Federal Register

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Part IV

Federal Trade Commission

16 CFR Part 437

Business Opportunity Rule; Notice of Proposed Rulemaking

FEDERAL TRADE COMMISSION

16 CFR Part 437

Business Opportunity Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission (the ''Commission'' or ''FTC'') is commencing a rulemaking to promulgate a trade regulation rule entitled ''The Business Opportunity Rule'' (or ''the Rule''), based upon the comments received in response to an Advance Notice of Proposed Rulemaking (''ANPR'') and other information discussed in this notice. The proposed Business Opportunity Rule would prohibit business opportunity sellers from failing to furnish prospective purchasers with material information needed to combat fraud and would prohibit other acts or practices that are unfair or deceptive within the meaning of section 5 of the Federal Trade Commission Act (''FTC Act'').

DATES: Written comments must be received on or before June 16, 2006. Rebuttal comments must be received on or before July 7, 2006.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''Business Opportunity Rule, R511993'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered, with two complete copies, to the following address: Federal Trade Commission/Office of the Secretary, Room H–135 (Annex W), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Moreover, because paper mail in the Washington area and at the Agency is subject to delay, please consider submitting your comments in electronic form, as prescribed below. Comments containing confidential material, however, must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c).[1]

Comments filed in electronic form should be submitted by clicking on the following weblink: *https://secure.commentworks.com/ftc-bizopNPR/* and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the *https://secure.commentworks.com/ftc-bizopNPR/* weblink. If this notice appears at *http://www.regulations.gov,* you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC Web site at *http://www.ftc.gov/opa/2006/04/newbizopprule.htm* to read the Notice of Proposed Rulemaking and the news release describing this proposed Rule.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov/os/publiccomments.htm.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission. Comments should be submitted via facsimile to (202) 395–6974 because U.S. Postal Mail is subject to lengthy delays due to heightened security precautions.

FOR FURTHER INFORMATION CONTACT: Steven Toporoff (202) 326–3135, or Craig Tregillus (202) 326–2970, Division of Marketing Practices, Room 238, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The Commission invites interested parties to submit data, views, and arguments on the proposed Business Opportunity Rule and, specifically, on the questions set forth in Section K of this notice. The comment period will remain open until June 16, 2006. To the extent practicable, all comments will be available on the public record and placed on the Commission's Web site: *http://www.ftc.gov/os/publiccomments.htm.* After the close of the comment period, the record will remain open until July 7, 2006, for rebuttal comments. If necessary, the Commission also will hold hearings with cross-examination and post-hearing rebuttal submissions, as specified in section 18(c) of the FTC Act, 15 U.S.C. 57a(c). Parties who request a hearing must file a comment in response to this notice and a statement explaining why they believe a hearing is warranted, how they would participate in a hearing, and a summary of their expected testimony, on or before June 16, 2006. Parties testifying at a hearing may be subject to cross-examination. For cross-examination or rebuttal to be permitted, interested parties must also file a comment and request to cross-examine or rebut a witness, designating specific facts in dispute and a summary of their expected testimony, on or before July 7, 2006. In lieu of a hearing, the Commission will also consider requests to hold one or more informal public workshop conferences to discuss the issues raised in this notice and comments.

Section A. Background

The Commission is publishing this Notice of Proposed Rulemaking (''NPR'') pursuant to section 18 of the FTC Act, 15 U.S.C. 57a *et seq.*, and part 1, subpart B, of the Commission's Rules of Practice. 16 CFR 1.7, and 5 U.S.C. 551 *et seq.* This authority permits the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of section (5)(a)(1) of the FTC Act. 15 U.S.C. 45(a)(1).

1. FTC Regulation of Franchising and Business Opportunity Ventures

In the 1970s, the Commission promulgated a trade regulation rule entitled ''Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures' (the ''Franchise Rule'') to address deceptive and unfair practices in the sale of franchises and business

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

opportunity ventures.[2] Based upon the original rulemaking record, the Commission found that franchise and business opportunity fraud was widespread, causing serious economic harm to consumers. To prevent fraudulent practices in the sale of franchises and business opportunities, the Commission adopted a pre-sale disclosure rule.

The Franchise Rule does not purport to regulate the substantive terms of a franchise or business opportunity contract. Rather, it is designed to prevent fraud by prohibiting sellers from failing to disclose material information to prospective buyers. The Franchise Rule is posited on the notion that a fully informed consumer can determine whether a particular offering is in his or her best interest.

The Franchise Rule requires extensive disclosures, including information about the seller;[3] the business background of its principals and their litigation and bankruptcy histories;[4] the terms and conditions of the offer;[5] statistical analyses of existing franchised and company-owned outlets;[6] prior purchasers, including the names and addresses of at least 10 purchasers nearest the prospective buyer;[7] and audited financial statements.[8] Additional disclosure and substantiation provisions apply if the seller chooses to make any financial performance representations.[9]

The Commission recognized that requiring these extensive disclosures would likely impose significant compliance costs on covered businesses. It therefore sought to strike the proper balance between prospective purchasers' need for pre-sale disclosure and the burden imposed on those selling business arrangements. As a result of this balancing, the Commission limited the scope of the Franchise Rule's coverage in three significant ways.

First, the Franchise Rule covers only those opportunities that require a buyer to make a payment of at least $500 within the first six months of operation.[10] In transactions where a prospective purchaser may incur high financial losses if the seller withholds material information, the benefit for purchasers of the Rule's pre-sale disclosure requirements outweighs the cost to sellers of making those disclosures. By contrast, when the required investment to purchase a business opportunity is comparatively small, prospective purchasers face a relatively small financial risk. In such circumstances, compliance costs may outweigh the benefits of pre-sale disclosure. Therefore, the Franchise Rule does not reach opportunities that charge lower fees.[11]

Second, the ''inventory exemption'' excludes certain types of payments from the Rule's $500 minimum cost threshold. The ''inventory exemption'' is the franchise industry's shorthand term for the Commission's determination that, as a matter of policy, voluntary purchases of reasonable amounts of inventory at bona fide wholesale prices for resale do not count toward the required threshold payment.[12] An important consequence of this policy determination is to eliminate from Franchise Rule coverage many pyramid marketing plans because the participants in such plans typically do not make a required payment of or exceeding $500, but instead make voluntary purchases of inventory in reasonable amounts and at bona fide wholesale prices for resale.[13]

Third, the Commission focused the Franchise Rule on the types of business opportunities that the record showed were likely to result in significant purchaser injury. The record showed that vending machines, rack displays, and similar opportunities frequently were sold through deception. A feature common to these types of schemes is the promise of assistance in securing locations or accounts.[14] Thus, the Commission incorporated this characteristic into the Rule's definitional elements to ensure coverage of demonstrably injurious schemes. Other forms of assistance that business opportunity sellers frequently offer—such as training[15] and the buy-back and resale of goods assembled by the purchaser (an element of many craft assembly opportunities)[16]—do not bring a business opportunity within the scope of the Franchise Rule's coverage.

In addition to these limits on the scope of the Franchise Rule's coverage—driven by balancing prospective purchasers' need for pre-sale disclosure against the burden imposed on business opportunity sellers—another aspect of the Rule's language further limits the Rule's scope of coverage. Specifically, the Rule provides that a business opportunity is covered only if the purchaser of the opportunity sells goods or services directly to end-users other than the business opportunity seller.[17] The effect of this limitation is to exclude most work-at-home opportunities—such as envelope stuffing and craft assembly ventures—from Franchise Rule coverage. In those opportunities, the purchaser typically works directly for the seller or produces various goods for the seller, who then purportedly distributes them to end-users.[18]

The proposed Business Opportunity Rule calls for streamlined disclosures that, compared to the Franchise Rule, substantially reduce the compliance burden. Therefore, the kinds of limits written into the Franchise Rule are not necessary to achieve an appropriate balance between prospective purchasers' need for pre-sale disclosure and the burden imposed on business opportunity sellers. Accordingly, the proposed Rule has no minimum cost threshold, no inventory exemption, and no limit on scope based on the type of assistance promised as part of the offer. Nor is the coverage of the proposed Rule limited to transactions where the purchaser of the opportunity sells goods or services directly to end-users other than the business opportunity seller. In short, the scope of coverage of the proposed Rule is much broader than

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[2] 16 CFR part 436. *See also* Statement of Basis and Purpose (''SBP''), 43 FR 59614 (Dec. 21, 1978).

[3] 16 CFR at 436.1(a)(1) and (3).

[4] 16 CFR at 436.1(a)(2)–(5).

[5] 16 CFR at 436.1(a)(7)–(15) and (17)–(18).

[6] 16 CFR at 436.1(a)(16).

[7] 16 CFR at 436.1(a)(16).

[8] 16 CFR at 436.1(a)(20).

[9] 16 CFR at 436.1(b)–(c) and (e).

[10] 16 CFR at 436.2(a)(2) and (a)(3)(iii). In the SBP, the Commission noted that ''[w]here a franchisee makes no significant investment in the franchise business, he assumes only a limited risk, and the protection of the rule is inappropriate.'' 43 FR at 59704. *See also* Final Interpretive Guides (''Interpretive Guides'') accompanying the Franchise Rule: ''The Commission's policy determination [is that] a significant financial investment is a necessary element of a franchise.'' Interpretive Guides, 44 FR 49966, 49968 (August 24, 1978).

[11] Nevertheless, deceptive and unfair conduct by a business opportunity seller falling below the Franchise Rule's $500 threshold may constitute a violation of section 5 of the FTC Act. *E.g., FTC* v. *Med. Billers Network, Inc.,* No. 05 CIV 2014 (RJH) (S.D.N.Y. 2005) ($200–295 fee); *FTC* v. *Kamaco Int'l,* No. CV 02–04566 LGB (RNBx) (C.D. Cal. 2002) ($42 fee); *FTC* v. *Healthcare Claims Network,* No. 2:02–CV–4569 MMM (AMWx) (C.D. Cal. 2002) ($485 fee); *FTC* v. *Stuffingforcash.com, Corp.,* No. 92 C 5022 (N.D. Ill. 2002) ($45 fee); *FTC* v. *Medicor LLC,* No. CV01–1896 (CBM) (C.D. Cal. 2001) ($375 fee); *FTC* v. *SkyBiz.com,* No. 01–CV–0396–EA (X) (N.D. Okla. 2001) ($125 fee).

[12] Interpretive Guides, 44 FR at 49967.

[13] *E.g., FTC* v. *Trek Alliance, Inc.,* No. 02–9270 SJL (AJWx) (C.D. Cal. 2002); *FTC* v. *Equinox, Int'l,* No. CV–S–99–0969–JBR–RLJ (D. Nev. 1999).

[14] 16 CFR at 436.2(a)(1)(ii)(B)(1)–(3).

[15] *E.g., FTC* v. *Academic Guidance Serv., Inc.,* No. 92–3001 (AET) (D. N.J. 1992).

[16] *E.g., FTC* v. *Misty Stafford,* No. 3: CV 05–0215 (M.D. Pa. 2005); *FTC* v. *USS Elder Enter. Inc.,* No. SACV–04–1039 AHS (ANx) (C.D. Cal. 2004); *FTC* v. *Holiday Magic,* No. C 93–4038 VRW (N.D. Cal. 1994).

[17] 16 CFR at 436.2(a)(1)(ii)(A)(1)–(3).

[18] *E.g., FTC* v. *Misty Stafford,* No. 3: CV 05–0215 (M.D. Pa. 2005); *FTC* v. *Sun Ray Trading, Inc.,* No. 05–20402 CIV-Seitz/Bandstra (S.D. Fla. 2005).

that of the Franchise Rule, while the compliance burden is much lighter.

2. Franchise Rule Review

In 1995, the Commission conducted a regulatory review of the Franchise Rule to ensure that it continues to serve a useful purpose.[19] One issue that the Commission explored in that proceeding was the application of the Franchise Rule to the sale of business opportunities. Specifically, the Commission noted that although the Franchise Rule applied to certain business opportunities, it lacked a clear definition of the term ''business opportunity.'' Accordingly, the Commission solicited comment on an appropriate definition.[20] In addition, the Commission asked whether such a definition should include business opportunities not covered by the Franchise Rule, such as ''multilevel marketing, seller assisted market plans, work-at-home plans, and certain distributorships and licenses.'' [21]

The Commission also inquired whether the Franchise Rule's extensive disclosure requirements are well-suited to business opportunity sales and whether the Franchise Rule imposes unnecessary compliance costs on both business opportunity sellers and buyers. For example, certain Franchise Rule disclosures—such as site selection and approval and public figure involvement—arguably are more likely to be important to franchise investors than business opportunity purchasers. To ensure that the required disclosures protect prospective business opportunity purchasers, while minimizing overall compliance costs, the Commission solicited comment on whether any of the Rule's disclosures should be eliminated because they are unnecessary in the business opportunity context and if any additional material disclosures should be required.[22]

At the conclusion of the Rule Review, the Commission determined to retain the Franchise Rule with modifications designed to harmonize it better with state franchise regulations. At the same time, the Commission determined to seek additional comment on whether to address the sale of business opportunities through a separate, narrowly tailored new trade regulation rule. To that end, it published an Advance Notice of Proposed Rulemaking, as described in the next section.

3. Advance Notice of Proposed Rulemaking

In 1997, the Commission published an Advance Notice of Proposed Rulemaking (''ANPR'') in the **Federal Register**,[23] seeking further comment on several proposed Franchise Rule modifications, including the separation of disclosure requirements for sales of business opportunities from those for sales of franchises. The Commission also sought comment on the proper scope of the term ''business opportunity,'' [24] the types of business opportunities that are known to engage in deceptive or fraudulent conduct,[25] and the types of disclosures that are material to business opportunity purchasers.[26] In addition to soliciting written comments, the Commission staff held three public workshops specifically addressing business opportunity sales issues. These were held in Chicago, Dallas, and Washington, DC. The workshop participants included: Business opportunity promoters; the Direct Sellers Association (''DSA''); several of DSA's multilevel marketer members (*e.g.*, Amway, Longaberger Company, Pampered Chef); several attorneys who represent business opportunity promoters; state regulators; and several franchise and distribution law attorneys.

4. Franchise Rule Notice of Proposed Rulemaking

After assessing the comments received in response to the ANPR, the Commission decided to amend the Franchise Rule and, to that end, published a Franchise Rule Notice of Proposed Rulemaking (''Franchise Rule NPR''), soliciting comment on proposed revisions to the Franchise Rule.[27] At the same time, the Commission announced its intention to conduct a separate rulemaking to address business opportunity sales.[28] Agreeing with the overwhelming view of the commenters who discussed this issue during the Rule Review and in response to the ANPR, the Commission found that franchises and business opportunities are distinct business arrangements that require separate disclosure approaches. Without proposing any specific Business Opportunity Rule provisions at that time, the Commission noted that:

> [M]any of the [Franchise] Rule's pre-sale disclosures, in particular those pertaining to the parties' detailed relationship, do not apply to the sale of most business opportunities, which typically involve fairly simple contracts or purchase agreements. The Rule's detailed disclosure obligations may also create barriers to entry for legitimate business opportunity sellers.

Franchise Rule NPR, 64 FR at 57296.

Section B. Need for a Separate Business Opportunity Rule

Based upon its enforcement experience and the record developed to date, the Commission has determined to promulgate a separate trade regulation rule to address widespread fraud in the sale of business opportunities. This approach is consistent with the view of the vast majority of commenters and the regulatory approaches adopted in most states.

Rule Review and ANPR commenters and participants overwhelmingly urged the Commission to promulgate a separate business opportunity rule.[29] As an initial matter, several commenters observed that business opportunities and franchises are distinct business arrangements that pose very different regulatory challenges. For example,

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[19] Rule Review, 60 FR 17656 (April 7, 1995). References to the Rule Review comments are cited as: The name of the commenter, RR comment number (*e.g.*, NASAA, RR 43). References to the Rule Review workshop conferences are cited as: Name of commenter, Sept95 Tr or March96 Tr, respectively (*e.g.*, D'Imperio, Sept95 Tr, and Ainsely, March96 Tr). A list of the Rule Review commenters and the abbreviations used to identify each is attached as Attachment A.

[20] Rule Review, 60 FR at 17656–658 (Question 13).

[21] Rule Review, 60 FR at 17658 (Question 13b).

[22] Rule Review, 60 FR at 17658 (Question 14).

[23] ANPR, 62 FR 9115 (Feb. 28, 1997). References to the ANPR comments are cited as: The name of the commenter, ANPR, comment number (*e.g.*, NASAA, ANPR 120). References to the ANPR workshop conferences are cited as: Name of commenter, ANPR, date Tr (*e.g.*, Bundy, ANPR, 6Nov97 Tr). A list of the ANPR commenters and the abbreviations used to identify each is attached as Attachment B.

[24] ANPR, 62 FR at 9116–117 and 9121 (Question 12).

[25] ANPR, 62 FR at 9121 (Questions 8–10).

[26] ANPR, 62 FR at 9121 (Questions 15–16).

[27] Franchise Rule NPR, 64 FR 57294 (October 22, 1999). References to the comments responding to the Franchise Rule NPR are cited as: Name of commenter, FR–NPR, commenter number (*e.g.*, IFA, FR–NPR 22). A list of the FR–NPR commenters and the abbreviations used to identify each is attached as Attachment C.

[28] Franchise Rule NPR, 64 FR at 57296.

[29] *E.g.,* Muncie, ANPR 15, at 2; Baer, ANPR 25; H&H, ANPR 28, at 6; Kaufmann, ANPR 33, at 6; DSA, ANPR 34, at 1; IL AG, ANPR 77, at 3; IFA, ANPR 82, at 2; Caffey, ANPR 94, at 1–2; Jeffers, ANPR 116, at 2; NASAA, ANPR 120, at 4; Selden, ANPR 133, at 2; Cendant, ANPR 140; Wieczorek, RR 23, at 2–3; CA BLS, RR 45, at 5–6; Forte Hotels, RR 52, at 2. *See also* Harrington, Sept95 Tr at 285 (noting complete consensus among public workshop participants for a separate business opportunity rule). *But see* NCL, ANPR 35 (''While there may be clear distinctions with those involved in the trade for franchises and business opportunities, the consumers who contact the NFIC are unaware of the differences. Moreover, a review of the NFIC complaints received in 1996 reveals that more involve business opportunities than franchises. This indicates that the same pre-sale disclosures are needed for business opportunities as for franchises.''); Cory, ANPR 12; McBirney, RR 7, at 2; Perry RR 44, at 3 (arguing that the Commission should create a level playing field between all income generating opportunities, subjecting each to the same disclosure approach).

franchises typically are expensive and involve complex contractual licensing relationships, while business opportunity sales are often less costly, involving simple purchase agreements that pose less of a financial risk for purchasers.[30] Also, in contrast to franchises, many business opportunity programs have no continuing relationship between the buyer and seller, but are a one time purchase of packaged information.[31]

Further, unlike most franchises, many business opportunities are permeated with fraud.[32] Perhaps one business opportunity and franchise consultant said it best when she described many business opportunity sellers as:

> Individuals who go from one business opportunity to the next, violating laws, committing frauds, taking funds without delivering what was promised only to shut down the operation within a year and move on to another one with new officers, new company names, and new products.

Chistopher, ANPR 115, at 1.[33]

Other commenters observed that business opportunity sellers take advantage of the Franchise Rule's narrow focus to avoid disclosure obligations.[34] Other commenters asserted that business opportunity sellers do not comply with the Franchise Rule because compliance costs are too high.[35] For example, attorney Kat Tidd explained:

> From my experience as a franchise attorney of more than 15 years, many entrepreneurs will choose to risk not complying with the Rule because the cost of compliance is too high relative to the size of the company, the size of the investment to be made and/or the number of, or profits to be derived from, the sale of opportunities.

Tidd, ANPR 112, at 1.[36]

The Commission is concerned that the current application of the Franchise Rule to the sale of business opportunities does not work well. Accordingly, the Commission is proposing a separate business opportunity rule, narrowly tailored to minimize compliance costs.[37] For the present, those business opportunity sellers covered by the original Franchise Rule will remain covered by that rule.[38]

Section C. Overview of the Proposed Rule

In drafting a Business Opportunity Rule, the Commission relies heavily on its law enforcement experience in addressing a wide array of business opportunity fraud under both the Franchise Rule and section 5 of the FTC Act. The Commission also relies on the staff's analysis of consumer complaints submitted to the FTC.[39] By far, the most frequent allegations in Commission business opportunity cases pertain to false or unsubstantiated earnings claims.[40] This is followed by false testimonials or fictitious references and misrepresentations concerning the profitability of locations, availability of support and assistance, nature of the products or services sold, prior success of the seller or locator, full extent of investment costs, and refund policies.[41] These alleged material misrepresentations or omissions also were most frequently mentioned in complaints to the Commission submitted by business opportunity purchasers.[42]

The proposed Rule would address these practices by requiring five affirmative disclosures.[43] The first

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[30] *E.g.,* IFA, FR–NPR 22, at 4; NASAA, ANPR 120, at 2–3; DSA, RR 21, at 3–4; Wieczorek, RR 23, at 2–3; D'Imperio, Sept95 Tr at 130; Kezios, Sept95 Tr at 365, 631.

[31] Caffey, ANPR 94, at 2.

[32] *E.g.,* Baer, ANPR 25, at 5; Wieczorek, 21Aug97 Tr at 35; DSA, *id.;* Finnigan, *id.* at 90; Kestenbaum, RR 14, at 3–4; Wieczorek, RR 23, at 2–3; Lewis, RR 40, Attachment at 3; CA BLS, RR 45, at 5–6; D'Imperio, Sept95 Tr at 130; Kezios, *id.* at 365, 631.

[33] At the Washington, DC public workshop conference, a business opportunity seller described an informal survey of business opportunity advertisements in the *Boston Globe.* He stated that in February 1997, he observed advertisements for 23 business opportunity ventures. When he attempted to call the advertised numbers the following August, he found ''20 of them were disconnected, meaning they shut down, left one to a thousand people with no customer support, no parts for machines, no parts whatsoever.'' M. Garceau, 20Nov97 Tr at 28–29.

[34] Kestenbaum, RR 14, at 3–4 (''Too many companies are trying to avoid the disclosure requirements of the Rule by sidestepping the franchise definition and taking a position that what they do is not defined under the FTC Rule.''). *See also* Caffey, 20Nov97 Tr at 24 (''I think one of the drawbacks of the existing Rule is it is very narrowly defined. Under the existing Rule * * * if the seller is not locating vending machines or providing assistance for locations, the seller is virtually not covered by the Rule.''); Lewis, Sept95 Tr at 283 (observing that the narrow definition of business opportunity enables business opportunity sellers to conclude that they ''are not part of it; it's very easy to say I'm not a franchise and I'm not a bis op [sic].'').

[35] CA BLS suggested that business opportunity sellers will go so far as to change their program to avoid falling within the Franchise Rule's definition of a business opportunity, resulting in reduced protection for prospective purchasers:

> [I]f the only reason that a seller's program is falling within the definition of the Rule is that it provides personnel who assist the purchaser in securing sites, it may withdraw this service. In some instances, companies have eliminated independent owner programs altogether rather than attempting to comply with the Rule and the ''patchwork quilt'' of multiple and diverse state regulations.

CA BLS, RR 45, at 6–7. *See also* Muncie, ANPR 15, at 2 (suggesting that Franchise Rule coverage of business opportunities ''only serve[s] to drive legitimate companies out of the marketplace, thereby harming consumers.'').

[36] *See also, e.g.*, Caffey, ANPR 94, at 2; Christopher, ANPR 115, at 1; CA BLS, RR 45, at 5–6; Huke, Sept95 Tr at 239–40.

[37] In this regard, one fairly typical comment urged that the Commission:

> Tailor the scope of disclosure content, creating a disclosure statement designed for compliance by a business opportunity seller. A number of sections of the FTC Rule disclosure have little relevance to a typical business opportunity sale. These include the business experience of executives of the seller, personal participation of the buyer in the operation of the business, termination/renewal information, statistical information, site selection, public figure involvement, financial information of the seller, the contract.

Caffey, ANPR 94, at 1–2. *See also* Muncie, ANPR 15, at 3; Baer, ANPR 25, at 5; Tifford, ANPR 78, at 4–5; D'Amico, Sept95 Tr at 151, 154; Huke, *id.* at 240; Simon, *id.* at 281; Lewis, *id.* at 284. A few commenters, however, suggested that disclosures for business opportunity sales should be ''stronger'' than those for franchise sales. *E.g.,* Cory, ANPR 12; D'Imperio, Sept95 Tr at 132; Perry, *id.* at 258–59.

[38] In the event that a revised Franchise Rule is promulgated before a new Business Opportunity Rule, business opportunities presently covered by the original Franchise Rule could remain covered by that rule pending completion of this rulemaking. For example, the Commission could finalize a revised Franchise Rule (16 CFR part 436), and simultaneously publish a modified version of the original Franchise Rule that would be named the ''Business Opportunity Rule'' (16 CFR part 437). This rule might differ from the original Franchise Rule in two respects. First, references to ''franchisor'' and ''franchisee'' in the original Franchise Rule would be changed to ''business opportunity seller'' and ''business opportunity purchaser,'' respectively. Second, the term ''franchise'' would be deleted from the original Franchise Rule's definitions and would be replaced with ''business opportunity.'' Further, the first part of the original definition—the ''franchise'' elements—would be deleted; the revised definition would focus on the second part of the original definition—the business opportunity elements. Except for these changes, all disclosures and prohibitions in part 437 would be identical to those of the original Franchise Rule.

[39] *See* Bureau of Consumer Protection Staff, *Franchise and Business Opportunity Program Review 1993–2000: A Review of Complaint Data, Law Enforcement, and Consumer Education* (June 2001) (''Staff Program Review'') (available at *http://www.ftc.gov/reports/franchise93-01.pdf*). *See also* Tifford, ANPR 78, at 4–5 (''[T]he FTC should draw upon its own experience with business opportunity enforcement in fashioning a definition that would encompass the business opportunity arrangements which have been the source of most of the consumer injury, as well as focusing on the types of disclosures that are best suited for business opportunity purchasers.'').

[40] Staff Program Review, *supra* note 39, Table I.1; I.2. (127 Franchise Rule allegations; 94 Section 5 allegations pertaining to earnings claims issues in FTC enforcement actions). *See also* NCL, ANPR 35, at 2.

[41] Staff Program Review, *supra* note 39, Table I.2.

[42] *Id.,* Appendix 5 (listing earnings claims; lack of promised support, locations, or training; exclusive territory and cost misrepresentations; and refund issues among most prevalent business opportunity complaints).

[43] Consistent with the Franchise Rule, the Commission does not express any opinion about the legality of any practices that might be disclosed under the proposed Rule. *See* 16 CFR part 436, note 1. In the Franchise Rule SBP, the Commission

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affirmative disclosure would require a business opportunity seller to state whether the seller chooses to make earnings claims. If the seller does, then the proposed Rule would require substantiation and additional disclosures. The other four affirmative disclosures pertain to certain prior litigation; the seller's cancellation or refund policies; statistics on cancellation and refund requests; and contact information for prior purchasers as references.

In addition to these disclosure requirements, the proposed Rule would prohibit common deceptive business opportunity sales practices. Among other things, business opportunity sellers would be prohibited from misrepresenting: (1) Earnings; (2) costs or the efficacy, nature, or central characteristics of the business opportunity or the goods or services sold to the purchaser as part of the business opportunity; (3) cancellation or refund policies; (4) promised assistance; (5) the calculation and distribution of commissions, bonuses, incentives, premiums, or other payments from the seller; (6) the likelihood of finding locations for equipment or accounts for services; (7) a business opportunity as an offer of employment; (8) territorial exclusivity or more limited territorial protections; (9) endorsements; and (10) shills as references. Finally, the proposed Rule would prohibit business opportunity sellers from failing to make promised refunds, as well as assigning ''to any purchaser a purported exclusive territory that, in fact, encompasses the same or overlapping areas already assigned to another purchaser.''

Section D. Scope of the Proposed Rule

1. Business Opportunities Covered by the Franchise Rule

The proposed Rule would continue to cover those business opportunities that are presently covered by the original Franchise Rule. The Commission's law enforcement experience demonstrates that sales of these opportunities are fraught with unfair and deceptive practices, in particular the making of false or unsubstantiated earnings claims.

Indeed, such practices are widespread. Since 1990 alone, the Commission has brought more than 140 Franchise Rule cases against vending machine, rack display, and similar opportunities. Since 1995, the Commission has conducted more than 11 business opportunity sweeps,[44] many with other federal and state law enforcement partners, to combat persistent business opportunity scams violating the Franchise Rule, such as those involving the sale of vending machines,[45] rack displays,[46] public telephones,[47] Internet kiosks,[48] and 900-number ventures,[49] among others.

Further, business opportunity ventures covered by the Franchise Rule continue to stand out as a major source of consumer complaints.[50] In fact, business opportunities covered by the Franchise Rule consistently rank among the top 10 categories of consumer fraud complaints reported to the Commission.[51]

Moreover, such scams typically cost consumers thousands of dollars.[52]

recognized that the Franchise Rule may require franchisors to disclose practices that may raise antitrust issues. SBP, 43 FR at 59719. While antitrust issues are probably less of a concern in the narrowly tailored Business Opportunity Rule context, the Commission nevertheless reserves the right to pursue violations of antitrust laws even if a business opportunity seller discloses a violation in complying with the proposed Rule's disclosure requirements. In short, disclosure does not create a safe harbor for engaging in otherwise unlawful conduct.

Further, a business opportunity seller may have an obligation under section 5 of the FTC Act to impart material information to prospective purchasers beyond the disclosures required by this proposed Rule. This clarification is critical, especially in an age of quickly developing changes in the marketplace. The Commission cannot now predict what types of business opportunities will be offered in the future, nor the information a business opportunity purchaser will find material. This does not mean that a seller must include additional information in its disclosure document. As noted below, proposed section 437.5(c) prohibits the inclusion of additional information in a disclosure document. Rather, when a seller must impart material information beyond that required by the Rule, it must provide the information separately from its disclosure document. The Commission does not purport to specify how such information must be disseminated, permitting sellers the flexibility to decide which method is best for their particular business.

[44] *E.g.,* Project Telesweep (1995); Operation Missed Fortune (1996); Project Trade Name Games (1997); Project Vend Up Broke (1998); Project Bizillion$ (1999); Project Busted Opportunity (2002); and Project Biz Opp Flop (2005). In addition to joint law enforcement sweeps, Commission staff has also targeted specific business opportunity ventures such as 900 numbers (Project Buylines 1996); vending (Project Yankee Trader 1997); seminars (Operation Showtime 1998); medical billing (Project House Call 1998); and Internet-related services (Net Opportunities 1998).

[45] *See, e.g., FTC* v. *Am. Entm't Distribs., Inc.,* No. 04–22431–CIV–Huck (2004); *FTC* v. *Pathway Merch., Inc.,* No. 01–CIV–8987 (S.D.N.Y. 2001); *U.S.* v. *Photo Vend Int'l, Inc.,* No. 98–6935–CIV–Ferguson (S.D. Fla. 1998); *FTC* v. *Hi Tech Mint Sys., Inc.,* No. 98 CIV 5881 (JES) (S.D.N.Y. 1998); *FTC* v. *Claude A. Blanc, Jr.,* No. 2:92–CV–129–WCO (N.D. Ga. 1992). *See also* FTC News Release: FTC Announces ''Operation Vend Up Broke'' (Sept. 3, 1998) (available at *http://www.ftc.gov/opa/1998/09/vendup2.htm*) (FTC and 10 states announce 40 enforcement actions against fraudulent vending business opportunities).

[46] *See, e.g., U.S.* v. *Elite Designs, Inc.,* No. CA 05 058 (D.R.I. 2005); *U.S.* v. *QX Int'l,* No. 398–CV–0453–D (N.D. Tex. 1998); *FTC* v. *Carousel of Toys,* No. 97–8587–CIV–Ungaro-Benages (S.D. Fla. 1997); *FTC* v. *Raymond Urso,* No. 97–2680–CIV–Ungaro-Benages (S.D. Fla. 1997); *FTC* v. *Infinity Multimedia, Inc.,* No. 96–6671–CIV–Gonzalez (S.D. Fla. 1996); *FTC* v. *O'Rourke,* No. 93–6511–CIV–Ferguson (S.D. Fla. 1993). *See also* FTC News Release: Display Racks for Trade-Named Toys and Trinkets are the Latest in Business Opportunity Fraud Schemes (Aug. 5, 1997) (available at *http://www.ftc.gov/opa/1997/08/tradenam.htm*) (FTC and 8 states file 18 enforcement actions against sellers of bogus display opportunities that use trademarks of well-known companies).

[47] *See, e.g., FTC* v. *Advanced Pub. Commc'ns Corp.,* No. 00–00515–CIV–Ungaro-Benages (S.D. Fla. 2000); *FTC* v. *Ameritel Payphone Distribs., Inc.,* No. 00–0514–CIV–Gold (S.D. Fla. 2000); *FTC* v. *ComTel Commc'ns Global Network, Inc.,* No. 96–3134–CIV–Highsmith (S.D. Fla. 1996); *FTC* v. *Intellipay, Inc.,* No. H92 2325 (S.D. Tex. 1992).

