

Disclosure Requirements and Prohibitions Concerning Business Opportunities
Staff Report to the Federal Trade Commission and
Proposed Revised Trade Regulation Rule
(16 CFR Part 437)

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This Report, as required by Section 1.13(f) of the Commission's Rules of Practice, contains the staff's analysis of the rule amendment record and its recommendations as to the form of the proposed final Business Opportunity Rule. The Report has not been endorsed or adopted by the Commission. The Commission's final determination in this matter will be based upon the record taken as a whole, including the Report and comments on the Report received during the 75-day period after the Report is placed on the public record.

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Key to Terms and Abbreviations Used Throughout This Report

“Amended Franchise Rule” refers to the amended Franchise Rule published at 72 Fed. Reg. 15,444 (Mar. 30, 2007) and codified at 16 CFR 436.

“Initial Proposed Disclosure Document” refers to the version of the Disclosure Document that was proposed in the INPR.

“INPR” refers to the Initial Notice of Proposed Rulemaking, 71 Fed. Reg. 19,054 (Apr. 12, 2006).

“Interim Business Opportunity Rule” refers to the current Business Opportunity Rule, codified at 16 CFR 437.

“IPBOR” refers to Initial Proposed Business Opportunity Rule, which was proposed in the INPR.

“Macro Report” refers to Macro International, Inc.'s report to the FTC on the Disclosure Form, available at <http://www.ftc.gov/bcp/workshops/bizopps/disclosure-form-report.pdf>.

“Original Franchise Rule” refers to the original Franchise Rule published at 43 Fed. Reg. 59,614 (Dec. 21, 1978).

“Proposed Final Disclosure Document” refers to the proposed Disclosure Document incorporating the staff's recommendations and attached as Attachment D.

“Proposed Final Rule” refers to the proposed Business Opportunity Rule incorporating the staff's recommendations and attached as Attachment B.

“Revised Proposed Disclosure Document” refers to the version of the Disclosure Form that was published in the Workshop Notice.

“RNPR” refers to the Revised Notice of Proposed Rulemaking, 73 Fed. Reg. 16,110 (Mar. 26, 2008).

“RPBOR” refers to the Revised Proposed Business Opportunity Rule, which was proposed in the RNPR.

“Workshop” refers to the June 1, 2009 public workshop held in Washington, D.C. to discuss the proposed Disclosure Document and other aspects of the Business Opportunity Rule.

“Workshop Notice” refers to the Federal Register Notice announcing the Workshop, 74 Fed. Reg. at 18,712 (Apr. 24, 2009).

The staff recommends that the Interim Business Opportunity Rule, 16 CFR Part 437, be amended to, among other things, broaden its scope to cover sellers not currently covered by the Interim Business Opportunity Rule, such as sellers of work-at-home opportunities, and to streamline and simplify the disclosures that sellers must provide to prospective purchasers (“Disclosure Document”). The Commission has gathered and analyzed comments on an Initial Proposed Business Opportunity Rule (“IPBOR”),¹ proposed significant changes to the scope and substance of the IPBOR in a Revised Proposed Business Opportunity Rule (“RPBOR”),² engaged a contractor to improve the clarity of the proposed Disclosure Document, and conducted a public workshop on this matter. In addition, the staff has reviewed public comments on the RPBOR and the workshop.³

The RPBOR would have required that business opportunity sellers disclose to potential purchasers four categories of material information, including: litigation history of the business opportunity and certain key personnel; the terms of any cancellation or refund policy, if offered; documentation and substantiation for any claims sellers make about potential earnings; and contact information for previous purchasers of the business opportunity. It also would have prohibited sellers from making certain misrepresentations and impose recordkeeping

¹ Business Opportunity Rule Notice of Proposed Rulemaking, 71 Fed. Reg. 19,054 (Apr. 12, 2006) (“INPR”). Comments responding to the INPR are available at <http://www.ftc.gov/os/comments/businessopprrule/index.shtm>.

² Business Opportunity Rule Revised Notice of Proposed Rulemaking, 73 Fed. Reg. 16,110 (Mar. 26, 2008) (“RNPR”). Comments responding to the RNPR are available at <http://www.ftc.gov/os/comments/bizoprevised/index.shtm>.

³ See An FTC Workshop Analyzing Business Opportunity Disclosure Form and Other Proposed Changes to the Business Opportunity Rule, 74 Fed. Reg. at 18,712 (Apr. 24, 2009). Workshop comments are available at <http://www.ftc.gov/os/comments/bizoprulerevwrkshp/index.shtm>.

requirements.

In general, there is substantial support for the Rule, particularly from the United States Department of Justice (“DOJ”), which has authority to seek civil penalties for violations of the Franchise Rule and the Business Opportunity Rule.⁴ There continues to be debate among public commenters about the scope of coverage, with some advocating broader coverage and others advocating clear exemptions from coverage. Several commenters also opined about the form of the Rule’s proposed Disclosure Document.

The staff now recommends that the Commission promulgate a final Business Opportunity Rule that modifies the RPBOR as follows:

- To clarify that a seller’s offer to provide, at no cost to the purchaser, the use of the seller’s office space or equipment for the operation of the purchaser’s business would not trigger the “provides locations” prong (437.1(c)(3)(i)) of the definition of “business opportunity”;
- To clarify that if a business opportunity seller provides advertising and general advice about business development and training, it would not trigger the “otherwise assisting” clause of the definition of “providing locations, outlets, accounts, or customers”⁵;
- To add a requirement that the Disclosure Document expressly state that the legal actions required to be disclosed under the Rule include, among other things, violations of an FTC rule;

⁴ Since 1995, DOJ has brought approximately 62 cases against 148 defendants alleging violations of the Franchise Rule.

⁵ See proposed section 437.1(m).

- To allow sellers to provide as part of a supplemental disclosure pertaining to any prior legal actions a 100-word description of any such action;
- To add a definition of “material” and to clarify that sellers must disclose to purchasers the “material” terms of any cancellation or refund policy;
- To omit from the required disclosure of prior purchasers information, the city where the prior purchaser is located;
- To add a requirement that if a business opportunity is marketed in Spanish to a potential purchaser, then the Spanish-language version of the Disclosure Document must be furnished, and any disclosures required by the Rule must be provided in Spanish, and if a business opportunity is marketed to a potential purchaser in a language other than English or Spanish, the business opportunity seller must furnish all required disclosures, including an accurate translation of the Disclosure Document, in the same language that the opportunity is marketed;
- To allow sellers to use industry statistics, when they have written substantiation demonstrating that purchasers of their business opportunity have earnings equal to or greater than the industry statistics; and
- To add a definition of “signature” or “signed” to include electronic signatures.

This Report analyzes the rulemaking record to date, describes each provision of the proposed Final Rule, and sets forth the staff’s recommendation on each provision.⁶

⁶ Within this Staff Report references to the comments responding to the Business Opportunity Rule INPR are cited as: Name of the commenter-INPR (e.g., Avon-INPR); references to the comments responding to the Business Opportunity Rule RNPR are cited as: Name of the commenter-RNPR (e.g., Primerica-RNPR). A list of the INPR and RNPR commenters and the abbreviations used to identify each are attached as Attachment A.

I. Background

On December 21, 1978, the Commission promulgated the Original Franchise Rule to address deceptive and unfair practices in the sale of franchises and business opportunity ventures.⁷ Based upon the original rulemaking record, the Commission found that franchise and business opportunity fraud was widespread, causing serious economic harm to consumers, and the Original Franchise Rule covered, in a single Code of Federal Regulations part, both franchises and business opportunity ventures.

The Commission adopted the Franchise Rule to prevent fraudulent practices in the sale of franchises and business opportunities through pre-sale disclosure of specified items of material information. The purpose of the Franchise Rule was not to regulate the substantive terms of a franchise or business opportunity agreement but to ensure that sellers disclose material information to prospective buyers. The Franchise Rule was posited on the notion that a fully informed consumer can determine whether a particular offering is in his or her best interest.

As part of the Commission's overall policy of periodic review of its trade regulation rules, the Commission commenced a regulatory review of the Original Franchise Rule in 1995. Much of the information revealed by the regulatory review focused on the differences between franchises and business opportunity ventures, and the distinct regulatory challenges presented by these two types of offerings – that 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 to purchasers. Based on the record amassed during the review proceeding, the Commission concluded that the Franchise

⁷ Promulgation of Trade Regulation Rule and Statement of Basis and Purpose (“SBP”), 43 Fed. Reg. 59,614 (Dec. 21, 1978).

Rule's extensive disclosure requirements imposed unnecessary compliance costs on both business opportunity sellers and buyers, and determined to create separate rules for franchises and non-franchise business opportunities. At the same time, the Commission's law enforcement experience in conducting numerous sweeps of the business opportunity industry demonstrated that fraud in the sale of business opportunities is not only prevalent but persistent.⁸ Accordingly, in February 1997, the Commission published an Advance Notice of Proposed Rulemaking soliciting comment on several proposed regulatory modifications, including the creation of a separate trade regulation rule governing the sale of business opportunities.⁹

A. The Initial Proposed Business Opportunity Rule

Having determined the need to create a separate business opportunity rule, in 2006, the Commission published the INPR announcing its intention to proceed with its proposal for a separate Business Opportunity Rule, the IPBOR.¹⁰ In recognition of the prevalence of fraud in

⁸ Since 1995, the Commission has conducted more than eighteen law enforcement sweeps, many with other law enforcement partners to combat business opportunity fraud. E.g., Operation Bottom Dollar (2010); Operation Short Change (2009); Project Fal\$e Hope\$ (2006); Project Biz Opp Flop (2005); Project Busted Opportunity (2002); Project Telesweep (1995); Project Bizillion\$ (1999); Operation Money Pit (1998); Project Vend Up Broke (1998); Project Trade Name Games (1997); and Operation Missed Fortune (1996). In addition to joint law enforcement sweeps, the Commission also targeted specific business opportunity ventures such as envelope stuffing (Operation Pushing the Envelope 2003); medical billing (Operation Dialing for Deception 2002 and Project Housecall 1997); seminars (Operation Showtime 1998); Internet-related services (Net Opportunities 1998); vending machines (Operation Yankee Trader 1997); and 900 numbers (Project Buylines 1996).

⁹ Trade Regulation Rule on Franchising and Business Opportunity Ventures: Advanced Notice of Proposed Rulemaking, 62 Fed. Reg. 9,115 (Feb. 28, 1997).

¹⁰ 71 Fed. Reg. at 19,054. Later, on March 30, 2007, the Commission published the Amended Franchise Rule that separated the Franchise Rule into two distinct CFR parts – part 436, governing the sales of business format franchises, and a new part 437, governing the sales of non-franchise business opportunities. Part 437 is identical to the Original Franchise Rule, with all of the definitional elements and references regarding business format franchising

the sale of business opportunities, the INPR proposed an expansive definition of “business opportunity” aimed at covering business opportunities that had been covered by the Franchise Rule, but also work-at home schemes, such as envelope stuffing and product assembly, medical billing schemes, and pyramid schemes.¹¹ While expanding the scope of the Original Franchise Rule’s coverage of business opportunities, the IPBOR greatly reduced the compliance burden that the Original Franchise Rule imposed on business opportunity sellers. The Commission recognized that the extensive disclosures of the Original Franchise Rule would entail disproportionate compliance costs for comparatively low-cost transactions involving the sale of business opportunities.¹² Therefore, in an attempt to strike the proper balance, the Commission mitigated the compliance burden by including in the IPBOR substantially simplified and streamlined disclosure requirements.¹³

The INPR also included, as Appendix A to the IPBOR, a proposed one-page Business Opportunity Disclosure Document (“initial proposed Disclosure Document”) that sellers of business opportunities would be required to provide to prospective purchasers. Section 437.2 of the IPBOR would have required “sellers” of covered business opportunities to provide potential purchasers with the initial proposed Disclosure Document at least seven calendar days either

deleted. As noted above, Part 437 continues to govern sales of non-franchise business opportunities, pending completion of these Business Opportunity rulemaking proceedings. 73 Fed. Reg. at 16,111.

¹¹ Promoters of these kinds of schemes were often able to evade coverage under the disclosure requirements of the Franchise Rule by pricing their opportunities below \$500, the monetary threshold of Franchise Rule coverage.

¹² 71 Fed. Reg. at 19,057.

¹³ Id.

before execution of a contract in connection with a business opportunity sale, or prior to payment of any consideration to the seller. The initial proposed Disclosure Document was intended to provide prospective purchasers with material information with which to make an informed decision about the potential business opportunity. The seller would have been required to use the exact form and language proposed by the Commission and to include identifying information about the seller and information about four substantive areas: earnings claims, legal actions involving the offered business and its key personnel, existence of cancellation or refund policies and the number of cancellation or refund requests, and references.¹⁴

In response to the INPR, the Commission received more than 17,000 comments, the overwhelming majority of which came from the multi-level marketing (“MLM”) industry. MLM companies, their representatives and trade associations,¹⁵ as well as individual participants in various MLM plans, expressed grave concern about the burdens the IPBOR would impose on them, and urged the Commission to narrow the scope of the IPBOR, to implement various safe harbor provisions, and/or to reduce the required disclosures.¹⁶ The Commission also received approximately 187 comments, primarily from individual consumers or consumer groups, in

¹⁴ Id. at 19,068.

