumers or are those published somewhere that we can
8 look at, anything like that?

9 DR. TAYLOR: Well, of course most of the ones
10 that I've worked with are business opportunity chains,
11 and there's a report on my web site mlm-thetruth.com,
12 and that includes the vast majority of business
13 opportunities, and I will be -- when I have my remarks
14 later, I'll expand on that.

15 MS. BENWAY: Okay.

16 MS. GREISMAN: Let me just follow-up to make
17 sure I'm hearing what I'm hearing accurately. I'm not
18 hearing a disagreement that there should be an earnings
19 disclosure. If an earnings claim is made, Jon, you're
20 not quite there.

1 to disagree that the business opportunity provider could
2 be required to disclose whether or not an earnings
3 claims is made. You don't have --

4 DR. TAYLOR: No, my strong recommendation would
5 be that the disclosure be instead whether or not it's --
6 whether or not the representation is made is whether or
7 not information was provided about potential earnings
8 real or implied with or without the information is
9 provided.

10 I think it should be provided in every case when
11 an business opportunity is sold.

12 MR. HILE: You mean -- just to back up, is that
13 what you mean when you say information should be on
14 there.

15 DR. TAYLOR: Back up statistics on average
16 earnings, statistics on breakdown, by however. I mean,

1 MR. MACLEOD: I think that this is again an
2 example of a difference between useful information and
3 enforceable promises. Lois, to get back to your
4 reference to the second sentence in the earnings claim,
5 I think that if this were something more like: Have
6 they stated or implied that you would earn a specific
7 level of sales income or profit, now that is something
8 that is very close to a representation to me as a
9 purchaser that says, I will get some benefit from this
10 bargain.

11 That is something that is an enforceable
12 something. Here's an example, Dr. Taylor, of an
13 earnings claim that I heard when I went to law school.
14 I think it came in the first day from the dean of the
15 law school. She told us that half of us, by the time we
16 graduated law school, would probably not find a job in
17 the law.

18 The other half us would find a variety of jobs,
19 some of which would pay very nicely and some of which
20 might not be as lucrative as the job you just had. Is
21 that an earnings claim? I don't think so. Was she
22 talking about earnings? Of course she was, but she was
23 not making a promise, and indeed she was specifically
24 disclaiming a promise that she was making to anybody and
25 everybody that he or she would make something by virtue

1 of going to the law school.

2 That is the difference between giving general
3 information and making a promise that at some point
4 perhaps Ken or the Federal Trade Commission would say,
5 You made a representation that was deceptive and false.

6 DR. TAYLOR: Working in the world of academia, I
7 have to say that I don't think the analogy applies. In
8 every field, in every field, and that includes the
9 fields I've studied, the same could be said. 62 percent
10 of people wind up in fields other than what they
11 studied. That's across the board. And so -- but that's
12 not necessarily an earnings claim because some of those
13 people are outside the field of law, made more money
14 outside of law than they would have made in it.

15 I know that for a fact, and pardon attorneys, I
16 know there's several of you here, but what I'm saying is
17 that -- I don't know what I'm saying.

18 MS. GREISMAN: Let me follow-up because I think,
19 Bill, where that might take you is it's so hard to --
20 earnings claim, there shouldn't be a disclosure of it,
21 and I think actually from the Commission's law
22 enforcement perspective, I'm sure there have been
23 litigated cases, but I'm not sure it is that difficult
24 to determine what is and what is not an earnings
25 statement.

1 MR. MACLEOD: Oh, I think I can agree with you
2 on that, and I think in the typical case a question
3 would really boil down to whether an earnings claim was
4 made or whether revenue or the industry generally was
5 discussed, and if it is the latter and an earnings
6 claim -- and that general discussion did not boil down
7 to an undertaking that you would accomplish this if you
8 buy this business opportunity, then I would say a
9 earnings claims was not made.

10 My point is that the way that the question is
11 worded here is closer to that general discussion than it
12 is to that here is what you would make, and it is the
13 "here is what you would make" that should be the
14 touchstone of the enforcement and the disclosure.

15 MS. BENWAY: Let me push you on that a little
16 bit though. So here's the problem that I have. You
17 would change the wording of the second sentence of that
18 earnings claim to apply only if a claim is made directly
19 to that person. Bill, you're going to earn \$50,000 a
20 month with this business opportunity, but what about if
21 I say to you, You know, in this business people earn,
22 people have earned \$50,000?

23 Is that an earnings claim because to an
24 unsophisticated me, I might very well think, well, if
25 they're earning 50,000, I'm going to earn 50,000.

1 They're telling me I can earn a lot of money from this.
2 Do you see my point there?

3 MR. MACLEOD: Sure, and I would go back to the
4 conditions policy on endorsements and testimonials, and
5 I would say that if I start giving examples and you say
6 nothing more than the example, then you are making the
7 implied representation that that example is a typical
8 experience, and you will then be held to substantiate
9 that as the typical experience.

10 MR. TREGILLUS: I would like to say I think what
11 may have happened here, Bill, in an effort to avoid a
12 rather lengthy question, how much you can earn or others
13 have earned, there was a collapse into the word
14 purchasers just to keep things short, and maybe that was
15 not advisable.

16 Can I raise a separate issue?

17 MR. HILE: As long as it's on point.

18 MR. TREGILLUS: Ken, perhaps you can speak
19 better to this than I can, but I think we're beginning
20 to see signs at least in the vending business again,
21 arrangements under the table are being made between
22 sellers of vending opportunities and the locating
23 companies where an allocation of making the earnings
24 claim goes to the locator so that the seller is relieved
25 of that lead to make a claim about how much money people

1 will earn.

2 Instead the locator says, We're going to provide
3 you with sites where you can earn ex dollars, and if we
4 don't provide you with that kind of profitable site, we
5 will relocate the machines for you, and they make pretty
6 specific earnings claims at the locator level.

7 I'm wondering if we need to consider any
8 expansion of this to include locating company that we
9 suggest or something like that in terms of who's making
10 the claim.

11 MR. JOST: Well, we certainly have seen some
12 cases where the locators were parse and parcel of the
13 problem, and reenforce what the company was saying. I
14 don't think we've heard a wholesale transfer of earnings
15 claims to locators, from franchise to locators.