[48] *See, e.g., FTC* v. *Bikini Vending Corp.,* No. CV–S–05–0439–LDG–RJJ (D. Nev. 2005); *FTC* v. *Network Service Depot, Inc.,* No. CV–S0–05–0440–LDG–LRL (D. Nev. 2005); *U.S.* v. *Am. Merch. Tech.,* No. 05–20443–CIV–Huck (S.D. Fla. 2005); *FTC* v. *Hart Mktg. Enter. Ltd., Inc.,* No. 98–222–CIV–T–23 E (M.D. Fla. 1998). *See also FTC* v. *FutureNet, Inc.,* No. CV–98–1113 GHK (BQRx) (C.D. Cal. 1998); *FTC* v. *TouchNet, Inc.,* No. C98–0176 (W.D. Wash. 1998).

[49] *See, e.g., FTC* v. *Bureau 2000 Int'l, Inc.,* No. 96–1473–DT–(JR) (C. D. Cal. 1996); *FTC* v. *Genesis One Corp.,* No. CV–96–1516–MRP (MCX) (C. D. Cal. 1996); *FTC* v. *Innovative Telemedia, Inc.,* No. 96–8140–CIV–Ferguson (S. D. Fla. 1996); *FTC* v. *Ad-Com Int'l,* No. 96–1472 LGB (VAP) (C.D. Cal. 1996).

[50] *See* FTC, *The FTC in 2005: Standing Up For Consumers and Competition* (2005) (available at *http://www.ftc.gov/os/2005/04/0504abareportfinal.pdf*), at 18 (announcing 14 criminal indictments in connection with business opportunity fraud); FTC Staff Report, *Consumer Fraud in the United States: An FTC Survey* (Aug. 2004) (''Fraud Survey'') (available at *http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf*) at 48 (showing 450,000 victims of business opportunity fraud).

[51] *See, e.g.*, FTC News Release: Criminal and Civil Enforcement Agencies Launch Major Assault Against Promoters of Business Opportunity and Work-at-Home Schemes (Feb. 22, 2005) (available at *http://www.ftc.gov/opa/2005/02/bizoppflop.htm*) (defendants in FTC cases alone caused tens of thousands of consumers to lose a total of more than $100 million); FTC News Release: Law Enforcers Target ''Top 10'' Online Scams; Consumer Protection Cops From 9 Countries, 5 U.S. Agencies, and 23 States Tackle Internet Fraud (Oct. 31, 2000) (available at *http://www.ftc.gov/opa/2000/10/topten.htm*) (listing business opportunities and work-at-home schemes among the top 10 Internet frauds). *See also* Prepared Statement of Federal Trade Commission on ''Internet Fraud'' before the House Subcomm. on Commerce, Trade, and Consumer Protection of the Comm. on Energy and Commerce (May 23, 2001) (available at *http://www.ftc.gov/opa/2001/05/iftestimony.htm*) (listing pyramids, business opportunities, and work-at-home schemes among the top Internet frauds); Prepared Statement of the Federal Trade Commission on ''Internet Fraud'' before the Senate Comm. on Finance (April 5, 2001) (available at *http://www.ftc.gov/os/2001/04/internetfraudstate.htm*) (listing pyramid, business opportunities, and work-at-home schemes among the top 10 Internet frauds based on Consumer Sentinel Database).

[52] *E.g., FTC* v. *World Traders Ass'n, Inc.,* No. CV05 0591 AHM (CTx) (C.D. Cal. 2005) (estimated $30 million in consumer injury); *FTC* v. *Am. Entm't*

While precise figures of consumer injury from fraudulent business opportunity ventures is unknown, the Commission's law enforcement experience reveals that it is not uncommon for purchasers of fraudulent business opportunities to lose thousands of dollars each.[53] For these reasons, the Commission has determined that sales of vending machines, rack displays, and similar opportunities should be covered by the Business Opportunity Rule, now that the Franchise Rule is being amended to focus exclusively on the sale of franchises.

2. Business Opportunities Not Presently Covered by the Franchise Rule

The proposed Business Opportunity Rule would also address the sale of other business arrangements that are currently outside the scope of the Franchise Rule, but have been shown by the Commission's law enforcement experience and complaint data to be sources of prevalent and persistent problems. Two important types of fraudulent or deceptive opportunities that would fall within the proposed Rule's coverage are work-at-home schemes and pyramid marketing schemes.[54]

a. Work-at-Home Schemes

Deceptive work-at-home schemes are a persistent type of fraud, preying upon stay-at-home parents, the physically disabled, non-English speakers, and others who cannot obtain employment outside of the home.[55] For the most part, they are not distinguishable in any material respect from business opportunities covered by the existing Franchise Rule.[56]

Sellers of fraudulent work-at-home opportunities deceive their victims with promises of an ongoing relationship in which the seller will buy the output that opportunity purchasers produce. These sellers often misrepresent that there is a market for a purchaser's goods and services,[57] just as sellers of fraudulent vending machine and rack display opportunities falsely claim that profitable vending locations are available.[58] Work-at-home opportunity sellers also often claim to provide ongoing training and other assistance, as business opportunity sellers covered by the Franchise Rule often do.[59]

Each of these promises by work-at-home opportunity sellers is often just as illusory as the analogous promises made by business opportunity sellers covered by the Franchise Rule. In addition, fraudulent work-at-home opportunity sellers frequently invent undisclosed conditions and limitations for rejecting the work performed by purchasers and refusing to buy back the goods the purchasers produce.[60] Similarly, these sellers' promises of continuing support and assistance frequently prove empty, leaving work-at-home opportunity purchasers with no help in figuring out how to assemble misshapen components into finished products.

Moreover, as the Commission's cases and complaint data demonstrate, the con artists who promote fraudulent work-at-home schemes frequently dupe consumers with false earnings claims,[61] a very prevalent practice among fraudulent business opportunity sellers. For example, in one envelope-stuffing case brought under section 5 of the FTC Act, the defendant allegedly offered to pay purchasers $550 to $3,000 weekly.[62] Similarly, in a medical billing work-at-home case, the defendant allegedly promised purchasers annual incomes of $25,000–$50,000.[63] Because the initial investment is relatively low, hundreds of thousands of bilked consumers do not formally complain or take action against these illegal operators.

The Commission's law enforcement experience demonstrates that work-at-home scams are widespread, causing significant consumer injury. Indeed, since 1990 the Commission has brought over 60 work-at-home cases.[64] These actions have targeted a variety of schemes, ranging from envelope

Distribs., No. 04–22431–CIV–Huck (S.D. Fla. 2004) (estimated $20 million in consumer injury). *See also* United States Postal Inspection Service, News Release: U.S. Postal Inspectors, Federal Trade Commission, Department of Justice dismantle business-opportunity scams (''Postal Inspectors have arrested 28 individuals * * * who victimized more than 140,000 consumers with estimated losses exceeding $73 million.'').

[53] *E.g., FTC* v. *Am. Entm't Distribs.,* No. 04–22431–CIV–Huck (S.D. Fla. 2004) ($28,000–$37,500 for one machine); *FTC* v. *Accent Mktg., Inc.,* No. 02–0405–CB–M (S.D. Ala. 2002) ($8,000 initial payment). One measure of injury attributed to business opportunity fraud can be gleaned from the 2001 Staff Program Review. In its review of 2,665 business opportunity complaints from 1997 through the first half of 1999, over 70% of complainants reported losses of at least $1,000, with over 48% reporting losses of over $5,000. Approximately 24% reported losses over $10,000. Staff Program Review, *supra* note 39, at 36.

[54] In response to the ANPR, state regulators argued for a broad rule covering a wide array of opportunities. For example, in its ANPR Comment, NASAA recommended that the disclosure requirements for business opportunity ventures include business opportunity formats such as multilevel marketing plans, seller-assisted marketing plans, work-at-home plans and certain distributorships and licensing plans not currently covered under the Franchise Rule. NASAA, ANPR 120, at 5. *See also* James, ANPR 76; WA Securities, ANPR 117, at 2; Maxey, Sept95 Tr at 38.

[55] *See, e.g., FTC* v. *USS A Enter., Inc.,* No. SA CV–04–1039 AHS (ANx) (C.D. Cal. 2004) (craft assembly opportunity aimed at Spanish speakers); *FTC* v. *Esteban Barrios Vega,* No. H–04–1478 (S.D. Tex. 2004) (product assembly opportunity aimed at Spanish speakers); *FTC* v. *Castle Publ'g, Inc.,* No. AO3CA 905 SS (W.D. Tex. 2003) (envelope-stuffing opportunity targeting unemployed, disabled, and elderly hoping to work from home); *FTC* v. *Medicor LLC,* No. CV01–1896 (CBM) (C.D. Cal. 2001) (work-at-home scams victimizing stay-at-home parents, the physically disabled, and non-English speakers). *See also* James, 21Nov97 Tr at 344 (describing work-at-home program aimed at the elderly and poorly-educated).

[56] *See* discussion above in Section A.1 explaining that the Franchise Rule's limitation requiring purchasers to sell directly to end-users effectively exempts many work-at-home opportunities from Franchise Rule coverage.

[57] *E.g., FTC* v. *Misty Stafford,* No. 3: CV 05–0215 (M.D. Pa. 2005); *FTC* v. *Elec. Med. Billing, Inc.,* No. SA02–368 AHS (ANX) (C.D. Cal. 2003); *FTC* v. *Holiday Magic,* No. C 93–4038 VRW (N.D. Cal. 1994); *In re New Mexico Custom Designs, Inc.,* FTC C–3485 (1993); *In re Sandcastle Creations,* FTC C–3484 (1993); *In re Homespun Prods., Inc.,* FTC C–3483 (1993); *In re Hairbow Co.,* FTC C–3482 (1993). *See* James, 21Nov97 Tr at 343 (bead assembly seller falsely represented a relationship with J.C. Penney).

[58] *E.g., FTC* v. *Nat'l Vending Consultants, Inc.,* No. CV–S–05–0160–RCJ–PAL (D. Nev. 2005); *FTC* v. *Pathway Merchandising, Inc.,* No. 01–CIV–8987 (S.D.N.Y. 2001); *FTC* v. *Int'l Computer Concepts, Inc.,* No. 1:94CV1678 (N.D. Ohio 1994).

[59] *E.g., FTC* v. *USS Elder Enter., Inc.,* No. SA CV–04–1039 AHS (ANx) (C.D. Cal. 2004) (company would provide work or substantial assistance in obtaining work); *FTC* v. *Leading Edge Processing, Inc.,* No. 6:02–CV–681–ORL–19 DAB (M.D. Fla. 2003) (company would provide specialized software, manuals, and training); *FTC* v. *Fin. Res. Unlimited,* No. 03–C–8864 (N.D. Ill. 2003) (no prior experience necessary; company would provide all supplies needed); *FTC* v. *Darrell Richmond,* No. 3:02–3972–22 (D.S.C. 2003) (seller claimed to provide all necessary materials to perform the work-at-home envelope stuffing business); *FTC* v. *Elec. Med. Billing, Inc.,* No. SACV02–368 AHS (ANX) (C.D. Cal. 2003) (company promised to provide everything necessary to perform medical billing, including a list of doctors, training, and software). *See also* Finnigan, 21Aug97 Tr at 95 (a business or income-earnings opportunity inherently must offer some sort of assistance or training); Catalano, 20Nov97 Tr at 37 (purchasers buy business opportunities to obtain the seller's expertise and know-how).

[60] *See FTC* v. *Misty Stafford,* No. 3: CV 05–0215 (M.D. Pa. 2005). *See also* James, 21Nov97 Tr at 244–45 (describing clown assembly work-at-home program that repeatedly rejected goods produced by investor).

[61] *E.g., FTC* v. *Sun Ray Trading,* No. 05–20402 CIV-Sitz/Bandstra (S.D. Fla. 2005) (potential weekly income of $550 to $3,000); *FTC* v. *Castle Publ'g, Inc.,* No. AO3CA 905 SS (W.D. Tex. 2003) (earn $2,900 to $5,000 and more weekly); *FTC* v. *Darrell Richmond,* No. 3:02–3972–22 (D.S.C. 2002) (earn between $100 and $1,000 or more per week). *See also* James, 21Nov97 Tr at 341 (describing a bead assembly work-at-home program that claimed earnings of $1,400 per $1,000 investment).

[62] *FTC* v. *Fin. Res. Unlimited,* No. 03–C–8864 (N.D. Ill. 2003) (earn ''$550.00 to $3,000 and more weekly'' stuffing envelopes).

[63] *FTC* v. *Elec. Med. Billing, Inc.,* No. SA02–368 AHS (AN) (C.D. Cal. 2002).

[64] Many of these cases were brought in connection with sweeps of fraudulent work-at-home and related employment opportunities, including Project Biz Opp Flop (2005); Project Homework (2001); Operation Top Ten Dot Con (2000); and Operation Missed Fortune (1996).

stuffing[65] and craft assembly programs,[66] to technology-driven opportunities,[67] including medical billing plans.[68] In some of these cases, what appeared to be simple work-at-home scams turned out to be illegal pyramid schemes.[69]

Consumer complaints to the Commission also demonstrate the prevalence of fraudulent work-at-home schemes.[70] To determine the level of complaints and alleged injury from work-at-home scams, the Commission staff analyzed fraud complaint information from the Commission's complaint database for the period January 1997 through December 2005. The staff's analysis shows 37,333 work-at-home complaints, resulting in alleged injury of over $15 million ($15,408,934).[71] Indeed, work-at-home complaints ranked among the top fraud complaint categories submitted to the Commission. For example, during the period studied, work-at-home schemes ranked among the top 20 fraud complaint categories each year:

Year	Rank	Complaints
1997	5th	1,399
1998	20th	1,653
1999	19th	2,611
2000	18th	3,448
2001	13th	4,852
2002	11th	17,307
2003	9th	16,694
2004	12th	6,485
2005	15th	4,366

Were it not for the minimum investment requirement and direct sales to end-user limitation in the Franchise Rule, many work-at-home schemes would be covered by that rule because the same potential for abuse exists as with vending machines and rack display opportunities, which are covered. In view of the misrepresentations and omissions that fraudulent work-at-home opportunity sellers have used, as shown by consumer complaints and past Commission cases, the Commission has determined that the proposed business opportunity disclosure requirements and prohibitions would provide potential work-at-home purchasers with the tools they need to protect themselves from false claims.

b. Pyramid Marketing Schemes

Like business opportunities covered by the existing Franchise Rule, pyramid schemes often deceive consumers with the promise of large potential incomes. It is not uncommon for promoters of these schemes to claim potential incomes of thousands of dollars a week or month.[72] Because of the claimed high earnings potential, pyramid schemes are highly successful in attracting prospective investors. For example, one pyramid program attracted more than 150,000 consumers who collectively paid over $80 million during the course of three years.[73] Indeed, cases brought under section 5 against pyramid marketing promotions have resulted in huge consumer redress, such as $40 million in *Equinox* and $20 million in *SkyBiz.com*.[74]

The prevalence of false earnings claims is not the only similarity between pyramid schemes and business opportunity frauds covered by the current Franchise Rule. Many induce new recruits with the promise of an ongoing commercial relationship that will enable recruits to operate their own business selling various products or services.[75] Typically, they promise to provide recruits with promotional assistance.[76] Some also offer training.[77] Few, however, reveal their high drop-out rates, much less the fact that the vast majority of those who have joined the program—often 90 percent or more—will not recoup their investment.[78]

Further, since 1990, the Commission has brought 20 cases against pyramid

[65] *E.g., FTC* v. *Sun Ray Trading,* No. 05–20402 CIV-Seitz/Bandstra (S.D. Fla, 2005); *FTC* v. *Fin. Res. Unlimited,* No. 03–C–8864 (N.D. Ill. 2003); *FTC* v. *Castle Publ'g, Inc.,* No. AO3CA 905 SS (W.D. Tex. 2003); *FTC* v. *Patrick Cella,* No. CV03–3202 GAF (SHSx) (W.D. Cal. 2003); *FTC* v. *Terrance Maurice Howard,* No. SA02CA0344 (W.D. Tex. 2002); *FTC* v. *Stuffingforcash.com, Corp.,* No. 92 C 5022 (N.D. Ill. 2002); *FTC* v. *America's Shopping Network, Inc.,* No. 02–80540–CIV-Hurley (S.D. Fla. 2002).

[66] *E.g., FTC* v. *Misty Stafford,* No. 3: CV 05–0215 (M.D. Pa. 2005); *FTC* v. *Esteban Barrios Vega,* No. H–04–1478 (S.D. Tex. 2004); *FTC* v. *Nat'l Crafters, Corp.,* No. 01–4825–CIV-Graham-Turnoff (S.D. Fla. 2001); *FTC* v. *Ed Boehlke,* No. 96–0482–E–BLW (D. Idaho 1996); *In re Sandcastle Creations,* FTC C–3484 (1993); *In re Hairbow Co.,* FTC C–3482 (1993); *FTC* v. *Holiday Magic,* No. C 93–4038 VRW (N.D. Cal. 1993); *In re Homespun Prods., Inc.,* FTC C–3483 (1993); *In re New Mexico Custom Designs, Inc.,* FTC C–3485 (1993). *See also* Prepared Statement of the FTC on ''Internet Fraud'' before the House Subcomm. on Commerce, Trade, and Consumer Protection, Comm. on Energy and Commerce (May 23, 2001) (listing business opportunities and work-at-home schemes among top 10 Internet or online scams); Prepared Statement of the FTC on ''Internet Fraud'' before the Senate Comm. on Finance (April 5, 2001) (listing business opportunities and work-at-home schemes among top 10 online scams).

[67] *E.g., FTC* v. *Wealth Sys., Inc.,* No. CV 05 0394 PHX JAT (D. Ariz. 2005) (web design); *FTC.* v. *Leading Edge Processing, Inc.,* No. 6:02–CV–681–ORL–19 DAB, (M.D. Fla. 2002) (data entry); *FTC* v. *LS Enter.,* FTC C–3884 (1999) (bulk email); *In re Computer Bus. Servs.,* FTC C–3705 (1996) (in-home computer work); *FTC* v. *AMP Publ'n, Inc.,* No. SACV–00–112–AHS–ANx (C.D. Cal. 2000) (in-home computer work).

[68] *E.g., FTC* v. *Med. Billers Network, Inc.,* No. 05 CV 2014 (RJH) (S.D.N.Y. 2005); *FTC* v. *Elec. Med. Billing,* No. SA02–368 AHS (AN) (C.D. Cal. 2002); *FTC* v. *Elec. Processing Servs., Inc.,* No. CV–S–02–0500–L.H.–R.S. (D. Nev. 2002); *FTC* v. *Medicor, LLC,* No. CV01–1896 (CBM) (C.D. Cal. 2001); *FTC* v. *Encore Networking Servs.,* No. 00–1083 WJR (AIJx) (C.D. Cal. 2000); *FTC* v. *Physicians Healthcare Dev. Serv. Corp.,* No. CV–02–2936 RMT (C.D. Cal. 2000); *FTC* v. *Data Med. Capital, Inc.,* No. SACV–99–1266 AHS (C.D. Cal. 1999); *FTC* v. *Elec. Filing Acad.,* No. 98–0054–PHX–EHC (D. Ariz. 1998).

[69] *E.g., FTC* v. *David Martinelli, Jr.,* No. 3:99 CV 1272 (CFD) (D. Conn. 1999) (income from work-at-home opportunity processing applications dependent upon signing new recruits to join the opportunity).

[70] In adopting amendments to the Telemarketing Sales Rule (''TSR''), the Commission observed ''that telemarketing fraud perpetuated by the advertising of work-at-home and other business opportunity schemes in general media sources is a prevalent and growing phenomenon.'' Indeed, the Commission stated that ''the single greatest per capita monetary loss category in complaints reported to the FTC is for business opportunities, including work-at-home schemes.'' 67 FR 4492, at 4530 (Jan. 30, 2002). *See also* TSR Statement of Basis and Purpose, 68 FR 4480, at 4661 (Jan. 29, 2003).

[71] *See also* James, 21Nov97 Tr at 340–45 (describing three work-at-home opportunities in Florida, one of which took in $18 million, victimizing 6,000 consumers).

[72] *E.g., FTC* v. *2Xtreme Performance Int'l, LLC,* No. JFM 99CV 3679 (D. Md. 1999) (''about $2,000 in the first month * * * and then it went to $60,000''); *FTC* v. *Bigsmart.com,* No. CIV 01–0466 PHX ROS (D. Ariz. 2001) (''50 people made over $50,000 their first month! We also had a $100,000 first month money earner!''); *FTC* v. *FutureNet, Inc.,* No. CV–98–1113 GHK (BQRx) (C.D. Cal. 1998) (''If you're serious, we can show you how to make ten thousand a month * * * And, you know, we have people doing thirty thousand a month.''); *FTC* v. *Nia Cano,* No. 97–7947–CAS (AJWx) (C.D. Cal. 1997) (as much as $18,000 per month); *FTC* v. *Global Assistance Network for Charities,* No. 96–2494 PHX RCB (D. Ariz. 1996) (promising over $89,000 a month); *FTC* v. *NexGen3000.com,* No. CIV–03–120 TUC WDB (D. Ariz. 2003) (''each activated business center has the potential to earn up to $60,000 per week''); *FTC* v. *SkyBiz.com,* No. 01–CV–0396–EA (X) (N.D. Okla. 2001) (''he's making 76,000 a week and growing'').

[73] *FTC* v. *2Xtreme Performance Int'l, LLC,* No. JFM 99CV 3679 (D. Md. 1999). *See also FTC* v. *Fortuna Alliance, LLC,* No. C96–799M (W.D. Wash. 1996) (tens of thousands of consumers in over 60 countries); *FTC* v. *Jewelway, Int'l,* No. CV–97 TUC JMR (D. Ariz. 1997) (200,000 investors).

[74] *See also FTC* v. *Bigsmart.com,* No. CIV 01–0466 PHX ROS (D. Ariz. 2001) ($5 million for redress); *FTC* v. *Nia Cano,* No. 97–7947–CAS (AJWx) (C.D. Cal. 1997) (nearly $2 million for redress); *FTC* v. *Fortuna Alliance, LLC,* No. C96–799M (W.D. Wash. 1996) (approximately $5.5 million for redress); *FTC* v. *FutureNet, Inc.,* No. CV–98–1113 GHK (BQRx) (C.D. Cal. 1998) ($1 million for redress); *FTC* v. *Jewelway, Int'l,* No. CV–97 TUC JMR (D. Ariz. 1997) ($5 million for redress); *FTC* v. *ICR Servs.,* No. 03 C 5532 (N.D. Ill. 2003) ($1.5 million for redress).

[75] *E.g., FTC* v. *Trek Alliance, Inc.,* No. 02–9270 SJL (AJWx) (C.D. Cal. 2002); *FTC* v. *Equinox, Int'l,* No. CV–S–99–0960–JBR–RLH (D. Nev. 1999); *FTC* v. *FutureNet, Inc.,* No. CV–98–1113 GHK (BQRx) (C.D. Cal. 1998).

[76] *E.g., FTC* v. *2Xtreme Performance Int'l, LLC,* No. JFM 99CV 3679 (D. Md. 1999); *FTC* v. *Bigsmart.com,* No. CIV 01–0455 PHX ROS (D. Ariz. 2001); *FTC* v. *NexGen3000.com,* No. CIV–03–120 TUC WDB (D. Ariz. 2003).

[77] *FTC* v. *World Class Network, Inc.,* No. SACV–97–162–AHS (EEx) (C.D. Cal. 1997).

[78] Peter J. VanderNat and William W. Keep, *Marketing Fraud: An Approach to Differentiating Multilevel Marketing from Pyramid Schemes*, 21 J. of Pub. Pol'y & Marketing (Spring 2002), at 139–151.

schemes under section 5.[79] These matters have involved a wide range of purported product sales or investments, ranging from the mundane [80] (nutritional supplements, beauty aids, weight-loss products, and water filters) to the unusual (auto leasing,[81] charitable giving,[82] unsecured credit cards,[83] credit repair,[84] travel agency credentials,[85] Internet malls,[86] and Internet access [87]). Indeed, pyramid fraud has gone high-tech, flooding the Internet [88] and consumers' email boxes.[89]

The Commission staff's analysis of consumer fraud complaint data also demonstrates the prevalence of deceptive pyramid marketing schemes.[90] For the period January 1997 through December 2005, Commission staff found that consumers lodged 17,858 complaints against pyramid schemes, reporting alleged aggregate injury level of over $46 million ($46,824,347). Indeed, complaints against pyramid marketing companies consistently ranked among the top 20 injury categories reported in consumer fraud complaints to the Commission.[91] For example, during the period 1997 through 2005, pyramid marketing schemes ranked among the top 20 injury levels each year, except in 2003, as follows:

Year	Rank	Injury
1997	9th	$352,769
1998	5th	1,858,787
1999	10th	2,011,012
2000	4th	12,632,132
2001	10th	10,685,083
2002	18th	9,685,722
2003	(not in top 20).	
2004	18th	2,264,112
2005	17th	3,347,443

Were it not for the minimum investment and inventory exemptions in the Franchise Rule, many pyramid schemes would be covered because the same potential for abuse exists as with vending machines and rack display opportunities covered by the Franchise Rule.[92] In view of the misrepresentations and omissions that fraudulent pyramid scheme promoters have used, as shown by consumer complaints and past Commission cases, pre-sale disclosures and prohibitions are necessary to protect potential recruits from deceptive practices.

Section E. The Proposed Rule

The proposed Rule is divided into nine sections. Section 437.1 would set forth the Rule's definitions. Section 437.2 would establish the business opportunity seller's obligation to furnish prospective purchasers with material information in the form of a written basic disclosure document. Section 437.3 would specify the content of the basic disclosure document. Section 437.4 would set forth the requirements business opportunity sellers must follow if they elect to make earnings representations. Section 437.5 would prohibit a number of deceptive claims and practices in connection with business opportunity sales. Section 437.6 would set forth the Rule's recordkeeping provisions. Section 437.7 would expressly exempt from the Business Opportunity Rule those business arrangements that are covered by the Franchise Rule. Finally, two administrative sections—437.8 and 437.9—would address other laws, rules, and orders, and severability.

1. Proposed Section 437.1: Definitions

The proposed Rule would begin with a definitions section setting forth defined terms in alphabetical order. In several instances, the proposed definitions closely track those contained in the current Franchise Rule, Commission interpretations of the Franchise Rule, and the states' comparable franchise disclosure document, the Uniform Franchise Offering Circular (''UFOC'') Guidelines. These include the definitions for the terms ''action,'' ''affiliate,'' ''disclose or state,'' ''earnings claims,'' ''person,'' and ''written.'' The Commission also proposes to define the terms ''business assistance,'' ''business opportunity,'' ''cancellation or refund request,'' ''designated person,'' ''exclusive territory,'' ''general media,'' ''new business,'' ''prior business,'' ''providing locations, outlets, accounts, or customers,'' ''purchaser,'' ''quarterly,'' and ''seller.'' Each proposed definition is set forth below.

a. Proposed Section 437.1(a): ''Action''

The term ''action'' arises in proposed section 437.3(a)(3), which would require business opportunity sellers to disclose material information about the seller's prior litigation. Proposed section 437.1(a) would define the term ''action'' closely tracking the Commission's current interpretation of the term ''action'' in connection with the Franchise Rule. Specifically, it would make clear that disclosures involving litigation include not only civil actions brought before a court, but matters before arbitrators.[93] It would also make clear that an ''action'' includes all governmental actions, including criminal matters, and administrative law enforcement actions, including cease and desist orders, or assurances of voluntary compliance.

b. Proposed Section 437.1(b): ''Affiliate''

To combat business opportunity sales fraud, proposed section 437.3(a)(3) would require a business opportunity seller to disclose not only litigation in which it was named as a party, but any litigation naming any of its affiliates. Closely tracking the UFOC Guidelines, proposed section 437.1(b) would define the term ''affiliate'' to mean: ''an entity controlled by, controlling, or under

[79] *E.g., FTC* v. *Trek Alliance, Inc.,* No. 02–9270 SJL (AJWx) (C.D. Cal. 2002); *FTC* v. *Streamline Int'l,* No. 01–6885–CIV–Ferguson (S.D. Fla. 2001); *FTC* v. *Bigsmart.com,* No. CIV 01–0466 PHX ROS (D. Ariz. 2001); *FTC* v. *Five Star Auto Club, Inc.,* No. CIV–99–1693 McMahon (S.D.N.Y. 1999); FTC v. *2Xtreme Performance Int'l, LLC,* No. JFM 99CV 3679 (D. Md. 1999); *FTC* v. *Equinox, Int'l,* No. CV–S–99–0969–JBR–RLH (D. Nev. 1999); *FTC* v. *FutureNet, Inc.,* No. CV–98–1113 GHK (BQRx) (C.D. Cal. 1998).

[80] *E.g., FTC* v. *Trek Alliance, Inc.,* No. 02–9270 SJL (AJWx) (C.D. Cal. 2002); *FTC* v. *Streamline Int'l, Inc.,* No. 01–6885–CIV–Ferguson (S.D. Fla. 2001); *FTC* v. *2Xtreme Performance Int'l,* No. JFM 99CV 3679 (D. Md. 1999); *FTC* v. *Equinox, Int'l,* No. CV–S–99–0969–JBR–RLH (D. Nev. 1999).

[81] *FTC* v. *Five Star Auto Club, Inc.,* No. CIV–99–1693 McMahon (S.D.N.Y. 1999).

[82] *FTC* v. *Universal Direct,* No. C 3–02–145 (S.D. Ohio 2002); *FTC* v. *Global Assistance Network for Charities,* No. 96–2494 PHX RCB (D. Ariz. 1996).

[83] *FTC* v. *Nia Cano,* No. 97–7947–CAS (AJWx) (C.D. Cal. 1997).

[84] *FTC* v. *ICR Servs.,* No. 03 C 5532 (N.D. Ill. 2003).

[85] *FTC* v. *World Class Network, Inc.,* No. SACV–97–162–AHS (Eex) (C.D. Cal. 1997).

[86] E.g., *FTC* v. *NexGen3000.com,* No. CIV–03–120 TUC WDB (D. Ariz. 2003); *FTC* v. *Bigsmart.com,* No. CIV 01–0466 PHX ROS (D. Ariz. 2001).

[87] *FTC* v. *FutureNet, Inc.,* No. CV–98–1113 GHK (BQRx) (C.D. Cal. 1998).

[88] *E.g., FTC* v. *Sun Ray Trading, Inc.,* No. 05–20402–CIV–Seitz/Bandstra (S.D. Fla. 2005); *FTC* v. *2Xtreme Performance Int'l, LLC,* No. JFM 99CV 3679 (D. Md. 1999); *FTC* v. *Nia Cano,* No. 97–7947–CAS (AJWx) (C.D. Cal. 1997); *FTC* v. *FutureNet, Inc.,* No. CV–98–1113 GHK (BQRx) (C.D. Cal. 1998).

[89] *E.g., FTC* v. *David Martinelli, Jr.,* No. 3:99 CV 1272 (CFD) (D. Conn. 1999); *FTC* v. *Universal Direct,* No. C 3–02–145 (S.D. Ohio 2002); *In re Kalvin P. Schmidt,* FTC C–3834 (1998).

[90] State regulators report similar data. For example, a Florida business opportunity regulator noted that in his office, 60% of the written complaints received pertain to pyramid marketing companies. ''They last about six months and they're gone.'' James, 20Nov97 Tr at 115–26. The State of Washington also reported a large number of pyramid marketing scheme complaints. See WA Securities, ANPR 117 at 2.

[91] *See also* Fraud Survey, *supra* note 50, at 48 (1.55 million victims of pyramid fraud).

[92] *See* discussion above in Section A.1 explaining that the current Rule's minimum required payment and inventory exemptions effectively exempt many pyramid marketing opportunities from Franchise Rule coverage.

[93] *See* Interpretive Guides, 44 FR at 49973; Rabenberg, Sept. 95 Tr. at 105, 279 (arguing for the disclosure of matters in arbitration, which normally are not public documents). *See also* Franchise Rule NPR, 64 FR at 57297 and 57332; UFOC Guidelines, Item 3.

common control with a business opportunity seller.'' [94] This definition would also cover litigation involving a parent and subsidiaries of the business opportunity seller.

c. Proposed Section 437.1(c): ''Business assistance''

One of the definitional elements of the term ''business opportunity'' in section 437.1(d) is the offer of ''business assistance.'' Proposed section 437.1(c) would define ''business assistance'' to mean '' the offer of material advice, information, or support to a prospective purchaser in connection with the establishment or operation of a new business.'' [95] By using the concept of business assistance as one of the definitional elements of the term ''business opportunity''—the term that establishes the parameters of the Rule's coverage—the Commission intends to ensure coverage of those business relationships that involve more than the ordinary sale of goods or services to existing businesses.