¹⁵ Multi-level marketing is one form of direct selling, and refers to a business model in which a company distributes products through a network of distributors who earn income from their own retail sales of the product and from retail sales made by the distributors’ direct and indirect recruits. Because they earn a commission from the sales their recruits make, each member in the MLM network has an incentive to continue recruiting additional sales representatives into their “down lines.” See Peter J. Vander Nat & William W. Keep, Marketing Fraud: An Approach to Differentiating Multilevel Marketing from Pyramid Schemes, 21 J. Pub. Pol’y & Marketing 140 (Spring 2002).

¹⁶ Thousands of comments were form letters submitted by participants in various MLM operations such as Quixtar, Shaklee, PartyLite, and Xango, among others. 73 Fed. Reg. at 16,113.

favor of the IPBOR.¹⁷ Only a handful of comments came from non-MLM companies and industry groups, expressing various concerns about obligations that the IPBOR would impose upon them.¹⁸ None of the comments addressed the initial proposed Disclosure Document.

B. The Revised Proposed Business Opportunity Rule

As a result of an extensive analysis of the public comments received, as well as a review of its own law enforcement history, the Commission identified two key problems with the IPBOR's breadth of coverage. First, the IPBOR would have unintentionally swept in numerous commercial arrangements, including training and/or educational organizations, where there is little or no evidence that fraud is occurring.¹⁹ Second, the IPBOR would have imposed greater burdens on the MLM industry than other types of business opportunity sellers without sufficient countervailing benefits to consumers.²⁰

¹⁷ Numerous letters came from individuals having negative experiences with various MLMs like Quixtar, 4Life, Mary Kay, Arbonne, Liberty League International, Financial Freedom Society, Herbalife, Xango, Melaleuca, EcoQuest, Pre-Paid Legal, PartyLite, Shaklee, Vartec/Excel, and Vemma. 73 Fed. Reg. at 16,113 n.37.

¹⁸ Id. at 16,113.

¹⁹ Id. As one commenter described it, the IPBOR would have swept in traditional arrangements for distribution of "food and beverages, construction equipment, manufactured homes, electronic components, computer systems, medical supplies and equipment, automotive parts, automotive tools and other tools, petroleum products, industrial chemicals, office supplies and equipment, and magazines." IBA-INPR at 5; see also Timberland-INPR (noting that numerous manufacturers structure their retail distribution in this manner).

²⁰ In the RNPR, the Commission acknowledged that some MLMs do engage in unfair or deceptive acts or practices, including the operation of pyramid schemes or unsubstantiated earnings claims that cause consumer harm, but concluded, based upon an analysis of typical MLM compensation structures and its law enforcement experience, that the IPBOR's required disclosures would not help consumers identify a fraudulent pyramid scheme. In the RNPR, the Commission stated its belief that consumer harm flowing from deceptive practices in the MLM industry could be more effectively addressed through the use of Section 5 of the FTC Act. 73 Fed. Reg. at 16,119.

On March 26, 2008, the Commission issued the RNPR that proposed a revised Business Opportunity Rule, the RPBOR, which would have modified the IPBOR in several significant ways, primarily by narrowing the scope of the proposed Rule to avoid broadly sweeping in all sellers of MLM opportunities,²¹ while retaining coverage of those business opportunities sellers historically covered by the FTC’s Original Franchise Rule (and by the FTC’s Interim Business Opportunity Rule), as well as coverage of sellers of work-at-home schemes, including envelope stuffing, medical billing, and product assembly. The RPBOR also would have cured a potential overbreadth problem that may have inadvertently swept in companies using traditional product distribution arrangements.²² The RPBOR also would have eliminated two disclosures that would have been required by the IPBOR – information about legal actions pertaining to a business opportunity seller’s sales personnel, and the number of cancellation or refund requests received.²³

The RNPR sought public comment on issues relevant to the Commission’s consideration of the RPBOR, including whether the RPBOR would adequately accomplish the Commission’s

²¹ The RPBOR would not have exempted MLMs from coverage under the RPBOR. Instead, it would have narrowed the scope of the IPBOR by redefining the term “business opportunity.” Under the RPBOR, the three definitional elements of a business opportunity would have been: (1) a solicitation to enter into a new business; (2) a “required payment” made to the seller; and (3) a representation that the seller will provide “business assistance” to the buyer. The RPBOR would have eliminated two types of “business assistance” that formerly would have triggered the Rule’s strictures and disclosure obligations, namely tracking payments and providing generalized training or advising. See infra Section V.C. (discussion of the term “business opportunity”); 73 Fed. Reg. at 16,121.

²² The RPBOR also would have included several other substantive modifications to the IPBOR. See 73 Fed. Reg. at 16,110.

²³ 73 Fed. Reg. at 16,125. The initial proposed Disclosure Document was revised to eliminate these disclosures. See 73 Fed. Reg. at 19,091.

stated purpose, and if it did not, what alternatives the Commission could consider.²⁴ In contrast to the INPR, which generated more than 17,000 comments, the Commission received fewer than 125 comments and rebuttal comments in response to the RNPR. The vast majority of commenters were from the MLM industry, and supported the Commission's proposal to narrow the scope of the Business Opportunity Rule, albeit with suggestions for fine tuning.²⁵ Only one comment came from a business opportunity seller.²⁶ The Commission also received comments from two consumer groups and approximately twelve individuals²⁷ who expressed their disappointment that the FTC's proposed rule would exclude MLMs from coverage.

C. The Proposed Disclosure Document

The RNPR also announced that the Commission had engaged an expert in document design and comprehension to evaluate the initial proposed Disclosure Document to ensure that it adequately conveyed to consumers information material to the prospective business opportunity, and to determine whether the overall presentation of the information in the initial proposed Disclosure Document could be improved to make it more useful and understandable.²⁸ The RNPR also invited public comment on the initial proposed Disclosure Document. The Commission received no comments in response to that request.

²⁴ 73 Fed. Reg. at 16,133.

²⁵ Some commenters suggested changes to the language of certain definitions proposed in the RNPR to ensure that the multi-level marketing industry was not inadvertently swept into the ambit of the rule.

²⁶ Planet Antares-RNPR.

²⁷ Some letters came from individuals having negative experiences with MLMs such as Quixtar, Herbalife, and USANA Health Science.

²⁸ 73 Fed. Reg. at 16,133.

Following publication of the RNPR, Macro International, Inc. (“Macro”), the expert engaged by the FTC, conducted extensive consumer testing of the initial proposed Disclosure Document that resulted in substantial improvement to both the layout and the wording of the form.²⁹ The Commission made public the resulting report and revised proposed Business Opportunity Disclosure Document (“revised proposed Disclosure Document”)³⁰ in a Federal Register Notice (“Workshop Notice”) that also announced a one-day public workshop (“Workshop”) in Washington, D.C.³¹ The Commission sought comment at the Workshop on the effectiveness of the revised proposed Disclosure Document as a means of conveying material information to prospective purchasers of business opportunities, and to further develop the public record related to issues raised in the comments received in response to the RNPR. The Workshop Notice invited requests to participate as panelists at the Workshop, and also sought written comment about the topics to be discussed at the Workshop. The Workshop featured five panelists who represented a range of interests in the proposed Rule, including a federal law enforcer, a state law enforcer, a self-identified consumer advocate, the general counsel of a national multi-level marketing company, and a former director of the FTC’s Bureau of Consumer Protection.³² At the

²⁹ A copy of the expert’s report to the FTC, “Design and Testing of Business Opportunity Disclosures,” (“Macro Report”) is available at <http://www.ftc.gov/bcp/workshops/bizopps/disclosure-form-report.pdf>.

³⁰ The version of the revised proposed Disclosure Document that was tested by Macro inadvertently omitted the phrase “or pay any money” from the conclusion of the penultimate sentence of the revised proposed Disclosure Document. Macro determined that this omission had no effect on the results of its testing. See Macro Report at 2.

³¹ See 74 Fed. Reg. at 18,712.

³² Commission staff selected individuals as panelists based upon their comments, backgrounds, and interest in the subject matter. See infra Section VII.B. for more information about the Workshop.

conclusion of the discussion of the revised proposed Disclosure Document, panelists and audience members were invited to express their views about other issues related to the RPBOR.³³ Following robust discussion on various topics, the Commission received written comment from six individuals and entities.³⁴

Following the Workshop, the staff has considered the utility of the Disclosure Document for business opportunities marketed in Spanish – specifically, whether the Disclosure Document could be made more effective by translating it into Spanish and requiring that when a business opportunity is marketed in Spanish, the Disclosure Document and any disclosures required by the Rule be provided in Spanish. The Commission’s law enforcement history demonstrates that some fraudulent business opportunities are marketed primarily to Spanish speaking consumers.³⁵

II. Organization of the Report

This Staff Report analyzes the rulemaking record to date, including the comments on the RNPR and the Workshop Notice, examines the continuing need for the Rule, and sets forth the staff’s recommendations to the Commission regarding the specific provisions of the proposed final Business Opportunity Rule (“proposed Final Rule”). The sections that follow discuss the specific Rule provisions that the staff recommends the Commission issue, along the way, noting areas of disagreement and attempts to harmonize the Commission’s law enforcement experience

³³ A copy of the transcript of the June 1, 2009 workshop is available at <http://www.ftc.gov/bcp/workshops/bizopps/index.shtml>. References to the transcript from the June 2009 Business Opportunity Rule public workshop are cited as: Name of commenter, June 09 Tr at page no. (e.g., Jost, June 09 Tr at 12).

³⁴ References to comments received in response to the Workshop Notice are cited as: Name of commenter-Workshop comment.

³⁵ See infra Section IX.

with legitimate concerns articulated by commenters.

Annexed to the Report are seven attachments. Attachment A is a list of commenters cited within the body of the Report. The proposed Final Rule that incorporates the staff's various recommendations is Attachment B. To assist the reader in reviewing the staff's analysis and recommendations, Attachment C is a redline that shows additions, deletions, and revisions to the RPBOR made by the proposed Final Rule. The Disclosure Document that incorporates the staff's various recommendations ("proposed final Disclosure Document") in English is Attachment D. To assist the reader in reviewing the staff's analysis and recommendations, Attachment E is a redline that shows additions, deletions, and revisions to the revised proposed Disclosure Document as compared to the proposed final Disclosure Document. The Spanish version of the proposed final Disclosure Document is Attachment F.

III. Summary of Comments to the Revised Notice of Proposed Rulemaking

The Commission invited members of the public to comment on any issues they believed were appropriate to the Commission's consideration of the RPBOR. The Commission also solicited comment in specific areas, including: (1) whether the proposed categories of "business assistance" that would trigger coverage by the Rule were adequate to cover the field of business opportunity promoters that were most likely to engage in fraud, and to exclude from coverage traditional distributor relationships; (2) whether the presentation of information in the one-page disclosure document could be improved to make it more useful and understandable; (3) whether the categories of individuals for which litigation history would be disclosed were adequate; (4) whether the proposal that sellers furnish prospective purchasers with a national list of prior purchasers was a viable option, and whether sellers should be permitted to post that list on their websites; (5) whether the proposal that would require sellers that make business opportunity

earnings claims to disclose the number and percentage of persons who achieved a specific level of earning within a certain time period would be useful to consumers or create difficulties for the seller; (6) whether the requirement that sellers who make earnings claims disclose “any characteristic of purchasers who achieved at least the represented level of earnings,” captures the relevant earnings information that should be disclosed; and (7) whether the categories of franchises that would be exempt from the requirements of the Rule were overly broad or overly narrow.³⁶

Many of these questions received no comment. Only one comment received was from a non-MLM business opportunity seller.³⁷ That commenter urged the Commission to abandon the Rule entirely, claiming among other things, that: (1) the record did not demonstrate the prevalence of harmful deception necessary to promulgate or amend a trade regulation; (2) the cost of implementing the Rule would exceed the benefit; (3) the Rule would have a chilling effect on the sale of legitimate business opportunities; and (4) implementation of the Rule would conflict with existing privacy laws.³⁸

The majority of comments received in response to the RNPR concerned whether MLMs should be included within the scope of the Business Opportunity Rule. The multi-level marketing industry, including trade associations, MLM companies, and a few distributors generally applauded the Commission’s decision to narrow the scope of the Rule, but expressed concern that the MLM industry would continue to be subject to the RPBOR despite the more narrowed

³⁶ 73 Fed. Reg. at 16,133.

³⁷ Planet Antares-RNPR.

³⁸ Id.; see infra Sections IV.A. and IV.B for a discussion of the commenter’s first three contentions, and Section VII.C.4. for a discussion of the fourth.

definition of “business opportunity.”³⁹ Some commenters suggested changes to various definitions to ensure that MLMs were not inadvertently swept within the scope of the Rule.⁴⁰ Other commenters urged the Commission to specifically exempt MLMs from coverage.⁴¹ One trade association representing direct sellers suggested that the Commission “clarify” that it intended to exempt all direct sellers from coverage.⁴²

A few consumer advocates and some individuals on the other hand, including former MLM distributors, expressed disappointment that the Rule had been narrowed, and urged the Commission to reconsider its decision to exclude MLMs from coverage of the RPBOR.⁴³ A few commenters argued that if MLMs were to be excluded from coverage, then the entire Rule should be jettisoned.⁴⁴

IV. The Commission Should Retain the Business Opportunity Rule

Section 18(d)(2)(B) of the FTC Act, 15 U.S.C. 57a(d)(2)(B), states that “[a] substantive

³⁹ See, e.g., DSA-RNPR; Avon-RNPR; Bates-RNPR; IBA-RNPR; MMS-RNPR; Mary Kay-RNPR; Melaleuca-RNPR; Primerica-RNPR; Pre-Paid Legal-RNPR; IDS-RNPR; Tupperware-RNPR; Venable-RNPR.

