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Title 16 - Commercial Practices

Chapter I - Federal Trade Commission

Subchapter D - Trade Regulation Rules

Part 437 Business Opportunity Rule

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PART 437 - BUSINESS OPPORTUNITY RULE

Authority: 15 U.S.C. 41-58.

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§ 437.1 Definitions.

The following definitions shall apply throughout this part:

- (a) **Action** means a criminal information, indictment, or proceeding; a civil complaint, cross claim, counterclaim, or third party complaint in a judicial action or proceeding; arbitration; or any governmental administrative proceeding, including, but not limited to, an action to obtain or issue a cease and desist order, an assurance of voluntary compliance, and an assurance of discontinuance.
- (b) **Affiliate** means an entity controlled by, controlling, or under common control with a business opportunity seller.
- (c) **Business opportunity** means a commercial arrangement in which:
 - (1) A seller solicits a prospective purchaser to enter into a new business; and
 - (2) The prospective purchaser makes a required payment; and
 - (3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:

- (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices, owned, leased, controlled, or paid for by the purchaser; or
 - (ii) Provide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser's goods or services; or
 - (iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home.
- (d) **Designated person** means any person, other than the seller, whose goods or services the seller suggests, recommends, or requires that the purchaser use in establishing or operating a new business.
- (e) **Disclose or state** means to give information in writing that is clear and conspicuous, accurate, concise, and legible.
- (f) **Earnings claim** means any oral, written, or visual representation to a prospective purchaser that conveys, expressly or by implication, a specific level or range of actual or potential sales, or gross or net income or profits. Earnings claims include, but are not limited to:
- (1) Any chart, table, or mathematical calculation that demonstrates possible results based upon a combination of variables; and
 - (2) Any statements from which a prospective purchaser can reasonably infer that he or she will earn a minimum level of income (e.g., "earn enough to buy a Porsche," "earn a six-figure income," or "earn your investment back within one year").
- (g) **Exclusive territory** means a specified geographic or other actual or implied marketing area in which the seller promises not to locate additional purchasers or offer the same or similar goods or services as the purchaser through alternative channels of distribution.
- (h) **General media** means any instrumentality through which a person may communicate with the public, including, but not limited to, television, radio, print, Internet, billboard, Web site, commercial bulk email, and mobile communications.
- (i) **Material** means likely to affect a person's choice of, or conduct regarding, goods or services.
- (j) **New business** means a business in which the prospective purchaser is not currently engaged, or a new line or type of business.
- (k) **Person** means an individual, group, association, limited or general partnership, corporation, or any other business entity.
- (l) **Prior business** means:
- (1) A business from which the seller acquired, directly or indirectly, the major portion of the business' assets; or
 - (2) Any business previously owned or operated by the seller, in whole or in part.
- (m) **Providing locations, outlets, accounts, or customers** means furnishing the prospective purchaser with existing or potential locations, outlets, accounts, or customers; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies; collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in obtaining his or her own

locations, outlets, accounts, or customers, *provided, however*, that advertising and general advice about business development and training shall not be considered as “providing locations, outlets, accounts, or customers.”

- (n) **Purchaser** means a person who buys a business opportunity.
- (o) **Quarterly** means as of January 1, April 1, July 1, and October 1.
- (p) **Required payment** means all consideration that the purchaser must pay to the seller or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the business opportunity. Such payment may be made directly or indirectly through a third party. A required payment does not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease.
- (q) **Seller** means a person who offers for sale or sells a business opportunity.
- (r) **Signature or signed** means a person's affirmative steps to authenticate his or her identity.

It includes a person's handwritten signature, as well as an electronic or digital form of signature to the extent that such signature is recognized as a valid signature under applicable federal law or state contract law.

- (s) **Written or in writing** means any document or information in printed form or in any form capable of being downloaded, printed, or otherwise preserved in tangible form and read. It includes: type-set, word processed, or handwritten documents; information on computer disk or CD-ROM; information sent via email; or information posted on the Internet. It does not include mere oral statements.

§ 437.2 The obligation to furnish written documents.

In connection with the offer for sale, sale, or promotion of a business opportunity, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act (“FTC Act”) for any seller to fail to furnish a prospective purchaser with the material information required by §§ 437.3(a) and 437.4(a) of this part in writing at least seven calendar days before the earlier of the time that the prospective purchaser:

- (a) Signs any contract in connection with the business opportunity sale; or
- (b) Makes a payment or provides other consideration to the seller, directly or indirectly through a third party.