In addition, the proposed definition of ''business assistance'' lists five illustrative, but not exhaustive, examples of qualifying assistance, corresponding to practices shown by the Commission's law enforcement experience, and that of the states, to be common among sellers of fraudulent business opportunities.[96] The common thread linking each of these five examples is that the seller promotes his or her expertise in operating the business or in providing a market for the goods or services the purchaser sells to the public, or in ensuring compensation promised to the purchaser, thereby reducing the purchaser's financial risk. Each of the five illustrative examples is discussed immediately below.

i. Location Assistance

The proposed ''business assistance'' definition would include as an illustrative example the promise to provide locations ''for the use or operation of equipment, displays, vending machines, or similar devices on premises neither owned nor leased by the purchaser.'' This is substantially similar to the analogous provision in the current Franchise Rule.[97] Including this example would help ensure that business opportunities currently covered by the Franchise Rule will remain covered by the Business Opportunities Rule. Indeed, the Commission's enforcement experience shows that the offer of location assistance is the hallmark of fraudulent vending machine and rack display route opportunities.[98]

ii. Account Assistance

Another illustrative example of ''business assistance'' would be ''providing, or purporting to provide, outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser's goods or services.'' As Commission cases have shown, fraudulent promises of assistance in securing accounts are often the linchpin of business opportunity scams such as fraudulent medical billing schemes.[99] The proposed definition would be similar to the current ''account assistance'' provision of the Franchise Rule,[100] but would update that provision by specifying that outlets, accounts, or customers include those on the Internet. Accordingly, the offer to provide Web sites or online shopping malls where the seller's products can be sold would also qualify as an offer of account assistance.[101]

iii. Buy-Back Assistance

A business opportunity seller's offer to pay purchasers for their work by buying back their work product typifies most fraudulent work-at-home plans, such as craft assembly opportunities.[102] To capture such opportunities, the term ''business assistance'' would include as an illustrative example ''buying back, or purporting to buy back, any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides.'' [103] The proposed definition, however, would not include the offer to buy back inventory or equipment needed to start a business.[104] In response to the ANPR, DSA opined that such a proposal very likely would result in discouraging legitimate sellers from adopting inventory or equipment buy-back policies.[105] The Commission finds this argument persuasive.

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[94] *See* NASAA Commentary on the Uniform Franchise Offering Circular Guidelines (1999), Bus. Franchise Guide (CCH), ¶5790, at 8,466. This is a greatly streamlined version of the definition of ''affiliated person'' in the current Franchise Rule:

The term affiliated person means a person * * * (1) Which directly or indirectly controls, is controlled by, or is under common control with, a franchisor; or (2) Which directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of a franchisor; or (3) Which has, in common with a franchisor, one or more partners, officers, directors, trustees, branch managers, or other persons occupying similar status or performing similar functions.

16 CFR at 436.2(i).

[95] As discussed below, the term ''new business'' also includes a new line of business.

[96] The examples are drawn from the Illinois business opportunity statute. Business Opportunity Sales Law of 1995, 815 ILCS 602/5–1 through 602/5–135 (1995) (''Illinois Act''). Several commenters pointed to that statute as a good model. E.g., Pampered Chef, ANPR 86, at 1; Amway, ANPR 89, at 1; Elman, Sept. 95 Tr. at 132–33; Wieczorek, id. at 284.

[97] *See* 16 CFR at 436.2(a)(1)(ii)(B). *See also* Illinois Act, 815 ILCS 602/5–510(a)(1) (''The seller or a person recommended by the seller will provide or assist the purchaser in finding locations for the use or operation of vending machines, rack display cases or other similar devices, on premises neither owned nor leased by the purchaser or seller.'').

[98] *E.g., FTC* v. *Am. Entm't Distribs.,* No. 04–22431–CIV–Huck (S.D. Fla. 2004); *FTC* v. *Advanced Pub. Commc'ns Corp.,* No. 00–00515–CIV–Ungaro-Benages (S.D. Fla. 2000); *FTC* v. *Ameritel Payphone Distribs., Inc.,* No. 00–0514–CIV–Gold (S.D. Fla. 2000); *FTC* v. *Mktg. and Vending Concepts,* No. 00–1131 (S.D.N.Y. 2000).

[99] *E.g., FTC* v. *Mediworks, Inc.,* No. 00–01079 (C.D. Cal. 2000); *FTC* v. *Home Professions, Inc.,* No. 00–111 (C.D. Cal. 2000); *FTC* v. *Data Med. Capital, Inc.,* No. SACV–99–1266 (C.D. Cal. 1999). *See also, FTC* v. *AMP Publ'n, Inc.,* No. SACV–00–112–AHS–ANx (C.D. Cal. 2000).

[100] *See* 16 CFR at 436.2(a)(1)(ii)(B). *See also,* Illinois Act, 815 ILCS at 602/5–1.10(a)(2) (''The seller or a person recommended by the seller will provide or assist the purchaser in finding outlets or accounts for the purchaser's products or services.'').

[101] *See, e.g., FTC* v. *NexGen3000.com,* No. CIV–03–120 TUC WDB (D. Ariz. 2003); *FTC* v. *Netforce Seminars,* No. 00 2260 PHX FJM (D. Ariz. 2000); *FTC* v. *iMall, Inc.,* No. 99–03650 (C.D. Cal. 1999).

[102] *E.g., FTC* v. *Fin. Res. Unlimited,* No. 03–C–8864 (N.D. Ill. 2003); *FTC* v. *Castle Publ'g, Inc.,* No. AO3CA 905 SS (W.D. Tex. 2003); *FTC* v. *Patrick Cella,* No. CV03–3202 GAF (SHSx) (W.D. Cal. 2003); *FTC* v. *Terrance Maurice Howard,* No. SA02CA0344 (W.D. Tex. 2002); *FTC* v. *Stuffingforcash.com, Corp.,* No. 92 C 5022 (N.D. Ill. 2002); *FTC* v. *America's Shopping Network, Inc.,* No. 02–80540–CIV–Hurley (S.D. Fla. 2002); *FTC* v. *Esteban Barrios Vega,* No. H–04–1478 (S.D. Tex. 2004); *FTC* v. *Nat'l Crafters, Corp.,* No. 01–4825–CIV–Graham-Turnoff (S.D. Fla. 2001); *FTC* v. *Ed Boehlke,* No. 96–0482–E–BLW (D. Idaho 1996); *In re Sandcastle Creations,* FTC C–3484 (1993); *In re Hairbow Co.,* FTC C–3482 (1993); *FTC* v. *Holiday Magic,* No. C 93–4038 VRW (N.D. Cal. 1993); *In re Homespun Prods., Inc.,* FTC C–3483 (1993); *In re New Mexico Custom Designs, Inc.,* FTC C–3485 (1993).

[103] *See* Illinois Act, 815 ILCS at 602/5–1.10(a)(3) (''The seller or a person specified by the seller will purchase any or all products made, produced, fabricated, grown, bred, or modified by the purchaser.''). *See also* California Contracts for Seller Assisted Marketing Plans, Cal. Civ. Code at § 1812.201(a)(3) (CA SAMP) (The ''seller will buy back or is likely to buy back any product made, produced, fabricated, grown or bred by the purchaser using in whole or in part, the product, supplies, equipment, or services which were initially sold or leased or offered for sale or lease to the purchaser by the seller assisted marketing plan seller'').

[104] *Cf.* Illinois Act, 815 ILCS at § 5–5.10(a)(5) (attaching coverage where ''[t]he seller will refund all or part of the price paid to the seller, or repurchase any of the products, equipment or supplies provided by the seller or a person recommended by the seller, if the purchaser is dissatisfied with the business'').

[105] Elman, 21-Aug-97 Tr. at 106–08. *See also,* Wieczorek, id. at 108–09 (a broad buy-back policy would result in business opportunity coverage where a franchisor permits a prospective franchisee to ''test drive'' an opportunity for a limited period of time).

iv. Payment Assistance

The proposed list of illustrative business assistance examples also includes ''tracking or paying, or purporting to track or pay, commissions or other compensation based upon the purchaser's sale of goods or services or recruitment of other persons to sell goods or services.'' Many pyramid marketing plans offer this type of assistance, purporting to compensate participants not only for their own product sales but also for sales made by their participants' downline recruits.[106] The inclusion of this illustrative example would help to make it clear that the Rule encompasses business opportunities in the form of pyramid schemes. As noted above, the Commission's law enforcement experience shows that these schemes cause significant injury to consumers.

v. Other Advice or Training Assistance

The final illustrative example of ''business assistance'' is ''advising or training, or purporting to advise or train, the purchaser in the promotion, operation, or management of a new business, or providing, or purporting to provide, the purchaser with operational, managerial, technical, or financial guidance in the operation of a new business.'' Our law enforcement experience shows that the promise of such assistance is a key feature of many fraudulent business opportunity ventures, such as vending, rack display scams, and medical billing work-at-home schemes.[107]

The proposed ''business assistance'' definition concludes with an important proviso—that the term ''business assistance'' does not include ''a written product warranty or repair contract, or guidance in the use, maintenance, and/or repair of any product to be sold by the purchaser or of any equipment acquired by the purchaser.'' This proviso is necessary to distinguish ordinary support and warranty commitments that many manufacturers or retailers offer in connection with the sale of their products from the more extensive assistance that characterizes a business opportunity offer. For example, a copier manufacturer may advise customers on how to operate and perform service on a copier machine. Or, a camera retailer may demonstrate routine maintenance on a high-end camera sold to a professional photographer. In both of these instances, the printing business and photographer may well find the promised assistance valuable even if they are already operating established businesses. In addition, this type of assistance is not likely to cause someone contemplating a new business to conclude that he or she is assured of success even if they have no prior business experience. For these reasons, offers of such product-related assistance, without more, do not rise to the level of ''business assistance'' necessary for coverage under the proposed Rule.

d. Proposed Section 437.1(d): ''Business opportunity''

This definition establishes the proposed Rule's scope. The proposed definition of ''business opportunity'' is intended to capture the sale of true business opportunities without regulating the ordinary sale of goods and services to businesses. The three definitional elements of the term ''business opportunity'' are: (1) A solicitation to enter into a new business; (2) payment of consideration, directly or indirectly through a third party; and (3) either an earnings claim or an offer to provide business assistance. Each of these elements is discussed immediately below.

i. Solicitation to Enter Into a New Business

The proposed definition of ''business opportunity'' set forth at section 437.1(d)(1) contemplates that business opportunity sellers will solicit prospective purchasers to enter into new businesses, as opposed to merely soliciting purchasers for goods or services.[108] A business opportunity seller typically advertises the sale of a business, not just goods or services. In contrast, a typical retailer may sell various goods that could be used in a business, and may even recommend that its goods be used in a particular business, but the retailer does not ordinarily promote the business itself.

ii. Consideration

The proposed definition of ''business opportunity'' in section 437.1(d) would apply where the purchaser pays consideration to the seller.[109] ''Consideration'' is to be read broadly to include a monetary payment, share of profits, or a current obligation to make a payment at a future date.[110] The proposed definition also would make clear that consideration can be paid directly to the seller, or indirectly through a third party, such as a broker, lead generator, or locator. This provision is designed to close a potential loophole that would subvert the proposed Rule's anti-fraud protections. Without such a provision, fraudulent business opportunity sellers could circumvent the Rule by requiring payment to a third party with whom the seller has a formal or informal business relationship.[111]

iii. An Earnings Claim or an Offer to Provide Business Assistance

The definition of ''business opportunity'' in section 437.1(d) would specify that either the making of an earnings claim or the promise of business assistance by a seller in connection with an offer to sell a new business will trigger Rule coverage. These elements are discussed in greater detail in the sections immediately below.

1. Earnings Claims

The Commission's law enforcement history demonstrates that the making of earnings claims underlies virtually all fraudulent business opportunity schemes. As detailed above, the Commission to date has brought over 140 cases against a multitude of business opportunities and related schemes, each of which lured

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[106] E.g., *FTC* v. *NexGen3000.com,* No. CIV–03–120 TUC WDB (D. Ariz. 2003); *FTC* v. *Bigsmart.com,* No. CIV 01–0466 PHX ROS (D. Ariz. 2001); *FTC* v. *SkyBiz.com,* No. 01–CV–0396–EA (X) (N.D. Okla. 2001); *FTC* v. *2Xtreme Performance Int'l, LLC,* No. JFM 99CV 3679 (D. Md. 1999); *FTC* v. *FutureNet, Inc.,* No. CV–98–1113 GHK (BQRx) (C.D. Cal. 1998); *FTC* v. *Nia Cano,* No. 97–7947–CAS (AJWx) (C.D. Cal. 1997); *FTC* v. *Global Assistance Network for Charities,* No. 96–2494 PHX RCB (D. Ariz. 1996). *See also, FTC* v. *Am. Safe Mktg.,* No. 1:89–CV–462–RLV (N.D. Ga. 1989).

[107] *E.g., FTC* v. *Inspired Ventures, Inc.,* No. 02–21760–CIV–Jordan (S.D. Fla. 2002); *FTC* v. *Inv. Dev. Inc.,* No. 89–0642 (E.D. La. 1989). *FTC* v. *Home Professions, Inc.,* No. 00–111 (C.D. Cal. 2000); *FTC* v. *Star Publ'g Group, Inc.,* No. 00–023 (D. Wyo. 2000) *FTC* v. *Hi Tech Mint Sys., Inc.,* No. 98 CIV 5881 (JES) (S.D.N.Y. 1998); *FTC* v. *Fresh-O-Matic Corp.,* No. 96–CV–315–CAS (E.D. Mo. 1996) *FTC* v. *Joseph Hayes,* No. 4:96CV06126SNL (E.D. Mo. 1996). *See* Illinois Act, 815 ILCS at § 602/5–5.15 (The seller offers a marketing plan, defined as ''advice or training * * * includ[ing], but not limited to * * * training, regarding the promotion, operation or management of the business opportunity; or operational, managerial, technical, or financial guidelines or assistance.'').

[108] ''New business'' is a term defined at section 437.(1)(k) of the proposed Rule: '' 'new business' means a new business in which the prospective purchaser is not engaged, or a new line or type of business.'' *See* Illinois Act, 815 ILCS at § 5–510(a) (''Business opportunity' means a contract or agreement * * * wherein it is agreed that the seller or a person recommended by the seller shall provide to the purchaser any product, equipment, supplies, or services enabling the purchaser to start a business'').

[109] As discussed below in connection with section 437.7 (exemptions), the proposed Business Opportunity Rule, unlike the Franchise Rule, would not include a minimum required payment exemption.

[110] This is consistent with the broad definition of ''payment'' in the current Franchise Rule. See Interpretive Guides, 44 FR at 49967.

[111] *See* Illinois Act, 815 ILCS at § 602/5–5.10 (a) (''payment to the seller or a person recommended by the seller'').

unsuspecting consumers through false or deceptive earnings representations.[112] These claims have taken the form of purported historical earnings statistics (*e.g.*, ''Our operators have earned $100,000 a year''), as well as wild and unsupported earnings projections (*e.g.*, ''You will earn $100,000 in your first year''). In the Commission's experience, such claims are highly relevant to consumers in making their investment decisions and typically are the single most decisive factor in such decisions.

Some commenters questioned whether the making of an earnings claim alone should be sufficient to bring the sale of a business opportunity within the ambit of the Rule, thereby triggering disclosure and other obligations. Pointing to various state business opportunity laws, these commenters contended that the disclosure and other requirements of the proposed Rule should be triggered only if either: (1) The seller guarantees a level of earnings; or (2) the seller represents that the purchaser will earn at least as much as his or her investment.[113]

Given the prevalence of earnings claims in business opportunity sales, the Commission believes that a broad earnings disclosure requirement is necessary to prevent fraud. Limiting the Rule's coverage to scenarios in which a seller either makes an express earnings guarantee or represents that the purchaser will recoup his or her investment would effectively clear the way for fraudulent sellers to make other types of earnings claims to deceive prospects. We see little difference, for example, between a seller representing that ''our purchasers earn $10,000 a month'' and ''we guarantee you $10,000 a month.'' In both instances, prospective purchasers are likely to give the claim significant weight in making their investment decision.[114]

2. An Offer of Business Assistance

Proposed section 437.1(d) brings within the scope of the Rule's coverage those business opportunity sellers that do not make earnings claims, but offer business assistance. As one business opportunity representative put it: ''[Purchasers are] buying the seller's expertise to an extent. * * * The [sellers] know how to do it and that's why [purchasers are] paying a premium.'' Catalano, 20Nov97 Tr at 37.[115] At the same time, the ''business assistance'' prong of the definition helps to distinguish the sale of a business opportunity from the ordinary sale of goods or services: The proposed definition of ''business assistance'' is limited to only those situations involving ''the establishment or operation of a new business.'' Assistance provided by a seller in connection with the sale of off-the-shelf goods, for example, would be excluded. The proposed definition of ''business assistance,'' therefore, expressly states that '' 'business assistance' does not include a written product warranty or repair contract, or guidance in the use, maintenance, and/or repair of any product to be sold by the purchaser or of any equipment acquired by the purchaser.''

e. Proposed Section 437.1(e): ''Cancellation or Refund Request''

Section 437.3(a)(5) uses the term ''cancellation or refund request.'' It would require a business opportunity seller to disclose the number of cancellation or refund requests received in the last two years.[116] As explained more fully below, this provision would enable the prospective purchaser to assess previous buyers' satisfaction with the business opportunity purchase. In that regard, it is analogous to the Franchise Rule's disclosure of terminations, cancellations, and non-renewals.[117] Proposed section 437.1(e) would define ''cancellation or refund request'' broadly to mean ''any request to cancel or rescind a business opportunity purchase, or any request to seek a refund, in whole or in part, for a business opportunity purchase, whether or not the purchaser has a contractual right to cancel, rescind, or seek a refund.''

f. Proposed Section 437.1(f): ''Designated Person''

The term ''designated person'' appears in section 437.1(d)(3)(ii), the business assistance element of the proposed ''business opportunity'' definition. That section specifies that offered business assistance underlying a business opportunity solicitation need not be provided to a purchaser directly by the seller. Rather, a seller who represents that business assistance may or will be provided by a third party, such as a locator or supplier, will still be covered by the Rule and subject to its disclosure requirements and prohibitions.[118] Proposed section 437.1(d)(3)(ii) uses the term ''designated person'' as a convenient way to refer to any third parties who would provide business assistance to a business opportunity purchaser. Section 437.1(f) would define the term ''designated person'' to mean ''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, including, but not limited to, any person who finds or purports to find locations for equipment.''

The definition of ''designated person'' and the use of this defined term in setting the scope of what constitutes a ''business opportunity'' are designed to close a potential loophole. For example, a fraudulent vending machine route seller would not be able to circumvent the Rule by representing to a prospective purchaser that a specific locator will place machines for the purchaser, because that would qualify as ''business assistance,'' bringing the transaction within the ambit of the Rule. Similarly, a fraudulent rack display seller could not evade Rule coverage by simply recommending that a prospective purchaser use a particular rack supplier. The recommendation itself would be sufficient to constitute ''business assistance'' under the Rule.

g. Proposed Section 437.1(g): ''Disclose or State''

Proposed section 437.1(g) would define the terms ''disclose'' and ''state''

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[112] *See* Section D above, discussing the scope of the proposed Rule. *See also* Franchise Rule SBP, 43 FR at 59630–632; 59684–689.

[113] *E.g.*, Wieczorek, 20Nov97 Tr at 32–33; Cantone, *id.* at 33; Catalano; *id.* at 34. *See* Illinois Act, 815 ILCS at § 602/5–5.10(a)(4) (''The seller guarantees that the purchaser will derive income from the business which exceeds the price paid to the seller.''); CA SAMP, Cal. Civ. Code, at § 1812.201(a)(1) (''represented that the purchaser will earn, is likely to earn, or can earn an amount in excess of the initial payment paid by the purchaser for participation in the seller assisted marketing plan'').

[114] *See* Grant, 20Nov97 Tr at 40–41 (''I'm concerned that using the word guarantee would be too limiting, that it would actually prevent the FTC going after companies that we are all concerned about for maybe not using the word guaranteeing but in their representations virtually guaranteeing through a variety of implications a level or range that the person can expect.'').

[115] *See also* Christopher, 20Nov97 Tr at 68; Grant, *id.* at 69.

[116] Like other provisions of the proposed Rule, this provision would be subject to the Rule's quarterly updating requirement set forth at proposed section 437.3(b). For example, a seller offering business opportunities on November 5, 2006, would disclose the data for the period October 1, 2004 through October 1, 2006, the last eight quarters before the date of disclosure. *See also* proposed section 437.1(p) (defining the term ''quarterly'' to mean January 1, April 1, July 1, and October 1).

[117] *See* 16 CFR at 436.1(a)(16).

[118] This approach is consistent with the current Franchise Rule's analogous definitional elements, extending the scope of that rule's coverage to reach transactions in which the franchisor provides to the franchisee the services of a person able to secure the retail outlets, accounts, sites, or locations. 16 CFR at 436.2(a)(1)(ii)(B)(3). *See also, e.g.*, Illinois Act, 815 ILCS at § 602/5–5.10(a)(1) (''The seller or a person recommended by the seller will provide or assist the purchaser in finding locations.'').

to mean ''to give information in writing that is clear and conspicuous, accurate, concise, and legible.''[119] This ensures that a prospective purchaser will receive complete information in a form that can easily be read. For example, the furnishing of a disclosure document without punctuation or appropriate spacing between words would not be ''clear.'' Similarly, required information such as the number and percentage of prior purchasers obtaining a represented level of earnings would not be ''conspicuous'' if set in small type, printed in a low-contrast ink, or buried amid extraneous information.

h. Proposed Section 437.1(h): ''Earnings Claim''

Proposed section 437.1(h) would define the term ''earnings claim'' as ''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.''[120] It is intended to cover all variations of earnings representations that the Commission's law enforcement experience shows are associated with business opportunity fraud.

The definition also provides examples of communications that constitute earnings claims. The first of these examples is taken from the UFOC Guidelines' description of common types of potentially fraudulent earnings claims: ''a chart, table, or mathematical calculation that demonstrates possible results based upon a combination of variables.'' UFOC Guidelines, Item 19, at i.[121] This is intended to clarify that sales matrixes that purport to show income from an array of ''vends'' per day from a vending machine, for example, would constitute an ''earnings claim'' under the proposed Rule.[122]

The second example incorporates the principle, as expressed in the Interpretive Guides to the Franchise Rule, that ''any statements from which a prospective purchaser can reasonably infer that he or she will earn a minimum level of income'' constitutes an earnings claims. Such implied claims are at least as likely to mislead prospective purchasers as express claims. The proposed definition includes three specific examples illustrative of this type of earnings claim, as follows: ''earn enough to buy a Porsche,'' ''earn a six-figure income,'' and ''earn your investment back within one year.''[123] Each of these three illustrative examples imply a minimum value—the cost of the lowest priced Porsche in the first example, at least $100,000 in the second, and an amount equal to the purchaser's initial investment in the third.[124] Accordingly, the proposed language makes it clear that these types of representations are indistinguishable from direct, express earnings claims.

i. Proposed Section 437.1(i): ''Exclusive Territory''

As discussed below, proposed section 437.5(n) would prohibit misrepresentations concerning exclusive territories. Representations about exclusive territories are material because they purport to assure a purchaser that he or she will not face competition from other business opportunity purchasers of the same type in his or her chosen location, or from the seller offering the same goods or services through alternative channels of distribution. Exclusive territory promises go to the viability of the business opportunity and to the level of risk entailed in the purchase. Indeed, misrepresented territories are commonly made by business opportunity sellers to lure consumers into believing that the offer poses little financial risk.[125]

Proposed section 437.1(i) would define an exclusive territory as follows: 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.

Thus, the definition of ''exclusive territory'' would reflect the common industry practice of establishing geographically delimited territories—such as a city, county, or state borders—as well as other marketing areas, such as those delineated by population.[126] It includes both representations that other business opportunity purchasers will not be allowed to compete with a new purchaser within the territory, as well as representations that the business opportunity seller itself or other purchasers will not compete with the new purchaser through alternative means of distribution, such as through Internet sales. It also includes implied marketing areas, such as representations that the seller or other operators will not compete with the purchaser, without delineating a specific territory, or stating a vague or undefined territory, such as ''in the metropolitan area,'' or ''in this region.'' If false, any of these kinds of representations can mislead a prospect about the likelihood of his or her success.

j. Proposed Section 437.1(j): ''General Media''

The term ''general media'' appears in proposed section 437.4(b), which prohibits business opportunity sellers from making unsubstantiated earnings claims in the ''general media.''[127] Proposed section 437.1(j) would define the term ''general media'' as follows: ''any instrumentality through which a person may communicate with the public, including, but not limited to, television, radio, print, Internet, billboard, Web site, and commercial bulk e-mail.''[128] Thus, the definition includes traditional advertising media, such as television, radio, and newspapers, as well as new technologies such as the Internet (both standard advertisements and pop-up window ads), and Web sites.[129] It also includes commercial bulk e-mail messages that are unsolicited, and often sent to individuals who have not previously expressed an interest in receiving an e-mail from the particular business opportunity seller.[130]

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[119] The Franchise Rule contains a comparable provision, 16 CFR at 436.1(a), as do the UFOC Guidelines. UFOC Guidelines, General Instruction 150.

[120] *See* UFOC Guidelines, Item 19.

[121] *See also* Staff Advisory Opinion, Handy Hardware Centers, Bus. Franchise Guide (CCH) ;¶ 6426 (1980).

[122] *E.g., FTC* v. *Inspired Ventures, Inc.*, No. 02–21760–CIV–Jordan (S.D. Fla. 2002); *FTC* v. *Inv. Dev. Inc.*, No. 89–0642 (E.D. La. 1989).

[123] *See* Interpretive Guides, 44 FR at 49967.

[124] *See* Interpretive Guides, 44 FR at 59685 n. 486.

[125] *See* Staff Program Review, *supra* note 39, at 39, 57. *E.g., FTC* v. *Vendors Fin. Serv., Inc.*, No. 98–1832 (D. Colo. 1998); *FTC* v. *Int'l Computer Concepts, Inc.*, No. 1:94CV1678 (N.D. Ohio 1994); *FTC* v. *O'Rourke*, No. 93–6511–CIV–Ferguson (S.D. Fla. 1993); *FTC* v. *Am. Safe Mktg.*, No. 1:89–CV–462–RLV (N.D. Ga. 1989).

[126] *See* UFOC Guidelines, Item 12 Instructions, ii.

[127] This proposed provision is based on an analogous provision in the current Franchise Rule. 16 CFR at 436.1(e). The Commission has alleged violations of this provision in numerous cases, for example: *FTC* v. *Wealth Sys., Inc.*, No. CV 05 0394 PHX JAT (D. Ariz. 2005); *U.S.* v. *Am. Coin-Op Servs., Inc.*, No. 00–0125 (N.D.N.Y. 2000); *U.S.* v. *Cigar Factory Outlet, Inc.*, No. 00–6209–CIV–Graham-Turnoff (S.D. Fla. 2000); *U.S.* v. *Emily Water & Beverage Co., Inc.*, No. 4–00–00131 (W.D. Mo. 2000); and *U.S.* v. *Greeting Card Depot, Inc.*, No. 00–6212–CIV–Gold (S.D. Fla. 2000).

[128] *See* Interpretative Guides, 44 FR at 49984–85 (earnings claims made ''for general dissemination'' includes ''claims made in advertising (radio, television, magazines, newspapers, billboards, etc.), as well as those contained in speeches or press releases.'' We also note that the Interpretive Guides recognize several exemptions to the general media claim, such as claims made to the press in connection with bona fide news stories, as well as claims made directly to lending institutions. *Id.* We propose that future Compliance Guides to the new Business Opportunity Rule retain these standard general media claims exemptions.

[129] *E.g., FTC* v. *Am. Entm't Distribs., Inc.*, No. 04–22431–CIV–Martinez (S.D. Fla. 2004) (challenging earnings claims posted on seller's Web site).

[130] *See* Informal Staff Advisory 04–2, Bus. Franchise Guides (CCH) ¶ 6522 (2004).

k. Proposed Section 437.1(k): ''New Business''

The term ''new business'' appears in section 437.1(d), setting forth the definitional elements of the term ''business opportunity.'' As noted above, the proposed ''business opportunity'' definition includes a ''solicitation to enter into a new business'' prong in order to distinguish the sale of a business opportunity from the ordinary sale of products and services. Section 437.1(k) would define the term ''new business'' to mean ''a business in which the prospective purchaser is not currently engaged, or a new line or type of business.'' Thus, the definition covers not only the establishment of a new business, but also entry into a new ''line or type of business.'' The intention in including the latter language is to cover sales of business opportunities to persons who may already be in a business. It is reasonable to assume that an existing businessperson could be defrauded like any other consumer when expanding his or her business to include new products or services not currently offered for sale. For example, an existing tire business could purchase a vending machines route, or a beverage vending machine route owner could purchase an envelope stuffing opportunity.[131] In such instances, the veteran businessperson may need the proposed Rule's protections as much as a novice.

l. Proposed Section 437.1(l): ''Person''

Proposed section 437.1(l) would define the term ''person,'' a term used in many of the proposed Rule's definitional or substantive provisions.[132] As in the current Franchise Rule, the term would include: ''an individual, group, association, limited or general partnership, corporation, or any other entity.''[133] Accordingly, the term ''person'' is to be read broadly to refer to both natural persons, businesses, associations, and other entities. Where the proposed Rule refers to a natural person only, it uses the term ''individual.''

m. Proposed Section 437.1(m): ''Prior Business''

As discussed below, section 437.3(a)(3) of the proposed Rule would require business opportunity sellers to disclose litigation in which they have been involved, in whole or in part, as well as that in which any of their affiliates or any prior businesses have been involved. Proposed section 437.1(m) defines ''prior business'' as

(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, by any of the seller's officers, directors, sales managers, or by any other individual who occupies a position or performs a function similar to that of an officer, director, or sales manager of the seller.

Thus, the definition is broader than the definition of ''predecessor'' found in the UFOC Guidelines, for example, which covers only an entity from whom a seller acquired, directly or indirectly, the major portion of the seller's assets.[134] It includes instances where the seller owned or operated companies that ceased operations. This broader definition is necessary to eliminate a potential loophole that would exist under a more restrictive definition. The Commission's law enforcement experience shows that sellers of fraudulent business opportunities frequently ply their trade through multiple companies simultaneously or sequentially, disappearing in order to avoid detection, and then reemerging in some new form or different part of the country under new names. Accordingly, the broader ''prior business'' is needed to capture all of a seller's operations that might fall outside a narrower term like ''predecessor.''[135]

n. Proposed Section 437.1(n): ''Providing Locations, Outlets, Accounts, or Customers''

As noted above, one of the hallmarks of fraudulent business opportunities is the offer to find locations, outlets, or accounts for prospective purchasers. The seller itself may purport to secure locations, or may represent that third parties will do so for the business opportunity purchaser.[136] Proposed section 437.1(n) would make clear that ''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; collecting a fee on behalf of one or more locators or lead generating companies; or training or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers.

Accordingly, ''providing locations,'' for example, includes both an offer to provide locations that have already been found, as well as an offer to furnish a list of potential locations. It includes not only directly furnishing locations, but also recommending to a prospective purchaser specific locators, providing a list of locators who will furnish the locations, and training or otherwise assisting prospects in finding their own locations.[137] The Commission's law enforcement history shows that in either case, misrepresentations of this nature are particularly potent fraudulent devices to which prospective purchasers are susceptible because of their reliance on the seller's expertise in making their investment decision.[138]

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[131] One commenter questioned whether the Rule should cover existing businesses that seek to expand into new lines of business. Caffey, 20Nov97 Tr at 25–27. In his view, experienced businesses may not need full disclosure, noting that the Commission recognized this point in including a fractional franchise exemption in the Franchise Rule. Id. We disagree. As a preliminary matter, we note that the current Franchise Rule's fractional franchise exemption is very narrow, covering instances where the purchaser has been in the same type of business for more than two years and the parties anticipate sales arising from the relationship will represent no more than 20% of total sales. 16 CFR at 436.2(a)(3)(i) and (h). The fractional franchise exemption's prior experience prerequisite recognizes the fact that, because a businessperson may be experienced in one sector—such as snack vending—does not necessarily mean that he or she is experienced enough to understand the potential for success and the risk of loss in another line of business, such as a greeting card rack display or envelope stuffing. Moreover, we are inclined to believe that a ''fractional'' exemption is unnecessary in the business opportunity context, given the greatly streamlined disclosure document contemplated by the proposed Rule, since the benefits of disclosure would outweigh the minimal compliance costs.

[132] *E.g.*, sections 437.1(o); 437.5(p).

[133] *See* 16 CFR at 436.2(b).

[134] *See* UFOC Guidelines, Item 1 Instructions, iii.

[135] *E.g., FTC* v. *Joseph Hayes*, No. 4:96CV06126 SNL (E.D. Mo. 1996); *FTC* v. *O'Rourke*, No. 93–6511–CIV–Ferguson (S.D. Fla. 1993); *FTC* v. *Inv. Dev. Inc.*, No. 89–0642 (E.D. La. 1989).

[136] *See, e.g., FTC* v. *Showcase Distribs., Inc.*, No. 95–1368–PHX–SMM (D. Ariz. 1995) (location assistance found where investor introduced to a third party to secure locations or sites or provided with a list of such persons); *FTC* v. *Jordan Ashley, Inc.*, No. 93–2257–CIV–Nesbitt (S.D. Fla. 1994) (locations assistance found where purchasers referred to a professional locator); *U.S.* v. *Hill*, No. IP–154–CR (S.D. Inc. 1991) (location assistance found, in contempt action, where the promoter permitted investors to find their own locations or engaged the services of independent locating companies, but introduced investors to one or two ''favored'' locators). *See also FTC* v. *World Traders Ass'n, Inc.*, No. CV05 0591 AHM (CTx) (C.D. Cal. 2005) (assistance in finding businesses to purchase surplus goods).