⁴⁰ See, e.g., Tupperware-RNPR; Primerica-RNPR; Mary Kay-RNPR.

⁴¹ See, e.g., DSA-RNPR; Babener-RNPR; MarketWave-RNPR; NBCC-RNPR; Whittle-RNPR.

⁴² DSA-RNPR. Although the RNPR indicates the Commission’s intent to narrow the scope of the Rule in order to avoid broadly sweeping in all MLMs, the staff maintains that nothing in the RNPR supports the DSA’s contention that the Commission has granted a categorical exemption to direct sellers. The test for whether any business offering will come within the scope of the Rule is set out in the definition of “business opportunity” and related provisions.

⁴³ See, e.g., Aird-RNPR; Integrative-RNPR; Lopez-RNPR; CAI-RNPR; Durand-RNPR; PSA-RNPR; Rotolante-RNPR; Parrington-RNPR.

⁴⁴ CAI-RNPR; Durand-RNPR; PSA-RNPR; Rotolante-RNPR.

amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection.”

The standard for amending or repealing a section 18 rule is identical to that for promulgating a trade regulation rule pursuant to section 18. When deciding whether to amend a rule, the Commission engages in a multi-step inquiry. Initially, the Commission requires evidence that an existing act or practice is legally unfair or deceptive. The Commission then requires affirmative answers, based upon the preponderance of reliable evidence, to the following four questions:

- (1) Is the act or practice prevalent?
- (2) Does a significant harm exist?
- (3) Would the rule provisions under consideration reduce that harm?
- and
- (4) Will the benefits of the rule exceed its costs?⁴⁵

In the RNPR the Commission engaged in this analysis and concluded, based upon its law enforcement experience, that fraud is pervasive in the sale of many business opportunities.⁴⁶ The Commission stated that the current requirements of the Interim Business Opportunity Rule are more extensive than necessary to protect prospective purchasers of business opportunities from deception. It reasoned that the pre-sale disclosures provided by the RPBOR would give

⁴⁵ See Credit Practices Rule, 49 Fed. Reg. 7,740, 7,742 (Mar. 1, 1984); see also 15 U.S.C. § 57a(d)(1)(A) – (C) (requiring in the Statement of Basis and Purpose accompanying the rule a statement as to prevalence, the manner in which the acts or practices are unfair or deceptive, and the economic effect of the rule); FTC Organization, Procedures and Rules of Practice, 16 CFR 1.14(a) (i) – (iv).

⁴⁶ See 73 Fed. Reg. at 16,131.

consumers the information they need to protect themselves from fraudulent sales claims, while minimizing the compliance costs and burdens on sellers of business opportunities.⁴⁷

A. The FTC’s Law Enforcement History Demonstrates the Continued Need for the Rule

The staff strongly disagrees with commenters who urge abandonment of the Business Opportunity Rule. The FTC’s law enforcement history demonstrates that the sale of fraudulent business opportunities has been a widespread and persistent problem since the Franchise Rule was first promulgated in 1978, and many consumer complaints received by the FTC have also sounded this theme.⁴⁸ The continued necessity of an anti-fraud regulation that provides consumers with material information on a pre-sale basis is, therefore, well supported by the Commission’s law enforcement experience. Since 1995, the Commission has brought more than 245 cases against business opportunity sellers, and conducted more than eighteen law enforcement sweeps,⁴⁹ many with other federal and state law enforcement partners, to combat persistent business opportunity frauds violating the Original Franchise Rule, such as those

⁴⁷ See id.

⁴⁸ In 2009, the Commission logged over 13,000 complaints against franchises, business opportunities, and work-at-home schemes, and that figure has increased each year since 2007. See Consumer Sentinel Databook, available at <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2009.pdf>.

⁴⁹ E.g., Operation Bottom Dollar (2010); Operation Short Change (2009); Project Fal\$e Hope\$ (2006); Project Biz Opp Flop (2005); Project Busted Opportunity (2002); Project Telesweep (1995); Project Bizillion\$ (1999); Operation Money Pit (1998); Project Vend Up Broke (1998); Project Trade Name Games (1997); and Operation Missed Fortune (1996). In addition to joint law enforcement sweeps, the Commission has also targeted specific business opportunity ventures such as envelope stuffing (Operation Pushing the Envelope 2003); medical billing (Operation Dialing for Deception 2002 and Project Housecall 1997); seminars (Operation Showtime 1998); Internet-related services (Net Opportunities 1998); vending machines (Operation Yankee Trader 1997); and 900 numbers (Project Buylines 1996).

involving the sale of vending machines,⁵⁰ rack displays,⁵¹ public telephones,⁵² Internet kiosks,⁵³ and 900-number ventures,⁵⁴ among others. To attack other forms of business opportunity fraud that fell outside of the scope of the Original Franchise Rule – most notably, work-at-home

⁵⁰ E.g., FTC v. Am. Entm't Distributions, Inc., No. 04-22431-CIV-Martinez (S.D. Fla. 2004); FTC v. Pathway Merch., Inc., No. 01-CIV-8987 (S.D.N.Y. 2001); United States 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), <http://www.ftc.gov/opa/1998/09/vendup2.htm> (FTC and ten states announce forty enforcement actions against fraudulent vending business opportunities).

⁵¹ E.g., United States v. Elite Designs, Inc., No. CA 05 058 (D.R.I. 2005); United States 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), <http://www.ftc.gov/opa/1997/08/tradenam.htm> (FTC and eight states file eighteen enforcement actions against sellers of bogus display opportunities that use trademarks of well-known companies).

⁵² E.g., FTC v. Advanced Pub. Commc'ns Corp., No. 00-00515-CIV-Ungaro-Benages (S.D. Fla. 2000); FTC v. Ameritel Payphone Distributions, 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).

⁵³ 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); United States 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).

⁵⁴ 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).

schemes (e.g., envelope stuffing, medical billing, and product assembly schemes) and pyramid schemes – the Commission used Section 5 of the FTC Act.⁵⁵

B. Compliance with the Proposed Business Opportunity Rule is Less Burdensome than Compliance with the Current Rule

The contention from commenters that compliance with the RPBOR would be costly to businesses and would chill legitimate business opportunities from operating is without merit. Compliance with the Franchise Rule and the Interim Business Opportunity Rule are significantly more costly and burdensome than the requirements would be under the RPBOR. Indeed, the proposed Rule would streamline the voluminous 22 separate categories of disclosures required by the interim Rule to just four, on a single-page document.⁵⁶ Logic would dictate that by reducing sellers' disclosure obligations as proposed the sale of business opportunities would not be chilled, but rather would have the opposite effect, as the compliance burden would be substantially lessened. Indeed, in the Commission's experience, sales of business opportunities have remained robust since the implementation of the Interim Business Opportunity Rule.⁵⁷

The staff believes that the proposed disclosure obligation strikes the appropriate balance by providing consumers with material information in a straightforward and focused document

⁵⁵ These types of schemes are generally priced below \$500, the minimum amount that triggers coverage by the Franchise Rule and the Interim Business Opportunity Rule. See 16 CFR 436.8(a)(1) and 437.2(a)(3)(iii).

⁵⁶ 73 Fed. Reg. at 16,129.

⁵⁷ See, e.g., FTC News Release: FTC Cracks Down on Con Artists Who Target Jobless Americans (Feb. 17, 2010) (Operation Bottom Dollar), <http://www.ftc.gov/opa/2010/02/bottomdollar.shtm>; FTC News Release: FTC Cracks Down on Scammers Trying to Take Advantage of the Economic Downturn (July 1, 2009) (Operation Short Change), <http://www.ftc.gov/opa/2009/07/shortchange.shtm>.

that will allow them to make informed purchasing decisions. At the same time, the streamlined form eases the compliance burden currently imposed on business opportunity sellers. The staff recommends that the Commission retain a pre-sale disclosure requirement for the sale of business opportunities. Like the Franchise Rule and the Interim Business Opportunity Rule, the RPBOR was posited on the notion that a fully informed consumer is in a better position to determine whether a particular offering is in his or her best interest. The proposed disclosure document would have provided prospective purchasers with information that is critical to making an informed purchasing decision. The RPBOR would not have regulated, nor was it intended to, the substantive terms of a business opportunity contract. Rather, it was designed to prevent fraud by prohibiting sellers from failing to disclose material information to prospective buyers. It is beyond dispute that consumers should be protected against receiving inaccurate information and self-serving unsubstantiated claims from business opportunity sellers.

C. The Rule Avoids Broadly Sweeping in MLMs

We agree with the Commission's decision articulated in the RNPR to narrow the scope of the IPBOR, to avoid broadly sweeping all MLMs into the ambit of the Rule. The Commission reasoned that the IPBOR would have imposed greater burdens on the MLM industry than on other types of business opportunity offerings without providing sufficient countervailing benefits to consumers.⁵⁸ At the same time, the Commission acknowledged that some MLMs engage in unfair or deceptive acts and practices, including the operation of pyramid schemes and the making of false and unsubstantiated earnings claims. However, the Commission concluded, and we agree, that neither the earnings disclosure provided by the proposed Rule, nor alternatives

⁵⁸ See 73 Fed. Reg. at 16,133.

proposed by commenters, would enable potential recruits to differentiate between a legitimate MLM and a pyramid scheme, or to inform consumers adequately about likely earnings.⁵⁹ Consequently, the Commission concluded that because Section 5 continues to provide an effective tool to challenge unfair and deceptive acts or practices in the MLM industry, the burden of applying the Rule to MLMs generally appeared to outweigh any potential benefits.

We agree with the Commission's conclusions. While we take very seriously the commenters' concerns about pyramid schemes posing as legitimate MLMs, we are not persuaded that subjecting all MLMs to the Rule would allow consumers to differentiate between unlawful pyramid schemes and legitimate companies using an MLM business model.⁶⁰ Identifying a pyramid scheme masquerading as an MLM requires a fact-intensive inquiry, making it particularly well-suited to Section 5 enforcement, which proceeds on a case-by-case basis. We also believe that the Commission has taken the correct approach in narrowing key definitions –

⁵⁹ The Commission determined that in view of the differences in the structure of MLM programs, it might not be possible to prescribe a feasible, uniform, industry-wide standard for providing earnings information. 73 Fed. Reg. at 16,120. Furthermore, identification of the true earnings of participants is undermined by the incentives in many MLMs for participants to report manufactured sales in order to retain a favorable commission level. *Id.* It further determined that other disclosures required by the proposed Rule, such as prior recruits, are not likely to help potential recruits evaluate the risk of participating, because all participants in the MLM have a financial incentive to enlist new recruits. *Id.*

⁶⁰ None of the comments received provided an industry-wide analysis of pyramid schemes masquerading as MLMs. They ask the Commission to assume widespread fraud in the multi-level marketing industry, but offer no evidence. Instead, the comments that purported to present evidence that legitimate MLMs were in fact unlawful pyramid schemes provided only anecdotal evidence. CAI-RNPR; Pyramid Watch-RNPR; Aird-RNPR; Durand-RNPR; Johnson-RNPR. As the Commission noted in the RNPR, identifying a pyramid scheme (or, at least, one that attempts to disguise itself as a legitimate business opportunity) entails a complex economic analysis including an in-depth examination of the compensation structure and the actual manner in which compensation flows within an organization. *See* Vander Nat & Keep, *supra* note 15, at 149. There is no bright line disclosure that would help consumers identify a fraudulent pyramid from a legitimate MLM.

namely, the IPBOR’s definition of “business assistance” and “required payment” – that would necessarily have extended the Rule’s coverage to all MLMs.

As discussed in more detail in infra Section V.C., some commenters argued that further refinement of the definition of the term “business opportunity” is necessary, either to address particular business practices common in the MLM industry or to ensure that MLMs are entirely excluded from the final Rule.⁶¹ Many commenters rehashed arguments the Commission previously rejected in the RNPR.

As to the concern that certain non-harmful business practices may be covered by the RPBOR, commenters proposed a number of revisions to the definitions section of the RPBOR.⁶² We believe the following clarifications to the RPBOR will address those concerns. First, a small change in section 437.1(a)(3)(i) to the definition of “business opportunity” will clarify that a seller’s offer to provide, at no cost to its purchasers, office space or the use of business equipment (such as computers and printers) for the operation of the purchaser’s business, does not trigger coverage by the Rule.⁶³ Second, a slight clarification in section 437.1(m) to the “otherwise assisting” clause of the “providing locations, outlets, accounts, or customers” will make clear that

⁶¹ Mary Kay-RNPR; Primerica-RNPR; Tupperware-RNPR; Pre-Paid Legal- RNPR.