§ 437.3 The disclosure document.

In connection with the offer for sale, sale, or promotion of a business opportunity, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act, for any seller to:

- (a) Fail to disclose to a prospective purchaser the following material information in a single written document in the form and using the language set forth in appendix A to this part; or if the offer for sale, sale, or promotion of a business opportunity is conducted in Spanish, in the form and using the language set forth in appendix B to this part; or if the offer for sale, sale, or promotion of a business opportunity is conducted in a language other than English or Spanish, using the form and an accurate translation of the language set forth in appendix A to this part:
 - (1) **Identifying information.** State the name, business address, and telephone number of the seller, the name of the salesperson offering the opportunity, and the date when the disclosure document is furnished to the prospective purchaser.

- (2) **Earnings claims.** If the seller makes an earnings claim, check the “yes” box and attach the earnings statement required by § 437.4. If not, check the “no” box.
 - (3) **Legal actions.**
 - (i) If any of the following persons has been the subject of any civil or criminal action for misrepresentation, fraud, securities law violations, or unfair or deceptive practices, including violations of any FTC Rule, within the 10 years immediately preceding the date that the business opportunity is offered, check the “yes” box:
 - (A) The seller;
 - (B) Any affiliate or prior business of the seller; or
 - (C) Any of the seller's officers, directors, sales managers, or any individual who occupies a position or performs a function similar to an officer, director, or sales manager of the seller.
 - (ii) If the “yes” box is checked, disclose all such actions in an attachment to the disclosure document. State the full caption of each action (names of the principal parties, case number, full name of court, and filing date). For each action, the seller may also provide a brief accurate statement not to exceed 100 words that describes the action.
 - (iii) If there are no actions to disclose, check the “no” box.
 - (4) **Cancellation or refund policy.** If the seller offers a refund or the right to cancel the purchase, check the “yes” box. If so, state all material terms and conditions of the refund or cancellation policy in an attachment to the disclosure document. If no refund or cancellation is offered, check the “no” box.
 - (5) **References.**
 - (i) State the name, state, and telephone number of all purchasers who purchased the business opportunity within the last three years. If more than 10 purchasers purchased the business opportunity within the last three years, the seller may limit the disclosure by stating the name, state, and telephone number of at least the 10 purchasers within the past three years who are located nearest to the prospective purchaser's location. Alternatively, a seller may furnish a prospective buyer with a list disclosing all purchasers nationwide within the last three years. If choosing this option, insert the words “See Attached List” without removing the list headings or the numbers 1 through 10, and attach a list of the references to the disclosure document.
 - (ii) Clearly and conspicuously, and in immediate conjunction with the list of references, state the following: “If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers.”
 - (6) **Receipt.** Attach a duplicate copy of the disclosure document to be signed and dated by the purchaser. The seller may inform the prospective purchaser how to return the signed receipt (for example, by sending to a street address, email address, or facsimile telephone number).
- (b) Fail to update the disclosures required by paragraph (a) of this section at least quarterly to reflect any changes in the required information, including, but not limited to, any changes in the seller's refund or cancellation policy, or the list of references; *provided, however*, that until a seller has 10 purchasers, the list of references must be updated monthly.

§ 437.4 Earnings claims.

In connection with the offer for sale, sale, or promotion of a business opportunity, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act, for the seller to:

- (a) Make any earnings claim to a prospective purchaser, unless the seller:
 - (1) Has a reasonable basis for its claim at the time the claim is made;
 - (2) Has in its possession written materials that substantiate its claim at the time the claim is made;
 - (3) Makes the written substantiation available upon request to the prospective purchaser and to the Commission; and
 - (4) Furnishes to the prospective purchaser an earnings claim statement. The earnings claim statement shall be a single written document and shall state the following information:
 - (i) The title "EARNINGS CLAIM STATEMENT REQUIRED BY LAW" in capital, bold type letters;
 - (ii) The name of the person making the earnings claim and the date of the earnings claim;
 - (iii) The earnings claim;
 - (iv) The beginning and ending dates when the represented earnings were achieved;
 - (v) The number and percentage of all persons who purchased the business opportunity prior to the ending date in paragraph (a)(4)(iv) of this section who achieved at least the stated level of earnings;
 - (vi) Any characteristics of the purchasers who achieved at least the represented level of earnings, such as their location, that may differ materially from the characteristics of the prospective purchasers being offered the business opportunity; and
 - (vii) A statement that written substantiation for the earnings claim will be made available to the prospective purchaser upon request.
- (b) Make any earnings claim in the general media, unless the seller:
 - (1) Has a reasonable basis for its claim at the time the claim is made;
 - (2) Has in its possession written material that substantiates its claim at the time the claim is made;
 - (3) States in immediate conjunction with the claim:
 - (i) The beginning and ending dates when the represented earnings were achieved; and
 - (ii) The number and percentage of all persons who purchased the business opportunity prior to the ending date in paragraph (b)(3)(i) of this section who achieved at least the stated level of earnings.
- (c) Disseminate industry financial, earnings, or performance information unless the seller has written substantiation demonstrating that the information reflects, or does not exceed, the typical or ordinary financial, earnings, or performance experience of purchasers of the business opportunity being offered for sale.

- (d) Fail to notify any prospective purchaser in writing of any material changes affecting the relevance or reliability of the information contained in an earnings claim statement before the prospective purchaser signs any contract or makes a payment or provides other consideration to the seller, directly or indirectly, through a third party.

§ 437.5 Sales conducted in Spanish or other languages besides English.

- (a) If the seller conducts the offer for sale, sale, or promotion of a business opportunity in Spanish, the seller must provide the disclosure document required by § 437.3(a) in the form and language set forth in appendix B to this part, and the disclosures required by §§ 437.3(a) and 437.4 must be made in Spanish.
- (b) If the seller conducts the offer for sale, sale, or promotion of a business opportunity in a language other than English or Spanish, the seller must provide the disclosure document required by § 437.3(a) using the form and an accurate translation of the language set forth in appendix A to this part, and the disclosures required by §§ 437.3(a) and 437.4 must be made in that language.

§ 437.6 Other prohibited practices.

In connection with the offer for sale, sale, or promotion of a business opportunity, it is a violation of this part and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act for any seller, directly or indirectly through a third party, to:

- (a) Disclaim, or require a prospective purchaser to waive reliance on, any statement made in any document or attachment that is required or permitted to be disclosed under this Rule;
- (b) Make any claim or representation, orally, visually, or in writing, that is inconsistent with or contradicts the information required to be disclosed by §§ 437.3 (basic disclosure document) and 437.4 (earnings claims document) of this Rule;
- (c) Include in any disclosure document or earnings claim statement any materials or information other than what is explicitly required or permitted by this Rule. For the sole purpose of enhancing the prospective purchaser's ability to maneuver through an electronic version of a disclosure document or earnings statement, the seller may include scroll bars and internal links. All other features (e.g., multimedia tools such as audio, video, animation, or pop-up screens) are prohibited;
- (d) Misrepresent the amount of sales, or gross or net income or profits a prospective purchaser may earn or that prior purchasers have earned;
- (e) Misrepresent that any governmental entity, law, or regulation prohibits a seller from:
 - (1) Furnishing earnings information to a prospective purchaser; or
 - (2) Disclosing to prospective purchasers the identity of other purchasers of the business opportunity;
- (f) Fail to make available to prospective purchasers, and to the Commission upon request, written substantiation for the seller's earnings claims;
- (g) Misrepresent how or when commissions, bonuses, incentives, premiums, or other payments from the seller to the purchaser will be calculated or distributed;
- (h) Misrepresent the cost, or the performance, efficacy, nature, or central characteristics of the business opportunity or the goods or services offered to a prospective purchaser;
- (i) Misrepresent any material aspect of any assistance offered to a prospective purchaser;