[137] The scope of this definition is consistent with the parallel scope of ''location assistance'' required for business opportunity coverage by the Franchise Rule. *See* Staff Advisory Opinion 95–10, Bus. Franchise Guide (CC) ¶ 6475 (1995).

[138] *See, e.g., FTC* v. *Greeting Cards of Am., Inc.*, No. 03–60745–CIV–Gold (S.D. Fla. 2003); *FTC* v. *Home Professions, Inc.*, No. 00–111 (C.D. Cal. 2000); *FTC* v. *Hart Mktg. Enter. Ltd., Inc.*, No. 98–222–CIV–T–23 E (M.D. Fla. 1998); *FTC* v. *Hi Tech Mint Sys., Inc.*, No. 98 CIV 5881 (JES) (S.D.N.Y. 1998); *FTC* v. *Fresh-O-Matic Corp.*, No. 96–CV–315–CAS (E.D. Mo. 1996).

o. Proposed Section 437.1(o): ''Purchaser''

Proposed section 437.1(o) would define the term ''purchaser'' to mean ''a person who buys a business opportunity.'' By operation of the definition of ''person'' in section 437.1(l), a natural person, as well as any of various entities, would qualify as a business opportunity purchaser.[139]

p. Proposed Section 437.1(p): ''Quarterly''

To ensure accuracy and reliability of disclosures, proposed section 437.3(b) would require sellers to revise their disclosures at least ''quarterly.'' [140] Proposed section 437.1(p) would set forth a bright line rule that is easy to follow and that would ensure uniformity of disclosures: ''quarterly'' means ''as of January 1, April 1, July 1, and October 1.'' Thus, the proposed Rule would require sellers to update their disclosure by those specific dates each year.

q. Proposed Section 437.1(q): ''Seller''

Proposed section 437.1(q) defines the term ''seller'' to mean: ''a person who offers for sale or sells a business opportunity.'' Like the ''purchaser'' definition, it contemplates that both natural persons and entities may be business opportunity sellers.

r. Proposed Section 437.1(r): ''Written'' or ''In Writing''

Proposed section 437.1(r) would define the terms ''written'' or ''in writing,'' which are used throughout the proposed Rule.[141] The terms are defined to include type-set, word processed, printed, handwritten, and faxed documents. The definition also would include new technologies, such as information stored in computer disks or CD–ROMs, as well as information sent via email or posted on the Internet.[142] Nevertheless, the definition seeks a balance, minimizing compliance costs while preventing fraud. To that end, the definition would make clear that all electronic media must be in a form ''capable of being downloaded, printed, or otherwise preserved in tangible form and read,'' thus ensuring that a prospective purchaser who receives disclosures electronically can read them, share them with an advisor, and retain them for future use.

2. Proposed Section 437.2: The Obligation To Furnish Written Documents

Proposed section 437.2 would set forth the Rule's basic disclosure obligation. It would specify that it is a violation of the Rule and section 5 of the FTC Act for a seller to fail to furnish a prospective business opportunity purchaser with a complete and accurate basic disclosure document containing particular items of material information (section 437.3(a)) and, where applicable, an earnings claim statement (section 437.4(a)). The provision requires that these disclosures must be provided to prospective purchasers ''at least seven calendar days before the earlier of the time that the prospective purchaser: (1) Signs any contract in connection with the business opportunity sale; or (2) makes a payment or provides other consideration to the seller, directly or indirectly through a third party.'' These two requirements are discussed immediately below.

a. ''Seven Calendar Days''

The proposed seven calendar-day timing period is modeled on the current Franchise Rule requirement that franchisors furnish prospective purchasers with a completed copy of the franchise agreement at least five business days (which typically works out to be seven calendar days), before the agreement is executed.[143] The Commission believes that seven calendar days is sufficient to enable a prospective purchaser to review the basic disclosure document and any earnings claims statement, as well as conduct a due diligence review of the offering, including contacting references. Nevertheless, the Commission recognizes that for business opportunity sales—as opposed to more complex franchise sales—a shorter period may be warranted. Accordingly, the Commission solicits comment on whether it should adopt a shorter time period.

b. Signing a Contract or Making a Payment as the Trigger for the Disclosure Obligation

Proposed section 437.2 would set forth two events before which the seller must furnish disclosures: The execution of any contract in connection with the business opportunity sale, or the payment of any consideration.[144] This provision ensures a uniform standard for determining when sellers must furnish disclosures, while ensuring sufficient time for prospective purchasers to review the sellers' disclosures before putting money at risk. To prevent circumvention of this requirement, section 437.2 clarifies that payment to the seller can be made either directly to the seller or indirectly through a third party, such as a broker or locator.[145]

3. Proposed Section 437.3: The Basic Disclosure Document

Proposed section 437.3 specifies the items of material information that must be included in the basic disclosure document. As an initial matter, we note that the proposed Rule specifies that only sellers of business opportunities have an obligation to prepare and furnish a basic disclosure document. Other persons involved in the sale of a business opportunity—such as brokers, locators, or suppliers—would have no obligation to prepare basic disclosure documents or to furnish such documents. The ultimate responsibility to ensure that disclosures are accurately prepared and disseminated would rest with the seller.[146]

Proposed § 437.3(a) would provide instructions for preparing the basic disclosure document. Specifically, sellers must present the information in ''a single written document in the form and using the language set forth in Appendix A to part 437''. The single written document requirement is necessary to ensure that disclosures are not furnished in piecemeal fashion that can easily be overlooked or lost. It

[139] *See* 16 CFR at 436.2(b).

[140] *See* 16 CFR at 436.1(a)(22).

[141] *E.g*, sections 437.2, 437.3(a), 437.4(a).

[142] *Cf.* Franchise Rule NPR, 64 FR at 57333. This proposal would effectively permit business opportunity sellers to comply with the proposed Rule electronically, consistent with the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001.

[143] 16 CFR 436.1(g). *See* NASAA, ANPR 120, at 4 (advocating 10 business days); Wieczorek, 21Aug97 Tr at 113–14 (suggesting a seven-day or 10 calendar-day waiting period). *But see* Caffey, ANPR 94, at 2 (opposing any waiting period).

[144] This is similar to the comparable Franchise Rule provision. 16 CFR at 436.1(a) and 436.2(g).

[145] This proposal is narrower than the original Franchise Rule approach. Under the original Franchise Rule, a franchisor must furnish a disclosure document before the signing of a contract or ''the payment by a prospective franchisee, about which the franchisor, franchise broker, or any agent, representative, or employee thereof, knows or should know, of any consideration in connection with the sale or proposed sale of a franchise.'' 16 CFR at 436.2(g). Accordingly, a franchisor must furnish the disclosures if it knows or should know that a prospective franchisee is going to pay for required equipment from a third party. *See* Interpretive Guides, 44 FR 49970. To reduce compliance burdens, the proposed Business Opportunity Rule, in contrast, would provide that a seller must provide required disclosure seven calendar days before it actually receives consideration, directly or indirectly from a third party.

[146] *See* Wieczorek, 20Nov97 Tr at 13. This is the same approach staff has recommended with respect to the Franchise Rule. See Staff Report on the Proposed Revised FTC Franchise Rule, at 85 (Aug. 25, 2004) (''Franchise Rule Staff Report'') (available at *http://www.ftc.gov/os/2004/08/0408franchiserulerpt.pdf.*

would also prevent a seller from circumventing the Rule by presenting damaging information in a format that is not sufficiently prominent to be noticed and understood, or not readily accessible.[147] By specifying that the basic disclosure document be ''in the form and using the language set forth in Appendix A,'' the Commission intends to make clear that all of the standard disclosures and other wording shown in Appendix A are to be followed without deviation. Failure to follow Appendix A's form and language would violate the Rule.

Appendix A to part 437 would set forth the required format and language of the disclosure document. It consists of a single page and certain attachments that in some instances may be necessary. Specifically, Appendix A prescribes required introductory identifying information, a standard preamble, and five substantive disclosures: (1) Earnings claims; (2) legal actions; (3) cancellation or refund policy; (4) cancellation or refund request history; and (5) references. Three of these disclosure items—earnings claims, legal actions, and cancellation or refund policy—take the form of a ''yes'' or ''no'' check box on the disclosure document. Finally, the seller must include a copy of the basic disclosure document to be signed by the prospect as a receipt. Each of these elements of the required disclosure document is explained in greater detail below.

a. Identifying Information

The basic disclosure document would begin with identifying information about the seller.[148] Proposed section 437.3(a)(1) would specify that the seller must include the seller's name, business address, telephone number, the name of the salesperson offering the opportunity,[149] and the date. This background information is material because it would enable a prospective purchaser to contact the seller and any salesperson for additional information, while providing a written record of who provided the required disclosures and when for law enforcement purposes.

b. Preamble

After the identifying information, the basic disclosure document would prescribe a preamble that briefly explains the purpose and limitations of the disclosures to prospective purchasers. Specifically, the preamble would state that the information contained in the disclosure document ''can help you in deciding whether to purchase a business opportunity.'' At the same time, it cautions that ''no governmental agency has verified the information.'' [150] It also advises prospects to seek more information from the FTC by calling the FTC or visiting the FTC's Web site.[151] It also advises prospects to check for information about additional state law requirements with their state's attorney general office.

c. ''Yes'' or ''No'' Disclosure Items

As noted above, the basic disclosure document would instruct the seller to check a box providing ''yes'' or ''no'' as to whether it: (1) Makes earnings claims; (2) has been the subject of legal actions; and (3) offers cancellation or refund rights.

i. Proposed Section 437.3(a)(2): Earnings Claims

Proposed section 437.3(a)(2) would address earnings claims. As discussed further below in connection with section 437.4, the Rule would permit sellers to make an earnings claim, provided there is a reasonable basis for the claim and the seller can substantiate the claim at the time it is made.[152] If the seller makes no earnings claim, then section 437.3(a)(2) would direct the seller simply to check the ''no'' box. If the seller does make an earnings claim, however, then the Rule would require the seller to check the ''yes'' box and to furnish the prospective purchaser with an earnings claim statement attached to the basic disclosure document.[153]

ii. Proposed Section 437.3(a)(3): Legal Actions

Proposed section 437.3(a)(3) would address fraud in the sale of business opportunities by requiring the disclosure of material information about certain prior legal actions.[154] Specifically, if the seller or certain persons associated with the seller have been the subject of specific types of actions within the last 10 years, the seller would be required to check the ''yes'' box. The types of actions covered by this provision include ''any civil or criminal actions for misrepresentation, fraud, securities law violations, or unfair or deceptive practices.'' Knowledge of actions of this nature against the seller or other persons associated with the seller would obviously affect a prospective purchaser's decision to go forward with the transaction. Moreover, the obligation to disclose these actions is not narrowly confined to the seller in its specific current corporate identity. It extends to any ''affiliate or prior business of the seller,'' 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,'' as well as any of the seller's ''employees who are involved in business opportunity sales activities.'' If there are no actions to disclose, the seller would simply check the ''no'' box.

Disclosure of actions against ''any affiliate or prior business of the seller'' is necessary to prevent circumvention of the Rule. The Commission's law enforcement experience amply demonstrates that fraudulent business opportunity sellers often operate through multiple related affiliates, or use, sequentially or simultaneously, a variety of corporate identities in order to

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[147] *See* 16 CFR at 436.1(a)(21).

[148] *See* 16 CFR at 436.1(a)(1) (requiring the disclosure of the official name and address of the principal place of business of the franchisor); UFOC Guidelines, Cover Page, at 2; Item 1. The Commission has long recognized the materiality of a business opportunity seller's background information. For example, in the Franchise Rule SBP, the Commission concluded that:

> The failure to disclose such material information * * * may mislead the [prospect] as to the business experience of the parties with whom he or she is dealing and * * * could easily result in economic injury to the [prospect] because of the * * * dependence upon the business experience and expertise of the [business opportunity seller].

43 FR at 59642. Other Commission trade regulation rules similarly require identity disclosures. *E.g.,* Wool Products Labeling Rule, 16 CFR at 300.14 (recognizing that names on a label may mislead consumers about the actual manufacturer); Fur Products Labeling Rule, 16 CFR at 301.43 (recognizing that corporate name may mislead consumers about the character of the product).

[149] *See* D'Imperio, Sept95 Tr at 278 (asserting that disclosure of salesperson is an imperative disclosure).

[150] This is very similar to the current Franchise Rule approach. *See* 16 CFR at 436.1(a)(21).

[151] The reference to the FTC Web site will further reduce fraud by giving prospects access to a wealth of information about business opportunities, including news releases on individual cases and joint enforcement sweeps, consumer education materials, and Commission reports.

[152] This is consistent with analogous provisions in the Franchise Rule, 16 CFR 436.1(b), (c), and (e), as well as the UFOC Guidelines, Item 19.

[153] Business opportunity sellers must also make the following prescribed cautionary statement in close proximity to the ''yes'' or ''no'' check boxes: ''*Read this statement carefully. You may wish to show this information to an advisor or accountant.*'' Obviously, this statement would not apply when a seller checks the ''no'' box.

[154] This provision is based upon analogous provisions of the original Franchise Rule, 16 CFR 436.1(a)(4), and UFOC Guidelines, UFOC Item 3. In connection with the Franchise Rule, the Commission stated in the Franchise Rule SBP that litigation history is material because it bears on the ''integrity and financial standing of the [seller].'' 43 FR at 59649. *E.g., FTC* v. *Joseph Hayes,* No. 4:96CV02162SNL (E.D. Mo. 1996) (full disclosure would have revealed prior state fines and injunctions); *FTC* v. *Inv. Dev. Inc.,* No. 89–0642 (E.D. La. 1989) (full disclosure would have revealed arson and insurance fraud convictions).

avoid detection.[155] The requirement to disclose legal actions against affiliates or prior businesses is designed to thwart such attempts to skirt the Rule.

The obligation to disclose prior legal actions reaches ''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'' [156] to ensure that key officers and sales personnel with prior litigation against them cannot evade the Rule by merely foregoing a formal title. It is the function such individuals perform, not a title, that triggers the proposed Rule's disclosure obligation. In the Commission's experience, there is often little correlation between titles and functions performed in business opportunity scams. Business opportunity sellers often operate as a ''d/b/a.'' [157] Even when a seller operates through a corporation, there often is no compliance with corporate formalities, or other separations of the entity from its owners, and any of the individuals involved in such operations may go on to operate multiple frauds in a variety of corporate formats.[158] Accordingly, any person who acts as a corporate director, officer, or sales manager would be deemed to fall within the ambit of the lawsuit disclosure requirement, whether or not he or she has a formal corporate title.

The section 437.3(a)(3) litigation disclosure would also extend to the ''seller's employees who are involved in business opportunity sales activities.'' [159] The Commission's law enforcement experience shows that sales employees, like officers, often make material misrepresentations to induce prospects to purchase a business opportunity.[160] To enable a prospective purchaser to evaluate better such salesperson's statements, the Rule would require a business opportunity seller to disclose certain information about sales personnel's prior adverse legal history.

The seller, however, would have no obligation to disclose litigation against other employees—secretarial, clerical, and accounting staff, for example. Indeed, because a prospective purchaser typically does not rely on these individuals' expertise, and does not expect these individuals to perform under the business opportunity agreement, any litigation in which they may have been involved is largely immaterial to the business opportunity sale.

To minimize compliance costs, only criminal proceedings or civil actions involving ''misrepresentation, fraud, securities law violations, or unfair or deceptive practices'' would be disclosed.[161] As previously noted in the discussion of the term ''action,'' disclosure of such actions is required regardless of whether the claim is brought in a court or administrative action or arbitration proceeding, and whether it is brought by a private party or a governmental agency.[162] The Commission believes that these types of actions are the most relevant in addressing business opportunity fraud.[163]

To minimize compliance costs further, the proposed Rule would not require sellers to detail the nature of each legal action, as in the Franchise Rule.[164] If the seller has litigation to disclose, it need only state in an attachment to the disclosure document the full caption of each legal matter (names of the principal parties, case number, full name of court, and filing date). We note that the disclosure document itself instructs prospects that the legal matters disclosed pertain to ''misrepresentation, fraud, securities law violation, or unfair or deceptive practices.'' This will provide the prospect with a basic understanding of the subject matter of the action. Armed with the full caption, a prospective purchaser can seek additional information if he or she so chooses.[165]

iii. Proposed Section 437.3(a)(4): Cancellation or Refund Policy

Proposed section 437.3(a)(4) would require sellers to disclose all terms and conditions of any cancellation or refund policy.[166] This pertains to a common practice among business opportunity sellers, namely, offering prospective purchasers the right to cancel or to seek a whole or partial refund.[167] Such

[155] *See* discussion of section 437.1(m) (''prior business'') above.

[156] The original Franchise Rule and UFOC Guidelines have comparable disclosure requirements. *See* 16 CFR at 436.1(a)(2) and (3) (directors, executives, including the chief executive and chief operating officer, financial, franchise marketing, training and service officers); UFOC Guidelines, Items 2 and 3 (affiliates offering franchises under the franchisor's principal trademark, directors, trustees and/or general partners, the principal officers, and other executives or subfranchisors who will have management responsibility relating to the offered franchises). Cf. Franchise Rule Staff Report, supra note 146, at 101 (recommending that a franchisor identify all individuals who control the franchisor, regardless of any formal title).

[157] *E.g., FTC* v. *Am. Universal Vending Corp.,* No. 00–0155 (W.D.N.Y. 2000); *FTC* v. *Data Med. Capital, Inc.,* No. SACV–99–1266 (C.D. Cal. 1999).

[158] *E.g., FTC* v. *Tashman,* 318 F.3d 1275 (11th Cir. 2003); *FTC* v. *Inv. Dev. Inc.,* No. 89–0642 (E.D. La. 1989).

[159] *See* D'Imperio, Sept95 Tr at 278 (asserting that salesperson litigation is a critical disclosure).

[160] *E.g., FTC* v. *Universal Greeting Card Corp.,* No. 02–21753–CIV–Jordan (S.D. Fla. 2002); *FTC* v. *Raymond Urso,* No. 97–2680–CIV–Ungaro–Benages (S.D. Fla. 1997). *See also FTC* v. *America's Shopping Network, Inc.,* No. 02–80540–CIV–Hurley (S.D. Fla. 2002).

[161] This is narrower than the range of actions that must be disclosed under the Franchise Rule. *See* 16 CFR at 436.1(a)(4) (legal actions that must be disclosed include embezzlement, fraudulent conversion, misappropriation of property, and actions filed by franchisees involving the franchise relationship). *See also* UFOC Guidelines, Item 3 (franchise, antitrust, or securities law, fraud, unfair or deceptive practices, or comparable allegations). One commenter suggested that the enumerated list of legal actions that must be disclosed in the Franchise Rule context may be unwarranted for business opportunities. We agree. *See* Wieczorek, 21Aug97 Tr at 124 (suggesting that disclosure of embezzlement, fraudulent conversion, and restraint of trade litigation for business opportunities may go too far).

[162] The proposed disclosure of legal actions is broader than the comparable disclosure under the Franchise Rule in one respect. The proposed Rule contemplates that a business opportunity seller must disclose prior suits even if the seller prevailed. In contrast, franchisors need not disclose isolated instances of suits in which they prevailed if such suits are not material. *See* 16 CFR at 436.1(a)(4)(ii) (only material individual civil actions need be listed). With respect to business opportunities, the filing of a suit for fraud or misrepresentation, for example, is likely to indicate discontent with the business opportunity seller, which is a material fact needed for a prospective purchaser to assess the quality of the relationship between the seller and prior purchasers. In that regard, it is comparable to the disclosure of requests for cancellation or refund, even if the sales agreement contemplates no cancellations or refunds, addressed below. *See also* 16 CFR at 436.1(a)(4)(ii) (requiring disclosure of ''any group of civil actions which, irrespective of the materiality of any single such action, in the aggregate is material'').

[163] *See* Finnigan, 21Aug97 Tr at 123 (observing that litigation disclosures are ''crucial information,'' but should be limited); Sokol, *id.* (suggesting fraud litigation by an enforcement body should be disclosed).

[164] *Cf.* 16 CFR at 436.1(a)(4) (''Such statement shall set forth the identity and location of the court or agency; the date of conviction, judgment, or decision; the penalty imposed; the damages assessed; the terms of the settlement or the terms of the order; and the date, nature, and issuer of each such order or ruling.'').

[165] We note that the public's ability to review complaints in legal proceedings has become significantly easier since the advent of the Internet. Many legal documents are now routinely posted on court or related websites.

[166] The Commission adopted the same approach in the TSR. *See* 16 CFR at 310.3(a)(1)(iii) (If a seller makes a representation about a refund policy, it must disclose ''a statement of all material terms and conditions of such policy.''). *See also* Cecal, 21Aug97 Tr at 126 (suggesting there should be a refund policy statement).

[167] *See, e.g., FTC* v. *AMP Publ'n., Inc.,* No. SACV–00–112–AHS–ANx (C.D. Cal. 2001); *FTC* v. *Home Professions, Inc.,* No. SACV 00–111 AHS (Eex) (C.D. Cal. 2001); *FTC Innovative Prods.,* No. 3:00–CV–0312–D (N.D. Tex. 2000); *FTC* v. *Encore Networking Servs.,* No. 00–1083 WJR (AIJx) (C.D. Cal. 2000); *FTC* v. *Mediworks, Inc.* No. 00–01079 (C.D. Cal. 2000). Indeed, allegations that business opportunity sellers misrepresented their refund policies ranks among the top 10 complaint allegations in

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cancellation or refund offers are material to prospective purchasers because they involve the potential risk of the proposed transaction, creating the impression that the business opportunity offer is either risk free or a low financial risk. Indeed, the Staff Program Review found that 24% of business opportunity complaints involved consumers seeking to cancel their purchase (818 of 4512 complaints), and 22% involved a refund policy issue (752 of 4512 complaints).[168]

The proposed Rule does not require any seller to offer cancellation or a refund. Rather, if a seller does make a cancellation or refund offer, it must disclose the terms and conditions prior to the sale. Specifically, a seller that offers a cancellation or refund policy must check the ''yes'' box on the disclosure document and also must attach to the disclosure document a written description of its policy. To minimize compliance costs, the seller may comply with this disclosure by attaching to the disclosure document a copy of a pre-existing document that details the seller's cancellation or refund policy. For example, a seller may detail its refund policy in a company brochure. If so, the seller need only attach to the disclosure document the particular page setting forth the refund policy. As in the other examples above, if no cancellation or refund is offered, then the seller need only check the ''no'' box.

d. Proposed Section 437.3(a)(5): Cancellation and Refund History

In addition to the ''yes'' or ''no'' items discussed above, the proposed Rule would require sellers to disclose information about prior cancellation or refund requests. This information is material to prospective purchasers because it goes to the viability of the business, the success of past purchasers, and their satisfaction with the business opportunity. Knowing that a seller has received a large number of cancellation or refund requests would likely influence a prospective purchaser's decision as to whether to go forward with a transaction.

In many instances, business opportunity sellers make false or deceptive claims about the success of prior purchasers.[169] Such claims are similar to false earnings representations in that they imply that the purchaser will also be successful, or, at the very least, that the seller's offer is a safe investment.[170] The most effective measure to combat such practices might be to require a business opportunity seller to disclose the drop-out rate of prior purchasers of the same opportunity within a given time period. Such an approach would be similar to the Franchise Rule requirement of detailed disclosures about the number of existing franchisees, as well as those who have left the system in the previous year.[171]

The Commission recognizes, however, that a business opportunity seller may not have access to detailed information about prior purchasers who have ceased operations. For example, a vending business opportunity seller may have no further contacts with purchasers after locating the machines and, therefore, would not necessarily know if the purchaser subsequently abandons the business. This is in contrast with the typical business format franchise, where the franchisor maintains direct and extensive contacts with its franchisees during the entire course of the franchise relationship. With respect to a typical business opportunity transaction, therefore, the Commission believes it would be impracticable to mandate a drop-out rate disclosure.

In lieu of a drop-out rate, the Commission proposes that sellers disclose cancellation or refund requests [172] made by prior purchasers during the past two years.[173] Specifically, proposed section 437.3(a)(5) would require sellers to state first the number of purchasers of the business opportunity during the two years prior to the date of disclosure.[174] This number would serve as a base line. Second, the seller would disclose the number of those purchasers who, during the same two-year period, asked to cancel their purchase or sought a refund, whether or not the purchaser has the contractual right to receive a cancellation or refund. This two-fold disclosure is reflected in Appendix A to the proposed Rule, setting forth the required format and language of the disclosure requirement.

The Commission believes that this proposed disclosure is narrowly tailored and would impose minimal compliance costs. It does not require a seller to gather statistics about the status of prior purchasers. Rather, the seller need only report the number of sales, as well as the total number of requests for cancellations or refunds that it has received,[175] both of which should be easy to tally. In addition, it would require sellers to disclose only the number of cancellation requests or refunds, not the identity of individual cancellation or refund requesters.

While the Commission believes that information on refund requests can provide material information on the satisfaction of previous purchasers, it is also aware that it is possible that such a disclosure requirement might cause some sellers to discourage refund requests by not offering refunds or by limiting the situations in which refunds are offered. On the other hand, the absence of a refund provision or the presence of a very restrictive provision might reduce the attractiveness of the offer. Therefore, the Commission invites comment on the likely effect of this provision on the willingness of business opportunity sellers to offer refunds.

Commission business opportunity cases brought under Section 5. *See* Staff Program Review, *supra* note 39, at 39.

[168] Staff Program Review, *supra* note 39, at 57.

[169] *E.g., FTC* v. *Trek Alliance, Inc.,* No. 02–9270 SJL (AJWx) (C.D. Cal. 2002); *FTC* v. *2Xtreme Performance Int'l, LLC,* No. JFM 99CV 3679 (D. Md. 1999); *In re Computer Bus. Servs.,* FTC C–3705 (1996); *FTC* v. *Roche, No. SACV* 96–481 LHM (Eex) (C.D. Cal. 1996); *FTC* v. *Infinity Multimedia, Inc.,* No. 96–6671–CIV–Gonzalez (S.D. Fla. 1996).

[170] *Cf.* Franchise Rule SBP, 43 FR at 59670–71 (''statistical information gives [prospects] material information about the size of the * * * system they are contemplating joining and sheds light on the prospect's likelihood of success.'').

[171] *See* 16 CFR at 436.1(a)(16); UFOC Guidelines, Item 20. *See also* Finnigan, 21Aug97 Tr at 167 (identifying success rate of a business opportunity as a ''crucial piece of information''). On the other hand, DSA and its members contended that a drop-out rate may be misleading in the multilevel marketing field, where, because of the low entry costs, people may test the waters for a period before deciding whether to continue with the program. *E.g.,* Elman, 21Aug97 Tr at 155–56; 168–69; Brown, *id.* at 157–58, 168. In such circumstances, a drop-out rate disclosure may overstate the difficulty of succeeding in the business. *But see In re Amway,* 93 FTC 618 (1979) (ordering Amway to make such a disclosure). The approach taken in the proposed Rule does not require a drop-out rate. Rather than requiring disclosure of a broad drop-out rate, it focuses narrowly on a subset of purchasers who have ceased operations, namely those who have requested to cancel or to obtain a refund.

[172] As discussed above, the definition of ''cancellation or refund request'' is broad, including any request for cancellation or a full or partial refund, whether or not the requester has the contractual right to receive such a remedy.

[173] *Cf.* Illinois Act, 815 ILCS § 602/5–35(b)(16)(B) (''The names and addresses of purchasers who have requested a refund or rescission from the seller within the last 12 months and the number of those who have received the refund or rescission). *See also* CA BLS, RR 45, at 9 (''If there is a promise to refund if the purchaser is not satisfied with the business opportunity, the number of times this has occurred during a certain period of time is relevant.'').

[174] *See* Wieczorek, 21Aug97 Tr at 157; Cecal, *id.* at 159.

[175] For purposes of this disclosure, the term ''past two years'' means the eight quarters immediately preceding the date of the disclosure document. This would require quarterly updating, consistent with the Rule's general updating provision, discussed below at proposed section 437.3(b).

e. Proposed Section 437.3(a)(6): References

Proposed section 437.3(a)(6) would require the disclosure of a limited number of prior purchasers as references. As in the current Franchise Rule,[176] the Commission believes that the disclosure of prior purchasers is very important to prevent fraud because it enables prospects to verify the seller's claims independently.[177] Such a disclosure has been required for over 25 years for business opportunities covered by the Franchise Rule.

Nevertheless, this proposed disclosure was one of the most controversial proposals in the ANPR. Several business opportunity seller representatives asserted that names of prior purchasers are proprietary information, essentially comprising a customer list. They maintained that there are certain fundamental differences between franchises and business opportunities with respect to the sensitivity of such information. They argued that in franchise relationships, franchisees are often subject to supplier agreements that compel them to purchase goods or services from specific sources contractually mandated by the franchisor. Accordingly, competing suppliers would not approach a franchisee listed in a disclosure document as a potential customer. In contrast, the seller of a business opportunity, such as a vending machine route, may supply the purchaser not only with machines, but products to fill the machines. Often, however, there is no ongoing contractual provision limiting the purchaser's source of supplies. A list of prior business opportunity purchasers, therefore, is essentially a list of potential customers.[178]

While the commenters' concern is not without merit, the Commission believes that the value to prospects of information about prior purchasers is so great as to outweigh any potential detriment to sellers jealous of their customer base. First, the only way prospects can reasonably protect themselves from a seller's fraudulent claims is to conduct their own due diligence review of the business opportunity offer by contacting prior purchasers.[179] Unlike franchisees identified by a common trademark or trade name, who can be identified by looking in the yellow pages or other business directories, business opportunity purchasers are not readily identifiable. Indeed, many business opportunities are conducted out of the purchaser's home, making them difficult, if not impossible, to find. Under the circumstances, the Commission concludes that a disclosure of references is essential.

The Commission has taken care to limit the scope of proposed section 437.3(a)(6). The seller need only disclose the name, city and state,[180] and telephone number of each prior purchaser (if fewer than 10), or at least the 10 prior purchasers nearest to the prospective purchaser's location.[181] In order to minimize compliance costs further, the proposed Rule provides an alternative: In lieu of a list of the 10 prior purchasers nearest the prospect, a seller may provide a prospect with a national list of all purchasers.[182] For example, the seller making disclosures online could maintain a master list of purchasers on its website that can be updated periodically. This would enable the seller to avoid having to tailor the disclosure to each prospective purchaser. Proposed section 437.3(a)(6) specifies that sellers selecting the national option must insert the words ''See Attached List'' and attach a list of the references to the disclosure document.

In addition, proposed section 437.3(a)(6) would limit the disclosure of references to those who have purchased the business opportunity within the last three years. The Commission believes that purchasers within the last three years—as opposed to those who purchased the business opportunity earlier than that—are likely to have the most current information about the seller and its business operation. Limiting the disclosure of references to a three-year period will also minimize compliance costs.

Finally, proposed section 437.3(a)(6) would address the privacy concerns raised by the use of purchaser information. As noted above, the proposed Rule would require a seller to disclose the name, city and state, and telephone number of certain purchasers to serve as references. The Commission has concerns about privacy protection with respect to requiring the disclosure of prior purchasers' contact information—notwithstanding the fact that this type of information is often readily available and in the public domain from such sources as telephone directories. To address this concern, the Commission proposes that sellers be required to state the following language clearly and conspicuously in their disclosure document and in immediate conjunction with the list of references: ''If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers.''

The Commission seeks comments and suggestions on balancing the need to enable prospective purchasers to verify sellers' claims with privacy concerns. Specifically, the Commission seeks comment on ways that the Commission might achieve availability of independent information about purchasers' experience consistent with protecting those purchasers' privacy. The Commission seeks comment on alternatives, including approaches that may be used by states with business opportunity laws containing reference disclosures. In addition, the Commission seeks comment on whether the Rule should permit purchasers the opportunity to opt-out of the disclosure of their contact information.

f. Proposed Section 437.3(a)(7): Receipt

Proposed section 436.3(a)(7) would set forth a receipt requirement. Specifically, the seller must attach a duplicate copy of the basic disclosure page to be signed and dated by the purchaser. A designation for the signature and date is included at the bottom of the page. This requirement is designed to document proper

[176] 16 CFR at 436.1(a)(16)(iii).

[177] *See* Franchise Rule SBP, 43 FR at 59673 (The disclosure of current franchisees' names and addresses ''will provide prospective franchisees with a means to (a) ascertain the problems confronting franchisees operating under conditions similar to those under which the prospective franchisees would be operating, and (b) verify the representations by the franchisor concerning the franchise'').

[178] *See, e.g.*, Catalano, ANPR 27, at 2–4 (''[U]nscrupulous competitors [with] access to the customer base of legitimate business opportunity sellers * * * would have a 'field day' contacting customers of other sellers, attempting to sell them competing products and services.''); Brown, 21Aug97 Tr at 167 (contending that Amway would fight ''tooth and nail'' to not disclose purchaser information, which it views as its customer list); Silverman 20Nov97 Tr at 222–23.

[179] *See* Rabenberg, Sept95 Tr at 105–06 (business opportunity purchaser asserting that the disclosure of names and addresses of existing purchasers is material information needed to conduct a due diligence investigation of the offer); D'Imperio, RR 16, at 3 (priority should be given to mandatory disclosure of reliable contact information).

[180] The proposed Rule would not require the disclosure of prior purchasers' street addresses. The Commission believes that prospects can readily contact a prior purchaser if provided with the prior purchaser's name, city and state, and telephone number. This approach enables prospects to contact references while minimizing the intrusion into prior purchasers' privacy.