16 I don't know how easy it would be to capture
17 that in here, but it's certainly worth considering to

1 the next session, session 5 which is the references
2 section of the proposed disclosure form. I know that at
3 least some of you have submitted comments about this
4 section and what it requires is that the business
5 opportunity seller provide a potential purchaser with
6 contact information for at least ten people who
7 purchased the business opportunity from them.

8 The form says if fewer than ten are listed, this
9 is the total list of all purchasers. It goes on to say
10 in bold lettering, you may wish to contact people below
11 to compare their experience with what Acme Product told
12 you about the business opportunities, and it also
13 discloses to potential purchasers that if they purchase
14 a business opportunity, their contact information can be
15 disclosed in the future to other potential buyers.

16 The form requires that the business opportunity
17 seller provide the name, city, state Zip Code and
18 telephone number of these previous purchasers, and if
19 there's more than ten individuals, they would include --
20 they would include the names on a separate sheet of
21 paper.

22 So I guess I'll first open the floor to
23 commenters and see what they want to talk about. I know
24 one issue is the issue of privacy that's been raised,
25 and I wonder what the panelists think about that,

1 whether or not the information that's required to be
2 disclosed creates privacy problems.

3 MR. JOST: This is something that when commented
4 on in our letter to the Commission and so in this
5 respect, it is fair to say that this is the Department
6 of Justice's view, that any shielding of biz op
7 purchasers from being disclosed, giving the biz op
8 seller the ability to not list the real purchasers in
9 the disclosure document gives the seller an opportunity
10 to manipulate the list and come up with a list of what
11 would effectively be shells.

12 And our view is that it needs to be the people
13 who have purchased the biz op who are listed, the real
14 individuals, and that it would be a simple matter for
15 the seller to make as part of the sales speech, when you
16 sign up for this, we're going to list you on our
17 disclosure document, but then you're going to be
18 inundated with calls, people calling to get a
19 recommendation, and you can opt-out of this system if
20 you want. You can be in it if you want, but you're
21 going to spend all your time answering the phone, and
22 thereby talk people into opting out of being on the
23 list.

24 So we think it's very important that the list be
25 complete not subject to manipulation by the seller.

1 MS. BENWAY: And what do you think about the
2 idea of allowing the business opportunity seller to
3 either -- first they can provide all of their purchasers
4 nationwide or they can provide a list of ten that are
5 closest in location to the potential purchaser? Do you
6 have an opinion about that?

7 MR. JOST: I think the more names on the list
8 the better because it's less subject to manipulation,
9 and under the old Franchise Rule, there were a series of
10 gradations. How does this differ from the old Franchise
11 Rule?

12 MR. TREGILLUS: Well, the old rule required at
13 least ten in your immediate area, but business
14 opportunity sellers may not be selling in your immediate
15 area by the time they get to you. You may be the first
16 in your area, so that wouldn't work, and then I think it
17 was a hundred nationwide or something like that. I
18 forget.

19 MR. JOST: I think requiring the largest -- the
20 biggest disclosure would be useful even if there's only
21 going to -- obviously there's only going to be a limited
22 number that are going to fit on the face of the form.

23 MS. BENWAY: Does anyone else want to comment on
24 this? Bill?

25 MR. MACLEOD: I'll go ahead and add a couple of

1 comments, and I think it is partly a form issue and
2 partly a rule issue, and I won't get into the rule
3 comments other than to say that my comment was one of
4 those that noted privacy concerns.

5 I think as a matter of disclosure, those
6 concerns can be addressed probably by appropriate
7 masking of names and provision of telephone numbers,
8 area codes or something like that that does not reveal
9 personally identifiable information.

1 not they would get this ongoing contact that Ken
2 described a couple minutes ago.

3 Does that mean that you give consumers a chance
4 to opt-out they could on a prospective basis? Does that
5 matter? Can you address Ken's concern in some other
6 ways? I think there are some other ways of doing that
7 with some sort of sampling technique, but that's a rule
8 issue rather than a form issue.

9 I think the form issue is largely an issue of
10 finding ways of making references available without
11 revealing information about the references that could
12 implicate their privacy rights.

13 MS. BENWAY: Do you have some ideas how we can
14 do that?

15 MR. MACLEOD: I think it would not be that
16 difficult I think to come up with a system whereby a
17 phone number is provided that is kind of a central
18 number or a central number is provided so that consumers
19 can have the central number and then be referred to the
20 references.

21 As I understand right now, the kind of
22 information that is on this form with the names, the
23 phone numbers, the locations, it is a relatively easy
24 thing with the map searches now available on the
25 Internet to get that person's address in relatively

1 short order, and that then gives a very clear indication
2 to someone, not necessarily a consumer who is interested
3 in getting a reference, but to people who might have
4 some ill will, some scheme unrelated to the business
5 opportunity to target those who are provided as
6 references.

7 MR. TREGILLUS: Bill, does your concern arise --
8 we have the same kind of disclosure in the Franchise
9 Rule, but it's of course in a much thicker document.
10 Does your concern arise because this is a single page
11 document?

12 MR. MACLEOD: The Franchise Rule -- and there
13 may be types of franchises that I haven't considered
14 here, but the typical franchise that I had in mind when
15 I thought of the Franchise Rule is not as significant a
16 problem because many franchises are in fact publicly
17 known and conspicuous, indeed advertised businesses so
18 that it is really a matter of public record already.
19 There is not personally identifiable information that is
20 being delivered when the -- when these kinds of
21 disclosures are made in the franchise rule.

22 With business opportunities, some of which are
23 likely to be more private opportunities, investment
24 opportunities and other things and many of these
25 opportunities being managed by consumers who are working

1 validate what's being disclosed on this form by
2 independent persons who are already active in the
3 business.

4 I don't know how you resolve that issue, and to
5 me it's compounded further when it's on a form such as
6 this. There's a limited amount of information that's
7 being provided to somebody who specifically has inquired
8 about the business opportunity. To me that's vastly
9 different than a national posting on a web site, and I
10 think that that has more onerous implications.

11 So I think this form is actually an improvement
12 as an alternative, but I don't know that it totally
13 addresses the issues that some of my business owners
14 expressed, and I think I would have an issue with
15 obtaining -- if I were going to be subject to this rule,
16 I suspect this is a problem for anybody that's
17 complying: How do I obtain the consent of those persons
18 to disclose this information so I insulate myself
19 against claims if something should arise that in fact
20 does affect their security or they are harassed in some
21 fashion?