- (j) Misrepresent the likelihood that a seller, locator, or lead generator will find locations, outlets, accounts, or customers for the purchaser;
- (k) Misrepresent any term or condition of the seller's refund or cancellation policies;
- (l) Fail to provide a refund or cancellation when the purchaser has satisfied the terms and conditions disclosed pursuant to § 437.3(a)(4);
- (m) Misrepresent a business opportunity as an employment opportunity;
- (n) Misrepresent the terms of any territorial exclusivity or territorial protection offered to a prospective purchaser;
- (o) Assign to any purchaser a purported exclusive territory that, in fact, encompasses the same or overlapping areas already assigned to another purchaser;
- (p) Misrepresent that any person, trademark or service mark holder, or governmental entity, directly or indirectly benefits from, sponsors, participates in, endorses, approves, authorizes, or is otherwise associated with the sale of the business opportunity or the goods or services sold through the business opportunity;
- (q) Misrepresent that any person:
 - (1) Has purchased a business opportunity from the seller or has operated a business opportunity of the type offered by the seller; or
 - (2) Can provide an independent or reliable report about the business opportunity or the experiences of any current or former purchaser.
- (r) Fail to disclose, with respect to any person identified as a purchaser or operator of a business opportunity offered by the seller:
 - (1) Any consideration promised or paid to such person. Consideration includes, but is not limited to, any payment, forgiveness of debt, or provision of equipment, services, or discounts to the person or to a third party on the person's behalf; or
 - (2) Any personal relationship or any past or present business relationship other than as the purchaser or operator of the business opportunity being offered by the seller.

§ 437.7 Record retention.

To prevent the unfair and deceptive acts or practices specified in this Rule, business opportunity sellers and their principals must prepare, retain, and make available for inspection by Commission officials copies of the following documents for a period of three years:

- (a) Each materially different version of all documents required by this Rule;
- (b) Each purchaser's disclosure receipt;
- (c) Each executed written contract with a purchaser; and
- (d) All substantiation upon which the seller relies for each earnings claim from the time each such claim is made.

§ 437.8 Franchise exemption.

The provisions of this Rule shall not apply to any business opportunity that constitutes a “franchise,” as defined in the Franchise Rule, 16 CFR part 436; *provided, however*, that the provisions of this Rule shall apply to any such franchise if it is exempted from the provisions of part 436 because, either:

- (a) Under § 436.8(a)(1), the total of the required payments or commitments to make a required payment, to the franchisor or an affiliate that are made any time from before to within six months after commencing operation of the franchisee's business is less than \$500, or
- (b) Under § 436.8(a)(7), there is no written document describing any material term or aspect of the relationship or arrangement.

§ 437.9 Outstanding orders; preemption.

- (a) A business opportunity required by prior FTC or court order to follow the Franchise Rule, 16 CFR part 436, may petition the Commission to amend the order or to stipulate to an amendment of the court order so that the business opportunity may follow the provisions of this part.
- (b) The FTC does not intend to preempt the business opportunity sales practices laws of any state or local government, except to the extent of any conflict with this part. A law is not in conflict with this Rule if it affords prospective purchasers equal or greater protection, such as registration of disclosure documents or more extensive disclosures. All such disclosures, however, must be made in a separate state disclosure document.

§ 437.10 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

APPENDIX A to PART 437

DISCLOSURE OF IMPORTANT INFORMATION ABOUT BUSINESS OPPORTUNITY

Required by the Federal Trade Commission, Rule 16 C.F.R. Part 437

Name of Seller: _____

Address: _____

Phone: _____

Salesperson: _____

Date: _____

[Name of Seller] has completed this form, which provides important information about the business opportunity it is offering you. The Federal Trade Commission, an agency of the federal government, requires that [Name of Seller] complete this form and give it to you. However, the Federal Trade Commission has not seen this completed form or checked that the information is true. **Make sure that this information is the same as what the salesperson told you about this opportunity.**

LEGAL ACTIONS: Has [Name of Seller] or any of its key personnel been the subject of a civil or criminal action involving misrepresentation, fraud, securities law violation, or unfair or deceptive practices, including violations of any FTC Rule, within the past 10 years?

- YES → If the answer is yes, [Name of Seller] must attach a list of all such legal actions to this form.
- NO

CANCELLATION OR REFUND POLICY: Does [Name of Seller] offer a cancellation or refund policy?

- YES → If the answer is yes, [Name of Seller] must attach a statement describing this policy to this form.
- NO

EARNINGS: Has [Name of Seller] or its salesperson discussed how much money purchasers of this business opportunity can earn or have earned? In other words, have they stated or implied that purchasers can earn a specific level of sales, income, or profit?

- YES → If the answer is yes, [Name of Seller] must attach an Earnings Claims Statement to this form. Read this statement carefully. You may wish to show this information to an advisor or accountant.
- NO

REFERENCES: In the section below, [Name of Seller] must provide you with contact information for at least 10 people who have purchased a business opportunity from them. If fewer than 10 are listed, this is the total list of all purchasers. **You may wish to contact the people below to compare their experiences with what [Name of Seller] told you about the business opportunity.**

Note: If you purchase a business opportunity from [Name of Seller], your contact information can be disclosed in the future to other potential buyers.