[181] *See* 16 CFR at 436.1(a)(16)(iii).

[182] *See* Catalano, ANPR 27, at 5. Mr. Catalano opposed the required disclosure of prior purchasers. He stated, however, that if the Commission were to mandate such a requirement, then sellers may prefer disclosing a single national reference list to the regulatory burden imposed by compiling individualized reference lists for each prospective purchaser. *Id.*

disclosure. The receipt is especially important to prove proper disclosure with respect to electronic documents. A seller furnishing disclosures online, either through email or access to a Web site, has the burden of establishing that the prospect was actually able to access the electronic document. Completion and submission of the receipt serves that purpose.

The proposed Rule does not impose any particular method of transmitting the receipt. In order to minimize compliance costs, the Commission believes that the parties should have maximum flexibility to determine the best method for their business opportunity. Accordingly, proposed section 437.3(a)(7) would permit the seller to inform the prospective purchaser how to return the signed receipts, for example, by sending the receipt to a street address, or through email address, or facsimile.

g. Proposed Section 437.3(b): Updating

To ensure that a seller's disclosures are current, proposed section 437.3(b) would require sellers to update their disclosures periodically. Specifically, the provision states that it would be a violation of the Rule for a seller to fail to update the disclosures to reflect any material changes in the information presented in the basic disclosure document on at least a quarterly basis.[183] The Commission believes that quarterly updating strikes the right balance between the need for accurate disclosure and the costs and burdens more frequent updating would entail. Nevertheless, proposed section 437.3(b) would include a proviso that would require more frequent updating in one respect: the list of references. Specifically, a seller would be required to update the list of references monthly until such time that it is able to include the full list of 10 purchaser/references. This is particularly necessary for start-up systems that may have few or no prior purchaser references when they commence business opportunity sales. The Commission believes that prospective purchasers' ability to contact at least 10 purchasers in their due diligence investigation of business opportunity offers outweighs any costs of more frequent updating until the list of 10 is compiled.

4. Proposed Section 437.4: Earnings Claims

Section 437.4 of the proposed Rule would address earnings claims.[184] For the most part, this section is similar to the parallel section of the Franchise Rule. Like the Franchise Rule, the proposed Rule would not require business opportunity sellers to make an earnings claim. Rather, the disclosure of earnings information is strictly voluntary. Also, like the analogous provision in the Franchise Rule, proposed section 437.4(a) would require a seller making an earnings claim to: (1) Have a reasonable basis for the claim at the time the claim is made;[185] (2) have in its possession written materials that substantiate the claim at the time the claim is made;[186] (3) make the written material available to the prospect and the Commission upon request;[187] and (4) furnish the prospect with an earnings claim statement.[188] Also, like the Franchise Rule, proposed section 437.4(b) would set forth the requirements for making earnings claims in the general media.[189] Finally, proposed section 437.4(d), like the analogous section of the Franchise Rule, would require sellers to notify prospects in writing of any changes in earnings information before the prospect enters into a contract or provides any consideration to the seller, directly or indirectly through a third party.[190] At the same time, the proposed Rule would differ from the original Franchise Rule by addressing in proposed section 437.4(c) the use of industry financial or earnings information. Each of these issues is discussed in the following section.

a. Proposed Section 437.4(a)(4): The Earnings Claim Statement

Proposed section 437.4(a)(4) would prescribe the content of the earnings claim statement. To ensure ease of review, each earnings claim statement must be a single written document.[191] The document must be titled ''EARNINGS CLAIM STATEMENT REQUIRED BY LAW'' in capital, bold type letters. This ensures that the prospective purchaser can readily determine from the face of the document the importance of its text. The title is followed by the name of the person making the claim, and the date of the claim.

After the title and identifying information, the proposed Rule requires the seller to state the specific earnings claim. The proposed Rule does not specify any particular format or formula for an earnings claim. Consistent with the Franchise Rule, the proposed Rule allows flexibility in presenting earnings information in the manner that is appropriate for each opportunity, provided that any such claim have a reasonable basis and that there be written substantiation for the claim at the time it is made, as noted above.

The proposed Rule would also require the seller making an earnings claim to disclose the beginning and ending dates when the represented earnings were achieved.[192] This information is material because a prospective purchaser cannot begin to evaluate an earnings representation without knowing how recently the supporting data was collected. For example, a seller may have conducted a survey of opportunity purchasers in 2002. The Rule would not necessarily prohibit the use of that survey information in 2005 or beyond.[193] Nonetheless, the prospect should be made aware of the applicable time period in order to assess the relevance of the claim to current market conditions. Similarly, a prospect may reasonably give greater weight to a survey of purchasers over an extended period of time (for example, over a three-year period), than a more limited survey (for example, over a three-month period).

Further, this section of the proposed Rule would require the disclosure of the number and percentage of all purchasers during the relevant time period who have achieved at least the claimed earnings.[194] This information is highly material because it enables the prospect to determine whether the claimed earnings of prior purchasers are typical.

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[183] *See* 16 CFR at 436.1(a)(22).

[184] Commenters widely supported earnings disclosure and substantiation. *E.g.,* Christopher, ANPR 115, at 2; Caffey, ANPR 94, at 2; NASAA, ANPR 120, at 3–4; NCL, ANPR 142; Samson, 21Aug97 Tr at 173; Finnigan, *id.*; Wieczorek, RR 23, at 2–3; NASAA, RR 43, at 2; Simon, Sept95 Tr at 281–82. *Cf.* TSR, 16 CFR at 310.3(a)(2)(vi) (prohibiting misrepresentations about any ''material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability'').

[185] *E.g.,* 16 CFR at 436.1(b)(2); 436.1(c)(2). Consistent with the Franchise Rule NPR, the Commission also proposes not to include in the proposed Business Opportunity Rule a ''geographic relevance'' requirement on the grounds that that prerequisite is subsumed in the ''reasonable basis'' requirement. *See* Franchise Rule NPR, 64 FR at 57310.

[186] 16 CFR at 436.1(b)(2); 436.1(c)(2).

[187] 16 CFR at 436.1(b)(2); 436.1(c)(2).

[188] 16 CFR at 436.1(d).

[189] 16 CFR at 436.1(e).

[190] 16 CFR at 436.1(d)(2) and 436.1(e)(6) (each prospective franchisee to whom the representation is made shall be notified of any material change in the information contained in the earnings claims document).

[191] *See* 16 CFR at 436.1(e)(5).

[192] *See, e.g.*, 16 CFR at 436.1(b)(5)(ii).

[193] Of course, supporting data may become so stale that a seller would no longer have a reasonable basis for making an earnings representation because the data, even if true when collected, no longer reflects current market conditions. Any such determination is necessarily fact-specific and can only be made on a case-by-case basis.

[194] *See, e.g.*, 16 CFR at 436.1(e)(5)(ii).

For example, a seller may claim that purchasers have average earnings of $50,000 a year. Even if true, this statement may not reflect the experience of the typical purchaser because a few purchasers with unusually high earnings could skew the average. Thus, the number and percentage of purchasers earning $50,000 a year might actually be very low.

In addition to the earnings claim and substantiation requirements, this section of the proposed Rule would require a seller making an earnings claim to disclose any characteristics that distinguish purchasers who achieved at least the represented level of earnings from those characteristics of the prospective purchasers.[195] For example, a survey of ice cream vending route purchasers operating only in the South may not be readily applicable to other regions, such as the North. Similarly, a survey limited to large urban areas may not be applicable to smaller, rural areas. Distinguishing characteristics of opportunity purchasers who achieved a represented level of earnings is very material information because it enables a prospect to assess the relevance of an earnings claim to his or her particular market.

Finally, the proposed Rule would require a seller making an earnings claim to disclose to the prospective purchaser that written substantiation for the claim will be made available upon request. Requiring that a prospective purchaser can obtain and review, or have his or her own advisor review, substantiation for earnings claims increases the likelihood that such claims actually have a reasonable basis, thus reducing fraud.[196] This proposal balances the prospective purchaser's need for material information with the necessity of minimizing the seller's compliance costs. Thus, a seller need only provide such substantiation upon request.

b. Proposed Section 437.4(b): General Media Claims

Proposed section 437.4(b) would address the making of earnings claims in the general media.[197] Specifically, a seller can make an earnings claim in the general media provided the seller: (1) Has a reasonable basis for the claim at the time the claim is made; [198] (2) has written material that substantiates the claim at the time the claim is made; [199] and (3) states in immediate conjunction with the claim the beginning and ending date when the represented earnings were achieved and the number and percentage of those who have achieved the presented earnings in the given time period.[200] These requirements are necessary to prevent deceptive and misleading earnings representations in advertisements, as well as to enable a prospect to assess the typicality of any advertised earnings claim.[201]

c. Proposed Section 437.4(c): Industry Statistics

As noted above, proposed section 437.4(c) would address a problem that is prevalent among business opportunity sellers: The use of real or purported industry statistics in the marketing of business opportunity ventures. It is common for vending machine promoters, for example, to tout what are purported to be industry-wide vending sales statistics. A matrix of potential earnings based upon an industry-average sliding scale of ''vends per day'' is typical.[202] The use of such industry statistics in the promotion of a business opportunity creates the impression that the level of sales or earnings is typical in the industry, and by extrapolation, that the prospective purchaser will achieve similar results.

To prevent this type of deceptive earnings claim, proposed section 437.4(c) would prohibit the use of industry financial, earnings, or performance information ''unless the seller has written substantiation demonstrating that the information reflects the typical or ordinary financial, earnings, or performance experience of purchasers of the business opportunity being offered for sale.'' Accordingly, before a seller could use industry statistics, it must be able to measure the performance of existing purchasers and document that the industry statistics reflect the existing purchasers' typical performance. For example, a start-up business opportunity with no or very limited prior sales would probably not be able to use industry statistics because it would lack a sufficient basis to demonstrate that the industry statistics reflect the typical or ordinary experience of the start-up's prior purchasers.

d. Prospective Section 437.4(d): Material Changes

Proposed section 437.4(d) would address post-disclosure changes in earnings information. Consistent with the Franchise Rule, it would prohibit any seller making an earnings claim from failing to notify the prospective purchaser, before the prospect enters into a contract or pays any consideration, of any material change that has occurred and that calls into question the relevance or reliability of the information contained in its earnings claim statement.[203] Such material changes include the issuance of a new survey or other facts that would lead the seller to conclude that a prior survey is no longer valid. As with the analogous provisions of the Franchise Rule, proposed section 437.4(d) recognizes the high degree of materiality of earnings information for prospective purchasers. At the same time, the Commission seeks to minimize compliance costs. The proposal would not require a seller, for example, to prepare a revised earnings claim statement immediately, but would simply require written notification of the change. The Commission believes this approach strikes the right balance between accurate disclosure to prevent deception and compliance costs that would result from a more frequent updating requirement.

5. Proposed Section 437.5: Other Prohibited Practices

In addition to the disclosure requirements and earnings claims provisions discussed above, section 437.5 of the proposed Rule would prohibit sellers from engaging in a number of deceptive practices, directly or through a third party, that are common in the sale of fraudulent business opportunity ventures. Each of these proposed prohibitions is discussed in detail below.

a. Proposed Section 437.5(a): Disclaimers

Proposed section 437.5(a) would prohibit a seller, directly or through a third party, from disclaiming, or requiring a prospective purchaser to waive reliance on, any statement made in any of the disclosures required or permitted by the Rule. This provision is parallel to the anti-disclaimer prohibition proposed in the revised

[195] This is a more streamlined approach than the current Franchise Rule, which requires earnings claims be presented with a statement of the material bases and assumptions upon which the claim is made. *See* 16 CFR at 436.1(b)(3); 436.1(c)(3).

[196] *See, e.g.,* 16 CFR at 436.1(b)(2); 436.1(c)(2).

[197] The Franchise Rule has an analogous section. *See* 16 CFR at 436.1(e).

[198] *See* 16 CFR at 436.1(e)(1).

[199] *See* 16 CFR at 436.1(e)(1).

[200] *See* 16 CFR at 436.1(e)(3).

[201] *E.g., FTC* v. *Inspired Ventures, Inc.,* No. 02–21760–CIV–Jordan (S.D. Fla. 2002); *FTC* v. *MegaKing, Inc.,* No. 00–00513–CIV–Lenard (S.D. Fla. 2000).

[202] *E.g., FTC* v. *Tashman,* 318 F.3d 1275 (11th Cir. 2003); *FTC* v. *Inspired Ventures, Inc.,* No. 02–21760–CIV–Jordan (S.D. Fla. 2002); *FTC* v. *Inv. Dev. Inc.,* No. 89–0642 (E.D. La. 1989).

[203] *See* 16 CFR at 436.1(e)(6).

Franchise Rule.[204] It is intended to preserve the reliability and integrity of pre-sale disclosures. Otherwise, the Rule's very purpose would be undermined by signaling to prospects that they cannot trust or rely on the Rule's mandated disclosures. It would prevent sellers from using disclaimers or waivers as a means of insulating themselves from the consequences of materially false or deceptive statements in their own disclosure documents.

b. Proposed Section 437.5(b): Inconsistent or Contradictory Information

Proposed section 437.5(b) would prohibit sellers from making any representation, directly or through a third party, that is inconsistent with or that contradicts any statement made in the basic disclosure document or in any earnings claim disclosures required by the Rule.[205] Inconsistent or contradictory statements can be made orally, visually, or in writing. Without this proposed prohibition, a seller, for example, would be free to show a prospect a graph with earnings information, even though the seller's disclosure document states that it does not make an earnings claim. Our law enforcement experience shows that this is a prevalent problem.[206] Accordingly, this provision, like the anti-disclaimer provision noted above, is necessary to preserve the reliability and integrity of the required disclosures.

c. Proposed Section 437.5(c): Extraneous Materials

Proposed section 437.5(c) would prohibit the inclusion of any additional information in a disclosure document that is not explicitly required or permitted by the Rule. This preserves the clarity, coherence, readability, and utility of the disclosures by ensuring that a seller does not include extraneous materials that may overwhelm purchasers, distracting them from the required disclosures.[207] The proposed provision also reflects the Commission's acknowledgment that some sellers may wish to furnish disclosures electronically and, to that end, expressly permits the use of common navigational tools, such as scroll bars and internal links that facilitate review of an electronic document. The proposed provision would expressly prohibit other electronic features—such as audio, video, animation, or pop-up screens—that may distract attention from the core disclosures.[208]

The prohibition on including extraneous materials extends to information required or permitted by state law. This approach toward the treatment of state law disclosures contrasts with the analogous provision of the Franchise Rule. The Franchise Rule permits franchisors great latitude to include information required or permitted by state law. This approach is appropriate in the franchise context because all the states with franchise disclosure laws have adopted the UFOC disclosure format. As a result, state additions to an FTC disclosure document generally are fitted smoothly into that uniform format. Because of this relative uniformity, such additions do not impede a prospect's ability to compare easily among various franchise offerings. This approach also reduces compliance burdens. If adding state materials were prohibited, franchisors would have to incur significant costs to prepare and disseminate separate federal and state disclosure documents simultaneously, without any corresponding benefit to consumers.

In contrast, business opportunity laws vary widely from state to state. Were the proposed Rule to permit the inclusion of the varied additional information and disclosures required by various states, the resulting disclosure document would likely confuse prospective purchasers with an overload of divergent and possibly inconsistent information.[209] Under the circumstances, we believe that the Commission's disclosures should be kept separate from any disclosures mandated by state law. Moreover, any additional costs associated with complying with separate federal and state business opportunity disclosure laws are likely to be small, given the proposed Rule's greatly streamlined disclosures. The Commission specifically requests comment on the appropriateness of this approach and seeks alternatives that could reconcile federal and state business opportunity disclosure laws while reducing compliance burdens.

d. Proposed Section 437.5(d): False Earnings Claims

As noted throughout this NPR, the making of false earnings claims is the most prevalent problem in the offer and sale of business opportunities.[210] Proposed section 437.5(d) would prohibit sellers from misrepresenting, directly or through a third party, the amount of sales, or gross or net income or profits a prospective purchaser may earn or that prior purchasers have earned. This prohibition would complement the Rule's proposed earnings substantiation requirements detailed in proposed section 437.4. Thus, both unsubstantiated and false earnings claims would be prohibited by the Rule.

e. Proposed Section 437.5(e): Misrepresentations Regarding the Law as to Earnings Claims

Proposed section 437.5(e) would prohibit sellers from misrepresenting,

[204] Franchise Rule NPR, 64 FR at 57323. Like the analogous proposed Franchise Rule revisions, this provision would not ban the use of disclaimers such as integration clauses. Integration clauses often serve valid purposes, putting a prospect on notice that he or she should rely solely on information authorized by the franchisor.

[205] This provision is similar to the current Franchise Rule prohibition against the making of statements that contradict required disclosures. *See* 16 CFR at 436.1(f). *See also* UFOC Guidelines, General Instruction 190.

[206] *E.g., FTC* v. *Am. Entm't Distribs., Inc.,* No. 04–22431–CIV–Martinez (S.D. Fla. 2004); *FTC* v. *Inspired Ventures, Inc.,* No. 02–21760–CIV–Jordan (S.D. Fla. 2002); *FTC* v. *Mortgage Serv. Assocs., Inc.,* No. 395–CV–13362 (AVC) (D. Conn. 1995); *FTC* v. *Tower Cleaning Sys., Inc.,* No. 96 58 44 (E.D. Pa. 1996). *See also FTC* v. *Minuteman Press,* 53 F. Supp. 2d 248, at 262 (E.D.N.Y. 1998) (''[A] conflict between a specific disclaimer and a contrary oral representation—typically fatal to a reasonable reliance argument in a purely private suit—is * * * ipso facto, actionable by the FTC as violative of Franchise Rule 436.1(f) if the disclaimer is in a [disclosure document.]'').

[207] As with the Franchise Rule, a seller may provide a prospective purchaser with truthful, consistent and non-contradictory information in materials that are separate and apart from the required disclosures. *See* 16 CFR at 436.1(a)(21).

[208] This is the same approach proposed in the Franchise Rule NPR. 64 FR at 57318.

[209] To illustrate the lack of consistency among state business opportunity statutes, the staff compared disclosure requirements in five states: Alaska (Alaska Stat. § 45.66.010–090); California (Cal. Civ. Code § 1812.200–1812.221); Florida (Fla. Stat. ch. 559.80–815); Kentucky (KRS 367.801–819), and Ohio (Ohio Rev. Code Ann. § 1334.01–99). In many instances, certain disclosures are required in some of the five states only. For example, Alaska and California require disclosures about the owners of the business opportunity, while Florida, Kentucky, and Ohio do not. Alaska alone requires a disclosure about other registration attempts by the seller. California, Florida, and Ohio require disclosures about bond and guarantees of credit requirements, while Alaska and Kentucky do not. Ohio requires disclosures about refunds, while California, Florida, Kentucky, and Alaska do not. Florida, however, requires a disclosure stating that the purchaser is permitted to cancel the business opportunity agreement if ''the seller fails to deliver the product * * * within 45 days.'' Ohio requires disclosure about affiliated persons with whom the purchaser is required to do business, while Alaska, Florida, and Kentucky do not. In addition to these inconsistent disclosure requirements, the timing requirements for making disclosures differ significantly. For example, Alaska requires disclosure within ''ten days;'' Florida requires ''three working days;'' California requires at least ''48 hours;'' and Ohio requires ''ten business days.''

[210] In the Franchise Rule SBP, the Commission found that one of the most frequent abuses occurring in the marketing of franchises and business opportunities is the use of deceptive past and potential sales, income, and profit claims. Indeed, the Commission stated that the ''use of deceptive and inaccurate profit and loss statements * * * has resulted in a legion of 'horror stories.' '' 43 FR at 59684.

directly or through a third party, that any law prohibits the furnishing of earnings information. This addresses a recurring problem identified in the rulemaking record—sellers misrepresenting that federal law or the FTC prohibits the making of earnings claims.[211] In effect, this prohibition ensures that prospective purchasers are not misled into believing that earnings information is unavailable to them as a matter of law. Prospective purchasers can then understand that if the seller provides no earnings information, it is because none exists, or because the seller chooses not to make such information available.

f. Proposed Section 437.5(f): Written Substantiation for Earnings Claims

Proposed section 437.5(f) would prohibit a seller who makes an earnings claim from failing to provide written substantiation to prospective purchasers and to the Commission upon request.[212] Rather than mandating that business opportunity sellers include documentation for earnings claims—which could be voluminous—in the earnings claim statement itself, section 437.5(f) would reduce compliance costs by requiring only that such materials be provided to potential purchasers and to the Commission upon request. Purchasers could then review the documentation if they so choose.

g. Proposed Section 437.5(g): Payments From the Seller

Proposed section 437.5(g) would prohibit sellers from misrepresenting, directly or through a third party, how or when commissions, bonuses, incentives, premiums, or other payments from the seller to the purchaser will be calculated or distributed. Our law enforcement experience shows that these kinds of misrepresentations underlie work-at-home and pyramid opportunities, where prospective purchasers rely on the seller as the source of income, or where the seller manages the system's cash flow.[213] Absent this prohibition, the Rule would not address false promises about the compensation sellers will provide post-sale.

h. Proposed Section 437.5(h): Costs and Material Characteristics

A common complaint of victims of business opportunity fraud arises from misrepresentations about the costs or the performance, efficacy, nature, or central characteristics of a business opportunity offered to a prospective purchaser, or the goods or services needed to operate the business opportunity. For example, a seller may misrepresent the total costs involved in purchasing or operating a business opportunity.[214] In other instances, a seller may misrepresent the quality of goods offered by the business opportunity seller, either for use in operating the business (*e.g.*, vending machines) or for ultimate resale to consumers (*e.g.*, novelty items).[215] Proposed section 437.5(h) would make such deception, directly or through a third party, actionable as a violation of the proposed Rule.

i. Proposed section 437.5(i): Assistance

Another area for potential fraud is the misrepresentation of post-sale assistance offered to a prospective purchaser.[216] The Commission's enforcement experience shows that this practice is an element common to many business opportunity frauds targeted in our cases.[217] Also, consumer complaints about misrepresentations concerning the type and amount of assistance promised but not received are among the top categories of reported deceptive business opportunity practices.[218] The Commission believes that the best way to address this deceptive practice is through a direct prohibition. Section 437.5(i), therefore, would prohibit business opportunity sellers from misrepresenting, directly or through a third party, any material aspect of assistance provided to purchasers.

j. Proposed Section 437.5(j): Locations, Outlets, Accounts, Customers

In many instances, business opportunity sellers promise to find locations or outlets for purchasers' equipment, or accounts or customers for the purchasers' services. Indeed, the Commission's law enforcement experience shows that business opportunity sellers not only offer such assistance, but also represent that the seller or some other third party will find locations, outlets, accounts, or customers for the purchaser.[219] Such

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[211] In the Franchise Rule context, the Commission proposed to address this problem through a new requirement that franchise sellers include a specific preamble in the financial performance section of their disclosures. Among other things, the prescribed preamble would make clear that franchisors can make financial performance information available, assuming they have a reasonable basis for their claims. Franchise Rule NPR, 64 FR at 57309–310; ANPR, 62 FR at 9118. In an effort to streamline the business opportunity disclosure document and reduce compliance costs, the proposed Rule takes a different approach. It would bar sellers from representing that any law prohibits the furnishing of earnings information. We believe this approach is sufficient to address deceptive business opportunity sales: whereas the Franchise Rule seeks to encourage franchisors to make earnings claims, no such encouragement is needed in the business opportunity field, where such claims are all too common.

[212] *See* 16 CFR at 436.1(b)(2); 436.1(c)(2). *See also* 16 CFR at 436.1(e)(1).

[213] *E.g., FTC* v. *Sun Ray Traders, Inc.,* No. 05–20402–CIV–Seitz/Bandstra (S.D. Fla. 2005); *FTC* v. *Castle Publ'g, Inc.,* No. AO3CA 905 SS (W.D. Tex. 2003); *FTC* v. *Trek Alliance, Inc.,* No. 02–9270 SJL (AJWx) (C.D. Cal. 2002); *FTC* v. *Terrance Maurice Howard,* No. SA02CA0344 (W.D. Tex. 2002); *FTC* v. *America's Shopping Network, Inc.,* No. 02–80540–CIV–Hurley (S.D. Fla. 2002); *FTC* v. *Equinox, Int'l,* No. CV–S–99–0969–JAR–RLH (D. Nev. 1999).

[214] *E.g., FTC* v. *World Traders Ass'n, Inc.,* No. CV05 0591 AHM (CTx) (C.D. Cal. 2005); *FTC* v. *Castle Publ'g, Inc.,* No. AO3CA 905 SS (W.D. Tex. 2003); *FTC* v. *End70 Corp.,* No. 3 03CV–0940N (N.D. Tex. 2003); *FTC* v. *Darrell Richmond,* No. 3:02–3972–22 (D.S.C. 2003); *FTC* v. *Carousel of Toys USA, Inc.,* No. 97–8587 CIV–Ungaro–Benages (S. D. Fla. 1997); *FTC* v. *Parade of Toys, Inc.,* No. 97–2367–GTV (D. Kan. 1997); *FTC* v. *Telecomm. of Am., Inc.,* No. 95–693–CIV–ORL–22 (M.D. Fla. 1995). In the Franchise Rule SBP, the Commission recognized that the failure to disclose complete and accurate information about fees is deceptive because ''it (1) misleads, or at least confuses [prospects] as to the amount of the required initial * * * investment and (2) could readily result in economic injury to a [prospect] unable to fully obtain all such funds or unable to recoup the full amount of such funds in the course of the * * * business.'' 43 FR at 59653. Indeed, pre-sale disclosure of cost information is a remedial approach taken in many Commission trade regulation rules. E.g., 900 Number Rule, 16 CFR at 308.3(b); Telemarketing Sales Rule, 16 CFR at 310.3; Funeral Rule, 16 CFR at 453.2.

[215] *E.g., FTC* v. *Kitco of Nevada,* 612 F. Supp. 1282 (D. Minn. 1985); *FTC* v. *Associated Record Distribs., Inc.,* No. 02–21754–CIV–Graham/Garber (S.D. Fla. 2002); *FTC* v. *Home Professions, Inc.,* No. 00–111 (C.D. Cal. 2000); *FTC* v. *Worldwide Mktg. and Distrib. Co., Inc.,* No. 95–8422–CIV–Roettger (S.D. Fla. 1995). *See also FTC* v. *Med. Billers Network,* No. 05 CV 2014 (RJH) (S.D.N.Y. 2005).

[216] In the Franchise Rule SBP, the Commission recognized that promises of assistance made to induce prospects to purchase a franchise are material, especially to those prospects with ''little or no experience at running a business.'' 43 FR at 59676–77.

[217] *E.g., FTC* v. *Am. Entm't Distribs., Inc.,* No. 04–22431–CIV–Martinez (S.D. Fla. 2004); *FTC* v. *USS Elder Enter., Inc.,* No. SA CV–04–1039 AHS (ANx) (C.D. Cal. 2004); *FTC* v. *Kitco of Nevada,* 612 F. Supp. 1282 (D. Minn. 1985), *FTC* v. *Leading Edge Processing, Inc.,* No. 6:02–CV–681–ORL–19 DAB (M.D. Fla. 2003); *FTC* v. *Darrell Richmond,* No. 3:02–3972–22 (D.S.C. 2003); *FTC* v. *Elec. Med. Billing, Inc.,* No. SA02–368 AHS (ANX) (C.D. Cal. 2003); *FTC* v. *Transworld Enter., Inc.,* No. 00 8126–CIV–Graham (S.D. Fla. 2000); *FTC* v. *Advanced Pub. Commc'ns Corp.,* No. 00–00515–CIV–Ungaro–Benages (S.D. Fla. 2000); *FTC* v. *Hi Tech Mint Sys., Inc.,* No. 98 CIV 5881 (JES) (S.D.N.Y. 1998); *U.S.* v. *QX Int'l, Inc.,* No. 398–CV–0453–D (N.D. Tex. 1998). *See* Cory, ANPR 12 (misrepresented training); SBA Advocacy, ANPR 36, at 6–7 (observing improper training and credentials in a travel opportunity). *Cf.* 16 CFR at 436.1(a)(18) (requiring a description of any training program); UFOC Guidelines, Item 11 (disclosure of franchisor's obligations including pre-opening advertising and training assistance).

[218] *See* Staff Program Review, *supra* note 39, Table I.2; Appendix 5.

[219] *E.g., FTC* v. *Am. Entm't Distribs., Inc.,* No. 04–22431–CIV–Martinez (S.D. Fla. 2004); *FTC* v. *Int'l Trader,* No. CV–02–02701 AHM (JTLx) (C.D. Cal. 2002); *FTC* v. *Elec. Processing Servs, Inc.,* No. CV–S–02–0500–L.H.–R.S. (D. Nev. 2002); *FTC* v. *Home*

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representations include claims that a particular locator is successful in finding locations, as well as representations that the seller or other third party has already found and entered into contracts with location owners or customers.[220] These types of representations are material to a prospective purchaser because they foster the expectation that a profitable market exists for the goods or services the purchaser will sell. To prevent fraudulent location assistance representations, proposed Section 437.5(j) would prohibit sellers, directly or through a third party, from misrepresenting ''the likelihood that a seller, locator, or lead generator will find locations, outlets, accounts, or customers for the purchaser.''

k. Proposed Section 437.5(k): Cancellation or Refund Policy

The Commission's law enforcement experience demonstrates that, in many instances, business opportunity sellers claim that they permit a purchaser to cancel the purchase, guarantee a 100% refund, or promise to buy back some or all of the products sold to a purchaser.[221] These representations have lured prospective purchasers into believing that the investment is either low-risk or even risk-free.[222] As noted above, however, a high level of business opportunity purchaser complaints received by the Commission revolve around cancellation and refund issues.[223] Accordingly, proposed section 437.5(k) would prohibit a seller from misrepresenting, directly or through a third party, the terms and conditions of any cancellation or refund policy. The Commission emphasizes, however, that this prohibition does not compel any seller to offer cancellation or a refund, nor does it dictate the terms and conditions under which a seller may offer such relief. Rather, it simply ensures that any cancellation or refund offer a seller makes before the sale is truthful and accurate.

l. Proposed Section 437.5(l): Failure To Cancel or Make a Refund

Proposed section 437.5(l) would prohibit a seller from failing to cancel a purchase or make a refund when the purchaser has qualified for such relief under the seller's cancellation or refund policy.[224] As noted above, proposed section 437.5(k) would prohibit a seller from misrepresenting, pre-sale, the seller's cancellation or refund policy. Proposed section 437.5(l) complements that section and is intended to address sellers' post-sale conduct, prohibiting the seller from failing to honor cancellation or refund requests when purchasers have satisfied all the terms and conditions disclosed in the seller's basic disclosure document for obtaining such relief.[225] In our experience, the failure of business opportunities sellers to make promised refunds or to honor cancellation policies ranks high among issues raised by business opportunity purchasers.[226]

m. Proposed Section 437.5(m): Employment Opportunity

Proposed section 437.5(m) would prohibit business opportunity sellers from misrepresenting, directly or through a third party, a business opportunity as an employment opportunity.[227] The Commission's law enforcement experience demonstrates that some business opportunity sellers lure unsuspecting consumers by falsely representing that they are offering employment when, in fact, they are offering vending, work-at-home, or pyramid sales opportunities. For example, in many instances consumers have responded to advertisements seeking sales executives, only to discover that the ''position'' requires them to purchase equipment or products from the seller and, in turn, to sell the products or to recruit a downline to sell the products for them.[228]

n. Proposed Section 437.5(n): Territories

Proposed section 437.5(n) would prohibit misrepresentations made directly by the seller or through a third party about the terms of any territorial exclusivity or limited territorial protection offered to a prospective purchaser.[229] In the Commission's experience, representations about territorial exclusivity or more limited territorial protections are material because they often induce a prospective purchaser into believing that he or she will not be competing for customers with the seller or other purchasers, thereby increasing the purchaser's likelihood of success.[230] As noted

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Professions, Inc., No. SACV 00–111 AHS (Eex) (C.D. Cal. 2001); *FTC* v. *Encore Networking Servs.,* No. 00–1083 WJR (AIJx) (C.D. Cal. 2000); *FTC* v. *AMP Publ'n, Inc.,* No. SACV–00–112–AHS–ANx (C.D. Cal. 2001); *FTC* v. *Infinity Multimedia, Inc.,* No. 96–6671–CIV–Gonzalez (S.D. Fla. 1996). *See* Staff Program Review, *supra* note 39, Table I.2, Appendix 5; Samson, 21Aug97 Tr at 100; Wieczorek, *id.* at 76–77; Cecal, *id.* at 78–79; James, 20Nov97 Tr at 19; Rabenberg, Sept95 Tr at 105.

[220] *E.g., FTC* v. *Hart Mktg. Enter. Ltd., Inc.,* No. 98–222–CIV–T–23 E (M.D. Fla. 1998); *FTC* v. *Vendors Fin. Servs., Inc.,* No. 98–1832 (D. Colo. 1998); *FTC* v. *Hi Tech Mint Sys., Inc.,* No. 98 CIV 5881 (S.D.N.Y. 1998); *FTC* v. *Infinity Multimedia, Inc.,* No. 96–6671–CIV–Gonzalez (S.D. Fla. 1996). Similarly, a Florida business opportunity regulator noted that during sales presentations, sellers of vending machines typically claim that they have ''15 locations in X community. And in fact there [are] no locations there. They have to hire a locator, a second locator, or a second person. A second check is written to the locator. And the consumer invariably ends up with a second-rate location because there [were none] to start with.'' James, 20Nov97 Tr at 19.