22 MS. BENWAY: I understand you to recognize that
23 this information is valuable to potential purchasers,
24 but you want some type of screen or filter in place so
25 that there's I guess maybe no direct contact information

1 with the --

2 MS. MORRISSEY: And I think Bill, when he
3 talked about some sort of central -- some sort of
4 vetting or centralized process, I think that that kind
5 of thing -- that sort of intervention or that
6 intermediary could play an important role here in terms
7 of people being willing to share their experiences and
8 have their information be made available to third
9 parties.

10 As I said, the biggest area of concern that I
11 encountered when we were evaluating the rule initially
12 for providing comments was this idea of a national
13 publication on a web site. There was universally an
14 outcry about, not me, and that's why I said, I think
15 that the more limited disclosure or the more focused
16 disclosure here where it says it's going to be
17 presumably done in a face-to-face context where the form
18 is actually delivered to a prospective purchaser does a
19 lot to erode or allay those fears, but I don't know that
20 it totally eliminates them.

21 So I don't know if there's perhaps some
22 additional safeguards we could put in for existing
23 persons so that they could feel free to express
24 themselves candidly, and to me the phone number is less
25 intrusive than the address. The idea of people being

1 able to find out where persons reside, particularly if

1 that federal law prohibits them from identifying the
2 identity of their franchisees to prospective purchasers
3 because that has been such a bad practice, that it's
4 worked its way into a prohibition of the decree.

5 MS. BENWAY: Anyone else? We're going to take a
6 break, and why don't we return at 11:30, and we'll
7 continue with the final session and then the audience
8 participation.

9 (A brief recess was taken.)

10 MS. BENWAY: We're back on the record. One of
11 our panelists has a handout, which while he's handing
12 out is his materials, I'll say for the record, I want to
13 thank everyone for their participation so far.

14 This has been an informative discussion. We
15 thought we had a good disclosure form, and I think this
16 discussion has really added to that. So this session is
17 session 6. It's "additional issues," and we've told
18 each of the panelists that they could take some time, up
19 to 30 minutes, although I don't think any of the
20 panelist's presentations are going to last that long --
21 some period of time to discuss other issues about the
22 Business Opportunity Rule or the disclosure form that we
23 haven't yet covered, perhaps to expand upon comments
24 that they've previously submitted.

25 Many of the panelists have submitted comments in

1 response to our March 2008 revised NPRM. I have asked
2 each of the panelists to limit their discussions to new
3 information or as I said expanding upon their previous
4 comments rather than just reiterating what's already
5 part of the record because we're, under our rulemaking
6 requirements, will already be considering those
7 comments.

8 Following the conclusion of the panelists
9 comments, we will open the floor up to the audience and
10 I think the best way when we get to that point to do
11 that is to line up behind the microphone, and I'll ask
12 you for your name and to spell it for the courtesy of
13 our court reporter and also indicate what company or
14 entity you represent.

15 So I think with that, we will open the session
16 with Jon Taylor.

17 DR. TAYLOR: Thank you very much. This balloon
18 here represents the entire field of business opportunity
19 sellers, and I'll come back to that in a minute and
20 explain why I'm using this little visual aid.

21 My concerns regarding the revised rule are as
22 follows, and I will concentrate on those that apply to
23 the workshop and things that have not been discussed
24 before specifically, although of course they're all
25 related.

1 One of my concerns is that if you look at the
2 sheer scale of business opportunities, and I just did a
3 Google search. You can do this several different ways.
4 You can look at directories of business opportunities.
5 You can break it down, for example, the workshop
6 announcement and the revised rule refer to vending
7 machine, rack display operations, medical and billing
8 ventures, and in the revised rule announcement, they
9 also mention car washes and envelope stuffing.

10 These are the kinds of thing that the rule now
11 would apply to, and just out of curiosity because I have
12 so much experience with this field, I ran through a
13 multi level marketing. If you take a multi level
14 marketing by itself -- pardon me, if you take the ones
15 that I listed and that are listed in the workshop
16 announcement, you get a total of 35,000 results.

17 You take MLM by itself, you get 329,000. If you
18 take the fact that with the entrepreneurial or the
19 business opportunity chains, which is what multi level
20 marketing is, an endless chain of recruitment,
21 recruiters recruiting, ad infinitum. This infinite
22 expansion within a finite marketplace, you have a
23 situation where you have hundreds of business
24 opportunity sellers, but each of them MLMs, some of them
25 thousands, but you have certain key ones that you might

1 call kingpins or TOPs, they call them TOPs. That stand
2 for Top of the pyramid promoters.

3 If you have -- just taking the TOPs alone and
4 their respective pyramids and you add those up into the
5 several hundred MLMs that are out there right now, have
6 indexes of over a thousand, we're up into the hundreds
7 of thousands, and if you take -- just from sheer scale
8 and you add up all of those that are listed in the
9 workshop announcement, vending machines, news racks,
10 medical billing ventures, and you compare it to the ones
11 I've been speaking to, business opportunity chain
12 sellers, this represents those folks, which are mostly
13 members of the DSA, and this baby aspirin, which I don't
14 know if you can see -- this baby aspirin represents the
15 totality of what the business opportunity rule will
16 cover.

17 I felt like I had to do this just to kind of
18 understand the scale of what we're talking about, and of
19 course the big objection to bringing MLM into the rule
20 was it was too broaden -- it was overbroad, so we're
21 going to narrow it down to this baby aspirin here, and
22 that's what we're going to deal with with the rule. I'm

1 are in these fields will have no real incentive to stay
2 as they are. In fact, most of them already qualified,
3 and that is they're disqualified as a business
4 opportunity seller because according to footnote 34 on
5 the revised rule, all you need is a commission shared by
6 two or more people to make it a multi level marketing
7 program.

8 That therefore disqualifies almost all of the
9 business opportunity sellers, and those who are not
10 disqualified will have an incentive to qualify, to
11 simply share the proceeds of the commissions with two or
12 more people. Therefore, the rule applies to nobody and
13 would provide no consumer protection, but just the
14 appearance of consumer protection.

15 That's an unintended consequences, and the
16 unintended consequence then becomes one of the FTC
17 actually aiding and abetting fraudulent, unfair and
18 deceptive practices which will be able to go unhindered
19 by this law or this rule.