⁶² See, e.g., Mary Kay-RNPR (revise definition of “business opportunity” to ensure that sellers’ offers to buy back unused inventory or equipment would not trigger coverage of the Rule); DSA-RNPR (same); Primerica-RNPR (definition of “equipment” in 437.1(c)(3)(i) should clarify that it is not intended to cover no-cost office space or equipment that an upstream seller offers); Pre-Paid Legal-RNPR (clarify that general advice and training about starting a new business would not trigger coverage of the Rule); Tupperware-RNPR (same); Avon-RNPR (clarify that the definition of required payment does not include payments for materials, supplies and equipment sold on a not-for-profit basis); Venable-RNPR (eliminate the word “customer” from the definitions of “business opportunity” and “provides locations, outlets, accounts, and customers”); DSA-RNPR (same); Primerica-RNPR (same).

⁶³ See infra Section V.C.

a business opportunity seller that provides advertising and general business advice to purchasers is not “providing locations, outlets, accounts, or customers”⁶⁴ within the meaning of the Rule.⁶⁵

We are not persuaded by a second set of commenters who advocate creating an exemption for all MLMs by crafting a definition of multi-level marketing opportunity.⁶⁶ In the RNPR, the Commission rejected a similar suggestion that the Rule include a definition of “pyramid scheme” that would exclude legitimate MLMs from coverage while ensuring pyramid schemes remained covered.⁶⁷ The Commission reasoned that any definition of “pyramid scheme” would provide bad actors with a road map for restructuring their businesses to skirt the definition, at least facially, and thereby provide them with a safe harbor that could undercut law enforcement efforts. Similarly, we believe that any definition of “multi-level marketing opportunity” would allow fraudulent business opportunity sellers to manipulate their corporate structure to evade coverage by the Rule.

MLM industry commenters also suggest limitations on the Rule by granting a safe harbor to exempt firms that require very low registration fees;⁶⁸ firms that offer refunds on inventory purchases;⁶⁹ firms that are publicly-traded;⁷⁰ firms that have a high net worth;⁷¹ or firms that are

⁶⁴ See proposed section 437.1(m).

⁶⁵ See *infra* Section V.M.

⁶⁶ DSA-RNPR; Babener-RNPR; Tupperware-RNPR.

⁶⁷ 73 Fed. Reg. at 16,119.

⁶⁸ See, e.g., Babener-RNPR; Pre-Paid Legal-RNPR.

⁶⁹ See, e.g., Pre-Paid Legal-RNPR; Tupperware-RNPR; IBA-RNPR.

⁷⁰ *Id.*

⁷¹ See, e.g., IBA-RNPR.

members of a self-regulatory body, such as the Direct Selling Association (“DSA”).⁷² These are not novel suggestions; each was also made in response to the INPR. In the RNPR, the Commission concluded that none of these factors is determinative of whether a company is, in fact, a pyramid scheme or otherwise engaged in deceptive conduct, and that the effort to craft a workable rule using these criteria could undermine law enforcement efforts.⁷³ We agree with the Commission’s conclusions.

The remainder of this Report is a discussion of each specific provision of the RPBOR. For each proposed provision, the Report provides background information, a discussion of the rulemaking record to date, including noting areas of disagreement and attempts to harmonize the Commission’s law enforcement experience with legitimate concerns articulated by commenters, and the staff’s recommendation for whether the provision should be omitted, revised, or adopted in the form proposed in the RPBOR.

V. Proposed Section 437.1: Definitions

The proposed Final Rule begins with a “definitions” section. As discussed below, the staff proposes minor clarifications to the definitions of “business opportunity” and “providing locations, outlets, accounts or customers,” and the addition of two new definitions – “material” and “signature or sign.” These proposed definitions are consistent with the usage of these terms in other rules enforced by the FTC.⁷⁴ With the exception of these changes and additions, the definitions in the proposed Final Rule are the same as in the RPBOR. Each definition, including

⁷² See, e.g., DSA-RNPR.

⁷³ 73 Fed. Reg. at 16,119.

⁷⁴ See, e.g., Telemarketing Sales Rule (“TSR”), 16 CFR 310; Franchise Rule, 16 CFR 436.

any relevant comments received in response to the RNPR, as well as the staff’s analysis and recommendation, is summarized below.

A. Proposed Section 437.1(a): Action

1. Background

Proposed section 437.3(a)(3) would require the disclosure of material information about certain civil or criminal actions⁷⁵ involving the business opportunity seller, its directors, and certain key employees.⁷⁶ Section 437.1(a) of the RPBOR would have defined “action” as “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.”

2. The record and recommendation

The Commission stated in the RNPR that “information about litigation history in the areas of ‘misrepresentation, fraud, securities law violations, or unfair or deceptive practices,’ is material to assessing that [investment] risk,” and that “discovering that a seller has a history of violating laws and regulations is perhaps the best indication that a particular business opportunity is a high-

⁷⁵ Proposed section 437.3(a)(3) would require disclosure of “any civil or criminal action for misrepresentation, fraud, securities law violations, or unfair or deceptive practices, including violations of any FTC Rule.”

⁷⁶ The proposed Rule would capture “any sales managers, or any individual who occupies a position or performs a function similar to an officer, director, or sales manager of the seller.” See proposed section 437.3(a)(3)(i)(c).

risk investment.”⁷⁷ Disclosure of litigation history is also required under the Amended Franchise Rule and the Interim Business Opportunity Rule.⁷⁸

During the Business Opportunity Workshop, a panelist representing the U.S. Department of Justice suggested that bankruptcy is another type of legal action that should be disclosed to potential purchasers because a bankruptcy filing could be a red flag warning of potential risk associated with the business opportunity.⁷⁹ A panelist from the Maryland Attorney General’s Office disagreed, arguing that this additional disclosure would not benefit potential business opportunity purchasers because, in his experience, fraudulent business opportunities do not typically file for bankruptcy protection.⁸⁰ Instead, in the panelist’s experience, they shutter the business and reopen as an entirely new fraudulent entity. Another panelist posited that disclosure of the existence of a bankruptcy by the business opportunity or its key personnel was not likely to identify fraudulent or problematic business opportunities that would not already be identified through the existing proposed categories of legal actions.⁸¹

The staff is not persuaded that disclosure of information concerning bankruptcy would significantly aid potential buyers in identifying a fraudulent offering. Based on a review of the FTC’s law enforcement history, we agree that fraudulent business opportunity sellers who run

⁷⁷ 73 Fed. Reg. at 16,125.

⁷⁸ 16 CFR 436.5(c); 16 CFR 437.1(a)(4).

⁷⁹ Jost, June 09 Tr at 32. A second panelist (Taylor, June 09 Tr at 35), and a commenter (Brooks-Workshop comment) agreed that existence of a bankruptcy might be relevant to a potential purchaser.

⁸⁰ Cantone, June 09 Tr at 37.

⁸¹ MacLeod, June 09 Tr at 33.

into law enforcement or other trouble tend to reopen under new company names.⁸² The disclosure of a prior bankruptcy could, therefore, lead potential purchasers to avoid the honest seller that fell upon hard times, but invest with the dishonest seller that never filed for bankruptcy, but instead continued to operate under a new name. We also agree that disclosing the existence of a bankruptcy filing is not likely to identify additional fraudulent business opportunities that would not otherwise be identified through the disclosure of actions in the proposed definition. Finally, in the INPR, the Commission specifically requested comment on whether the proposed categories of legal actions should be expanded to include bankruptcy,⁸³ but this request generated no substantive comment. We agree with the Commission's conclusion that the categories of legal action proposed in the RPBOR will aid consumers in identifying risks associated with the business opportunity, and therefore, do not recommend expanding the scope of 437.3(c)(3)(i) to require the disclosure of bankruptcy filings. We note, however, that some state administrative proceedings result in parties entering into assurances of voluntary compliance, while other states refer to such orders as assurances of discontinuance. Accordingly, the staff recommends adding "assurance of discontinuance" to the categories of legal actions enumerated in the proposed definition.

⁸² See, e.g., FTC v. Nat'l Vending Consultants, Inc., CV-S-05-0160-RCJ-PAL (D. Nev. complaint filed Feb. 7, 2005) (business under federal order began operating under new company name).

⁸³ 71 Fed. Reg. at 19,085 (Question 14).

B. Proposed Section 437.1(b): Affiliate

1. Background

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 the seller's affiliates or prior businesses. Proposed section 437.1(b) would define the term "affiliate" to mean: "an entity controlled by, controlling, or under common control with a business opportunity seller." This definition would also cover litigation involving a parent or subsidiary of the business opportunity seller.

2. The record and recommendation

Apart from comments pertaining specifically to the MLM industry, which were discussed in the RNPR,⁸⁴ the Commission's proposed definition of "affiliate" received no comment. The staff recommends, therefore, that the definition of "affiliate" be adopted in the form proposed in the RPBOR.

C. Proposed Section 437.1(c): Business Opportunity

1. Background

The RNPR proposed a definition of "business opportunity" that significantly narrowed the definition originally proposed in the INPR. As explained in Section I.A., the IPBOR was designed to be broad enough to cover the sale of virtually any type of business opportunity, including two types in particular that had traditionally fallen outside the scope of the Original Franchise Rule – work-at-home and pyramid marketing schemes. As explained more fully in the INPR, these two schemes have been shown by the Commission's law enforcement experience and

⁸⁴ 73 Fed. Reg. at 16,125 n.197.

consumer complaints to be sources of prevalent and persistent problems.⁸⁵ The Commission has traditionally used Section 5 of the FTC Act to challenge these schemes.⁸⁶

In order to reach these schemes, the INPR proposed a broad definition of “business opportunity” that comprised three elements: (1) a solicitation to enter into a new business; (2) payment of consideration, directly or indirectly through a third party; and (3) the making of either an “earnings claim” or an offer to provide “business assistance.”⁸⁷ The Commission incorporated the broad definition of “earnings claims” from the Original Franchise Rule,⁸⁸ recognizing that the most frequent allegation in its law enforcement actions against business opportunity frauds has been that the seller made false and unsubstantiated earnings claims. Furthermore, the IPBOR’s definition of “business assistance” would have included assistance in the form of “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.”⁸⁹ The Commission noted that many pyramid schemes offer this type of assistance, purporting to compensate participants not only for their own product sales but also for sales made by their

⁸⁵ In 2009, pyramid schemes generated nearly 2,500 consumer complaints, while work-at-home schemes generated nearly 8,000 complaints.

⁸⁶ Many of these schemes fell outside the ambit of the Franchise Rule because: (1) the purchase price was less than \$500, the minimum payment necessary to trigger coverage under the Original Franchise Rule; (2) required payments were primarily for inventory, which did not count toward the \$500 monetary threshold; (3) the scheme did not offer location or account assistance; or (4) the scheme involved the sale of products to the business opportunity seller rather than to end-users, a further limitation on coverage under the Original Franchise Rule. See 71 Fed. Reg. at 19,055, 19,059.

⁸⁷ See IPBOR, 437.1(d)(3).

⁸⁸ IPBOR, 437.1(h).

⁸⁹ IPBOR, 437.1(c)(iv).

downline recruits.⁹⁰ Under the IPBOR, “business assistance” would have also included other advice or training assistance.⁹¹

As the IPBOR defined a broader scope of coverage, it also excised two features of the Original Franchise Rule that had traditionally excluded work-at-home and pyramid schemes from its coverage: (1) a minimum payment threshold set at \$500; and (2) an exemption from the calculation of the minimum payment for purchases of inventory at bona fide wholesale prices.⁹² By eliminating the \$500 minimum payment requirement, the IPBOR aimed to reach the various types of fraudulent business opportunity sellers that have evaded coverage under the Franchise Rule by pricing their schemes below \$500.⁹³ Indeed, it is the Commission’s experience that work-at-home schemes such as envelope stuffing, product assembly, and medical billing frequently are priced below the monetary threshold of Franchise Rule coverage.⁹⁴ Additionally, the IPBOR would have ensured coverage of pyramid schemes by eliminating the inventory exemption.⁹⁵

As explained in supra Section I.B., two key problems emerged with the IPBOR’s breadth of coverage. First, the IPBOR would have unintentionally swept in numerous commercial arrangements where there is little or no evidence that fraud is occurring.⁹⁶ Second, the IPBOR

⁹⁰ 71 Fed. Reg. at 19,063 & n.106

⁹¹ IPBOR, 437.1(c)(v).

⁹² 73 Fed. Reg. at 16,112.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ See 73 Fed. Reg. at 16,113-14.

would have imposed greater burdens on the MLM industry than other types of business opportunity sellers without sufficient countervailing benefits to consumers.⁹⁷

To cure these problems, the Commission proposed a tailored definition of “business opportunity” intended to reach those business opportunities that have, in the Commission’s law enforcement experience, persistently caused substantial consumer injury.⁹⁸ The changes to the IPBOR’s definition of “business opportunity” were three-fold. First, the RPBOR definition of “business opportunity” would have included those opportunities for which “the prospective purchaser makes a required payment.” The term “required payment” was defined to exclude payments for inventory at bona fide wholesale prices. Second, the RPBOR definition would have eliminated two types of “business assistance” that formerly would have triggered the Rule’s strictures and disclosure obligations, namely tracking payments and providing training. Third, unlike the IPBOR, the RPBOR would not have linked the definition of “business opportunity” to the making of an earnings claim.