[221] *E.g., FTC* v. *Med. Billers Network,* No. 05 CV 2014 (RJH) (S.D.N.Y. 2005); *FTC* v. *Castle Publ'g, Inc.,* No. AO3CA 905 SS (W.D. Tex. 2003); *FTC* v. *America's Shopping Network, Inc.,* No. 02–80540–CIV–Hurley (S.D. Fla. 2002); *FTC* v. *Home Professions, Inc.,* No. SACV 00–111 AHS (Eex) (C.D. Cal. 2001); *FTC* v. *Encore Networking Servs.,* No. 00–1083 WJR (AIJx) (C.D. Cal. 2000).

[222] In the Franchise Rule SBP, the Commission noted the difficulty consumers have in obtaining promised refunds from franchisors. ''It is clear from the record that all franchisors do not adequately adhere to the refund policies they themselves agree to in their contracts. By requiring strict adherence to their own refund policies, [the Rule] serves an essential remedial purpose.'' 43 FR at 59696–697.

[223] *See, e.g.*, Staff Program Review, *supra* note 39, Table I.2 and Appendix 5.

[224] This is consistent with the current Franchise Rule approach. *See* 16 CFR at 436.1(h). *See also* Franchise Rule SBP, 43 FR at 59697.

[225] *E.g., FTC* v. *AMP Publ'ns, Inc.,* No. SACV–00–112–AHS–ANx (C.D. Cal. 2001) (failure to honor 90-day money back guarantee); *FTC* v. *Star Publ'g Group, Inc.,* No. 00–023 (D. Wyo. 2000) (failure to honor 90-day refund policy). *See* 16 CFR at 436.1(h). *See also* Cory, ANPR 12 (describing difficulty in securing a refund).

[226] *See* Staff Program Review, *supra* note 39, at 28–29 (nearly 25% of business opportunity complaints indicated the consumer's desire to cancel, and more than 20% indicated that consumers failed to receive a refund or were dissatisfied with the company's refund policies.). *See, e.g., FTC* v. *AMP Publ'ns, Inc.,* No. 00–112 (C.D. Cal. 2000); *FTC* v. *Home Professions, Inc.,* No. 00–111 (C.D. Cal. 2000); *FTC* v. *Innovative Prods.,* No. 3–00–0312 (N.D. Tex. 2000); *FTC* v. *Mediworks, Inc.,* No. 00–01079 (C.D. Cal. 2000).

[227] *See* Wis. Admin. Code § ACP 116.06 (prohibiting misrepresented employment offers).

[228] *See, e.g., FTC* v. *Trek Alliance, Inc.,* No. 02–9270 SJL (AJWx) (C.D. Cal. 2002) (defendants placed ads in ''Help Wanted'' sections of newspaper offering salaried position); *FTC* v. *Leading Edge Processing, Inc.,* No. 6:02–CV–681–ORL–19 DAB (M.D. Fla. 2003) (defendants sent emails to job seekers who posted their resumes on job websites, falsely representing the availability of jobs and guaranteeing a steady stream of work); *FTC* v. *David Martinelli, Jr.,* No. 3:99 CV 1272 (D. Conn. 2000) (defendants sent unsolicited emails falsely offering a $13.50 per hour position processing applications for credit, loans, or employment); *FTC* v. *Equinox, Int'l,* No. CV–S–99–0969–JAR–RLH (D. Nev. 1999) (defendants allegedly ran classified ads in the ''Help Wanted'' sections of newspapers, impliedly offering a salaried position).

[229] *See* 16 CFR at 436.1(a)(13) (requiring a description of any limited geographic area or territorial protections); UFOC Guidelines, Item 12 (disclosure of the nature and scope of any exclusive territory). In some instances, a business opportunity seller may offer a prospect an exclusive territory, in which no other person has the right to compete within the territory. In other instances, a seller may offer a more limited protection. For example, the seller may prohibit other purchasers from operating in the territory, but reserve to itself the ability to conduct telemarking or Internet sales in the territory. Regardless of the scope of the territorial protection, section 437.5(n) prohibits business opportunity sellers from misrepresenting the nature of the territory.

[230] *E.g., FTC* v. *Advanced Pub. Commc'ns Corp.,* No. 00–00515–CIV–Ungaro–Benages (S.D. Fla.

above, the Staff Program Review revealed that false promises about territories are a common deceptive practice reported by business opportunity purchasers.[231]

o. Proposed Section 437.5(o): Assignment of Territories

Proposed section 437.5(o) would prohibit a seller from assigning a single ''exclusive'' territory to more than one purchaser. This prohibition complements section 437.5(n), which prohibits sellers from misrepresenting territories. It is intended to address sellers' post-sale conduct, prohibiting the seller from failing to honor its promises regarding exclusive or protected territories. Consumer complaints indicate, and the Commission's law enforcement experience confirms, that fraudulent business opportunity sellers often sell the same purportedly exclusive territory to several unsuspecting purchasers.[232] In these circumstances, purchasers who have been lured to invest in an opportunity on the basis of promises of an exclusive territorial lock on their market find that their chances of success are materially reduced by competition from the other purchasers.

p. Proposed Section 437.5(p): Third-Party Endorsements

To prevent endorsement fraud, Proposed section 437.5(p) would prohibit business opportunity sellers from misrepresenting, directly or through a third party, 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.'' [233] Our law enforcement experience reveals that business opportunity frauds often lure consumers by misrepresenting that their opportunities have been approved or endorsed by a government agency or well-known third party.[234] In other instances, business opportunity sellers falsely claim that their opportunities are sponsored by or associated with a charity, or that a charity will benefit from a percentage of sales.[235] Such claims are material to a purchaser because an alleged endorsement or shared-profit arrangement may create the impression that the opportunity is legitimate or that the affiliation will enhance sales and profits.

q. Proposed Section 437.5(q): Shills

Proposed section 437.5(q) would address one of the most pernicious practices common in fraudulent business opportunity sales—the use of shill references to lure unsuspecting consumers to invest.[236] The Commission has brought many actions against business opportunity sellers who provided prospects with the names of individuals they falsely claimed were independent prior purchasers or independent third parties, but who in fact were paid by the seller to give favorable false reports confirming the seller's claims, especially their earnings claims.[237] The use of paid shills to give false reports induces prospective purchasers into believing that the opportunity is a safe and lucrative investment.

To address this deceptive practice, Proposed section 437.5(q) contains two related prohibitions. First, it would prohibit any seller from misrepresenting, directly or through a third party, that any person ''has purchased a business opportunity from the seller.'' This would prevent a seller, for example, from claiming that a company employee, locator, or other third party is a prior purchaser of the opportunity, when that is not the case. Second, the provision would prohibit a seller from misrepresenting that any person—such as a locator, broker, or organization that purports to be an independent trade association—''can provide an independent or reliable report about the business opportunity or the experiences of any current or former purchaser.'' Providing a prospect with a list of brokers who are paid to give favorable reports, for example, would violate this provision because any statement a person on such a list makes would fail the ''independence and reliability'' test.[238]

r. Proposed Section 437.5(r): Paid Consideration or Prior Relationship

Proposed section 437.5(r) would complement the prohibition in section 437.5(q) against fictitious references by requiring sellers to disclose any compensation paid to an endorser [239] and the existence of any personal or business relationship between the seller and an endorser. The Commission has long held that the failure to disclose compensation paid to an endorser is a deceptive practice in violation of section 5.[240] Obviously, an individual

2000); *FTC* v. *Summit Photographix,* No. 398–CV–0449–T (N.D. Tex. 1998); *FTC* v. *Telecard Dispensing Corp.,* No. 98–7058 (S.D. Fla. 1998); *FTC* v. *Vendors Fin. Servs., Inc.,* No. 98–1832 (D. Colo. 1998); *U.S.* v. *QX Int'l, Inc.,* No. 398–CV–0453–D (N.D. Tex. 1998); *FTC* v. *Am. Legal Distribs.,* No. 1:88–CV–519–MHS (N.D. Ga. 1988). *See also* Franchise Rule SBP, 43 FR at 59662 (recognizing that sales restrictions and limited territories impact upon a purchaser's ability to conduct business and are, therefore, material).

[231] *See* Staff Program Review, *supra* note 39, Table I.2; Appendix 5.

[232] *E.g., FTC* v. *Am. Safe Mktg.,* No. 1:89–CV–462–RLV (N.D. Ga. 1989).

[233] *Cf.* TSR, 16 CFR at 310.3(a)(vii) (prohibiting misrepresentations concerning ''affiliation with, or endorsement or sponsorship by, any person or government entity'').

[234] *E.g., FTC* v. *Streamline Int'l,* No. 01–6885–CIV–Ferguson (S.D. Fla. 2001) (misrepresented FDA approval); *FTC* v. *Bus. Opportunity Ctr., Inc.,* No. 95 8429–CIV–Zloch (S.D. Fla. 1995) (misrepresented FDA approval); *FTC* v. *Star Publ'g Group, Inc.,* No. 00–023 (D. Wyo. 2000) (misrepresented HUD approval). *See also FTC* v. *Hawthorne Commc'ns,* No. 93–7002 AAH (JGX) (C.D. Cal. 1993) (order restricting use of testimonials and endorsements in the sale of business opportunities); James, 21Nov97 Tr at 343 (work-at-home promoter falsely represented that JCPenney was a buyer of its products).

[235] *E.g., FTC* v. *Global Assistance Network for Charities,* No. 96–2494 PHX RCB (D. Ariz. 1996). *See also* NCL, ANPR 35, at 2.

[236] Staff Program Review, *supra* note 39, Table I.2 (after earnings claims, false testimonials and shill references are the most common Section 5 allegations in Commission business opportunities cases). *See also* NCL, ANPR 35, at 2; Cecal, 21Aug97 Tr, at 67–68 (observing the common use of shills to sell business opportunities in Illinois).

[237] *E.g., FTC* v. *Am. Entm't Distribs., Inc.,* No. 04–22431–CIV–Martinez (S.D. Fla. 2004); *U.S.* v. *Vaughn,* No. 01–20077–01–KHV (D. Kan. 2001); *FTC* v. *Hart Mktg. Enter. Ltd., Inc.,* No. 98–222–CIV–T–23 E (M.D. Fla. 1998); *FTC* v. *Inetintl.com,* No. 98–2140 (C.D. Cal. 1998); *FTC* v. *Infinity Multimedia, Inc.,* No. 96–6671–CIV–Gonzalez (S.D. Fla. 1996); *FTC* v. *Allstate Bus. Consultants Group, Inc.,* No. 95–6634–CIV–Ryskamp (S.D. Fla. 1995). *See also* Cantone, 20Nov97 Tr at 245 (''Shills may be one of the most common problems in the business opportunity industry.''); James, *id.* at 246 (''It is a huge, huge problem.'').

[238] *E.g., FTC* v. *Affiliated Vendors Ass'n, Inc.,* No. 02–CV–0679–D (N.D. Tex. 2002); *FTC* v. *Raymond Urso,* No. 97–2680–CIV–Ungaro–Benages (S.D. Fla. 1997). *See* Cantone, 20Nov97 Tr at 251–52 (voicing concern about reports from groups that purport to be independent consumer associations. ''I know from our standpoint in Maryland, we have a lot of complaints from buyers who * * * got a report from who they thought was an independent company like a Better Business Bureau for business opportunities.''); McKee, *id.* at 252 (observing that the Internet permits anyone to set up a website that purports to belong to an independent organization providing reports similar to those of the Better Business Bureau).

[239] *E.g., FTC* v. *Tashman,* 318 F.3d 1275 (11th Cir. 2003); *FTC* v. *Wolf,* No. 94–8119 CIV–Ferguson (S. D. Fla. 1994); *FTC* v. *Jordan Ashley,* No. 93–2257–CIV–Nesbitt (S.D. Fla. 1993); *FTC* v. *Nat'l Bus. Consultants,* 781 F. Supp. 1136 (E.D. La. 1991).

[240] *See* Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 CFR at 255.5 (''When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (i.e, the connection is not reasonably expected by the audience) such connection must be fully disclosed. * * * [W]hen the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the

Continued

paid for his or her assessment of an opportunity is likely to be biased, and any story of success or high earnings from a person paid to tell it is suspect. The proposed Rule would clarify that the term ''consideration'' is to be interpreted broadly. Specifically, proposed section 437.5(r)(1) would state that consideration includes not only direct cash payments, but indirect financial benefits, such as forgiveness of debt, as well as other tangible benefits such as equipment, services, and discounts.

Similarly, proposed section 437.5(r)(2) would also prohibit a seller from failing to disclose any personal or business relationship with any endorser. For example, an endorser may have a personal relationship with the seller (*e.g.*, family member), or an ongoing business relationship with the seller (*e.g.*, as a broker, supplier, or locator) other than a relationship created by the prior purchase of the business opportunity being offered for sale.[241] In each instance, the prior business or personal relationship is material to a prospective purchaser because it calls into question the endorser's independence from the seller.

6. Proposed Section 437.6: Record Retention

Proposed section 437.6 would establish minimal record retention requirements necessary to document compliance and permit effective Rule enforcement. This section applies to both the business opportunity seller and its principals to ensure that records required by the Rule are not destroyed if the seller goes out of business or otherwise ceases operations. As detailed below, sellers and their principals must keep, and make available to the Commission, the following five types of records for a period of three years:

Proposed section 437.6(a)	Each materially different version of all documents required by the Rule;
Proposed section 437.6(b)	Each purchaser's disclosure receipt;
Propsed section 437.6(c)	Each executed written contract with a purchaser;
Proposed section 437.6(d)	Each oral or written cancellation or refund request received from a purchaser; and
Proposed section 437.6(e)	All substantiation upon which the seller relies from the time an earnings claim is made.

The Commission believes that these limited recordkeeping requirements strike the right balance, requiring no more than necessary for effective law enforcement, while reducing compliance costs.

7. Proposed Section 437.7: Franchise Exemption

Proposed section 437.7 is designed to eliminate potential overlap between the Business Opportunity Rule's coverage and that of the Franchise Rule, so that no business would face duplicative compliance burdens.[242] Specifically, section 437.7 would exempt from the proposed Rule's coverage those business opportunities that: (1) Satisfy the definitional elements of the term ''franchise'' under the Franchise Rule; (2) entail a written contract between the seller and the business opportunity buyer; and (3) require the buyer to make a payment that meets the Franchise Rule's minimum payment requirement. These criteria are designed to accomplish two ends: to ensure that certain categories of businesses ''carved out'' from the Franchise Rule's coverage are not inappropriately subjected to coverage by the proposed Business Opportunity Rule; and, simultaneously, to obviate any loophole that could be exploited by certain other types of business opportunities that are exempt from the Franchise Rule but that should be regulated by the proposed Business Opportunity Rule.

Thus, for example, businesses exempt from Franchise Rule coverage pursuant to the exemption for fractional franchises[243] and the exemption for ''leased department'' arrangements[244] would not be subjected to coverage by the proposed Business Opportunity Rule because such businesses would meet the criteria of proposed section 437.7. This is an appropriate result because the same rationale underlying exemption of these types of businesses from the Franchise Rule would also dictate that they not be covered by the proposed Business Opportunity Rule—*i.e.*, in the case of a fractional franchise, the franchisor is not likely to deceive the prospective franchisee or to subject the prospective franchisee to significant investment risk. Therefore, imposing the requirements of either the Franchise Rule or the proposed Business Opportunity Rule would not be justified.

On the other hand, certain businesses carved out of Franchise Rule coverage should not escape regulation by the proposed Business Opportunity Rule—specifically, those exempt from the Franchise Rule's coverage due to the minimum payment exemption[245] or the oral agreement exemption.[246] While these two exemptions are warranted in the franchise context to ensure that the significant disclosure costs imposed by the Franchise Rule are cost-justified, they do not apply to the proposed Business Opportunity Rule, with its comparatively much lighter disclosure burden.

In response to the ANPR, DSA and its members argued for additional exemptions that would keep multilevel programs, in particular, from falling within the proposed Rule's purview.[247] DSA asserted that pre-sale disclosures are unnecessary in the context of direct selling where the risk of financial loss is low.[248] To that end, DSA and its members recommended that the Commission preserve the inventory

endorsement or the fact that the endorser knew or had reasons to know or to believe that if the endorsement favors the advertised product some benefit, such as an appearance on TV, would be extended to the endorser.''). *See also* UFOC Guidelines, Item 18 (disclosure of any compensation or other benefit given or promised to a public figure).

[241] *See, e.g., FTC* v. *Inspired Ventures, Inc.,* No. 02–21760–CIV–Jordan (S.D. Fla. 2002); *FTC* v. *Universal Greeting Cards Corp.,* No. 02–21753–CIV–Jordan (S.D. Fla. 2002); *FTC* v. *Inetintl.com, Inc.,* No. 98–2140 (C.D. Cal. 1998).

[242] *See, e.g.,* Illinois Act, 815 ILCS § 601/5–10.(f) (exempting opportunities falling under the Franchise Disclosure Act of 1987); CA SAMP, Cal. Civ. Code at § 1812.201(b)(2) (exempting opportunities falling under the Franchise Investment Law).

[243] 16 CFR at 436.2(a)(3)(i).

[244] 16 CFR at 436.2(a)(3)(ii).

[245] 16 CFR at 436.2(a)(3)(iii).

[246] 16 CFR at 436.2(a)(3)(iv).

[247] The comments submitted by DSA and its members urging various exemptions from the proposed Rule apparently contemplated extensive disclosures, something akin to the current Franchise Rule. For example, during the Rule Review and ANPR proceedings, comments suggested a wide array of disclosures for business opportunities. *E.g.,* Christopher, ANPR 115, at 2 (adding officer histories, financial statements); NASAA, ANPR 120, at 3–4 (adding business experience of promoters and bankruptcy information); Simon, Sept95 Tr at 281–82 (adding audited financials, guarantee of sites); Wieczorek, Sept95 Tr at 284 (adding background on the seller, bankruptcy, fees and initial investment, financials). In light of the streamlined proposed Rule, such exemptions are unnecessary.

[248] DSA, ANPR 34, at 6.

exemptions from the minimum payment requirement.[249] In addition, they contended that a Business Opportunity Rule should not cover opportunities with a repurchase or buy-back plan.[250] They also suggested that the minimum payment threshold should be raised from the current $500 to at least $1,000,[251] in order not to impose significant costs on small direct sellers. In short, DSA and its members asserted that any regulation of the multilevel marketing industry is likely to impose significant costs on small proprietors. Rather, in DSA's view, the problem in the industry is not from multilevel marketers, but from fraudulent pyramid schemes, which the Commission can address through current law.[252]

We note, however, that DSA's position on raising the minimum payment threshold was opposed by many other commenters. Several commenters noted that the purpose of the Rule is to prevent fraud, regardless of the amount at issue. Others asserted that a monetary threshold simply provides scam operators a means to circumvent the Rule, noting that business opportunities frequently charge $495 to skirt the current Franchise Rule's disclosure requirements. For example, NCL stated that the:

> $500 minimum investment * * * leaves many consumers without the disclosures and other protections that they need. Nearly one-third of the consumers who reported to the NFIC last year that they had lost money to fraudulent or deceptive business opportunities paid less than $500. . . . Whatever minimum amount might be set, fraudulent operators will price their services below it, and consumers will be victimized.

NCL, ANPR 35, at 11.[253]

The Commission agrees with the commenters that the scope of the Rule should be broadened to reach all business opportunities that our anti-fraud law enforcement history and consumer complaints show are a widespread and persistent problem. This expansion of Rule coverage, however, would be balanced by drastically reduced compliance costs, as discussed above.

8. Proposed Section 437.8: Other Orders and Preemption

Proposed section 437.8 would address the effect the proposed Rule may have on outstanding Commission orders. It also discusses preemption of state business opportunity laws.

a. Proposed Section 437.8(a): Effect on Prior Commission Orders

The Commission recognizes that the proposed Rule significantly changes the disclosure obligations for those sellers who are now under order in prior Commission Franchise Rule and section 5 actions. For example, the proposed Business Opportunity Rule contemplates greatly streamlined disclosures, as compared to the Franchise Rule's extensive disclosures. At the same time, the proposed Rule would require new disclosures not present in the Franchise Rule, such as the disclosure of the seller's cancellation or refund history. To enable business opportunity sellers to take advantage of the Business Opportunity Rule's reduced disclosure obligations, as well as to reduce any potential conflicts between existing orders and the proposed Business Opportunity Rule, proposed section 437.8(a) would permit persons under order to petition the Commission for relief consistent with the provisions of the new Rule. Specifically, ''business opportunities covered by FTC or court order to follow the Franchise Rule, 16 CFR part 436, may petition the Commission to amend the order so that the business opportunity may follow the provisions of the Business Opportunity Rule.'' Such determinations, however, will be made on a case-by-case basis.

b. Proposed Section 437.8(b): Preemption

Proposed section 437.8(b) would adopt the preemption policy currently found at note 2 of the Franchise Rule.[254] It would provide that the Commission does not intend to preempt state or local business opportunity laws, except to the extent of any conflict with the Rule. Further, a law does not conflict if it affords prospective purchasers equal or greater protection, such as a requirement for registration of disclosure documents or more extensive disclosures.

9. Proposed Section 437.9: Severability

Finally, proposed section 437.9 would adopt the severability provision currently found in the Franchise Rule at 16 CFR at 436.3. This provision would make clear that, if any part of the Rule is held invalid by a court, the remainder will still be in effect.[255]

Section F—Rulemaking Procedures

Pursuant to 16 CFR 1.20, the Commission will use the following rulemaking procedures. These procedures are a modified version of the rulemaking procedures specified in section 1.13 of the Commission's Rules of Practice.

First, the Commission is publishing this Notice of Proposed Rulemaking. The comment period will be open until June 16, 2006, followed by a rebuttal period until July 7, 2006. Interested parties are invited to submit written comments. Written comments must be received on or before June 16, 2006. Rebuttal comments must be received on or before July 7, 2006. All comments should be filed as prescribed in the **ADDRESSES** section above.

Second, pursuant to Section 18(c) of the Federal Trade Commission Act, 15 U.S.C. 57a(c), the Commission will hold hearings with cross-examination and rebuttal submissions only if an interested party requests a hearing by the close of the comment period. Parties interested in a hearing must submit within the comment period the following: (1) A comment in response to this notice; (2) a statement how they would participate in a hearing; and (3) a summary of their expected testimony. Parties wishing to cross-examine witnesses must also file a request by the

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[249] *E.g.,* Longaberger, ANPR 31, at 1; DSA, ANPR 34, at 4; Amway, ANPR 89, at 2; Mary Kay, ANPR 110, at 2.

[250] DSA, ANPR 34, at 5. DSA explained that its code requires all members to repurchase 90% of all inventory on hand from a terminating direct seller if that inventory was purchased within one year prior to termination. *Id. See also* Amway, ANPR 89 at 2 (buyback of unused, marketable inventory within 12 months). DSA and its supporters also contended that the Commission should retain the current 'sales kit exemption.'' In the Interpretive Guides, the Commission said that the sale of sales kits or the distribution of promotional materials alone would not constitute 'significant assistance'' for coverage as a franchise. Interpretive Guides, 44 FR at 49967.

[251] *E.g.,* DSA, ANPR 34, at 3–4; Pampered Chef, ANPR 86, at 2; Amway, ANPR 89, at 2; Mary Kay, ANPR 110.

[252] DSA, RR 21, at 5; Elman, Sept95 Tr at 42. Similarly, DSA asserted that false earnings claims can be addressed through section 5 of the FTC Act. Elman, Sept95 Tr at 265. *See also* Catalano, 20Nov97 Tr at 20 (noting that 25–26 states already have business opportunity laws on the books).

[253] *See also* SBA Advocacy, ANPR 36, at 6 (''threshold should be lowered to $100 in order to curtail the number of unsavory companies that are beyond the reach of the FTC because they sell their scandalous 'business opportunities' for $495.''); James, ANPR 76 (lower the threshold to $300); M. Garceau, 20Nov97 Tr at 53 (''it should be one dollar''); Finnigan, 21Aug97 Tr at 188–99 (''They'll go right to $999 and that's the experience of every state.''); D'Imperio, Sept95 Tr at 130 (''I don't care if it's $10, fraud is fraud.''); Purvin, *id.* at 280 (''companies use that threshold to avoid regulation and consequently have their entry fee be under $500, which seems to me forces the amount of money that a prospective purchaser can lose within a very acceptable norm'').

[254] This approach is consistent with other Commission trade regulation rules. *See, e.g.,* Appliance Labeling Rule, 16 CFR at 305.17; Cooling-Off Rule, 16 CFR at 429.2; Mail Order Rule, 16 CFR at 435.3(b)(2).

[255] This provision is comparable to the severability provisions in other Commission trade regulation rules. *E.g.,* 900–Number Rule, 16 CFR at 308.8; TSR, 16 CFR at 310.9.

close of the 20-day rebuttal period, designating specific facts in dispute and a summary of their expected testimony. If requested to do so, the Commission will hold one or more informal public workshop conferences in lieu of hearings. After the close of the comment period, the Commission will publish a notice in the **Federal Register** stating whether hearings (or a public workshop conference in lieu of hearings) will be held and, if so, the time and place of the hearings and instructions for those wishing to present testimony or engage in cross-examination of witnesses.

Finally, after the conclusion of the rebuttal period, and any hearings or additional public workshop conferences, Commission staff will issue a Report on the Business Opportunity Rule (''Staff Report''). The Commission will announce in the **Federal Register** the availability of the Staff Report and will accept comment on the Staff Report for a period of 75 days.

Section G—Communications to Commissioners and Commissioner Advisors by Outside Parties

Pursuant to Commission Rule 1.18(c)(1), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor shall be subject to the following treatment. Written communications and summaries or transcripts of oral communications shall be placed on the rulemaking record if the communication is received before the end of the comment period. They shall be placed on the public record if the communication is received later. Unless the outside party making an oral communication is a member of Congress, such communications are permitted only if advance notice is published in the Weekly Calendar and Notice of ''Sunshine'' Meetings.[256]

Section H—Paperwork Reduction Act

The Commission has submitted this proposed Rule and a Supporting Statement for Information Collection Provisions to the Office of Management and Budget (''OMB'') for review under the Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501–3517. In this notice, the Commission proposes to promulgate a trade regulation rule governing business opportunity sales. The proposed Rule would cover those business opportunities currently covered by the Franchise Rule, as well as those not covered by the Franchise Rule, including work-at-home and multilevel marketing programs. The proposed Rule would require business opportunity sellers to disclose information and to maintain certain records relating to business opportunity sales transactions and refund requests.

The current public disclosure and recordkeeping burden associated with the Franchise Rule is 37,000 hours, approved under OMB Control No. 3084–0107. In the FTC's most recent submission for extension of the clearance for the Franchise Rule, the Commission staff estimated that there were 5,000 franchisors (2,500 business and product format franchises and 2,500 business opportunity sellers).[257] As discussed below, the proposed Rule would reduce the burden on business opportunity sellers by streamlining disclosure requirements to minimize compliance costs.[258]

The proposed Rule is designed to streamline and reduce substantially the quantity of information required to be disclosed by business opportunity sellers. The proposals would impact sellers differently, depending upon whether they are currently covered by the Franchise Rule. The Commission staff estimates that there are approximately 3,200 business opportunity sellers, comprised of some 2,500 vending machine, rack display, and related opportunity sellers, 550 work-at-home opportunity sellers, and 150 multilevel marketing companies.

For the 2,500 vending machine, rack display, and related opportunity sellers presently covered by the Franchise Rule, the proposed Rule would reduce the number of disclosures from 20 categories of information to five mandatory disclosures pertaining to earnings claims, lawsuits, refund policy, cancellation and refund requests, and references. For the 700 business opportunity sellers presently exempted from the Franchise Rule, the disclosures, as noted below, are streamlined to minimize compliance costs.

1. Reduced Mandatory Disclosures

The proposed Business Opportunity Rule contains five mandatory disclosures pertaining to earnings claims, lawsuits, refund policy, cancellation and refund requests, and references. With respect to earnings claims, business opportunity sellers must disclose whether or not they make earnings claims. However, the decision to make an earnings claim is optional. While the disclosures of references and earnings claims retain, for the most part, the current Franchise Rule requirements, the required disclosures for lawsuits and refund requests are reduced from the Franchise Rule.

a. Lawsuits

As noted above, the current Franchise Rule requires an extensive list of suits that must be disclosed including those involving allegations of fraud, unfair or deceptive business practices, embezzlement, fraudulent conversion, misappropriation of property, and restraint of trade. Franchisors also must disclose suits filed against them involving the franchise relationship. 16 CFR at 436.1(a)(4). In contrast, the proposed Rule's lawsuit disclosure requirements are limited to suits for misrepresentation, fraud, or unfair or deceptive business practices only.

b. Cancellation and Refund Requests

The current Franchise Rule requires detailed statistical information reflecting changes in the number of franchises during the previous year, specifically the number of:

(1) Franchises sold; (2) franchises voluntarily terminated or not renewed; (3) franchises otherwise reacquired by the franchisor; (4) franchises for which the franchisor refused renewal; (5) franchises cancelled or terminated; as well as the reasons for any reacquisitions, refusals to renew, or terminations. 16 CFR at 436.1(a)(16). In contrast, the proposed Rule requires only the disclosure of the number of sales in the last two years and the number of cancellation and refund requests received by the seller during the same period.

2. Incorporation of Existing Materials

The proposed Rule also reduces collection and dissemination costs by permitting sellers to reference in their disclosure documents materials already in their possession. For example, a seller need not repeat its refund policy in the text of the disclosure document, but may incorporate its contract or brochures, or other materials that already provide the necessary details.

3. Use of Electronic Dissemination of Information

The proposed Rule redefines the term ''written'' to include electronic media. Accordingly, all business opportunities covered by the proposed Rule are permitted to use the Internet and other electronic media to furnish disclosure

[256] *See* 15 U.S.C. 57a(i)(2)(A); 45 FR 50814 (1980); 45 FR 78626 (1980).

[257] 70 FR 51819 (Aug. 31, 2005).

[258] If the Commission ultimately issues a final rule for business opportunity sellers, the Commission staff will request that OMB adjust the clearance for the Franchise Rule because the Franchise Rule will no longer apply to business opportunity sellers.

documents. Allowing this distribution method could greatly reduce sellers' compliance costs over the long run, especially costs associated with printing and distributing disclosure documents. As a result of this proposal, the Commission expects sellers' compliance costs will decrease substantially over time.

4. Use of Computerized Data Collection Technology

Finally, because of advances in computerized data collection technology, the Commission staff anticipates that the costs of collecting information and recordkeeping requirements imposed by the Rule will be minimal. For example, a seller can easily maintain a spreadsheet of its purchasers, which can be sorted by location. This would enable a seller to comply easily with the proposed reference list requirement (at least 10 prior purchasers in the last three years who are located nearest the prospective purchaser, or, if there are not 10, then all prior purchasers). In the alternative, the proposed Rule permits a seller to maintain a national list of purchasers. Such a list could be posted on the seller's Web site, for example.

As a result of these proposals, the Commission staff estimates that compliance with the proposed Rule by business opportunity sellers, on average, will require one to three hours to prepare an initial disclosure document, and one to two hours per year to maintain the necessary records. Staff assumes that in many instances an attorney likely would prepare or update the disclosure document. Accordingly, staff estimates the total number of hours initially to comply with the proposed Rule to be approximately 16,000 (3,200 sellers × 5 hours), at a total initial labor cost of $4,000,000 (16,000 hours × $250). The Commission staff expects that the annual disclosure burden will diminish after the first year to one to two hours to prepare disclosures and one to two hours to retain records, resulting in approximately 12,800 hours (3,200 sellers × 4 hours) or fewer, for a total average cost of $3,200,000 (12,800 hours × $250), or less.

The Commission invites comments that will enable it to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical utility;

2. Evaluate the accuracy of the Commission's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, usefulness, and clarity of the information to be collected; and

4. Minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, for example, permitting electronic submission of responses.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission. Comments should be submitted via facsimile to (202) 395–6974 because U.S. Postal Mail is subject to lengthy delays due to heightened security precautions.

OMB will act on this request for review of the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives the comment within 30 days of publication. This does not affect the deadline for the public to comment to the FTC on the proposed regulation.