20 Secondly, I happen to live in Utah, the
21 epicenter for this kind of thing. The DSA, the Direct
22 Selling Association -- by the way there's some of your
23 representatives here, and they're fine people. They're
24 likeable people, and I sympathize with them because
25 they're in a position where they have to promote these

1 concerns here, and that's footnote 7, and I'm going to
2 come back to foot note 7. I just wanted to mention it
3 so it's not forgotten, but put that in your mind because
4 this is crucially important to all that we're talking
5 about.

6 I have passed out here some information for you
7 to read the details later, but we have -- in addition,
8 we have the situation where the rulemaking process
9 itself has been corrupted by ex parte communications
10 between FTC officials and the DSA.

11 And what happened and how this came about was
12 that I -- after the rulemaking closed for the revised
13 rule, I had some real concerns about the FTC's
14 misunderstanding of some of my comments, and I had
15 basically said that earnings claim wouldn't be -- it
16 didn't matter what the earnings claim was, that there
17 would be -- it would be misunderstood, and it would
18 be -- the MLM would do whatever they could to hide their
19 numbers, to camouflage -- I found 20 deceptions on one
20 part of a news statement of average in earnings.

21 So that was taken a from my saying that the
22 earnings representation was not useful. I wasn't saying
23 it couldn't be used, but at least analysts have
24 something to go on and could report back to consumers.
25 I was denied the opportunity of giving that information

1 to the FTC because it was after the rulemaking had
2 closed, and it would be an ex parte communication.

3 However, on October 23 and 24, 2008, in
4 Alexandria, Virginia, certain FTC officials met with and
5 even spoke at a revenue generating event for the DSA in
6 Alexandria, Virginia, on October 23 to 24th. This is
7 just one more piece of evidence of collusion between
8 certain FTC officials and the Direct Selling

1 cover MLMs. C: The Commission does not believe it is
2 practicable or sufficiently beneficial to consumers to
3 attempt to apply the proposals advanced in this rule
4 making against multi level marketing companies.

5 D: The Commission takes MLMs companies out of
6 the ambit of the rule. E: The MLM industry articulated
7 concerns particularly peculiar to its business model,
8 that these provisions would no longer apply to MLM
9 companies inasmuch as these companies and their
10 representatives are excluded from the ambit of RPBOR,
11 the revised rule."

12 So now between the four corners of the revised
13 rule, the FTC has expressly stated over and over that
14 ambulant is exempt from the ambit of the rule. Yet in
15 the announcement of this workshop, in footnote 7 the FTC
16 states the RMPR, revised rule, does not except MLMs from
17 coverage of the revised rule.

18 So on and for the record, Ms. Benway, are you
19 saying that all MLMs, including without limitation,
20 members of the DSA are included under the ambient of the
21 rule?

22 MS. GREISMAN: Sir, we're not here to answer
23 your questions in that nature. Please continue.

24 DR. TAYLOR: Then I would ask the question: If
25 they are -- are they or are they not? That's just for

1 the record. That is something that needs to be answered
2 and if so, if they are outside the ambit of the rule,
3 then why is footnote 7 in there, which misleads the
4 public?

5 I'll take any questions on that, on those
6 concerns. But my summary comment on that is that we
7 have a situation here where unfortunately the DSA -- or
8 pardon me, the Federal Trade Commission is abrogating
9 its responsibility to garden and protect consumers
10 against fraudulent, unfair and deceptive practices, and
11 I'm saddened by that, and I think everybody here should
12 feel likewise.

13 Thank you.

14 MS. BENWAY: Thanks, Jon. I think as you
15 probably know based on our NPRM, the revised NPRM, we do
16 disagree with many of your comments but thank you for
17 your comments, and I want to see if anyone else on the
18 panel would like to respond.

19 MS. GREISMAN: No, just noting for the record
20 that the statements that you believe the FTC has acted
21 improperly or the Staff has acted improperly have
22 already been addressed, and if you feel they need
23 further discussion, we're happy to do so.

24 MS. BENWAY: Then I'll move along and go around
25 the horseshoe, and I'll turn next to Dale Cantone.

1 opportunity to thank you for listening to what I had to
2 say and what other members of the panel had to say.
3 Thank you.

4 MS. BENWAY: Thank you. Ken Jost?

5 MR. JOST: Thank you for having me as part of
6 this panel. I've enjoyed the morning and basically shot
7 my wad in the course of the meeting.

8 One other question I have though is back spacing
9 a little bit in terms of the disclosure of legal
10 actions. It goes down to the level of sales managers
11 but excludes salespeople, and I would suggest that more
12 thought be given to including the salespeople at the biz
13 op as somebody for whom disclosures of prior fraudulent
14 false and deceptive litigation should be disclosed.

15 MR. MACLEOD: I have a couple comments, and I
16 think my first comment I will direct to Dr. Taylor, and
17 that has to do with your descriptions of certain
18 industry forms and the question of the propriety of the
19 industry forms.

20 I believe that the issue that we ought to be
21 discussing is the effort to regulate, prevent and
22 prosecute fraud, not an effort to categorize business
23 forms for particular regulatory or particular
24 disparagement.

25 I remember very vividly a time when I was

1 serving as an expert witness for a number of consumers
2 who were filing and pursuing a litigation against a
3 pyramid scheme, a litigation that took the consumers a
4 good year or more to get through the courts and a case
5 that was about to go to trial when the Federal Trade
6 Commission in one fell swoop came in with an asset
7 freeze and a temporary restraining order and shut that
8 pyramid scheme down. The efficiency and the finality
9 with which the Commission acted impressed everyone
10 including all of the lawyers and the court that was
11 supervising that case.

12 There is no question in my mind that the Federal
13 Trade Commission has the ability to recognize and
14 prosecute fraudulent schemes and transactions, and that
15 is what we ought to be talking about today, not whether
16 any particular industry or a particular industry form
17 should be singled out for a particular regulation.

18 DR. TAYLOR: I would like to respond to that.

19 MR. MACLEOD: I am not quite done, thank you.
20 The other issue that I wanted to raise was related to
21 that. A number of the comments that I made today were
22 comments that were largely directed toward seeing if we
23 could come up with a form and a rule that accomplished
24 as surgically as possible the regulation and prevention
25 of fraud in the kinds of businesses where the Commission

1 thinks that a rule would be effective.