The RPBOR incorporated and expanded the definition of “business opportunity” used in the Original Franchise Rule and the Interim Business Opportunity Rule to cover the types of

⁹⁷ See 73 Fed. Reg. at 16,120. For instance, in the RNPR, the Commission acknowledged one characteristic of the MLM model that could undermine the utility of requiring MLMs to disclose a list of prior purchasers. Specifically, prior purchasers on the reference list likely would stand to receive a financial benefit if they could convince a prospect to enroll into their downline. Under these circumstances, information provided by such a reference might not be a reliable indicator of the potential risk and rewards of enrollment. The Commission further acknowledged that the varied and complex structure of MLMs would make it exceedingly difficult to make an accurate earnings disclosure and likely would require different disclosures for different levels of participation in the company.

⁹⁸ These include business opportunities promoting vending machine, rack-display, work-at-home, medical billing, and 900-number schemes, among others. 73 Fed. Reg. at 16,121.

schemes that had evaded coverage by those rules.⁹⁹ Accordingly, section 437.1(c) of the RPBOR would have defined the term “business opportunity” as follows:

(c) *Business opportunity* means:

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

In the RNPR, the Commission solicited comment as to whether the categories of assistance enumerated above adequately cover the field of business opportunity promoters who are likely to engage in fraud, and conversely, queried whether the limitations to the RPBOR’s

⁹⁹ See supra note 85.

coverage are sufficient to exclude from the rule traditional distributor relationships¹⁰⁰ that had been inadvertently swept in.¹⁰¹

2. The record and recommendation

The majority of comments in response to the RNPR focus on whether the revisions to the proposed Rule would capture MLMs,¹⁰² and as noted above, the staff recommends against creating a blanket exemption for MLMs. The remaining comments focus on two issues. First, some commenters expressed concern that the buy-back provision, set forth in section 437.1(c)(3)(iii), would sweep in MLM companies that offer to buy back their distributors' unused inventory.¹⁰³ These commenters suggested amending this provision to strike the word "provides" from section 437.1(c)(iii), so that the definition of "business opportunity" would clearly not

¹⁰⁰ For example, commenters to the INPR noted that the IPBOR would cover "manufacturers, suppliers and other traditional distribution firms that have relied on the bona fide wholesale price exclusion to avoid coverage" under the Rule. Sonnenschein-INPR. The Cosmetic, Toiletry and Fragrance Association posited that the IPBOR would cover the relationship between a manufacturer and an independent contractor who sells the product to beauty supply companies, salons, and others. CTFA-INPR; see also LHD&L-INPR at 2 (noting that the IPBOR could cover the relationship between a manufacturer and a regional distributor of products).

¹⁰¹ 73 Fed. Reg. at 16,133.

¹⁰² DSA-RNPR. In addition, the Commission received more than 40 comments from various MLMs that expressed support and concurrence with DSA's comments. See, e.g., Big Ear-RNPR; Jafra Cosmetics-RNPR; Lia Sophia-RNPR; Longaberger-RNPR; Princess House-RNPR; Shaklee-RNPR. Some commenters expressed disappointment that the Commission proposed to exclude MLMs from coverage by the Rule. See, e.g., CAI-RNPR; Durand-RNPR; PSA-RNPR; Aird-RNPR (Rebuttal); Parrington-RNPR. For the reasons identified in supra Section IV.C., we agree with the Commission's decision to narrow the scope of the Rule to avoid broadly sweeping in MLMs.

¹⁰³ DSA requires that its members offer to buy back, at 90% of the salesperson's cost, all resalable inventory and other sales materials. DSA-INPR at 35.

encompass a return of unused materials or merchandise.¹⁰⁴ We are not persuaded that this change is necessary. The Commission made clear in the RNPR that proposed 437.1(c)(iii) was intended to capture work-at-home business opportunities in which the seller provides the purchaser with some supplies and the purchaser converts those supplies into a product or other “good” for repurchase by the seller or other person.¹⁰⁵ We believe it would require a labored reading of this section to suggest that the word “provides” means “to return unused inventory the purchaser bought from the seller but was not able to sell.” Moreover, the Commission has explicitly stated that this provision “would not include the offer to buy back inventory or equipment needed to start a business.”¹⁰⁶

Second, some commenters argued that section 437.1(c)(i) would inadvertently cover entities that offer, at no cost to purchasers, the use of office space and equipment for the operation of the purchasers’ business.¹⁰⁷ These commenters were concerned that such offers could be construed under proposed section 437.1(c)(3)(i) to be providing “locations for the use or operation of equipment . . . on premises neither owned nor leased by the purchaser.” In the

¹⁰⁴ DSA-RNPR at 6 n.14 (noting that “the buy-back provision is the cornerstone of the DSA’s self regulatory regime and a valuable protection for individual direct sellers”); Mary Kay-RNPR at 6; Babener-RNPR; Melaleuca-RNPR.

¹⁰⁵ See 73 Fed. Reg. at 16,123.

¹⁰⁶ See 71 Fed. Reg. at 19,062.

¹⁰⁷ For example, Primerica, an MLM that sells insurance products and services, requires that its regional managers provide at no cost to “downline” sales agents the use of office space, supplies, and equipment (such as computers and printers) for the operation of his or her business. Primerica noted that as a practical matter, it must require this assistance, as the regulatory structure in which Primerica operates necessitates that regional managers exercise compliance oversight functions with respect to the agents in their downlines. Primerica-RNPR; see also Avon-RNPR; Tupperware-RNPR.

RNPR, the Commission stated that this provision was intended to capture fraudulent vending machine and rack display schemes,¹⁰⁸ as well as schemes where a purchaser is forced to lease office space, telephones and other equipment for operation of his or her business.¹⁰⁹ The staff agrees with the commenters that the Commission did not intend to capture the incidental use of office space and equipment that the purchaser does not own, lease, or control, and for which the purchaser makes no payment. We propose, therefore, a slight modification to section 437.1(c)(3)(i) to include: “provid[ing] locations for the use or operation of equipment, displays, vending machines, or similar devices, when such equipment, displays, vending machines, or similar devices are owned, leased, controlled or paid for by the purchaser.”¹¹⁰ This change will clarify that the third prong of the “business opportunity” definition would be triggered when the seller offers to provide the purchaser with locations in which to place equipment, displays, vending machines, or similar devices that the purchaser controls. The staff believes that this change will not compromise the traditional coverage of the Rule, and will allow legitimate sellers to offer beneficial assistance to purchasers, at no cost to those purchasers.

¹⁰⁸ 73 Fed. Reg. at 16,123 (citing FTC v. Am. Entm’t Distribs., No. 04-22431-CIV-Martinez (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)).

¹⁰⁹ FTC v. Equinox, Int’l, No. CV-S-99-0969-JAR-RLH (D. Nev. 1999).

¹¹⁰ The staff additionally recommends that the Commission strike the final clause of this provision of the RPBOR – “on premises neither owned or leased by the purchaser.” The clause is superfluous, as a buyer would never need a seller’s assistance in identifying locations that the buyer already owns or leases.

D. Proposed Section 437.1(d): Designated Person

1. Background

The term “designated person” appears in the definition of “business opportunity” in section 437.1(c)(3), which refers to representations made by the seller or by “one or more designated persons.” It is used to ensure coverage of those transactions in which a seller refers a purchaser to a third party for the provision of locations, accounts, buy-back services, etc., as specified in sections 437.1(c)(3)(i)-(iii).¹¹¹ Proposed section 437.1(d) 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.”¹¹²

2. The record and recommendation

In response to the RNPR, one commenter argued that the current proposed definition of “designated person” is overbroad and that its application would result in many multi-level marketing opportunities being swept into the Rule.¹¹³ For instance, if an MLM company requires its managers to provide the use of office space, equipment and supplies, and general business

¹¹¹ In other words, the definition and use of “designated person” is 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. The referral to a third party would be sufficient to bring the transaction within the ambit of the Rule. See 71 Fed. Reg. at 19,064.

¹¹² This approach is consistent with the Amended 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 436.1(j).

¹¹³ Primerica-RNPR at 11.

advice to new agents (and presumably to describe these types of assistance to prospective purchasers as part of a sales pitch),¹¹⁴ it could be argued that the company would be covered by the Rule.¹¹⁵ The commenter offered several suggested revisions to resolve this problem, one of which was to specify that “designated person” does not include entities that receive no payment from the purchaser in order to receive the services provided.¹¹⁶ The staff determined that an alternate resolution is more appropriate – namely the modification to the definitions of “business opportunity”¹¹⁷ and “providing locations, outlets, accounts, or customers.”¹¹⁸ The staff recommends, therefore, that the definition of “designated person” be adopted in the form proposed in the RPBOR.

E. Proposed Section 437.1(e): Disclose or State

1. Background

RPBOR section 437.1(e) would have defined “disclose or state” to mean “to give information in writing that is clear and conspicuous, accurate, concise, and legible.”¹¹⁹ According to the Commission, the purpose of this definition was to ensure that a prospective purchaser will receive complete information in a form that easily can be read. For example, the furnishing of a disclosure document without punctuation or appropriate spacing between words would not be

¹¹⁴ The MLM company compensates managers for this service; there is no cost to down-line agents. Primerica-RNPR at 11.

¹¹⁵ Id.

¹¹⁶ Id. at 13.

¹¹⁷ See supra Section V.C.

¹¹⁸ See infra Section V.M.

¹¹⁹ The Franchise Rule contains a comparable provision. See 16 CFR 436.1(a).

“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.

2. The record and recommendation

The Commission’s proposed definition of “disclose or state” received no comment. The staff agrees that this definition will ensure that potential purchasers are provided with information that will assist them in making an informed purchasing decision. The staff recommends, therefore, that the definition of “disclose or state” be adopted in the form proposed in the RPBOR.

F. Proposed Section 437.1(f): Earnings Claim

1. Background

As noted above, the Rule’s key feature is the disclosure document, which provides potential purchasers of a business opportunity with four items of material information before they pay any money or other consideration or execute a contract. The RPBOR would have required written disclosure of all “earnings claims” made by the seller. This would allow a potential purchase to compare a seller’s written representations with any oral representations made. Proposed section 437.1(f) would have defined 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.” It was intended to cover all variations of earnings representations that the Commission’s law enforcement experience shows are associated with business opportunity fraud.¹²⁰

¹²⁰ 71 Fed. Reg. at 19,065.

The definition would also provide two examples of communications that constitute earnings claims. The first of these examples would describe common types of potentially fraudulent earnings claims: “a chart, table, or mathematical calculation that demonstrates possible results based upon a combination of variables.” This example was intended to clarify that sales matrices 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.¹²¹

The second example would incorporate the principle, as expressed in the Interpretive Guides to the Original Franchise Rule, that “any statements from which a prospective purchaser can reasonably infer that he or she will earn a minimum level of income” would constitute an earnings claim. There, the Commission concluded that such implied claims are at least as likely to mislead prospective purchasers as express claims.¹²² The proposed definition included 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.” Each of these three illustrative examples implies 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. Accordingly, the proposed language made it clear that these types of representations are indistinguishable from direct, express earnings claims.

2. The record and recommendation

While the Commission received comments about the circumstances under which a seller

¹²¹ Id.

¹²² Final Interpretive Guides Accompanying the Franchise Rule (“Interpretive Guides”), 44 Fed. Reg. 49,966 (Aug. 24, 1978).

should be required to make an earnings disclosure,¹²³ the Commission received virtually no comments related to the proposed definition itself.¹²⁴ The staff agrees with the Commission's analysis and recommends, therefore, that the definition of "earnings claim" be adopted in the form proposed in the RPBOR.

G. Proposed Section 437.1(g): Exclusive Territory

1. Background

Proposed section 437.6(n) would prohibit misrepresentations concerning territory exclusivity. The Commission reasoned that representations about exclusive territories are material because they purport to assure a potential 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.¹²⁵ The Commission has stated that exclusive territory promises go to the viability of the business opportunity and to the level of risk entailed in the purchase.¹²⁶ Indeed, misrepresentations about territories have commonly been made by business opportunity sellers to lure consumers into believing that a purchase poses little financial risk.¹²⁷

¹²³ See infra Section VIII.

¹²⁴ Planet Antares stated that the earnings claim definition was so broad that "it would be difficult to imagine how a business opportunity seller could avoid making an earnings claim." It offered no suggestions about how to narrow the definition, however.

¹²⁵ 71 Fed. Reg. at 19,065.

¹²⁶ Id.

¹²⁷ 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).

Accordingly, proposed section 437.1(g) would define the term “exclusive territory” as “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.” According to the Commission, this definition reflects 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.¹²⁸ It would include 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.

The definition would also cover 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.” The Commission concluded that if untrue, any of these kinds of representations can mislead a prospect about the likelihood of his or her success.¹²⁹

2. The record and recommendation

The Commission’s proposed definition of “exclusive territory” received no comment. The staff agrees with the Commission’s analysis, and recommends, therefore, that the definition of “exclusive territory” be adopted in the form proposed in the RPBOR.

¹²⁸ 71 Fed. Reg. at 19,065.

¹²⁹ Id.

H. Proposed Section 437.1(h): General Media

1. Background

The term “general media” would appear in proposed section 437.4(b), which would prohibit business opportunity sellers from making unsubstantiated earnings claims in the “general media.”¹³⁰ Proposed section 437.1(h) would define “general media” to mean: “any instrumentality through which a person may communicate with the public, including, but not limited to, television, radio, print, Internet, billboard, website, and commercial bulk email.”¹³¹ .