<u>Name</u>	<u>State</u>	<u>Telephone Number</u>	<u>Name</u>	<u>State</u>	<u>Telephone Number</u>
1.			6.		
2.			7.		
3.			8.		
4.			9.		
5.			10.		

Signature: _____

Date: _____

APPENDIX B to PART 437

DIVULGACIÓN DE INFORMACIÓN IMPORTANTE SOBRE OPORTUNIDAD DE NEGOCIO

Formulario requerido por la Comisión Federal de Comercio (FTC)
Regla 16 de la Parte 437 del Código de Regulaciones Federales

Nombre del Vendedor:
Teléfono:

Domicilio:
Representante de Ventas:

Fecha:

[Nombre del Vendedor] completó el presente formulario y en el mismo le suministra información importante sobre la oportunidad de negocio que le está ofreciendo. La Comisión Federal de Comercio (*Federal Trade Commission, FTC*), una agencia del gobierno federal, le requiere a la compañía [Nombre del Vendedor] que complete el presente formulario y que se lo entregue a usted. Pero la FTC no ha visto este formulario completado por la compañía ni ha verificado que la información indicada sea veraz. **Asegúrese de que la información contenida en el presente formulario coincida con lo que le dijo el representante de ventas respecto de esta oportunidad.**

ACCIONES LEGALES: ¿La compañía [Nombre del Vendedor] o alguno de los principales miembros de su personal ha sido sujeto de una acción civil o penal, que involucre falsedad, fraude, infracción de las leyes de títulos y valores, o prácticas desleales o engañosas, incluyendo infracciones de las Reglas o Normas de la FTC, dentro de los 10 últimos años?
 SI → Si la respuesta es afirmativa, [Nombre del Vendedor] debe adjuntar al formulario una lista completa de dichas acciones legales.
 NO

POLÍTICA DE CANCELACIÓN O REINTEGRO: ¿Ofrece [Nombre del Vendedor] una política de cancelación o reintegro?
 SÍ → Si la respuesta es afirmativa, [Nombre del Vendedor] debe adjuntar al formulario una declaración con la descripción de dicha política.
 NO

INGRESOS: ¿La compañía [Nombre del Vendedor] o alguno de sus representantes de ventas ha manifestado la cantidad de dinero que pueden ganar o que han ganado los compradores de esta oportunidad de negocio? ¿Dicho en otras palabras, han expresado de manera explícita o implícita que los compradores pueden alcanzar un nivel específico de ventas, o ganar un nivel específico de ingresos?
 SÍ → Si la respuesta es afirmativa, [Nombre del Vendedor] debe adjuntar a este formulario una Declaración de los Ingresos Proclamados. Lea esta declaración atentamente. Puede que desee analizar esta información con un asesor o contador.
 NO

REFERENCIAS: En esta sección del formulario, [Nombre del Vendedor] debe listar la información de contacto de por lo menos 10 personas que le hayan comprado una oportunidad de negocio. Si le suministran los datos de menos de 10 personas, es porque ésa es la lista completa de todos los compradores. **Puede que desee comunicarse con las personas listadas a continuación para comparar sus respectivas experiencias con lo que le dijo [Nombre del Vendedor] sobre la oportunidad de negocio que le está ofreciendo.**

Nota: Si usted compra una oportunidad de negocio de [Nombre del Vendedor], podrá divulgarse su información de contacto a otros posibles compradores.

<u>Nombre</u>	<u>Estado</u>	<u>Número de Teléfono</u>	<u>Nombre</u>	<u>Estado</u>	<u>Número de Teléfono</u>
1.			6.		
2.			7.		
3.			8.		
4.			9.		
5.			10.		

Firma: _____ Fecha: _____

Por medio de su firma, usted acusa recibo del presente formulario. Esto no es un contrato de compra. La Comisión Federal de Comercio (FTC) establece que con el fin de concederle el tiempo necesario para que usted investigue esta oportunidad, [Nombre del Vendedor] debe esperar un mínimo de siete días naturales o corridos a partir de la fecha en que le entregue este formulario antes de pedirle que firme un contrato de compra o que efectúe un pago.