2 The closer I think that the rule and the fraud
3 and the rule and the form will approach and regulate and
4 root out that fraud, the more effective the rule will be
5 and the less cost the rule will impose on legitimate
6 businesses, and I think that that is a very significant
7 trend that the Commission has followed so far in its
8 amendments and reconsideration of the rule, and in the
9 efforts that it put forward in putting this workshop
10 together today.

11 So I would like to join Ken, Dale and Dr. Taylor
12 in thanking the Commission staff for hosting this
13 workshop, and I would like to compliment the Staff for
14 conducting this entire proceeding in what I regard as an
15 exemplary fashion.

16 MS. BENWAY: Well, thank you very much. And
17 finally, I'll turn the floor over to Maureen Morrissey.

18 MS. MORRISSEY: First of all, I want to say
19 that Tupperware really welcomes the opportunity to
20 amplify the comments that it made on the revised notice
21 of proposed rulemaking. We do understand and appreciate
22 that they're holding this workshop to gather additional
23 insight and not merely to hear a rehash of the comments
24 that we submitted previously.

25 Accordingly, my intention is to focus my remarks

1 on our remaining definitional concerns with regard to
2 the revised notice of proposed rulemaking, which I'll
3 refer hereinafter to as the RMPR.

4 At the outset I really want to applaud and
5 express my appreciation for the effort of the Commission
6 and the Staff to narrow the scope of the proposed
7 Business Opportunity Rule. We were pleased to see last
8 spring that the Commission specifically stated in the
9 Federal Register notice that the revisions narrowed the
10 scope of the proposed rule to, quote, avoid broadly
11 sweeping end sellers of multi level marketing
12 opportunities, and that your agency attended to avoid
13 inadvertently including in the new regulatory regime
14 companies that used traditional product distribution
15 arrangements.

16 While Tupperware does not believe that the
17 Business Opportunity Rule in its revised form will apply
18 to our company, we do operate in an environment where
19 regulatory certainty is critical, to a billion dollars
20 business such as ours.

21 Accordingly, I would refer you to our written
22 comments which provides several suggested way to make
23 entirely clear to whom the Commission intends to apply
24 the ruled. In the explanatory statement accompanying
25 the RMPR, the Commission stated that it believes that it

1 has other authorities to regulate the conduct of multi
2 level marketing companies, and we encourage you to
3 finalize the BOR by clarifying further the exemptions
4 and exclusions that you've already provided in revised
5 texts.

6 By way of background, Tupperware is a publicly
7 traded global seller of premium innovative products
8 including the Tupperware brand of kitchen and home
9 products that has become a household iconic product in
10 virtually every household, as well as beauty and
11 personal care products which you might be less familiar
12 that are sold through the Beauty Control brand here in
13 the United States.

14 I'm proud to note the lifetime guarantee that we
15 offer on our durable goods, which also helps to
16 distinguish us from our competitors, and many of the
17 companies from whom the Commission is trying to regulate
18 and provide consumer protection.

19 Our products are sold to consumers outside
20 traditional retail store channels, with our independent
21 contractor sales consultants providing and compromising
22 the vast majority of our sales force. Our consultants
23 recruit and train other consultants, and we currently
24 have an active average sales force between the two
25 brands of approximately 152,000 in the United States.

1 With their help, Tupperware is now found in more
2 than 90 percent of U.S. homes today. Particularly in
3 this economy, the ability of Americans to start as
4 Tupperware consultants or Beauty Control consultants
5 with minimum obstacles to business entry is a
6 critical element to helping their families make ends
7 meet.

8 My purpose in participating in the workshop
9 today was to help the Commission understand more fully
10 the need for additional clarity in the final version of
11 the Business Opportunity Rule. Businesses need bright
12 lines in order to understand the definition of a
13 business opportunity or in the alternative, the explicit
14 safe harbors within which to stay.

15 We believe that the Commission can make some
16 tweaks without sacrificing the efficacy of the overall
17 new regulatory regime and its ability to stifle the
18 kinds of illegitimate businesses and opportunities that
19 stimulated your initial call to action.

20 A bright line exception or the example of a
21 bright line exemptions that we support in the clearest
22 way for the Commission to ensure that companies like
23 Tupperware are not swept in is to exempt from the
24 coverage of the Business Opportunity Rule any business
25 opportunity where the seller is a publicly traded

1 company and the required investment by the business
2 opportunity purchaser does not exceed \$250, that's point
3 one.

4 Such purchaser receives merchandise whose retail
5 value is equal to or greater than the required
6 investment that they must make in order to enter the
7 opportunity, and the seller agrees to buy back the
8 unused inventory within a period of time such as one
9 year for at least 90 percent of the purchaser's cost.

10 Publicly traded companies, as they're well
11 aware, are already subject to regulatory scrutiny and
12 are not generally the kind of business entities that
13 engage in scams that the FTC seeks to police under the
14 Business Opportunity Rule.

15 By combining a reasonable dollar threshold with
16 a requirement that the exempt entity be a publicly
17 traded company subject to whole host of disclosure
18 regimes, this proposal should give comfort to the
19 Commission that only reputable firms would be subject to
20 the exemption or safe harbor.

21 It would also ensure that the consumers suffer
22 virtually no economic harm in pursuing such a business
23 opportunity since the combination of the low cost of
24 entry with the high percentage and long-term return
25 policy would leave little amounts unreturned if somebody

1 were ultimately to be dissatisfied.

2 The other thing I would like to discuss is the
3 required payment definition that appears in the
4 definition of the business opportunity. In the event
5 that the Commission should elect not to include
6 categorical exemptions such as the one I just described,
7 we encourage the Commission to clarify the definition of
8 required payment to more accurately show the agency's
9 intention to exclude companies like Tupperware.

10 Whether a company is included in the new
11 regulatory regime or not depends almost entirely on the
12 definition of business opportunity, and a key element of
13 that definition is whether the prospective purchaser of
14 the business opportunity has made a required payment.

15 The RMPR defined required payment in section
16 437.1 o, to include all consideration that the purchaser
17 must pay to the seller but exempt the payments for the
18 purchase of reasonable amounts of inventory at bona fide
19 wholesale prices for resale or lease.

20 We would like the Commission to consider
21 clarifying that no required payment occurs when the
22 business opportunity seller agrees to buy back from the
23 business opportunity purchaser any unused inventory
24 within 12 months of purchase for at least 90 percent of
25 the purchaser's cost.