Section I—Regulatory Analysis

Section 22 of the FTC Act, 15 U.S.C. 57b, requires the Commission to issue a preliminary regulatory analysis when publishing a Notice of Proposed Rulemaking, but requires the Commission to prepare such an analysis for a rule amendment proceeding only if it: (1) Estimates that the amendment will have an annual effect on the national economy of $100,000,000 or more; (2) estimates that the amendment will cause a substantial change in the cost or price of certain categories of goods or services; or (3) otherwise determines that the amendment will have a significant effect upon covered entities or upon consumers. To the extent that this Document constitutes a Notice of Proposed Rulemaking, the Commission has set forth in Section J below, in connection with its Initial Regulatory Flexibility Analysis (''IRFA'') under the Regulatory Flexibility Act, and has discussed elsewhere in this Document: (1) The need for and objectives of the proposed Rule (see IRFA ¶ 2); (2) a description of reasonable alternatives that would accomplish the Rule's stated objectives consistent with applicable law (see IRFA ¶ 6); and a preliminary analysis of the benefits and adverse effects of those alternatives (see *id.*). Alternatively, to the extent that this proceeding proposes to amend the existing Franchise Rule, the Commission has preliminarily determined that the proposed amendments to the Franchise Rule will not have such an effect on the national economy, on the cost or prices of goods or services sold through business opportunities, or on covered businesses or consumers. As noted in the Paperwork Reduction Act discussion above, the Commission staff estimates each business affected by the Rule will likely incur only minimal compliance costs. Specifically, approximately 3,200 businesses will spend not more than $750 (3 hours × $250 each) to create an initial disclosure document and not more than $500 (2 hours × $250 each) to update the four required disclosures on an annual basis. To ensure that the Commission has considered all relevant facts, however, it requests additional comment on these issues.

Section J—Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, requires an agency to provide an IRFA with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA'') with the final rule, if any, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603–605. The FTC does not expect that the proposed Business Opportunity Rule will have a significant economic impact on a substantial number of small entities. The abbreviated disclosure and recordkeeping requirements of the proposed Business Opportunity Rule are the minimum necessary to give consumers the information they need to protect themselves and permit effective enforcement of the rule. As such, the economic impact of the proposed Rule will be minimal. In any event, the burdens imposed on small businesses are likely to be relatively small, and in the Commission's enforcement experience, insignificant in comparison to their gross sales and profits.

This document serves as notice to the Small Business Administration of the agency's certification of no effect. Nonetheless, the Commission has determined that it is appropriate to publish an IRFA in order to inquire into the impact of the proposed Rule on small entities. Therefore, the

Commission has prepared the following analysis.

1. Description of the Reasons That Action by the Agency Is Being Considered

The Commission's law enforcement experience provides ample evidence that fraud is pervasive in the sale of many business opportunities marketed to consumers. The pre-sale disclosures provided by the proposed Business Opportunity Rule will give consumers the minimal information they need to protect themselves from fraudulent sales claims, while minimizing the compliance costs and burdens on sellers.

2. Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objective of the proposed Rule is to provide consumers considering the purchase of a business opportunity with material information they need to investigate the offering thoroughly so they can protect themselves from fraudulent claims. The legal basis for the proposed Rule is Section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section (5)(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

3. Description of and, Where Feasible, Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

The proposed Rule primarily applies to ''sellers'' of business opportunities, including vending, rack display, medical billing and work-at-home (*e.g.*, craft assembly, envelope stuffing) opportunities, as well as pyramid schemes masquerading as multilevel sales programs. The FTC staff believes that many of these sellers will fall into the category of small entities. Determining the precise number of small entities affected by the proposed Rule, however, is difficult due to the wide range of types of businesses engaged in business opportunity sales. The staff estimates that there are approximately 3,200 business opportunity sellers, including some 2,500 vending machine, rack display, and related opportunity sellers; 550 work-at-home opportunity sellers; and 150 multilevel marketing companies. Most established and some start-up business opportunities would likely be considered small businesses according to the applicable SBA size standards.[259] The FTC staff estimates that as many as 70% of business opportunities, as defined by the Rule, are small businesses. The Commission invites comments and information on this issue.

4. Projected Reporting, Recordkeeping and Other Compliance Requirements, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The proposed Rule imposes disclosure and recordkeeping requirements, within the meaning of the Paperwork Reduction Act, on the ''sellers'' of business opportunities and their principals. Section 437.2 of the proposed Rule would require ''sellers'' of covered business opportunities to provide potential purchasers with a one-page disclosure document, as specified by section 437.3 and Appendix A, at least seven calendar days before they sign a contract or pay any money toward a purchase. If a seller elects to make an earnings claim, section 437.4 would require that written substantiation for the claim be provided to the purchaser in a separate ''earnings claim statement'' document. However, the proposed Rule would not require sellers to make an earnings claim, and thus any compliance costs incurred in connection with such claims are strictly optional.

Section 437.6 of the proposed Rule prescribes recordkeeping requirements necessary for effective enforcement of the Rule. Specifically, sellers of a covered business opportunity, and their principals, must retain for at least three years the following six types of documents: (1) Records of any oral cancellation or refund requests received from a purchaser; (2) each materially different version of all documents required by the Rule; (3) each purchaser's disclosure receipt; (4) each executed written contract with a purchaser; (5) each cancellation or refund request received from a purchaser; and (6) all substantiation upon which the seller relies for each earnings claim made. The proposed Rule requires that these records be made available for inspection by the Commission, but does not otherwise require production of the records. The Commission is seeking clearance from the Office of Management and Budget (''OMB'') for these requirements and the Commission's Supporting Statement submitted as part of that process will be made available on the public record of this rulemaking.

As discussed in section H above, FTC staff estimates that the total number of hours initially to comply with the proposed Rule to be approximately 16,000 (3,200 sellers × 5 hours), with a total initial legal and clerical cost of $4,000,000 (16,000 hours × $250). FTC staff expects that the annual burden will diminish after the first year, however, to approximately 12,800 hours (3,200 sellers × 4 hours) or fewer, for a total average of annual legal and clerical labor costs of $3,200,000 (12,800 hours × $250), or less.

5. Other Duplicative, Overlapping, or Conflicting Federal Rules

There are no other federal statutes, rules, or policies that would conflict with the proposed Business Opportunity Rule. The Commission's Franchise Rule, 16 CFR Part 436.1, is the only federal regulation currently applicable to some of the business opportunities covered by the proposed Rule. When the proposed Business Opportunity Rule takes effect, its requirements for business opportunity sellers will supercede the requirements of the Franchise Rule, so that any possible conflict between the two rules will be avoided.

The Commission notes, however, that it is aware that 22 states have statutes specifically governing the sale of business opportunities. The Commission therefore seeks comment and information about any state statutes or rules that may conflict with the proposed requirements, as well as any other state, local, or industry rules or policies that require covered entities to implement practices that conflict or comport with the requirements of the proposed Rule.

[259] Since October 2000, SBA size standards have been based on the North American Industry Classification System (''NAICS''), in place of the Standard Industrial Classification (''SIC'') system. In general, a company in a non-manufacturing industry is a small business if its average annual receipts are $6 million or less. *See http://www.sba.gov/size/indexguide.html.* Thus, the size standard for vending machine operators is $6 million in annual receipts (NAICS 454210), and the same size standard applies to other direct selling establishments (NAICS 454390), marketing consulting services (NAICS 541613), other management consulting services (NAICS 541618) and other business support services (NAICS 561499 and 561990). *See http://www.sba.gov/size/sizetable2002.html.*

6. Description of Any Significant Alternatives to the Proposed Rule That Would Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities, Including Alternatives Considered, Such as: (1) Establishment of Differing Compliance or Reporting Requirements or Timetables That Take Into Account the Resources Available to Small Entities; (2) Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements Under the Rule for Such Small Entities; and (3) Any Exemption From Coverage of the Rule, or Any Part Thereof, for Such Small Entities

The proposed Rule's disclosure and recordkeeping requirements are designed to impose the minimum burden on all affected business opportunity sellers, regardless of size. In formulating the proposed Rule, the Commission has taken a number of significant steps to minimize the burdens the proposed Rule would impose on large and small businesses. These include: (1) Limiting the required pre-sale disclosure to a one-page document, with check boxes provided to simplify disclosure responses; (2) allowing the disclosure to refer to information in other existing documents to avoid needless duplication; (3) permitting the disclosure document itself to be furnished in electronic form to minimize printing and distribution costs; and (4) employing specific prohibitions in place of affirmative disclosures whenever possible. Moreover, because many of the sellers covered by the proposed Rule are already required to comply with the Commission's Franchise Rule and the business opportunity laws in 22 states, FTC staff anticipates that the proposed Rule will drastically reduce their current compliance costs, while imposing exceedingly modest ongoing compliance costs on all covered sellers. Consequently, the Commission believes that the proposed Rule will not have a significant economic impact upon small businesses.

The proposed Rule would require business opportunity sellers to provide only five affirmative disclosures in a one-page disclosure document. This is a significant reduction from the 20 disclosures now required by the Commission's Franchise Rule, with which many business opportunity sellers are now obligated to comply. The proposed Rule limits required disclosures to information about the sellers' litigation history, refund policy, refund request history, and prior purchaser references. Because the proposed Rule does not require sellers to make information about potential earnings available to potential purchasers, such earnings claims are entirely optional. Thus, if sellers make no earnings claims whatsoever, they can avoid the proposed Rule's requirement that any person making an earnings claim provide a potential purchaser with an earnings claim representation in writing that provides substantiation for the claim.

Thus, the Commission does not believe that the proposed Rule will impose a significant economic impact on a substantial number of small businesses. Nonetheless, the Commission specifically requests comment on the question whether the proposed Rule imposes a significant impact upon a substantial number of small entities, and what modifications to the Rule the Commission could make to minimize the burden on small entities. Moreover, the Commission requests comment on the general question whether new technology or changes in technology can be used to reduce the burdens mandated by the Act.

In some situations, the Commission has considered adopting a delayed effective date for small entities subject to a new regulation in order to provide them with additional time to come into compliance. In this case, however, in light of the proposed Rule's flexible standard and modest compliance costs, the Commission believes that small entities should feasibly be able to come into compliance with the proposed Rule by the proposed effective date, six months following publication of the final Rule. Nonetheless, the Commission invites comment on whether small businesses might need additional time to come into compliance and, if so, why.

In addition, the Commission has the authority to exempt any persons or classes of persons from the Rule's application pursuant to section 18(g) of the FTC Act. The Commission therefore requests comment on whether there are any persons or classes of persons covered by the proposed Rule that it should consider exempting from the Rule's application pursuant to section 18(g). However, the Commission notes that the proposed Rule's purpose of protecting consumers against fraud could be undermined by the granting of a broad exemption to small entities.

7. Questions for Comment To Assist Regulatory Flexibility Analysis

a. Please provide information or comment on the number and type of small entities affected by the proposed Rule. Include in your comment the number of small entities that will be required to comply with the Rule's disclosure and recordkeeping requirements.

b. Please provide comment on any or all of the provisions in the proposed Rule with regard to: (a) The impact of the provision(s) (including benefits and costs to implement and comply with the Rule or Rule provision), if any; and (b) what alternatives, if any, the Commission should consider, as well as the costs and benefits of those alternatives, paying specific attention to the effect of the proposed Rule on small entities in light of the above analysis. In particular, please provide the above information with regard to the disclosure and recordkeeping provisions of the proposed Rule set forth in sections 437.2, 437.3, 437.4 and 437.6, and describe any ways in which the proposed Rule could be modified to reduce any costs or burdens for small entities consistent with the proposed Rule's purpose. Costs to implement and comply with a Rule provision include expenditures of time and money for: Any employee training; attorney, computer programmer or other professional time; preparing relevant materials (*e.g.*, disclosure documents), and recordkeeping.

c. Please describe ways in which the Rule could be modified to reduce any costs or burdens on small entities, including whether and how technological developments could further reduce the costs of implementing and complying with the proposed Rule for small entities.

d. Please provide any information quantifying the economic costs and benefits of the proposed Rule on the entities covered, including small entities.

e. Please identify any relevant federal, state, or local rules that may duplicate, overlap or conflict with the proposed Rule.

Section K—Request for Comments

The Commission invites members of the public to comment on any issues or concerns they believe are relevant or appropriate to the Commission's consideration of the proposed Business Opportunity Rule. The Commission requests that factual data upon which the comments are based be submitted with the comments. In addition to the issues raised above, the Commission solicits public comment on the specific questions identified below. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted.

1. General Questions

Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on each different provision of the proposed Rule. Regarding each provision, please include answers to the following questions:

a. How prevalent is the practice the provision seeks to address?

b. What is the impact (including any benefits and costs), if any, on:

1. Prospective business opportunity purchasers;

2. Existing business opportunity purchasers; and

3. Business opportunity sellers (including small business opportunity sellers and start-up sellers)?

c. What alternative proposals should the Commission consider? How would these proposed alternatives affect the costs and benefits of the proposed Rule?

2. Questions on Specific Proposals

In response to each of the following questions, please provide: (1) Detailed comment, including data, statistics, consumer complaint information, and other evidence, regarding the issues addressed in the question; (2) comment as to whether the proposal does or does not provide an adequate solution to the problems it is intended to address; and (3) suggestions for additional changes that might better maximize consumer protections or minimize the burden on business opportunity sellers.

Definitions

1. Proposed section 437.1(d) would limit the definition of ''business opportunity'' to instances where a seller solicits a purchaser to enter into a new business (or new line or type of business). This limitation seeks to distinguish the sale of business opportunity ventures from the ordinary sale of goods and services. Is limiting the definition of ''business opportunity'' to solicitations to enter into a new business adequate to make this distinction? If not, what alternative limitation should the Commission consider? What would be the costs and benefits of each alternative?

2. Proposed section 437.1(d) contemplates that a business arrangement will constitute a ''business opportunity'' if the seller either promises business assistance or makes an earnings claim. Are both alternatives necessary? Are there business opportunities that offer assistance without making an earnings claim? Are there business opportunities that make earnings claims that do not offer assistance? Should the definition of ''business opportunity'' focus on the offer of assistance alone or on the making of earnings claims alone? What alternatives should the Commission consider? What would be the costs and benefits of each alternative?

3. Proposed section 437.1(d) contemplates that a business arrangement will constitute a ''business opportunity'' if the purchaser pays consideration to the seller, directly or indirectly through a third party. The proposed definition, however, does not contain a minimum payment threshold. The Commission believes that, in light of the limited compliance costs—far less than under the Franchise Rule—all business opportunity sellers (with the exception of franchisors under the Franchise Rule), should comply with the Rule. Further, the record shows that whatever threshold might be set forth in a Business Opportunity Rule, fraudulent business opportunity sellers will price their opportunities at an amount just under the threshold in order to avoid compliance. Nevertheless, should the Commission consider a monetary threshold and if so, why? At what level should the threshold be set? If so, how can the Commission ensure that fraudulent business opportunity sellers will not price their opportunities just under the threshold in order to avoid Rule coverage? What alternatives should the Commission consider? What would be the costs and benefits of each alternative?

4. Proposed section 437.1(c) would define the term ''business assistance,'' setting forth five examples. Are each of these examples warranted? What other examples, if any, might better capture the nature of business assistance offered by business opportunity sellers? What would be the costs and benefits of each alternative?

5. Proposed section 437.1(c) would include as an example of ''business assistance'' the tracking or paying, or purporting to track or pay, commissions or other compensation based upon the sale of goods or services or recruitment of other persons to sell goods or services. This example is intended to capture pyramid marketing programs that assist program participants in tracking commissions to be paid or by paying commissions to participants' downstream. Does this example adequately capture pyramid schemes? Is it too broad, sweeping in business arrangements other than pyramids? If so, what alternative, if any, should the Commission consider to capture pyramid programs? What would be the costs and benefits of each alternative?

6. Proposed section 437.1(k) would make clear that the Rule applies to persons already in business who are seeking to enter into a new line of business. Do persons already in business need the protection of the proposed Rule? Does this provision impose unwarranted costs? Should the Commission consider alternatives regarding persons already in business who are either looking to purchase a new business opportunity or to expand their line of business? If so, what would be the costs and benefits of each alternative?

Timing Provision

7. Proposed section 437.2 contemplates that a seller must furnish a prospective purchaser with a disclosure document at least seven calendar days before the earlier of the time that the prospective purchaser: (1) Signs any contract in connection with the business opportunity sale; or (2) makes a payment or provides other consideration to the seller, directly or indirectly through a third party, for the purchase or lease of goods or services. Is a seven calendar-day period warranted to enable prospective purchasers to investigate and make an informed investment decision? Is a seven calendar-day period necessary to enable prospective purchasers to review any earnings claims? Would a seven calendar-day review period impose unnecessary delay or excessive costs when the prospective purchaser is already in business? Should the review period be shortened to five or three days? What would be the costs and benefits of each alternative time period?

Liability

8. Proposed section 437.3 would provide that only a seller has the obligation to furnish a basic disclosure document. While a seller may hire brokers or others to arrange for sales, the seller ultimately has the obligation to ensure that disclosures are properly prepared and disseminated to prospective purchasers. Is it proper to limit liability for preparing and disseminating disclosure documents to the seller? Should other individuals or entities involved in a business opportunity sale also be liable for either failing to furnish disclosure documents or for the contents of an incomplete or inaccurate disclosure documents? What alternatives, if any, should the Commission consider? What would be the costs and benefits of each alternative?

The Disclosure Document

9. Proposed section 437.3(a) requires that disclosure documents be ''in the form and using the language set forth in

Appendix A.'' Is this instruction sufficient to inform business opportunity sellers on how to prepare a basic disclosure document? Should the Commission revise the proposed Rule specifically to reference each of the required boilerplate disclosures? What alternatives, if any, should the Commission consider? What would be the costs and benefits of each alternative?

10. The one-page disclosure document set forth in Appendix A is intended to provide prospective purchasers with material information with which to make an informed investment decision. Can the overall presentation of the information in the one-page disclosure document be improved? Are there specific sections that can be improved by simplifying the presentation to make it easier for prospective purchasers to understand? How could the presentation be improved? What would be the costs and benefits of each alternative?

11. The one-page disclosure document set forth in Appendix A is intended to assist prospective purchasers by describing the nature of the information disclosed. For example, where a seller checks the ''yes'' box in connection with earnings claims, it clarifies for prospective purchasers that the seller or its representative is furnishing sales, income, or profit data. At the same time, the one-page disclosure document sets forth legal standards, summarizing for sellers and prospective purchasers the more lengthy disclosure obligations found in the text of the Rule. Accordingly, the Commission has tried to balance, as much as possible, the use of clear language readily understandable by prospective purchasers with the need for clear legal standards applicable to sellers. Has the Commission succeeded in striking the appropriate balance? Are there areas where the understandability of the one-page disclosure document may be improved, without sacrificing clear legal standards? Are there specific sections where the proposed language does not accurately convey the substance of the corresponding Rule provision? What improvements should the Commission consider to the language found in the one-page disclosure document? What would be the costs and benefits of each alternative?

12. The disclosure document provides a space for the name of the ''Seller.'' In addition to any company or d/b/a name listed next to ''Seller,'' should ''Seller'' also include the principal officers' names? Should the addition of such names depend on whether or not the seller is a d/b/a? What are the costs and benefits of including both the company and the principal officers' names next to ''Seller''? Should previous business opportunities offered by the seller's principal officers be disclosed? What are the costs and benefits of including such information?

13. Proposed section 437.3(a)(3) would require sellers to furnish certain litigation information. Specifically, the seller would disclose information about itself, as well as any affiliates and prior businesses, any of the seller's officers, directors, sales managers (or other individuals who occupy a similar position or perform similar functions), and employees who are involved in business opportunity sales activities. The intent of this provision is to capture all individuals who function as officers, directors, or sales managers, even though they may not have a formal title. In addition, it also captures those employees who are involved in sales activities. Does this provision adequately capture the types of individuals whose litigation should be disclosed? Is the phrase ''any individual who occupies a similar position or performs a function similar to an officer, director, or sales manager of the seller'' adequate to identify those who act as or perform the functions of officers, directors, or sales managers? Similarly, is the language ''employees who are involved in business opportunity sales activities'' too broad? What alternative language, if any, should the Commission consider? What would be the costs and benefits of each alternative?

14. Proposed section 437.3(a)(3) would limit the types of suits that must be disclosed to civil and criminal actions involving misrepresentation, fraud, securities law violations, or unfair or deceptive practices within 10 years immediately preceding the date that the business opportunity is offered. Are these types of actions sufficient to enable a prospective purchaser to assess the risk of purchasing an opportunity from the seller? Should the list be expanded to include bankruptcy? Should it be expanded to include suits against the seller for breach of contract? How often do business opportunity purchasers sue sellers for breach of contract, as opposed to misrepresentation or fraud? Is 10 years a sufficient period to track prior litigation? Is a 10-year period too long? If so, what alternative time period, if any, should the Commission consider? What would be the costs and benefits of each alternative?

15. Proposed section 437.3(a)(3) would require a seller disclosing litigation to include the full caption of each action, including the names of the principal parties, case number, full name of the court, and the filing date. Should more detail be provided about legal actions? Should the business opportunity seller also have to provide information about any of the following topics: the final disposition of the action; the penalties imposed; the damages assessed; the terms of the settlement; or the terms of the order? What would be the costs and benefits of including such additional information?

16. Proposed section 437.3(a)(4) would require a seller to disclose whether or not the seller has a cancellation or refund policy. In addition, proposed section 437.3(a)(5) would require the seller to state the number of purchasers of the business opportunity during the two years prior to the date of the disclosure and the number of cancellation and refund requests submitted by prior purchasers during the same period. The purpose of this provision is to assist the prospective purchaser in assessing the viability of the offer and the likelihood of the seller's post-sale performance. The focus on cancellations and refunds assumes that a seller would be better able to disclose information about such requests that it receives than information about the current status of prior purchasers. Is this assumption correct? To what extent do business opportunity sellers track the current status of prior purchasers? Is cancellation or refund request information relevant in a business opportunity sale? Does such information correctly imply dissatisfaction or problems within a business opportunity system? Would such a disclosure requirement actually discourage sellers from offering cancellations or refunds? What alternatives, if any, should the Commission consider? What would be the costs and benefits of each alternative?

17. Proposed section 437.3(a)(6) would require each seller to disclose the name, city and state, and telephone number for at least 10 prior purchasers nearest to the prospective purchaser's location. The Commission believes the disclosure of this information is critical to enable a prospective business opportunity purchaser to verify the seller's claims and to conduct a due diligence investigation of the offering. Is this information proprietary for the seller? If so, do the benefits of such disclosure to prospective purchasers outweigh the costs to sellers? Are there other ways to identify prior purchasers? What alternatives, if any, should the Commission consider? What would be

the costs and benefits of each alternative?

18. As an alternative, proposed section 437.3(a)(6) would enable a seller to furnish prospective purchasers with a national list of prior purchasers. Is this a viable option? Would sellers be inclined to publish a single national list rather than individualized lists of purchasers ''nearest to the prospective purchaser's location?'' Under what circumstances should the Rule permit a seller to post a national list of purchasers on its Web site? What protections should be put in place to limit access to the list? What protections might be sufficient to prevent those who merely want to sell fraudulent business opportunities from accessing such a list? What other options, if any, should the Commission consider? Would these options enable the seller to select only those prior purchasers who are successful or who otherwise would give a favorable report on the seller? What would be the costs and benefits of each alternative?

19. Proposed section 437.3(b) would require the disclosure of contact information, raising privacy concerns. Accordingly, the Commission proposes that sellers include in the references section of the disclosure document the following: ''If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers.'' Are there alternative methods that would protect prior purchasers' privacy? Should the Commission consider an opt-out provision, enabling purchasers to decline having their contact information listed in a disclosure document? Would sellers likely exploit an opt-out provision by inducing purchasers to opt out, thereby avoiding the obligation to disclose prior purchasers as references? Would sellers use an opt-out provision to create, in effect, a self-serving list of successful purchasers or shills? Are there alternative methods employed by the states that the Commission should consider?

20. Once the Rule becomes effective, sellers must disclose contact information for prior purchasers. However, individuals who have purchased a business opportunity before the Rule becomes effective probably will have received no notice that their contact information can be disclosed to other purchasers in the future. How should the Commission balance the goals of disclosing prior purchasers as references with the fact that, at least initially, some prior purchasers will not have received any privacy notice? Should the Commission phase in the use of references? For example, should the seller update its reference list on a monthly basis drawing only from those purchasers who have received a privacy notice? Is a monthly updating requirement feasible? What alternative updating requirement should the Commission consider? Would a monthly updating requirement disadvantage those purchasers who buy a business opportunity immediately after the Rule goes into effect, when no or few prior purchasers will have received the required privacy notice? What alternatives should the Commission consider? What would be the costs and benefits of each alternative?

21. Are there other disclosures that should be included in the disclosure document? Specifically, should any proposed initial purchaser price of the business opportunity and/or payments to be sent to third parties be listed on the disclosure document? Why or why not? What would be the costs and benefits of including such information?

Earnings Claims

22. Proposed section 437.4(a)(4) would set forth the required content of an earnings claims statement. It includes the name of the person making the claim, the date of the claim, the claim, the beginning and ending dates when the represented earnings were achieved, the number and percentage of all purchasers during the stated time frame who achieved at least the stated level of earnings, and a description of any characteristics of the purchasers who achieved the represented earnings that may be materially different from the characteristics of the prospective purchasers being offered the business opportunity. Is this information sufficient to enable a prospective purchaser to assess the validity of an earnings claim? What other substantiation, if any, should be required? Should a seller be able to make an earnings claim if it does not have complete and accurate information on the number and percentage of prior purchasers who have achieved the represented level of earnings? If so, under what conditions should such earnings claims be permitted? What alternatives, if any, should the Commission consider? What would be the costs and benefits of each alternative?

23. Proposed section 437.4(c) would address the dissemination of industry financial, earnings, or performance information. Specifically, a seller would be barred from using such information unless the seller has written substantiation demonstrating that the information reflects the typical or ordinary financial performance experience of purchasers of the business opportunity being offered for sale. Should a seller be required to disclose the number and percentage of its purchasers that have achieved at least the same level of performance as the industry figures? Would number and percentage information be sufficient to enable a prospective purchaser to assess the applicability of industry information to the opportunity being offered? Do business opportunity sellers collect performance data from purchasers? Is such information readily available? What other alternatives, if any, should the Commission consider? What would be the costs and benefits of each alternative?

Prohibited Acts and Practices

24. Proposed section 437.5 would set forth a number of prohibited acts or practices. Is the proposed list complete? Are there any other practices common among business opportunity sellers that should be prohibited? Are any of the proposed prohibitions unnecessary? What would be the costs and benefits of each proposed prohibition? What alternatives, if any, should the Commission consider? What would be the costs and benefits of each alternative?

25. Proposed section 437.5 would prohibit sellers from misrepresenting the business opportunity, directly or through third parties. Accordingly, a business opportunity could be held liable for misrepresentations made about the business opportunity through third parties, such as a locator or broker. Should third parties involved in the business opportunity sales process be held liable for misrepresenting the seller's disclosures? Proposed section 437.5 also does not address when a third party—such as a shill—makes his or her own misrepresentations outside of the disclosure document. The Commission believes that third parties can be held liable for their own misrepresentations under section 5 of the FTC Act. Is section 5 of the FTC Act sufficient to address independent misrepresentations made outside of a disclosure document by such third parties? What alternatives, if any, should the Commission consider? What would be the costs and benefits of each alternative?

Federal and State Relations

26. The proposed Rule would prohibit business opportunity sellers from adding any other information to the required disclosures, including information required by state law. This approach is different from the Franchise

Rule approach, which enables franchisors to include additional materials in a disclosure document that are required or permitted by state law. Because the proposed disclosure document comprises a single page (and any attachments), sellers can easily attach the federal disclosure document to any disclosure document required under state law, without imposing significant costs or burdens. In light of the vastly different laws governing business opportunities on the state level, this approach will also preserve the uniformity of federal disclosure documents. Is this approach proper? How can the Commission best accommodate divergent state business opportunity approaches? What alternatives, if any, should the Commission consider? What would be the costs and benefits of each alternative?

Record Retention

27. Proposed section 437.6 would require that records be kept for ''each oral or written cancellation or refund request received from a purchaser.'' How should oral cancellation or refund requests be kept? Is there certain information that should be preserved in a written form, such as name, address, amount of request, date, and resolution of the request? What would be the costs and benefits of requiring such record retention obligations?

Section L—Proposed Rule

For the reasons set forth in the preamble, the Federal Trade Commission proposes to amend 16 CFR Chapter I by adding part 437 to read as follows:

PART 437—BUSINESS OPPORTUNITY RULE

Sec.

Appendix A to Part 437—Model Document

Authority: 15 U.S.C. 41–58.

§ 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, and an assurance of voluntary compliance.

(b) *Affiliate* means an entity controlled by, controlling, or under common control with a business opportunity seller.

(c) *Business assistance* means the offer of material advice, information, or support to a prospective purchaser in connection with the establishment or operation of a new business.

(1) Business assistance includes, but is not limited to:

(i) Providing, or purporting to provide, locations for the use or operation of equipment, displays, vending machines, or similar devices, on premises neither owned nor leased by the purchaser;

(ii) Providing, or purporting to provide, outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser's goods or services;

(iii) Buying back, or purporting to buy back, any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides;

(iv) Tracking or paying, or purporting to track or pay, commissions or other compensation based on the purchaser's sale of goods or services or recruitment of other persons to sell goods or services; and

(v) Advising or training, or purporting to advise or train, the purchaser in the promotion, operation, or management of a new business, or providing, or purporting to provide, the purchaser with operational, managerial, technical, or financial guidance in the operation of a new business.

(2) Provided, however, that ''business assistance'' does not include a written product warranty or repair contract, or guidance in the use, maintenance, and/or repair of any product to be sold by the purchaser or of any equipment acquired by the purchaser.

(d) *Business opportunity* means a commercial arrangement in which:

(1) The seller solicits a prospective purchaser to enter into a new business;

(2) The prospective purchaser makes a payment or provides other consideration to the seller, directly or indirectly through a third party; and

(3) The seller, expressly or by implication, orally or in writing, either:

(i) Makes an earnings claim; or

(ii) Represents that the seller or one or more designated persons will provide the purchaser with business assistance.

(e) *Cancellation or refund request* means any request to cancel or rescind a business opportunity purchase, or any request to seek a refund, in whole or in part, for a business opportunity purchase, whether or not the purchaser has a contractual right to cancel, rescind, or seek a refund.

(f) *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, including, but not limited to, any person who finds or purports to find locations for equipment.

(g) *Disclose or state* means to give information in writing that is clear and conspicuous, accurate, concise, and legible.

(h) *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'').

(i) *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.

(j) *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, and commercial bulk e-mail.

(k) *New business* means a business in which the prospective purchaser is not currently engaged, or a new line or type of business.

(l) *Person* means an individual, group, association, limited or general partnership, corporation, or any other entity.

(m) *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, by any of the seller's officers, directors, sales managers, or by any other individual who occupies a

position or performs a function similar to that of an officer, director, or sales manager of the seller.

(n) *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; collecting a fee on behalf of one or more locators or lead generating companies; or training or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers.

(o) *Purchaser* means a person who buys a business opportunity.

(p) *Quarterly* means as of January 1, April 1, July 1, and October 1.

(q) *Seller* means a person who offers for sale or sells a business opportunity.

(r) *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 e-mail; 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 Rule 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 part 437:

(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 section 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 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;

(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; or

(D) Any of the seller's employees who are involved in business opportunity sales activities.

(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).

(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 the terms 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) Cancellation or refund requests. State the total number of purchasers of the same type of business opportunity offered by the seller during the two years prior to the date of disclosure. State the total number of oral and written cancellation requests during that period for the sale of the same type of business opportunity. For purposes of this disclosure, ''two years'' means the eight quarters immediately preceding the date of the disclosure document.

(6) References.

(i) State the name, city and 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, city and 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.''

(7) Receipt. Attach a duplicate copy of the disclosure page 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, the total number of purchasers, the number of cancellation requests, 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 purchasers during the stated time period 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 purchasers during that time period who achieved the represented earnings.

(c) Disseminate industry financial, earnings, or performance information unless the seller has written substantiation demonstrating that the information reflects 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 Other prohibited practices.

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, 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 furnishing earnings information to a prospective purchaser;

(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:

(1) Any consideration promised or paid to any person identified as a purchaser or operator of a business opportunity of the type offered by the seller. 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;

(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.

§ 437.6 Record retention.

To prevent the unfair and deceptive acts or practices specified in this part, 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;

(d) Each oral or written cancellation or refund request received from a purchaser; and

(e) All substantiation upon which the seller relies for each earnings claim from the time each such claim is made.

§ 437.7 Franchise exemption.

The provisions of this part shall not apply to any business opportunity that:

(a) Constitutes a ''franchise,'' as defined in the Franchise Rule, 16 CFR part 436;

(b) Has a written contract; and

(c) Requires purchasers to make a payment that meets the minimum payment requirement set forth in the Franchise Rule (part 436 of this chapter).

§ 437.8 Other orders and preemption.

(a) If an outstanding FTC or court order applies to a person, but imposes requirements that are inconsistent with any provision of this regulation, the person may petition the Commission to amend the order. In particular, business opportunities required by FTC or court order to follow the Franchise Rule, 16 CFR part 436, may petition the Commission to amend the order so that the business opportunity may follow the provisions of the Business Opportunity Rule.

(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 the Rule. 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.

§ 437.9 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

BILLING CODE 6750–01–P

Apppendix A to Part 437--Model Document

BUSINESS OPPORTUNITY DISCLOSURES

Seller: [Name]_____ [Address] _____
[Phone] _____ Salesperson:_____ Date: _____

The following information can help you in deciding whether to buy a business opportunity. Note, however, that no governmental agency has verified the information. To learn more about business opportunities, call the FTC at 1-877-FTC-HELP (877-382-4357) or visit the FTC's website at ftc.gov/bizopps/. Also, check with your state's Attorney General.