2. The record and recommendation

The Commission’s proposed definition of “general media” received no comment. The Commission intended that this definition be broad enough to include traditional advertising, as well as new and emerging technologies.¹³² Due to the explosive growth of advertising through mobile devices, the staff recommends adding the phrase “mobile communications” to the list of

¹³⁰ This proposed provision was based on an analogous provision in the Franchise Rule, 16 CFR 436.1(e). The Commission has alleged unsubstantiated earnings claims through the general media in numerous cases, e.g., FTC v. Wealth Sys., Inc., No. CV 05 0394 PHX JAT (D. Ariz. 2005); United States v. Am. Coin-Op Servs., Inc., No. 00-0125 (N.D.N.Y. 2000); United States v. Cigar Factory Outlet, Inc., No. 00-6209-CIV-Graham-Turnoff (S.D. Fla. 2000); United States v. Emily Water & Beverage Co., Inc., No. 4-00-00131 (W.D. Mo. 2000); and United States v. Greeting Card Depot, Inc., No. 00-6212-CIV-Gold (S.D. Fla. 2000).

¹³¹ See Interpretative Guides, 44 Fed. Reg. at 49,984-84 (earnings claims made “for general dissemination” include “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. The Commission proposed that future Compliance Guides to the new Business Opportunity Rule retain these standard general media claims exemptions. See 71 Fed. Reg. at 19,065. The staff agrees with the Commission’s proposal.

¹³² 71 Fed. Reg. at 19,065.

instrumentalities enumerated in the definition. At the same time, the staff notes that this is not an exhaustive list, and other current (and future) types of mass communication could also fall within this definition.

I. Proposed Section 437.1(i): Material (New Proposed Definition)

Proposed section 437.3(a)(4) would require sellers that offer refunds and cancellations to “state the terms of the refund or cancellation policy in an attachment to the disclosure document.” Some participants at the June 1, 2009 Business Opportunity Workshop expressed concern that proposed section 437.3(a)(4) would not provide sellers with sufficient guidance about the types of information that should be disclosed.¹³³ The staff agrees with the commenters and recommends that proposed section 437.3(a)(4) be revised to make clear that sellers are required to disclose all material terms and conditions of any refund or cancellation policy.¹³⁴ We further recommend that the proposed Final Rule, at 437.1(i), define “material” to mean “likely to affect a person’s choice of, or conduct regarding, goods or services.”¹³⁵ This definition is consistent with the definition of “material” used in the TSR.¹³⁶

¹³³ Morrissey, June 09 Tr at 41; Taylor, June 09 Tr at 43; Cantone, June 09 Tr at 47.

¹³⁴ We recommend that the second sentence of 437.3(a)(4) be revised to read “If so, state all material terms of the refund or cancellation policy in an attachment to the disclosure document.” See infra Section VII.C.3.

¹³⁵ Under the TSR, the Commission adopted a similar approach regarding disclosure of telemarketers’ refund policies. See 16 CFR 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 infra Section VII.C.3.

¹³⁶ See 16 CFR 310.2(q) (defining “material” to mean “likely to affect a person’s choice of, or conduct regarding, goods or services or a charitable contribution”).

J. Proposed Section 437.1(j): New Business

1. Background

The term “new business” would appear in proposed section 437.1(c), which would set forth the definition of the term “business opportunity.” As discussed in supra Section V.C., the first of three elements comprising a “business opportunity” is a “solicitation to enter into a new business.” This prong would distinguish the sale of a business opportunity from the ordinary sale of products and services.¹³⁷ “New business” was defined in section 437.1(i) of the RPBOR¹³⁸ as “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.”¹³⁹ The Commission’s intent was to cover sales of business opportunities to persons who may already be in a business, because 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.¹⁴⁰ The Commission concluded that in such instances, the veteran businessperson may need the proposed Rule’s protections as much as a novice.¹⁴¹

¹³⁷ 71 Fed. Reg. at 19,066.

¹³⁸ Because of the addition of two proposed new definitions – “material” at 437.1(i), and “signature or signed” at 437.1(r) – the numbering designation of section 437.1 of the proposed Final Rule does not match that in the RPBOR. See Attachment C for a redline of the proposed Final Rule and the RPBOR.

¹³⁹ 71 Fed. Reg. at 19,066.

¹⁴⁰ For example, an existing tire business could purchase a vending machine route, or a beverage vending machine route owner could purchase an envelope stuffing opportunity.

¹⁴¹ 71 Fed. Reg. at 19,066.

2. The record and recommendation

The Commission's proposed definition of "new business" received no comment. The staff agrees with the Commission's analysis and recommends, therefore, that the definition of "new business" be adopted in the form proposed in the RPBOR.

K. Proposed Section 437.1(k): Person

1. Background

Proposed section 437.1(k) would define the term "person," a term used in many of the proposed Rule's definitional or substantive provisions.¹⁴² As in the Amended Franchise Rule and Interim Business Opportunity Rule, the term means "an individual, group, association, limited or general partnership, corporation, or any other entity."¹⁴³ The term "person" is to be read broadly to refer to both natural persons, businesses, associations, and other entities. Where the Rule refers to a natural person only, it uses the term "individual."¹⁴⁴

2. The record and recommendation

The Commission received no comments in response to the RNPR related to the proposed definition of person. The staff recommends, therefore, that the definition of "person" be adopted in the form proposed in the RPBOR.

L. Proposed Section 437.1(l): Prior Business

1. Background

As discussed in infra Section VII.C., section 437.3(a)(3) of the proposed Final Rule would

¹⁴² E.g., proposed sections 437.1(n); 437.6(q).

¹⁴³ See 16 CFR 436.1(n); 437.2(b).

¹⁴⁴ 71 Fed. Reg. at 19,066.

require business opportunity sellers to disclose litigation in which they have been involved, including through their affiliates or any prior businesses. Proposed section 437.1(k) of the RPBOR would have defined “prior business” to mean:

- (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.

This definition was intended to include not only an entity from which a seller acquired the major portion of the seller’s assets, but also businesses that the seller previously owned or operated, but that had ceased operations.¹⁴⁵ This coverage is necessary because it is the Commission’s law enforcement experience 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 in a different part of the country under new names.¹⁴⁶ Accordingly, a broad definition of “prior business” is necessary to capture all of a seller’s prior operations.¹⁴⁷

¹⁴⁵ The proposed definition of “prior business” is broader than the definition of “predecessor” found in the Amended Franchise Rule, which covers only an entity from which a seller acquired the major portion of the seller’s assets. See 16 CFR 436.1(p).

¹⁴⁶ E.g., FTC v. Nat’l Vending Consultants, Inc., No. 05-0160 (D. Nev. 2005); 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).

¹⁴⁷ 71 Fed. Reg. at 19,066.

2. The record and recommendation

The Commission's proposed definition of "prior business" received no comment. The term is used to identify the legal actions that a seller must disclose, including any legal actions pertaining to a "prior business of the seller."¹⁴⁸ On its own initiative, the staff notes that the second prong of the "prior business" definition contains a redundancy that renders the rule unclear. Namely, the second prong of the definition of "prior business" refers not only to the seller but to the seller's key personnel. It thus repeats the language in proposed section 437.3(a)(3)(i)(C), which requires the disclosure of legal actions of certain key personnel of the seller. To eliminate any potential confusion, the staff recommends that the second prong of the "prior business" definition eliminate reference to "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."

M. Proposed Section 437.1(m): Providing Locations, Outlets, Accounts, or Customers

1. Background

The proposed definition of "providing locations, outlets, accounts, or customers" relates to the third prong of the "business opportunity" definition, which requires a representation that the seller will provide assistance in the form of securing locations or accounts, or by buying back goods produced by the purchasers.¹⁴⁹ The Commission's law enforcement history shows that fraudulent sellers will often falsely promise to assist the purchaser in obtaining the key

¹⁴⁸ Proposed section 437.3(a)(3)(i)(B).

¹⁴⁹ See supra Section V.C.

ingredients necessary for the success of the proposed business: a source of customers, locations, outlets, or accounts. Location assistance is the hallmark of fraudulent vending machine and rack display route opportunities,¹⁵⁰ while the provision of accounts or customers is typical of medical billing schemes.¹⁵¹ In such schemes, the seller itself may purport to secure locations or accounts, or may represent that third parties will do so. Proposed section 437.1(l) of the RPBOR defined “providing locations, outlets, accounts, or customers” as:

furnishing the prospective purchaser with existing or potential locations, outlets, accounts, or customers; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies; collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers.¹⁵²

The IPBOR had included two additional categories of assistance that would have triggered coverage by the Rule – advice or training in the promotion, operation or management of a new

¹⁵⁰ E.g., FTC v. Am. Entm’t Distribs., No. 04-22431-CIV-Martinez (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).

¹⁵¹ 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).

¹⁵² The Commission has noted that the proposed definition is intended to capture offers to provide locations that have already been found, as well as offers to furnish a list of potential locations; and includes not only directly furnishing locations, but also “recommending to a prospective purchaser specific locators, providing lists of locators who will furnish the locations, and training or otherwise assisting prospects in finding their own locations.” 71 Fed. Reg. at 19,066.

business, and assistance in tracking or paying commissions or other compensation for recruitment or sales.¹⁵³ These were subsequently eliminated in the RPBOR, as the Commission was persuaded by commenters who argued that “advice or training” was overbroad and could unintentionally capture a broad array of legitimate commercial relationships, including certain educational offerings, as well as manufacturers who provide product and sales training to third-party retailers.¹⁵⁴ The RPBOR also would have excluded commercial arrangements where the only assistance the seller provides is tracking or paying commissions. The RNPR noted that many pyramid marketing schemes offer this type of assistance.¹⁵⁵ The Commission eliminated this category of business assistance, however, because it would have covered legitimate MLM companies, many of which offer assistance in tracking payments.¹⁵⁶ The Commission solicited comment on whether elimination of these two categories of business assistance cured potential overbreadth without sacrificing the full extent of coverage of the Original Franchise Rule.¹⁵⁷

At the same time, the Commission noted that in determining whether a seller provides the requisite assistance to trigger the “otherwise assisting” clause of the proposed definition, the Commission would continue to apply its long-standing analysis, which considers the kinds of

¹⁵³ 71 Fed. Reg. at 19,087.

¹⁵⁴ The Commission stated, however, that elimination of the word “training” from the definition of “providing locations” does nothing to erode the long-standing interpretation of “location assistance” in the Original Franchise Rule to reach, potentially, circumstances where a seller “instructs investors on how to find their own profitable locations.” 73 Fed. Reg. at 16,123 n.178.

¹⁵⁵ 73 Fed. Reg. at 16,123.

¹⁵⁶ Id.

¹⁵⁷ 73 Fed. Reg. at 16,123 n.178.

assistance the seller offers and the significance of that assistance to the prospective purchaser (e.g., whether the assistance is likely to induce reliance on the part of the prospective purchaser).¹⁵⁸ The Commission solicited comment on three issues related to the “otherwise assisting” clause of the definition: (1) whether the “otherwise assisting” clause adequately covered all of the business opportunity arrangements that should be within the scope of the Rule; (2) whether inclusion of the “otherwise assisting” clause in the definition would cause traditional product distribution arrangements, educational institutions, or how-to books to be subject to the Rule; and (3) whether the clause would result in the inclusion of multi-level marketing relationships that otherwise would not be covered by the Rule.¹⁵⁹

2. The record and recommendation

The majority of comments received in response to the RNPR focused on when the “otherwise assisting” clause of the definition would be triggered. Commenters from the MLM industry were concerned that various types of optional or no-cost assistance that MLM companies frequently offer their sales representatives, including general advice and training about how to succeed in a new business venture,¹⁶⁰ general advertising for the purpose of promoting the MLM’s products or services,¹⁶¹ occasional ad hoc referrals from consumers who contact the

¹⁵⁸ 73 Fed. Reg. at 16,124.

¹⁵⁹ 73 Fed. Reg. at 16,133.

¹⁶⁰ E.g., Primerica-RNPR at 5 (provides advice and training about how to identify potential customers and how to make effective sales presentations); Tupperware-RNPR at 4 (provides training about how new representatives can develop own customer bases); Venable-RNPR.

¹⁶¹ DSA-RNPR (5/25/2008); Primerica-RNPR at 5.

company directly,¹⁶² and optional business tools, such as web templates and links to corporate websites that some MLM companies offer for sale to its sales representatives, could be considered to be “otherwise assisting.”¹⁶³ Additionally, one commenter expressed concern that sellers of general training services, such as training on how to start a new business and advice about how to obtain customers, would be covered by the Rule.¹⁶⁴

Commenters made a number of suggestions to cure what they perceived to be the overbreadth of this provision. Some commenters suggested omitting the word “customers” from the “otherwise assisting” provision and the corresponding provisions of the “business opportunity” definition.¹⁶⁵ Other commenters recommended that the definition distinguish customers from “near customers” so as to exclude the provision of potential customers or businesses that the seller obtains from publically available records.¹⁶⁶ Others suggested adding a statement that no-cost general business advice is not “providing customers.”¹⁶⁷ Another commenter suggested adding a new clause to the definition of business opportunity that would

¹⁶² E.g., Avon-RNPR at 3 (noting that this practice is designed to help potential customers find a sales representative, not to help sales representatives find potential customers); Mary Kay-RNPR at 7 (suggesting that merely providing the ability to search for a sales associate on the company’s website should not trigger the “providing locations” factor of the “business opportunity” definition); DSA-RNPR at 5; Melaleuca-RNPR at 2.