1 In other words, a required payment is only a
2 payment when one does not have the ability to get a
3 return on or nearly an entire return of the money back.
4 We believe that this makes good policy because the
5 underlying purchase of the required payment definition
6 is to help business opportunity purchasers avoid paying
7 out of a lot of their own money without a fair chance of
8 recovering or recouping their outlays.

9 When a company like Tupperware has a contractual
10 return policy that significantly limits the exposure of
11 potential purchasers of the business opportunity, we
12 satisfy the agency's objective from the get go.

13 Further by creating the kind of exemption that
14 I'm proposing here, the agency will likely encourage the
15 greater availability of satisfactory return policies and
16 lower the effective at risk amount to only a few
17 dollars, no more than 10 percent of the initial cost of
18 the products.

19 We believe that clarifying or expanding the
20 exclusions from required payments would not in any way
21 operate to undermine the objectives of the business
22 opportunity definition. Instead they would allow the
23 definition to actually reflect the business reality of
24 the multi level business operating model.

25 Business assistance is the additional

1 definitional point with which we have some concern. A
2 key definitional element of the business opportunity is
3 the phrase business assistance. The agency needs to do
4 a better job of creating a safe harbor in this arena in
5 order to ensure that legitimate multi level marketing
6 enterprises such as Tupperware can continue to provide
7 free training and information to business owners without
8 having to incur the inordinate expense associated with
9 compliance with the Business Opportunity Rule, which
10 would be on top of the costs it already incurs for the
11 provision of its time, efforts and resources to our
12 sales force at no cost.

13 Tupperware provides several types of business
14 assistance to its business owners at no cost or on a
15 voluntary basis as a subscription service. In addition,
16 existing Tupperware business owners are encouraged to
17 provide mentoring, training and guidance to new business
18 owners.

19 To the extent that the assistance provided by
20 either Tupperware or its sales force leadership could
21 operate to bring the business within the scope of the
22 RMPR, the FTC would create a huge disincentive to
23 provide valuable training and assistance that we view as
24 critical to the success of Tupperware business owners
25 and similarly situated business enterprises.

1 To elaborate on our written comments, let me
2 illustrate. Tupperware provides the following training
3 opportunities and business assistance either directly or
4 indirectly through its sales leadership: A grand
5 opening party, which we refer in our internal
6 nomenclature as the Go Party. It is conducted by a
7 senior Tupperware business owner, generally the
8 recruiter of the person who is purchasing the business
9 opportunity for the benefit of the new Tupperware
10 business owner in order to provide that individual with
11 training on the following key areas: How to organize a
12 Tupperware party and to assist the party host; how to
13 demonstrate Tupperware products and their features and
14 benefits to potential customers; how to use Tupperware
15 products to create the refreshments for the party guests
16 in attendance at the party; how to complete product
17 order forms and answer customer's questions; how to
18 process payments for orders; how to order products and
19 host gifts for delivery to customers; and how to handle
20 warranty returns.

21 Each of these elements is critical to a
22 successful business operation and operates to provide a
23 hands on opportunity for that new business owner to
24 actually have a live, virtual and actual experience in
25 that arena.

1 Another example is our new consultant
2 orientation classes for small groups of new Tupperware
3 business owners that are conducted locally in their
4 community which are again conducted by senior sales
5 leaders who are experienced Tupperware business owners.

6 This program is supported by training materials
7 that are prepared by Tupperware itself, as supplemented
8 by the programs field presenters. Attendance at this
9 orientation, while entirely voluntarily, is strongly
10 encouraged, and in fact attendance is rewarded by
11 providing additional product samples at no cost to the
12 attendees of the these orientation classes.

13 We also provide training on various business
14 activities, including but not limited, to the following
15 as an online proposition: Fund raisers using Tupperware
16 products; demonstration themes and recipes using
17 Tupperware products; recruiting new consultants and
18 dating new hosts for Tupperware parties.

19 In addition, the company provides catalogs,
20 promotional fliers, host gifts, attendance gifts and
21 other sales aids that are available for purchase by
22 Tupperware business owners but are never required. We
23 also have a web based order entry system, replacement of
24 product orders, collection of sales tax and credit card
25 processing that we do as an accommodation to our field

1 members.

2 Consultant web sites are provided at no cost for
3 basic business communications and services, and at a
4 subscription price that is only 7.95 a month for
5 upgraded services including a shopping cart feature that
6 links into the Tupperware.com web site and for which
7 every sale is commissioned to the individual sales force
8 member.

9 We also provide lead generation. Customers
10 hosts and recruits through a consult director service
11 that is available by subscription, and finally we
12 provide customer care services or, if you will, consumer
13 services for both our business owners and for our retail
14 customers.

15 The foregoing training and assistance, with the
16 exception of the lead generation service, is designed to
17 equip the new business owner with the skills and
18 information necessary to operate a successful business.
19 Tupperware Company does not provide locations, outlet
20 accounts or customers to the business owner, although it
21 could be argued that the recruiting materials are
22 defined to create new locations or outlets for the
23 recruiting business owner and that lead generation and
24 advertising activities conducted by the company are
25 designed to provide new customers and/or recruits for

1 the existing business owners as well as to the newly
2 introduced business owner.

3 Clearly to have these essential business
4 activities be the vehicle whereby the exemption for
5 multi level marketing is lost and BOR compliance is
6 required makes no sense and is totally at odds with the
7 objectives articulated by the FTC, and in the
8 alternative companies run the risk that no good deed
9 goes unpunished.

10 The FTC would be regulating a company that
11 spends significant amounts of its own money to provide
12 this free assistance, training and guidance all at no
13 cost to the purchaser of the business opportunity, and
14 the consumer has the right to hold on to the products it
15 bought at a below market price for up to a year and to
16 sue for a refund of the purchase price.

1 that the Commission's intention of exempting Tupperware
2 and similar companies that provide themselves on
3 providing appropriate and meaningful assistance to their
4 new owners is maintained and in fact encouraged.

5 At the end of the day, unless the Commission
6 takes steps that we have requested, it is conceivable
7 that a company could provide copies and free training
8 with no meaningful cost to the business opportunity
9 purchaser because of an established and legitimate
10 refund policy, and the only way that a company could
11 truly be assured that it's exempt is if all the products
12 were essentially subject to bona fide by that
13 opportunity.