Yes No (Either the "YES" or "NO" box must be checked for the following three disclosures)

[ ] [ ] **EARNINGS**: The seller or its representatives states or implies a specific level of sales, income, or profit you can make or that current or former purchasers have earned. If so, the information must be set forth in an "Earnings Claims Statement" attached to this page. Read this statement carefully. You may wish to show this information to an advisor or accountant.

[ ] [ ] **LEGAL ACTIONS**: The seller, its key personnel, or its representatives involved in the sale of business opportunities have been the subject of a civil or criminal action involving misrepresentation, fraud, securities law violation, or unfair or deceptive practices within the past 10 years. **If so, the seller must attach a list of all such legal actions.**

[ ] [ ] **CANCELLATION OR REFUND POLICY**: The seller offers a cancellation or refund policy. **If so, the seller must attach a statement describing its policy.**

CANCELLATION OR REFUND REQUESTS: In the past two years, the seller sold the same type of business opportunity to ____ purchasers, and, of those, ____ purchasers asked to cancel their purchase or requested a refund.

REFERENCES: The seller must provide you with contact information for at least 10 of its purchasers located nearest to you (or, if there are fewer than 10, all purchasers). You may wish to contact them to verify the seller's claims. If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers.

	Name	City	State	Zip	Telephone Number
1.					
2.					
3.					
4.					
5.					
6.					
7.					
8.					
9.					
10.					

Received by: Date:

BILLING CODE 6750-01-C

By direction of the Commission.

Donald S. Clark,

Secretary.

Note: The following attachments will not appear in the Code of Federal Regulations.

Attachment A: Rule Review Commenters

RR 1. Robert E. Mulloy, Jr. (''Mulloy'')
RR 2. Stanley M. Dub, Dworken & Bernstein (''Dub'')
RR 3. Marvin J. Migdol, Nationwide Franchise Marketing Services (''Migdol'')
RR 4. SCPromotions, Inc. (''SCPromotions'')
RR 5. R. Dana Pennell (''Pennell'')
RR 6. Robin Day Glenn (''Glenn'')
RR 7. Jack McBirney, McGrow Consulting (''McBirney'')
RR 8. SRA International (''SRA International'')
RR 9. Harold Brown, Brown & Stadfeld (''Brown'')
RR 10. Ronald N. Rosenwasser (''Rosenwasser'')
RR 11. Louis F. Sokol (''Sokol'')
RR 12. J. Howard Beales III, Professor, George Washington University (''Beales'')
RR 13. Peter Lagarias (''Lagarias'')
RR 14. Harold L. Kestenbaum (''Kestenbaum'')
RR 15. Walter D. Wilson, Better Business Bureau of Central Georgia, Inc. (''Wilson'')
RR 16. Connie B. D'Imperio, Color Your Carpet, Inc. (''D'Imperio'')
RR 17. Q.M. Marketing, Inc (''Q.M. Marketing'')
RR 18. David Gurnick, Kindel & Anderson (''Gurnick'')
RR 19. U-Save Auto Rental (''U-Save Auto Rental'')
RR 20. The Longaberger Co. (''Longaberger'')
RR 21. Direct Selling Association (''DSA'')
RR 22. American Bar Association, Section on Antitrust Law (''ABA AT'')
RR 23. Dennis E. Wieczorek, Rudnick & Wolfe (''Wieczorek'')
RR 24. Real Estate National Network (''RENN'')
RR 25. Attorney General Jim Ryan (''General Ryan''), State of Illinois
RR 26. Alan S. Nopar (''Nopar'')
RR 27. Snap-On, Inc. (''Snap-On'')
RR 28. Steven Rabenberg, Explore St. Louis (''Rabenberg'')
RR 29. Douglas M. Brooks, Martland & Brooks (''Brooks'')
RR 30. Robert N. McDonald (''Commissioner McDonald''), Securities Commissioner, State of Maryland
RR 31. Little Caesars (''Little Caesars'')
RR 32. International Franchise Association (''IFA'')
RR 33. Brownstein, Zeidman & Lore (''Brownstein Zeidman'')
RR 34. Jere W. Glover (''Glover''), Counsel for Advocacy, U.S. Small Business Administration (''SBA Advocacy'')
RR 35. Jan Meyers, Chair, House Committee on Small Business (''Representative Myers'')
RR 36. Neil A. Simon, Hogan and Hartson (''Simon'')
RR 37. Deborah Bortner (''Bortner''), Washington State Department of Financial Institutions, Securities Division
RR 38. American Franchisee Association (''AFA'')
RR 39. American Association of Franchisees & Dealers (''AAFD'')
RR 40. Warren Lewis, Lewis & Trattner (''Lewis'')
RR 41. Century 21 Real Estate Corp. (''Century 21'')
RR 42. John Hayden (''Hayden'')
RR 43. North American Securities Administrators Association (''NASAA'')
RR 44. Robert L. PeRRy (''Perry'')
RR 45. The State Bar of California, Business Law Section (''CA BLS'')
RR 46. Mike Gaston, Barkely & Evergreen (''Gaston'')
RR 47. The Southland Corp. (''Southland'')
RR 48. Medicap Pharmacies, Inc. (''Medicap'')
RR 49. Rochelle B. Spandorf (''Spandorf''), ABA Forum on Franchising, Andrew C. Selden (''Selden''), David J. Kaufman (''Kaufmann'')
RR 50. Joyce G. Mazero, Locke Pernell Rain Harrell (''Mazero'')
RR 51. Mark B. Forseth, Locke Pernell Rain Harrell (''Forseth'')
RR 52. Forte Hotels (''Forte Hotels'')
RR 53. R.A. Politte (''Politte'')
RR 54. Politte (*see supra* RR 53).
RR 55. Brown (*see supra* RR 9).
RR 56. Wieczorek (*see supra* RR 23).
RR 57. Scott Shane, Georgia Institute of Technology (''Shane'')
RR 58. Friday's (''Friday's'')
RR 59. Carl E. Zwisler, Keck, Mahin & Cate (''Zwisler'')
RR 60. Wieczorek (*see supra* RR 23)
RR 61. Enrique A. Gonzalez, Gonzalez Cavillo Y Forastierei (''Gonzalez'')
RR 62. Pepsico Restaurants (''Pepsico'')
RR 63. IFA (*see supra* RR 32)
RR 64. Atlantic Richfield Co (''ARCO'')
RR 65. David Clanton (''Clanton'')
RR 66. Leonard Swartz, Arthur Andersen & Co. (''Swartz'')
RR 67. John R.F. Baer, Keck, Mahin & Cate (''Baer'')
RR 68. Lynn Scott (''Scott'')
RR 69. Eversheds (''Eversheds'')
RR 70. Brownstein Zeidman (*see supra* RR 33)
RR 71. Penny Ward, Baker & McKenzie (''Ward'')
RR 72. Matthias Stein (''Stein'')
RR 73. Byron Fox, Hunton & Williams (''Fox'')
RR 74. Papa John's Pizza (''Papa Johns'')
RR 75. Harold L. Kestenbaum (*see supra* RR 14)

Rule Review September 1995 Public Workshop Conference

Panelists

Harold Brown, Brown & Stadfeld (''Brown'')
Sam Damico, Q.M. Marketing, Inc. (''Damico'')
Connie B. D'Imperio, Color Your Carpet, Inc. (''D'Imperio'')
Eric Ellman (''Ellman''), Direct Selling Assocation (''DSA'')
Mark B. Forseth, Locke Purnell Rain Harrell (''Forseth'')
Mike Gason, Barkely & Evergreen (''Gaston'')
Susan Kezios, American Franchisee Association (''AFA'') (''Kezios'')
William Kimball, Iowa Coalition for Responsible Franchising (''Kimball'')
Warren Lewis, Lewis & Trattner (''Lewis'')
Steven Maxey (''Maxey''), North American Securities Administrators Association (''NASAA'')
Joyce G. Mazero, Locke Purnell Rain Harrell (''Mazero'')
Barry Pineles (''Pineles''), U.S. Small Business Administration (''SBA Advocacy'')
Robert Purvin, American Association of Franchisees & Dealers (''AAFD'') (''Purvin'')
Steven Rabenberg, Explore St. Louis (''Rabenberg'')
Matthew R. Shay (''Shay''), International Franchise Association (''IFA'')
Neil A. Simon, Hogan & Hartson (''Simon'')
Robin Spencer (''Spencer''), representing American Franchisee Association
Leonard Swartz, Arthur Anderson & Co. (''Swartz'')
John Tifford, Brownstein Zeidman & Lore
Ronnie Volkening (''Volkening''), The Southland Corp. (''Southland'')
Dennis E. Wieczorek, Rudnick & Wolfe (''Wieczorek'')
William J. Wimmer (''Wimmer''), Iowa Coalition for Responsible Franchising

Public Participants

Peter Denzen (''Denzen'')

Bob Hessler, Wendy's (''Hessler'')
Chris Huke, SC Promotions (''Huke'')
Michael Jorgensen (''Jorgensen'')
Robert L. Perry (''Perry'')
Brian Schnell, Gray, Plant Mooty (''Schnell'')

March 1996 Public Workshop Conference

Panelists

Kay M. Ainsley, Ziebart Intl, Corp. (''Ainsley'')
John R.F. Baer, Keck, Mahin & Cate (''Baer'')
Michael Brennan, Rudnick & Wolfe (''Brennan'')
Joel R. Buckberg, HFA, Inc. (''Buckberg'')
David A. Clanton, Baker & McKenzie (''Clanton'')
Kenneth R. Costello, Loeb & Loeb (''Costello'')
Edward J. Fay, Kwik Kopy Corp. (''Fay'')
Mark B. Forseth, Locke Purnell Rain Harrell (''Forseth'')
Byron E. Fox, Hunton & Williams (''Fox'')
Bruce Harsh, International Trade Specialist, U.S. Department of Commerce (''Harsh'')
Arnold Janofsky, Precision Tune (''Janofsky'')
Susan P. Kezios (''Kezios''), American Franchisee Association (''AFA'')
Alex S. Konigsberg, QC (''Konigsberg''), Lapoint Rosenstein
Andrew P. Loewinger, Abraham Pressman & Bauer (''Loewinger'')
H. Bret Lowell, Brownstein Zeidman (''Lowell'')
John Melle, Office of U.S. Trade Representative (''Melle'')
Raymond L. Miolla, Burger King Corp. (''Miolla'')
Alex Papadakis, Hurt Sinisi Papadakis (''Papadakis'')
Matthew R. Shay (''Shay''), International Franchise Association (''IFA'')
Neil A. Simon, Hogan & Hartson (''Simon'')
Leonard Swartz, Arthur Anderson & Co. (''Swartz'')
Greg L. Walther, Outback Steakhouse Intl (''Walther'')
Dennis E. Wieczorek, Rudnick & Wolfe (''Wieczorek'')
Erik B. Wulff, Hogan & Hartson (''Wulff'')
Philip F. Zeidman (''Zeidman'')
Carl Zwisler, Keck, Mahin & Cate (''Zwisler'')

Public Participants

Jeff Brams, Sign-A-Rama and Shipping Connections (''Brams'')
Pamela Mills, Baker & McKenzie (''Mills'')

Attachment B: Advance Notice of Proposed Rulemaking Commenters

ANPR 1. Kevin Brendan Murphy, Mr. Franchise (''Murphy'')
ANPR 2. Murphy (*see supra* ANPR 1).
ANPR 3. Mike Bruce, The Michael Bruce Fund (''Bruce'')
ANPR 4. Harold Brown, Brown & Stadfeld (''Brown'')
ANPR 5. Frances L. Diaz (''Diaz'')
ANPR 6. Brown (*see supra* ANPR 4).
ANPR 7. Diaz (*see supra* ANPR 5).
ANPR 8. Marian Kunihisa (''Kunihisa'')
ANPR 9. Kevin Bores, Domino's Pizza Franchisee (''Bores'')
ANPR 10. Terrence L. Packer, Supercuts Franchisee (''Packer'')
ANPR 11. John Delasandro (''Delasandro'')
ANPR 12. William Cory (''Cory'')
ANPR 13. Joseph Manuszak, Domino's Franchisee (''Manuszak'')
ANPR 14. Daryl Donafin, Taco Bell Franchisee (''Donafin'')
ANPR 15. David Muncie, National Claims Service, Inc. (''Muncie'')
ANPR 16. Patrick E. Meyers, The Quizno's Corp. (''Quizno's'')
ANPR 17. David Weaver, Domino's Pizza Franchisee (''Weaver'')
ANPR 18. Karen M. Paquet, Domino's Pizza Franchisee (''Paquet'')
ANPR 19. Gary R. Duvall Graham & Dunn (''Duvall'')
ANPR 20. Andrew J. Sherman, Greenberg & Tauris (''Sherman'')
ANPR 21. S. Beavis Stubbings (''Stubbings'')
ANPR 22. Jim & Evalena Gray, Pearle Vision Franchisee (''J&E Gray'')
ANPR 23. Ernest Higginbotham (''Higginbotham'')
ANPR 24. Henry C. Su & Bryon Fox (''Su'')
ANPR 25. John R.F. Baer, Keck, Mahin & Cate (''Baer'')
ANPR 26. Clay Small & Lowell Dixon, Nat'l Franchise Mediation Program Steering Committee (''NFMP'')
ANPR 27. Richard T. Catalano (''Catalano'')
ANPR 28. Neil Simon & Erik Wulff, Hogan & Hartson (''H&H'')
ANPR 29. Glenn A. Mueller, Domino's Pizza Franchisee (''Mueller'')
ANPR 30. Doug Bell et al. Supercuts Franchisees (''Supercut Franchisees'')
ANPR 31. Michael L. Bennett, Longaberger Co. (''Longaberger'')
ANPR 32. John Rachide, Domino's Pizza Franchisee (''Rachide'')
ANPR 33. David J. Kaufmann, Kaufmann, Feiner, Yamin, Gildin & Robbins (''Kaufmann'')
ANPR 34. Joseph N. Mariano, Direct Selling Association (''DSA'')
ANPR 35. Linda F. Golodner & Susan Grant, National Consumers League (''NCL'')
ANPR 36. Jere W. Glover & Jennifer A. Smith, U.S. Small Business Administration Office of Chief Counsel for Advocacy (''SBA Advocacy'')
ANPR 37. Robert Chabot, Domino's Pizza Franchisee (''Chabot'')
ANPR 38. Teresa Maloney, National Coalition of 7-Eleven Franchisees (''Maloney'')
ANPR 39. BLANK
ANPR 40. Harold L. Kestenbaum (''Kestenbaum'')
ANPR 41. Samuel L. Sibent, KFC Franchisee (''Sibent'')
ANPR 42. Oren C. Crothers, KFC Franchisee (''Crothers'')
ANPR 43. Matthew Jankowski, KFC Franchisee (''Jankowski'')
ANPR 44. Rodney A. DeBoer, KFC Franchisee (''DeBoer'')
ANPR 45. Liesje Bertoldi, KFC Franchisee (''L. Bertoldi)'
ANPR 46. Steve Bertoldi, KFC Franchisee (''S. Bertoldi'')
ANPR 47. Charles Buckner, KFC Franchisee (''Buckner'')
ANPR 48. Walter J. Knezevich, KFC Franchisee (''Knezevich'')
ANPR 49. Jeffrey W. Gray, KFC Franchisee (''J. Gray'')
ANPR 50. Fred Jackson, KFC Franchisee (''Jackson'')
ANPR 51. Ronald L. Rufener, KFC Franchisee (''Rufener'')
ANPR 52. Tim Morris, KFC Franchisee (''Morris'')
ANPR 53. Scarlett Norris Adams, KFC Franchisee (''Adams'')
ANPR 54. Calvin G. White, KFC Franchisee (''White'')
ANPR 55. Nick Iuliano, KFC Franchisee (''N. Iuliano'')
ANPR 56. Dolores Iuliano, KFC Franchisee (''D. Iuliano'')
ANPR 57. Ralph A Harman, KFC Franchisee (''R. Harman'')
ANPR 58. Saundra S. Harman, KFC Franchisee (''S. Harman'')
ANPR 59. Richard Braden, KFC Franchisee (''Barden'')
ANPR 60. K.F.C. of Pollys, KFC Franchisee (''Pollys'')
ANPR 61. Joan Fiore, McDonalds Franchisee (''Fiore'')
ANPR 62. Susan P. Kezios, American Franchisee Association (''AFA'')
ANPR 63. Kenneth R. Costello, Loeb & Loeb (''Costello'')
ANPR 64. AFA (*see supra* ANPR 62)
ANPR 65. Susan Rich, KFC Franchisee (''Rich'')
ANPR 66. Fiore (*see supra* ANPR 61)
ANPR 67. Mike Johnson, Subway Franchisee (''Johnson'')
ANPR 68. Laurie Gaither, GNC Franchisee (''L. Gaither'')
ANPR 69. Greg Gaither, GNC Franchisee (''G. Gaither'')

ANPR 70. Greg Suslovic, Subway Franchisee (''Suslovic'')
ANPR 71. Richard Colenda, GNC Franchisee (''Colenda'')
ANPR 72. Bob Gagliati, GNC Franchisee (''Gagliati'')
ANPR 73. Pat Orzano, 7-Eleven Franchisee (''Orzano'')
ANPR 74. Linda Gaither, GNC Franchisee (''Li Gaither'')
ANPR 75. Kevin 100 (''Kevin 100'')
ANPR 76. Robert James, Florida Department of Agriculture & Consumer Services (''James'')
ANPR 77. Robert A. Tingler, Office of the Attorney General, State of Illinois (''IL AG'')
ANPR 78. John M. Tifford, Rudnick, Wolfe, Epstien & Zeidman (''Tifford'')
ANPR 79. Robert L. Purvin, Jr. (''Purvin'')
ANPR 80. Teresa Heron, My Favorite Muffin Franchisee (''Heron'')
ANPR 81. Purvin (*see supra* ANPR 79)
ANPR 82. Matthew R. Shay, International Franchise Association (''IFA'')
ANPR 83. Duvall (*see supra* ANPR 19)
ANPR 84. Lance Winslow, Car Wash Guys (''Winslow'')
ANPR 85. Winslow (*see supra* ANPR 84)
ANPR 86. Rick Gue, The Pampered Chef, (''Pampered Chef'')
ANPR 87. John M. Tifford, Coverall North America (''Coverall'')
ANPR 88. John M. Tifford, Merchandise Mart Properties (''Merchandise Mart'')
ANPR 89. Dirk C. Bloemendaal, Amway Corporation (''Amway'')
ANPR 90. Winslow (*see supra* ANPR 84)
ANPR 91. Winslow (*see supra* ANPR 84)
ANPR 92. Winslow (*see supra* ANPR 84)
ANPR 93. Winslow (*see supra* ANPR 84)
ANPR 94. Andrew A. Caffey (''Caffey'')
ANPR 95. Entrepreneur Media, Inc. (''Entrepreneur'')
ANPR 96. Brown (*see supra* ANPR 4)
ANPR 97. Raymond & Robert Buckley, Scorecard Plus Franchisees (''Buckley'')
ANPR 98. Mark A. Kirsch, Rudnick, Wolfe, Epstien & Zeidman (''Kirsch'')
ANPR 99. Dale E. Cantone, Maryland Division of Securities, Office of the Attorney General (''Md Securities'')
ANPR 100. Roger C. Haines, Scorecard Plus Franchisee (''Haines'')
ANPR 101. David E. Myklebust, Scorecard Plus Franchisee (''Myklebust'')
ANPR 102. Robert Larson (''Larson'')
ANPR 103. Brown (*see supra* ANPR 4)
ANPR 104. Mark B. Forseth, CII Enterprises (''CII'')
ANPR 105. Bertrand T. Unger, PR One (''Pr One'')
ANPR 106. Dennis E. Wieczorek, Rudnick & Wolfe (''Wieczorek'')
ANPR 107. Gerald A. Marks, Marks & Krantz (''Marks'')
ANPR 108. Brown (*see supra* ANPR 4)
ANPR 109. Everett W. Knell (''Knell'')
ANPR 110. Anne Crews, Mary Kay, Inc. (''Mary Kay'')
ANPR 111. Carl Letts, Domino's Pizza Franchisee (''Letts'')
ANPR 112. Kat Tidd (''Tidd'')
ANPR 113. Ted Poggi, National Coalition of Associations of 7-Eleven Franchisees (''NCA 7-Eleven Franchisees)
ANPR 114. Gary R. Duvall & Nadine C. Mandel (''Duvall & Mandel'')
ANPR 115. Sherry Christopher, Christopher Consulting, Inc. (''Christopher'')
ANPR 116. Carl C. Jeffers, Intel Marketing Systems, Inc. (''Jeffers'')
ANPR 117. Deborah Bortner, State of Washington, Department of Financial Institutions, Securities Divisions (''WA Securities'')
ANPR 118. Carmen D. Caruso, Noonan & Caruso (''Caruso'')
ANPR 119. Howard Bundy, Bundy & Morrill, Inc.(''Bundy'')
ANPR 120. Franchise & Business Opportunity Committee, North American Securities Administrations Association (''NASAA'')
ANPR 121. Tifford (*see supra* ANPR 78)
ANPR 122. Wieczorek (*see supra* ANPR 106)
ANPR 123. John & Debbie Lopez, Baskin & Robbins Franchisee (''Lopez'')
ANPR 124. Susan R. Essex & Ted Storey, California Bar, Business Law Section (''CA BLS'')
ANPR 125. Peter C. Lagarias, The Legal Solutions Group (''Lagarias'')
ANPR 126. James G. Merret, Jr. (''Merret'')
ANPR 127. W. Michael Garner, Dady & Garner (''Garner'')
ANPR 128. Jeff Brickner (''Brickner'')
ANPR 129. Bernard A. Brynda, Baskin & Robbins Franchisee (''Brynda'')
ANPR 130. Caron B. Slimak, Jacadi USA Franchisee (''Slimak'')
ANPR 131. Dr. Ralph Geiderman, Pearl Vision Franchisee (''Geiderman'')
ANPR 132. Felipe Frydmann, Minister of Economic & Trade Affairs, Embassy of the Argentine Republic (''Argentine Embassy'')
ANPR 133. Andrew C. Selden, Briggs & Morgan (''Selden'')
ANPR 134. Robert Zarco, Zarco & Pardo (''Zarco & Pardo'')
ANPR 135. Jason H. Griffing, Baskin & Robbins Franchisee (''Griffing'')
ANPR 136. Erik H. Karp, Witmer, Karp, Warner & Thuotte (''Karp'')
ANPR 137. William D. Brandt, Ferder, Brandt, Casebeer, Copper, Hoyt & French (''Brandt'')
ANPR 138. Robert S. Keating, Baskin & Robbins Franchisee (''Keating'')
ANPR 139. A. Patel, Baskin & Robbins Franchisee (''A. Patel'')
ANPR 140. Joel R. Buckberg, Cendant Corporation (''Cendant'')
ANPR 141. Duvall (*see supra* ANPR 19)
ANPR 142. NCL (*see supra* ANPR 35)
ANPR 143. AFA (*see supra* ANPR 62)
ANPR 144. Catalano (*see supra* ANPR 27)
ANPR 145. DSA (*see supra* ANPR 34)
ANPR 146. Keating (*see supra* ANPR 139)
ANPR 147. Kathie & David Leap, Baskin & Robbins Franchisee (''Leap'')
ANPR 148. Ted D. Kuhn, Baskin & Robbins Franchisee (''Kuhn'')
ANPR 149. Mike S. Lee, Baskin & Robbins Franchisee (''Lee'')
ANPR 150. R. Deilal, Baskin & Robbins Franchisee (''Deilal'')
ANPR 151. Frank J. Demotto, Baskin & Robbins Franchisee (''Demotto'')
ANPR 152. Thomas Hung, Baskin & Robbins Franchisee (''Hung'')
ANPR 153. Jean Jones, Baskin & Robbins Franchisee (''Jones'')
ANPR 154. Hang, Baskin & Robbins Franchisee (''Hang'')
ANPR 155. Dilip Patel, Baskin & Robbins Franchisee (''D. Patel'')
ANPR 156. Terry L. Glase, Baskin & Robbins Franchisee (''Glase'')
ANPR 157. R.E. Williamson, Baskin & Robbins Franchisee (''Williamson'')
ANPR 158. R.M. Valum, Baskin & Robbins Franchisee (''Valum'')
ANPR 159. Rajendra Patel, Baskin & Robbins Franchisee (''R. Patel'')
ANPR 160. Jerry & Debbie Robinett, Baskin & Robbins Franchisee (''Robinett'')
ANPR 161. Ronald J. Rudolf, Baskin & Robbins Franchisee (''Rudolf'')
ANPR 162. Kamlesh Patel, Baskin & Robbins Franchisee (''K. Patel'')
ANPR 163. Nicholas & Marilyn Apostal, Baskin & Robbins Franchisee (''Apostal'')
ANPR 164. Patrick Sitin, Baskin & Robbins Franchisee (''Sitin'')
ANPR 165. Paul & Lisa SeLander, Baskin & Robbins Franchisee (''SeLander'')
ANPR 166. S. Bhilnym, Baskin & Robbins Franchisee (''Bhilnym'')
ANPR 167. Mike & Kathy Denino, Baskin & Robbins Franchisee (''Denino'')

ANPR Workshop Participants

Michael Bennett, Longaberger Company (''Bennett'')
Kennedy Brooks (''Brooks'')
John Brown, Amway Corporation (''J. Brown'')
Howard Bundy, Bundy & Morrill (''Bundy'')

Delia Burke, Jenkins & Gilchrist (''Burke'')
Andrew Caffey, Esq. (''Caffey'')
Dale Catone, Office of the Maryland Attorney General (''Cantone'')
Emilio Casillas, Washington State Securities Division (''Casillas'')
Richard Catalano, Esq. (''Catalano'')
Sherry Christopher, Esq. (''Christopher'')
Michael W. Chiodo, Domino's Franchisee (''Chiodo'')
Martin Cordell, Washington State Securities Division (''Cordell'')
Joseph Cristiano, Carvel Franchisee (''Cristiano'')
John D'Alessandro, Quaker State Lube Distributor (''D'Alessandro'')
Mark Deutsch, former franchisee (''Deutsch'')
Steve Doe, Franchisee (''Doe'')
Gary Duvall, Graham & Dunn (''Duvall'')
Eric Ellman, Direct Selling Association (''Ellman'')
Debbie Fetzer, Snap-On Franchisee (''Fetzer'')
David Finigan, Illinois Securities Department (''Finigan'')
Mark B. Forseth, Jenkens & Gilchrist (''Forseth'')
Richard W. Galloway, Domino's Pizza Franchisee (''Galloway'')
Elizabeth Garceau, Pro Design (''E. Garceau'')
Michael Garceau, Pro Design (''M. Garceau'')
Roger Gerdes, Microsoft Corp. (''Gerdes'')
Rick Geu, The Pampered Chef (''Geu'')
Judy Gitterman, Jenkens & Gilchrist (''Gitterman'')
Susan Grant, National Consumers League (''Grant'')
Bruce Hoar, Hanes Franchisee (''B. Hoar'')
Thomas Hoar, Hanes Franchisee (''T. Hoar'')
Nelson Hockert-Lotz, Domino's Pizza Franchisee (''Hockert-Lotz'')
Tee Houston-Aldridge, World Inspection Network (''Houston-Aldridge'')
Robert James, Florida Dept. of Agriculture & Consumer Services (''James'')
Carl Jeffers, Intel Marketing Systems (''Jeffers'')
Erik Karp, Witmer, Karp, Warner & Thuotte (''Karp'')
David Kaufmann, Kaufmann, Feiner, Yamin, Gildin & Robbins (''Kaufmann'')
Harold Kestenbaum, Hollenbrug, Bleven, Solomon, Ross (''Kestenbaum'')
Susan Kezios, American Franchisee Association (''Kezios'')
Mark Kirsch, Rudnick Wolfe, Epstien & Zeidman (''Kirsch'')
Charles Lay, Brite Site Franchisee (''Lay'')
Mike Ludlum, Entrepreneur Media (''Ludlum'')
Marge Lundquist, Franchisee (''Lundquist'')
Gerald Marks, Marks & Krantz (''Marks'')
Philip McKee, National Consumers League (''McKee'')
Dianne Mousley, Mike Schmidt's Phil. Hoagies Franchisee (''Mousley'')
Joseph Punturo, Office of the New York Attorney General (''Punturo'')
Mehran Rafizadeh, GNC Franchisee (''Rafizadeh'')
David R. Raymond, Esq. (''Raymond'')
Iris Sandow, Blimpie Franchisee (''Sandow'')
Philip Sanson, Illinois Securities Department (''Sanson'')
Matthew Shay, International Franchise Association (''IFA'')
David Silverman, Sportworld Int'l (''Silverman'')
Neil Simon, Hogan & Hartson (''Simon'')
Caron Slimak (''Slimak''), Jacadi USA Franchisee
J.H. Snow, Jenkens & Gilcrist (''Snow'')
Adam Sokol, Illinois Attorney General's Office (''Sokol'')
Kat Tidd, Esq. (''Tidd'')
John Tifford, Rudnick Wolfe, Epstien & Zeidman, (''Tifford'')
Robert Tingler, Franchise Bureau Chief, Illinois Attorney General's Office (''Tingler'')
Bertrand Unger, PR One (''Unger'')
Dr. Spencer Vidulich, Pearle Vision Franchisee (''Vidulich'')
Dick Way, PR One (''Way'')
Dennis Wieczorek, Rudnick & Wolfe (''Wieczorek'')
Erik Wulff, Hogan & Hartson (''Wulff'')
Barry Zaslav, Coverall North America (''Zaslav'')

Attachment C: Franchise Rule Notice of Proposed Rulemaking Commenters

FR–NPR 1. Patrick E. Meyers, The Quizno's Corporation (''Quizno's'')
FR–NPR 2. Steven A. Rosen, Frannet (''Frannet'')
FR–NPR 3. Robert Tingler, Franchise Bureau Chief, Illinois Attorney General (''IL AG'')
FR–NPR 4. Dennis E. Wieczorek, Piper Marbury Rudnick & Wolfe (''PMR&W'')
FR–NPR 5. Jack Schuessler, Wendy's Intl, Inc. (''Wendy's'')
FR–NPR 6. Curtis S. Gimson, Triarc Restaurant Group (''Triarc'')
FR–NPR 7. Eugene Stachowiak, McDonald's (''McDonalds'')
FR–NPR 8. David E. Holmes (''Holmes'')
FR–NPR 9. Erik B. Wulff, John F. Dienelt, Hogan & Hartson (''H&H'')
FR–NPR 10. Ronnie R. Volkening, 7-Eleven, Inc. (''7-Eleven'')
FR–NPR 11. John R.F. Baer, Robert T. Joseph, Alan H. Silberman, Sonnenschein Nath & Rosenthal (''Baer'')
FR–NPR 12. Morton A. Aronson, Neil A. Simon, David J. Kaufmann, National Franchise Council (''NFC'')
FR–NPR 13. Alaska Turner (''Turner'')
FR–NPR 14. Susan P. Kezios, American Franchisee Association (''AFA'')
FR–NPR 15. Warren L. Lewis, Lewis & Kolton (''Lewis'')
FR–NPR 16. John W. Regnery, Snap-On Inc. (''Snap-On'')
FR–NPR 17. Dale E. Cantone, Stephen W. Maxey, Joseph J. Punturo, NASAA Franchise and Business Opportunity Project Group (''NASAA'')
FR–NPR 18. Howard E. Bundy, Bundy & Morrill, Inc. (''Bundy'')
FR–NPR 19. Laurie Taylor (''Taylor'')
FR–NPR 20. Jonathan Hubbell, Prudential Real Estate Affiliates (''PREA'')
FR–NPR 21. David Gurnick, Arter & Hadden (''Gurnick'')
FR–NPR 22. Don J. DeBolt, Matthew R. Shay, International Franchise Association (''IFA'')
FR–NPR 23. L. Seth Stadfeld, Weston, Patrick, Willard & Redding (''Stadfeld'')
FR–NPR 24. Eric H. Karp, Witmer, Karp, Warner & Thuotte (''Karp'')
FR–NPR 25. Janet L. McDavid, American Bar Association, Section of Antitrust Law (''ABA AT'')
FR–NPR 26. Randall Loeb, NaturaLawn of America (''NaturaLawn'')
FR–NPR 27. Tony Rolland, National Franchisee Association (''NFA'')
FR–NPR 28. Andrew P. Loewinger, Buchanan Ingersoll (''BI'')
FR–NPR 29. Jeffrey E. Kolton, Frandata (''Frandata'')
FR–NPR 30. AFC Enterprises (''AFC'')
FR–NPR 31. Howard Morrill, Bundy & Morrill, Inc. (''Morrill'')
FR–NPR 32. Carl E. Zwisler, Jenkens & Gilchrist (''J&G'')
FR–NPR 33. Diane T. Nauer, TruServ Corporation (''TruServ'')
FR–NPR 34. Brian H. Cole, Tricon (''Tricon'')
FR–NPR 35. Steven Goldman, Mark Forseth, Marriott Corp. (''Marriott'')
FR–NPR Rebuttal 36. Gurnick (*see supra* FR–NPR 21)
FR–NPR Rebuttal 37. Kezios (*see supra* FR–NPR 14)
FR–NPR Rebuttal 38. IL AG (*see supra* FR–NPR 3)
FR–NPR Rebuttal 39. Bundy (*see supra* FR–NPR 18)

FR–NPR Rebuttal 40. John W. Fitzgerald, Gray, Plant, Mooty, Mooty & Bennett (''GPM'')

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