¹⁶³ E.g., DSA-RNPR at 5 (tools are intended to maintain brand uniformity and promote effective customer service).

¹⁶⁴ Venable-RNPR at 2.

¹⁶⁵ DSA-RNPR at 5; Venable Rebuttal-RNPR at 3; Primerica-RNPR at 5.

¹⁶⁶ Venable-RNPR.

¹⁶⁷ Primerica-RNPR at 8; Tupperware-RNPR at 6; Avon-RNPR; Mary Kay-RNPR.

create an exception when the assistance offered by the seller is limited to advice or training.¹⁶⁸

Some commenters suggested eliminating the concept of “potential customers” from the scope of the “otherwise assisting” language.¹⁶⁹ Finally, one commenter suggested revising the definition of “business opportunity” to require that the seller’s assistance in providing outlets, accounts or customers be a “material inducement” to the purchaser.¹⁷⁰

The staff is concerned that narrowing the definition in the ways that the commenters suggest will allow peddlers of fraudulent schemes to craft their sales pitch carefully to escape inclusion within the Rule. In particular, we disagree with commenters who recommend excising the word “customers” from the definition. One important goal of the Rule is to protect consumers from investing their money into a business venture that appears likely to succeed because the seller promises to provide not only the mechanism to earn money but also the customers who will patronize the purchaser’s new business. For instance, in the cases the Commission has brought against medical billing opportunities, it is typical for sellers to offer to provide assistance to the potential purchaser in finding customers for the medical billing service.¹⁷¹ Therefore, we

¹⁶⁸ Pre-Paid Legal-RNPR.

¹⁶⁹ Mary Kay-RNPR at 7 (as an alternative Mary Kay suggests that in the commentary to the Final Rule, the Commission make clear that passing on ad hoc referrals of customers who contact the company directly would not trigger this provision).

¹⁷⁰ Melaleuca-RNPR.

¹⁷¹ See, e.g., FTC v. Medical Billers Network, Inc., No. 05-CV-2014 (S.D.N.Y. 2005); FTC v. Medical-Billing.com, Inc., No. 3-02CV0702CP (N.D. Tex. 2002); FTC v. Electronic Medical Billing, Inc., No. SACV02-368 AHS (C.D. Cal. 2002). See also FTC v. Star Publishing Group, Inc., No. 00cv-023D (D. Wyo. 2000) (offering everything necessary to earn money processing HUD refunds); FTC v. AMP Publications, Inc., SACV-00-112-AHS (C.D. Cal. 2000) (offering to provide list of companies in need of consumer’s home-based computer services).

recommend that the Commission continue its long-standing policy of analyzing the significance of assistance in the context of the specific business opportunity, focusing on whether the seller's offer is "reasonably likely to have the effect of inducing reliance on [the seller] to provide a prepackaged business."¹⁷²

Although the staff does not recommend eliminating the word "customers" from the definition of "providing locations, outlets, accounts, or customers," the staff recommends adding language to address the concern that the definition could be read more broadly than the Commission intends. The RNPR makes it clear that the "otherwise assisting" provision of the definition was not intended to apply to advertising and no-cost offers of general business advice and training described by the various commenters.¹⁷³ A short proviso to the "otherwise assisting" clause would add clarity, and therefore, we recommend adding to the final clause of this definition the phrase "provided, however, that advertising and general advice about business development and training shall not be considered as 'providing locations, outlets, accounts, or customers.'"¹⁷⁴

¹⁷² Staff Advisory Opinion 95-10, Business Franchise Guide, (CC) ¶ 6475 (1995) (citing Original Franchise Rule, Statement of Basis and Purpose, 43 Fed. Reg at 59,705).

¹⁷³ 73 Fed. Reg. at 16,123.

¹⁷⁴ For example, this new proviso makes even clearer that giving advice about how to demonstrate products, complete product order forms and process payments, and how to process returns (Tupperware-RNPR); or providing brand advertising and generalized training in customer and business development (Primerica-RNPR), would not be considered as "providing locations, outlets, accounts, and customers."

N. Proposed Section 437.1(n): Purchaser

1. Background

Proposed section 437.1(m) of the RPBOR would have defined the term “purchaser” to mean “a person who buys a business opportunity.” By operation of the definition of “person,”¹⁷⁵ a natural person, as well as any of various entities, would qualify as a business opportunity purchaser.

2. The record and recommendation

The Commission’s proposed definition of “purchaser” received no comment. The staff recommends, therefore, that the definition of “purchaser” be adopted in the form proposed in the RPBOR.

O. Proposed Section 437.1(o): Quarterly

1. Background

To ensure accuracy and reliability of disclosures, proposed section 437.3 (instructions for completing the disclosure document) requires sellers to revise their disclosures at least “quarterly.”¹⁷⁶ The definition of “quarterly” proposed in the RPBOR would have 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.

¹⁷⁵ Supra Section V.K.

¹⁷⁶ Proposed section 437.3(b) requires that until a seller has at least 10 purchasers, the list of references must be updated monthly.

2. The record and recommendation

The Commission's proposed definition of "quarterly" received no comment. The staff recommends, therefore, that the definition of "quarterly" be adopted in the form proposed in the RPBOR.

P. Proposed Section 437.1(p): Required Payment

1. Background

The RPBOR would have reached only business opportunities in which the prospective purchaser makes a "required payment." The RPBOR would have defined "required payment" to mean:

all consideration that the purchaser must pay to the seller or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the business opportunity. Such payment may be made directly or indirectly through a third-party. A required payment does not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease.

The definition of "required payment" is substantially similar to that employed in the Franchise Rule, but it also includes language that reaches situations where a payment is made directly to a seller or indirectly through a third party. The Commission reasoned that without such a provision, fraudulent business opportunity sellers could circumvent the Rule by requiring payment to a third party with which the seller has a formal or informal business relationship.¹⁷⁷

The last sentence of the definition excludes payments for reasonable amounts of inventory at bona fide wholesale prices. This effectuates the Commission's determination that traditional

¹⁷⁷ 73 Fed. Reg. at 16,122.

product distribution arrangements should not be covered by the Business Opportunity Rule.¹⁷⁸

Manufacturers, suppliers, and other traditional distribution firms “have relied solely on the bona fide wholesale price exclusion to avoid coverage as a franchise.”¹⁷⁹ The IPBOR had eliminated the inventory exemption in an attempt to bring pyramid schemes that engaged in “inventory loading” within the ambit of the Rule.¹⁸⁰ However, as discussed in Section IV.C., the Commission has determined that challenging such practices in targeted law enforcement actions brought under Section 5 of the FTC Act is a more cost-effective approach than attempting to address pyramid schemes as proposed in the IPBOR.¹⁸¹

2. The record and recommendation

In response to the RNPR, MLM industry commenters urged the Commission to expand the inventory exemption to additionally exempt sales of business materials, supplies, and equipment to purchasers on a not-for-profit basis.¹⁸² Commenters stated that the MLM business

¹⁷⁸ Id.

¹⁷⁹ Id.

¹⁸⁰ 71 Fed. Reg. at 19,055.

¹⁸¹ 73 Fed. Reg. at 16,122.

¹⁸² Commenters suggested various ways to expand the exemption. See DSA-RNPR at 4 (recommending that the exemption include “business materials, supplies, and equipment sold on a not-for-profit basis”); Mary Kay-RNPR at 2 (same); Avon-RNPR at 2 (exemption should extend to “sales aid or kits at cost”); Tupperware-RNPR at 4 (required payment should not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices, which may be used for resale, lease or display, or payments for products for personal use). Also, one commenter expressed concern that under the proposed definition, voluntary payments made to third parties unaffiliated with the seller for items or equipment to be used in a purchaser’s business could be considered a “required payment.” See IBA-RNPR at 4. We do not agree. By its very words, the definition is not intended to capture payments of the type described by the commenter, as such payments are not made directly or indirectly to the seller.

model often requires that a new sales representative purchase materials, supplies, or equipment to facilitate his or her sales to consumers.¹⁸³ At least one commenter also noted that individuals sometimes pay to become sales consultants solely to obtain the products that are part of the company's sales kit for personal use at less than retail cost.¹⁸⁴ These commenters argued that without expanding the exemption, MLMs would be swept within the scope of the Rule.¹⁸⁵

The staff believes that these concerns are misplaced and that the proposed changes to the definition of "required payment" are unnecessary. Therefore, the staff recommends that the definition of "required payment" be adopted in the form proposed in the RNPR.

The staff agrees that without making the changes suggested by the commenters, some MLM companies may indeed meet the "required payment" prong of the business opportunity definition. But, as noted previously, in order to be covered by the Rule, an entity must meet each of the three definitional components of the term "business opportunity."¹⁸⁶ Meeting one prong is insufficient to come within the scope of the Rule. The other proposed clarifications and changes

¹⁸³ DSA-RNPR at 4; Tupperware-RNPR at 2 (explaining that it requires purchase of a starter Business Kit that contains a selection of Tupperware products sold below retail value for demonstration at parties); Mary Kay-RNPR at 4 (initial sales kit, sold to consultant at below cost, is used to demonstrate products to customers); Avon-RNPR (sales kits, which explain business fundamentals and provide necessary equipment such as sales brochures, sales receipts, a tote bag, and product samples, are sold to independent sales representatives without a profit).

¹⁸⁴ Tupperware-RNPR (products in starter Business Kit sold to sales consultants for \$79 or \$129 have retail value of \$350 and \$550 respectively).

¹⁸⁵ DSA-RNPR; Mary Kay-RNPR; Tupperware-RNPR; Pre-Paid Legal-RNPR.

¹⁸⁶ Those components are: (1) a solicitation to enter into a new business; (2) a required payment made to the seller; and (3) a representation that the seller will provide assistance in the form of securing locations, securing accounts, or buying back goods produced by the business.

to the definitions of “business opportunity”¹⁸⁷ and “providing locations, outlets, accounts, or customers,”¹⁸⁸ ensure appropriate coverage, and make the additional proposed changes unnecessary.

Not only are the proposed changes unnecessary, the staff is concerned that expanding the exemption as the commenters suggest would create enforcement problems. For example, when a “required payment” includes both an inventory and non-inventory component, it would be difficult to determine whether non-inventory products – such as sales kits or display-related materials – were, in fact, being sold to purchasers at less than the seller’s cost. Finally, the changes proposed could have the unintended consequence of allowing some fraudulent business operators to be excluded from the Rule’s coverage.¹⁸⁹

Q. Proposed Section 437.1(q): Seller

1. Background

The RPBOR would have defined 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.¹⁹⁰

¹⁸⁷ See supra Section V.C.

¹⁸⁸ See supra Section V.M.

¹⁸⁹ For example, in United States v. Universal Adver., Inc., No. 1:06-cv-152-DAK (D. Utah 2006), the fraudulent business opportunity seller told purchasers they could earn significant money by signing up business owners to pay monthly fees to display their business cards in rack display “profit centers.” In that case, the entire purchase cost went towards the rack display profit centers, which could be characterized as “display-related materials.”

¹⁹⁰ 71 Fed. Reg. at 19,067.

2. The record and recommendation

The Commission's proposed definition of "seller" received no comment. The staff recommends, therefore, that the definition of "seller" be adopted in the form proposed in the RPBOR.

R. Proposed Section 437.1(r): Signature or Signed (New Proposed Definition)

Proposed section 436.3(a)(6) would require that a business opportunity seller attach a duplicate copy of the disclosure document to be signed and dated by the purchaser. A designation for the signature and date is included at the bottom of the disclosure document. The staff believes that a definition of "signature" is necessary to clarify that, consistent with other rules enforced by the FTC, for purposes of the Business Opportunity Rule, a signature may include any electronic or digital form of signature to the extent that such signatures are valid under applicable law.¹⁹¹ We recommend, therefore, adding to the proposed Final Rule the following new definition at 437.1(r): "Signature or signed" means "a person's affirmative steps to authenticate his or her identity. It includes a person's handwritten signature, as well as an electronic or digital form of signature to the extent that such signature is recognized as a valid signature under applicable federal law or state contract law."¹⁹²

¹⁹¹ The proposed definition 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. See 71 Fed. Reg. at 19,067 n.142; see also TSR, 16 CFR 310.3(a)(3)(i); Franchise Rule, 16 CFR 436.3(u) (containing similar definitions).

¹⁹² This proposed definition is consistent with the definition of signature in the TSR. See 16 CFR 310.3(a)(3).

S. Proposed Section 437.1(s): Written or In Writing

1. Background

The RPBOR defined the terms “written” or “in writing,” which are used throughout the proposed Rule¹⁹³ to mean “any document or information in printed form or in any form capable of being downloaded, printed, or otherwise preserved in tangible form and read. It includes: type-set, word processed, or handwritten documents; information on computer disk or CD-ROM; information sent via email; or information posted on the Internet. It does not include mere oral statements.” This definition was designed to capture information stored on computer disks, CD-ROMs, or through new or emerging technologies, as well as information sent via email or posted on the Internet. Nevertheless, the definition seeks a balance, attempting to minimize compliance costs while at the same time 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.¹⁹⁴

2. The record and recommendation

The Commission’s proposed definition of “written” or “in writing” received no comment. The staff recommends, therefore, that this definition be adopted in the form proposed in the RPBOR.