14 In conclusion, we thank you again for the
15 opportunity to permit me to comment on a little more
16 insight into how our operations operate and are used and
17 practiced in the field because while the definitional
18 aspects certainly do a lot to provide us with a level of
19 comfort, there's a couple of minor things that would
20 clearly make it one side of the line or the other, and
21 we think that that's kind of certainty is what would
22 allow companies like Tupper to continue to flourish.

23 Thank you for your time and attention.

24 MS. BENWAY: Thanks, Maureen. I had actually
25 just a couple of questions to follow up on your remarks.

1 The first one was: You had mentioned the lead
2 generation that the company provides, and could you just
3 describe how that works a little bit?

4 MS. MORRISSEY: It actually operates on a
5 number of fronts. We have our Tupperware.com web site.
6 We actually have a link that is find a consultant, and
7 if a consumer who visits our site clicks on that link,
8 it basically brings up in a geographic area all of the
9 Tupperware consultants or business owners within a
10 certain geographic area that they designate, and it
11 gives them their contact information.

1 MS. MORRISSEY: Uh-huh.

2 MS. BENWAY: And I believe in your comments you
3 said a certain percentage of those purchasers don't have
4 any intention necessarily of becoming a Tupperware
5 consultant, but they're just buying them for their own
6 personal use. Is that right?

7 MS. MORRISSEY: We certainly don't discount
8 that fact. We do know that because of the way we
9 designed our opportunity kit value as a proposition,
10 that because the value of the kit at say \$79 actually
11 contains Tupperware products that if they were to
12 purchase them through the catalog or through one of our
13 consultants on the web would be roughly \$300, that that
14 could obviously create an incentive for someone to
15 purchase the kit if the items were attractive to them
16 simply for their personal use.

17 However, even if they do that, we feel that
18 there's no harm because if they've achieved a value so
19 far in excess of what their initial investment is and
20 they didn't intend to make a profit, it's kind of like,
21 who cares I guess at the end of the day.

22 We have had persons position or attempt to
23 position the opportunity as a buying club, and we have
24 strongly come out on a policy basis saying that this is
25 a business opportunity. It is not a buying club. It is

1 not to purchase products at wholesale for personal use,
2 and so we consistently try to eradicate that as a blind
3 set within our corporate culture and in our field, but I
4 would be disingenuous to say that it couldn't happen
5 because the relative values make it a possibility, but
6 it's not something that we think occurs on a regular or
7 a frequently basis.

8 MS. GREISMAN: Is purchase required?

9 MS. MORRISSEY: Of the opportunity kit, the
10 initial opportunity kit, yes, it is. And, Lois, to that
11 point, to basically provide somebody only with paper

1 consumers nationwide did need to be represented, and I
2 did want to respond to what Bill said about singling out
3 MLM.

4 I think it important that he understand that the
5 reason I did it is because MLM was excluded, and they
6 were excluded because of certain things, and those
7 things had to be defunct. I didn't go into all the
8 details. You can look at your written materials.

9 I won't take your time, but basically my
10 position is is that the rule as it stands is invalid for
11 four reasons: One, false and misleading statements by
12 the FTC. I gave you one example, and there are many
13 others. I don't have the time to go into them, but some
14 of them are in the report.

15 Two -- and most of which by the way came from
16 the DSA. Two, the ex parte communication between DSA
17 and FTC officials which were -- was a revenue generating
18 event outside of the rulemaking time period and which
19 was denied to consumers and also to the general public
20 and to the media.

21 Three, the rule applied to virtually no one and
22 would provide essentially no consumer protection because
23 it would be very easy, I know myself having put together
24 a business opportunity, to gain exclusion as the rule is
25 now worded. It would be foolish not to.

1 The fourth reason is Section 5 is simply
2 unworkable. I strongly disagree that it is -- simply 14
3 over ten years, and there are hundreds, hundreds that
4 need to be investigated immediately. I know that from
5 the hundreds of thousands of visits to our web site,
6 from the tens of thousand of letters that I have
7 personally had to deal with.

8 Thank you very much for letting me explain that.

9 MS. BENWAY: Thank you. I'm going to open up
10 the floor to our audience if anyone has a comment. We
11 would welcome that. I would ask that you come up to the
12 microphone and state your name and if you can spell your
13 name for our court reporter, she would appreciate that,
14 and then indicate the entity that they're here
15 representing.

16 MR. HAILEY: I'll get started. Gary Hailey from
17 the Venable law firm. I left a card with the reporter.

18 I had a couple of unrelated questions in the
19 different areas you've discussed, and I think this has
20 given us a lot of food for thought.

21 On the legal action area, I was just curious to
22 verify to make sure that I understood that legal action,
23 it appeared from the examples you gave, to include the
24 filing of a complaint, regardless of how far that formal
25 legal action proceeded short of final decision, and any

- 1 kind of consent agreement or settlement of a legal
- 2 proceeding, again even if that had been done with no

1 for any complaint that has been filed. Do you have -- I
2 mean, if you could expand a little bit on what you see
3 as any potential problems with that or any fixes for
4 that.

5 MR. HAILEY: Well, I'm not sure what the fix
6 would be. I think there's an obvious difference between
7 an FTC or a State Attorney General pursuing someone,
8 going through a full blown trial, getting a decision on
9 the merits, getting an appellate affirmance of that
10 decision at one extreme. The other extreme and one of
11 the examples you give, as I recall, was a county court
12 in Kansas that appeared to be a private action, could be
13 a purchaser of the business opportunity, could be a
14 competitor, could be a disgruntled X employee making
15 allegations of misrepresentations or frauds, not to say
16 that you would presume that the person does not have
17 good motives or doesn't sincerely believe in their
18 complaint.

19 But I'm not sure what an action like that -- I
20 think there's another side to the story, so I was
21 curious if in particular the business opportunity
22 company could, would be allowed under the rule or
23 proposal to provide other information or explanation as
24 well as simply giving it.

25 MR. HILE: Is it your position that they should

1 be allowed to add more?

2 MR. HAILEY: I don't know that I have a position
3 but, yeah, I would think that that would certainly be a
4 possibility or that they should be allowed if they felt
5 there was something to say, assuming it was honest and
6 didn't misrepresent the facts so that they could get
7 their side of the story or explain this, but I'm not
8 sure if the rule really covers that or not at this
9 point.

10 MS. GREISMAN: Could you give an example of a
11 statement, some sort of explanation that would fit the
12 bill in the proposals?

13 MR. HAILEY: I guess a simple one, if it were a
14 settlement or consent agreement, simply to say no
15 admission of liability, settled, as you often see people
16 give in press releases about FTC settlements: Done to
17 minimize litigation expense or whatever their reason was
18 or perhaps you would say in some of these other cases,
19 suit filed by -- or maybe as you would do in FCC
20 disclosure, suit filed by disgruntled ex employee or
21 former partner of someone, a company or individual
22 denying liability and give kind of a status of the case,
23 case in discovery or scheduled for trial in three years
24 or whatever it might be.

25 I haven't really thought that out. I was just

1 reading how strong the reaction was that your
2 interviewees had with this kind of information. They
3 seem to take even just a list of a case in a local court
4 without any other facts, a very, very negative thing
5 about that.

6 MS. BENWAY: Do any of the panelists want to
7 comment on Gary's comment?

8 MS. GREISMAN: Which I would describe as
9 permitting inclusion of a short, truthful statement and
10 perhaps rather than getting into words like disgruntled
11 consider that a non subjective statement.

12 MR. HAILEY: Sure, yeah. Again I'm not
13 proposing anything in particular, just trying to raise
14 the issue.

15 MR. MACLEOD: I think he raises an important
16 issue and one that is difficult potentially to implement
17 but one that is well worthwhile considering -- because
18 as we all know who fashion lawsuits, very often this
19 might be a very simple breach of contract claim that
20 gets dressed up with five or six additional counts
21 alleging everything from securities to constitutional
22 violations, and it may well be that on some of these, it
23 is not really of particular materiality to a prospective
24 purchaser.

25 But these kinds of disclosures do carry probably

1 more weight than a typical layperson or a typical
2 layperson would put more weight on these kinds of
3 disclosures than they may merit.

4 MS. BENWAY: Ken?

5 MR. JOST: It's hard to say that people
6 shouldn't be allowed to explain themselves when they've
7 been sued, but at the same time I've seen misleading
8 descriptions of actions that we've brought against
9 franchises as characterizing them as essentially failure
10 to register type cases, which just isn't true.

11 So it's subject to abuse, of course, but I can't
12 say I'm unalterably opposed to it because again it puts
13 the consumers on notice and if it's a governmental
14 action, the consumer should have maybe a bigger burden
15 to look into it, if it's material to the consumer what
16 that action meant, not just take a defendant's word for
17 what happened in the lawsuit.

18 MS. BENWAY: Thank you.

19 MR. HAILEY: Could I discuss one other issue
20 also? I think the thing about disclosing the references
21 and all the discussion that we had again is something
22 that's bothered me and is reflected in my previous
23 comments.

24 A little different twist though, I would wonder,
25 and I don't know how this -- how the references work in

1 the franchise area. We heard something today
2 distinguishing or attempting to distinguish the type of
3 references the fact that they may be businesses as
4 opposed to individuals, but in some of the cases of a
5 biz op, would the reference have any incentive or any
6 motivation to be negative about the company because they
7 would view the new caller, the new purchaser, potential
8 purchaser as a potential competitor or would they feel
9 like this was burdensome and they just didn't want to
10 deal with it and might give a negative view about it?

11 I also think that, as other people said, there's
12 always a chance that the biz op company could present a
13 list of references in an attempt to manipulate or shade
14 who was getting called. I don't know if this would be
15 practical at all to take care of the privacy issue by
16 reversing this, by saying, We will communicate to the
17 same list of references a request to call you, a
18 prospective purchaser and answer any question that you
19 have.

20 I don't know if that would be any more
21 practical. I would just say without putting forth
22 alternatives, I think that is a difficult issue for all
23 the reasons people raised and is something we really
24 need to think about.

25 I don't know -- other than the Franchise Rule,

1 I'm not aware of anything that's been done like that in
2 other rules. I was thinking of something like the
3 Funeral Rule where there would be again a lot
4 of personal issues there to say, Here are ten recent
5 customers who purchased a similar package, and you can
6 call them to see what their experience was, and maybe
7 there are other rules that would be a better example but
8 it seemed to me a fairly unique requirement and concern
9 of mine.

10 Thank you.

11 MS. BENWAY: Thank you. Anyone else?

12 MR. COOK: Great job. I love the panel and
13 everything, except Dr. Taylor here, and I use that with
14 some -- I'm Rod Cook.

15 MS. BENWAY: Are you with some company?

16 MR. COOK: Distributors Rights Association made
17 up of top leaders, mid range leaders and the little
18 people. We have 3,000 members feeding down that covers
19 about 1.8 million or so people, so we see it all the
20 way, and we're in opposition at times to some of the
21 companies within the DSA, some of their activities.

22 I won't say anything -- that it's illegal, but
23 just conflict between distributors and companies, so I
24 talk to thousands of the people. I myself have been a
25 top distributor. 90 percent of my sales were retail and

1 that I analyzed, and I got the statistics for gambling
2 from the Nevada Gaming Commission. These were not --
3 these not just generated statistics, the same as
4 Fitzpatrick, so I can go on and on but I can back up
5 everything I say.

6 MR. COOK: Start selling stock to the report to
7 Harry Maytho (phonetic), any fallacies in there?

8 DR. TAYLOR: Short telling the stock -- first of
9 all I was not involved in that.

10 MR. COOK: This is your report.

11 MS. BENWAY: We need to move on.

12 (Discussion off the record.)

13 MS. GREISMAN: Jon, thank you for responding.
14 Let's move on from questions or comments.

15 MR. HILE: Is there another person in the
16 audience that would like to pose a question or make a
17 comment, someone who hasn't yet?

18 MS. BENWAY: All right. If that's the case,
19 then I want to thank all the panelists for their
20 participation as well as the audience members and we are
21 off the record.

22 (Whereupon, at the workshop was concluded.)

23

24

25

1 CERTIFICATE OF REPORTER

2

3 DOCKET/FILE NUMBER: R511993

4 CASE TITLE: BUSINESS OPPORTUNITY RULE ROUNDTABLE

5 HEARING DATE: JUNE 1, 2009

6

7 I HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the steno
9 notes transcribed by me on the above cause before the
10 FEDERAL TRADE COMMISSION to the best of my knowledge and
11 belief.

12

13 DATED: JUNE 8, 2009

14

15

16 DEBRA L. MAHEUX

17

18 CERTIFICATION OF PROOFREADER

19

20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

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DIANE QUADE

25