¹⁹³ E.g., RPBOR sections 437.2, 437.3(a), 437.4(a).

¹⁹⁴ 71 Fed. Reg. at 19,067.

VI. Proposed Section 437.2: The Obligation to Furnish Written Documents

A. Background

The next section of the Rule, proposed section 437.2, would impose the first and arguably most important substantive requirement of the Rule – the obligation of sellers to furnish prospective purchasers with a single-page disclosure document in advance of purchasers executing a contract or paying any money or other consideration. As noted previously, the Original Franchise Rule’s disclosure document was often extremely lengthy, cumbersome, and in some ways ill-suited to business opportunity transactions. Through the INPR and the RNPR, the Commission sought to simplify and streamline this document in order to make the disclosures more meaningful to consumers.

As described in proposed section 437.2, the basic disclosure document must be furnished at least seven calendar days before one of two triggering events: either (1) the execution of any contract in connection with the business opportunity sale; or (2) the payment of any consideration to the seller.¹⁹⁵ This provision was intended to ensure a uniform standard for determining when sellers must furnish disclosures before putting potential purchasers’ money at risk. Proposed section 437.2 would clarify that payment to the seller refers to payments made either directly to the seller, or indirectly through a third party, such as a broker locator.

The proposed seven calendar-day period was modeled on the Original Franchise Rule’s requirement that business opportunity sellers furnish prospective purchasers with a completed

¹⁹⁵ Proposed section 437.1(s) allows the disclosure document to be provided to purchasers by posting it on the Internet, sending it via email, or providing it in any form capable of being downloaded, printed, or otherwise preserved in tangible form and read. Providing the disclosure document through one of these alternative methods does not, however, relieve the seller of the obligation to obtain and maintain copies of signed and dated disclosure documents provided to purchasers. See *infra* Section XI.

copy of the proposed disclosure document within five business days (which typically works out to be seven calendar days) of requiring potential purchasers to execute any agreement in connection with the business opportunity sale.¹⁹⁶ The Interim Business Opportunity Rule extends this time period to ten business days.¹⁹⁷ In the RPBOR, the Commission proposed shortening the period of time business opportunity sellers would be required to provide the disclosures to potential purchasers, finding that seven calendar days is sufficient time to enable a prospective purchaser to review the information contained on the simplified and streamlined basic disclosure document and any earnings claims statements, as well as to conduct a due diligence review of the offering, including contacting references.¹⁹⁸

B. The Record and Recommendation

Only one comment was received in response to this provision. The comment argues, without providing any evidence, that imposing a “waiting period” of any length before a prospective purchaser could sign a binding agreement or make any payment to a seller would chill the sale of legitimate business opportunities.¹⁹⁹ The staff is not persuaded by the comment, as both the Franchise Rule and Interim Business Opportunity Rule have waiting periods in excess of seven days.²⁰⁰ The staff agrees with the Commission’s conclusion that seven calendar days is

¹⁹⁶ See 71 Fed. Reg. at 19,067.

¹⁹⁷ See 16 CFR 437.2(g).

¹⁹⁸ See 71 Fed. Reg. at 19,067.

¹⁹⁹ Planet Antares - RNPR.

²⁰⁰ See 16 CFR 436.2(a) (fourteen (14) calendar days); 16 CFR 437.2(g) (ten (10) business days).

sufficient time to review the disclosure information and conduct due diligence, and recommends, therefore, that section 437.2 be adopted in the form proposed in the RPBOR.

VII. Proposed Section 437.3: Disclosure Document

Section 437.3(a) of the RPBOR instructed how to prepare the basic disclosure document, identified the categories of required disclosure, and specified what information must be included in each of these categories. Section 437.3(a) would require that sellers present to a prospective purchaser information about the seller's litigation history, cancellation and refund policy, earnings claims, and references²⁰¹ in "a single written document in the form and using the language set forth in Appendix A" to the Rule.²⁰² The Commission concluded that the single written document requirement was necessary to ensure that disclosures were not furnished in piecemeal fashion that easily could be overlooked or lost.²⁰³ In addition, the Commission noted that requiring the disclosure information to be presented in the manner proposed would prevent a seller from circumventing the Rule by presenting damaging information in a format that is not sufficiently prominent to be noticed or understood, or that is not readily accessible.²⁰⁴ Failure to

²⁰¹ Each of these substantive disclosures is discussed infra in Section VII.C.

²⁰² The staff recommends adding a clause to proposed section 437.3(a) requiring that if the offer for sale, sale, or promotion of a business opportunity is conducted in Spanish, the seller must provide a Spanish-language versions of the Disclosure Document and any required disclosures must also be provided in Spanish. Thus, proposed section 437.3(a) would make it an unfair or deceptive practice in violation of Section 5 of the FTC Act for any seller to "[f]ail to disclose to a prospective purchaser . . . material information in a single written document in the form and using the language set forth in Appendix A to this part; or if the offer for sale, sale, or promotion of a business opportunity is conducted in Spanish, Appendix B to this part." See infra Section IX.

²⁰³ 71 Fed. Reg. at 19,067.

²⁰⁴ Id.

follow Appendix A's form and language would constitute a violation of Section 5 of the FTC Act.²⁰⁵

Proposed section 437.3(a)(6) would require that a seller provide the potential purchaser with two copies of the disclosure document, one of which is to be signed and dated by the prospective purchaser and returned to and maintained by the seller in accordance with proposed section 437.6.²⁰⁶ Proposed section 437.3(b) would make it an unfair or deceptive practice and a violation of Section 5 of the FTC Act for a seller to fail to update the required disclosures at least quarterly to reflect changes in the four required categories of information, provided, however, that the list of references would be required to be updated monthly, until the seller had 10 purchasers, after which quarterly updates would be required.

The sections that follow discuss the evolution of the disclosure document's form and substance, the commentary received about the proposed disclosure document, and the further revisions to the form that the staff recommends.

A. Background on the Format of the Revised Proposed Disclosure Document

As noted above, a major goal of this rulemaking was to streamline the lengthy disclosure document that was appropriate in the sale of business-format franchises, but ill-suited to the sale of traditional business opportunities. The Interim Business Opportunity Rule, modeled on the Original Franchise Rule, requires sellers to make more than 22 separate disclosures to potential

²⁰⁵ Proposed section 437.3(a).

²⁰⁶ One commenter noted that the requirement that a purchaser be provided with a second copy of the disclosure document appears inconsistent with the proposed Rule's recognition that the disclosure document can be provided to potential purchasers through electronic media. Quixtar-INPR at 27. As the definition of "written" or "in writing" makes clear, the disclosure document can be provided via electronic media. See supra Section V.C.

purchasers.²⁰⁷ The Commission recognized that requiring sellers to make these extensive disclosures would likely impose significant compliance costs on covered businesses, and that many of the disclosures, which are more relevant in the context of franchise sales, are not well-suited to business opportunity sales. The Commission sought to strike the proper balance, therefore, between prospective purchasers' need for pre-sale disclosure and the burden imposed on those selling business arrangements.²⁰⁸

Thus, the Commission proposed a single-page Disclosure Document in the INPR and the RNPR. The Commission invited public comment about the form, including whether the overall presentation of information could be improved to make it more useful and understandable, and whether the four substantive sections capture the information that would most benefit potential purchasers.²⁰⁹ The Commission received no comments in response to this request.

As explained in supra Section I.C., the Commission engaged a consultant with expertise in document design and comprehension to evaluate the proposed Disclosure Document to ensure that it adequately conveyed to consumers information material to the prospective business opportunity, and to determine whether the overall presentation of the information in the proposed Disclosure Document could be improved to make it more useful and understandable.²¹⁰

²⁰⁷ These include but are not limited to information about the seller; the business background of its principals and their litigation and bankruptcy histories; the terms and conditions of the offer; statistical analyses of existing franchised and company-owned outlets; prior purchasers, including the names and addresses of at least 10 purchasers nearest the prospective buyer; and audited financial statements. Additional disclosure and substantiation provisions apply if the seller chooses to make any financial performance representations.

²⁰⁸ 73 Fed. Reg. at 16,013.

²⁰⁹ 73 Fed. Reg. at 16,133.

²¹⁰ See generally Macro Report.

Following publication of the initial proposed Disclosure Document, the consultant conducted extensive consumer testing that resulted in the revised proposed Disclosure Document that the Commission concluded substantially improved both the layout and the wording of the form.²¹¹

Some of the changes suggested by the consultant included: changing the title of the form from “Business Opportunity Disclosures” to “Disclosure of Important Information about Business Opportunity”; revising the preamble of the disclosure to make it more readable; adding a description of the Federal Trade Commission for consumers who may not be familiar with the agency; clarifying that the information on the form relates specifically to the business opportunity the reader is being offered; reformatting the sections that address earnings, legal actions, and cancellation or refund policies, to make those sections easier to understand; and adding a note below the signature line stating that the FTC requires that the business opportunity seller give potential buyers at least seven calendar days before asking him or her to sign a purchase contract.²¹² A copy of the revised proposed Disclosure Document, which incorporated the consultant’s suggested revisions, was included in a Workshop Notice announcing that the FTC planned to hold a public workshop to discuss proposed changes to the Business Opportunity Rule, and in particular, the revised proposed Disclosure Document.²¹³

²¹¹ 74 Fed. Reg. at 18,714-15.

²¹² See generally Macro Report.

²¹³ 74 Fed. Reg. at 18,714.

B. Public Workshop

The Workshop Notice invited interested parties to submit a request to participate as a panelist.²¹⁴ Ultimately, the Workshop featured five panelists who represented a range of interests in the proposed Rule, including a federal law enforcer,²¹⁵ a state law enforcer,²¹⁶ a consumer advocate,²¹⁷ the general counsel of a national multilevel-marketing company,²¹⁸ and a former director of the FTC’s Bureau of Consumer Protection.²¹⁹

Workshop participants uniformly approved the revised proposed Disclosure Document, and applauded the Commission’s goal of streamlining and simplifying the form.²²⁰ All Workshop participants believed that the form generally accomplished the Commission’s stated purposes of streamlining and simplifying the form to make it more useful to prospective business opportunity

²¹⁴ The staff received requests to serve as panelists from eight persons. We extended offers to serve as panelists to each of these individuals, three of whom declined.

²¹⁵ Kenneth Jost (“Jost”), DOJ, Office of Consumer Litigation.

²¹⁶ Dale Cantone (“Cantone”), Maryland Attorney General’s Office.

²¹⁷ Jon Taylor (“Taylor”), Consumer Awareness Institute.

²¹⁸ Maureen Morrissey (“Morrissey”), Tupperware.

²¹⁹ William MacLeod (“MacLeod”). Although at the Workshop Mr. MacLeod represented only his own views, he had previously filed comment to the INPR and RNPR on behalf of Planet Antares, which markets vending machine businesses.

²²⁰ See, e.g., Jost, June 09 Tr at 12-15 (noting that the simplicity of the form is the key to it being successful: “Having a one page document that focuses on the key issues such as legal actions, earnings claims, and references will put the most important information in the hands of the prospective purchaser”); MacLeod, June 09 Tr at 18 (same, and commending the staff for engaging a consumer research expert to copy test the disclosure document); Cantone, June 09 Tr at 20 (stating that the disclosure document captures the major components of business opportunity fraud, including fraudulent earnings claims and false refund offers); Taylor, June 09 Tr at 23 (noting that the disclosure document is “easy to understand and short and accomplishes its purposes.”).

purchasers, although they did have some minor suggestions related both to the proposed disclosure document and some of the substantive disclosure requirements.

C. Substantive Disclosure Requirements

Proposed section 437.3 would require that business opportunity sellers give prospective purchasers four items of material information in a basic disclosure document.²²¹ Each required disclosure is intended to help prospective purchasers make informed investment decisions. First, sellers must disclose whether or not they make earnings claims and, if so, must state the claim or claims in a separate earnings claims statement attached to the basic disclosure document. Second, sellers must disclose prior civil or criminal litigation involving claims of misrepresentation, fraud, securities law violations, or unfair or deceptive business practices that involve the business opportunity or its key personnel.²²² Third, sellers must disclose any cancellation or refund policy.²²³ Finally, sellers must provide contact information for at least 10 of their purchasers

²²¹ Like the Franchise Rule and the Interim Business Opportunity Rule, 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. See 71 Fed. Reg. at 19,067.

²²² Key personnel include any of the business opportunity seller’s principals, officers, directors, and sales managers, as well as any individual who occupies “a position or performs a function similar to an officer, director, or sales manager of the seller.” The IPBOR would have required that business opportunity sellers also disclose the litigation history of each of its sales representatives. The Commission later determined that the burden of collecting litigation histories for every sales person is not outweighed by the corresponding benefit to prospective purchasers, and thus omitted this requirement from the RPBOR. See 73 Fed. Reg. at 16,126.

²²³ The IPBOR would have required disclosure of the business opportunity seller’s cancellation or refund request history. Some commenters argued that requiring disclosure of the seller’s refund history would have had the perverse effect of discouraging legitimate businesses

nearest to the prospective purchaser's location. A discussion of the record pertaining to each of the required substantive disclosures follows, along with the staff's recommendations that the Commission adopt minor changes to the proposed Rule and conforming amendments to the Disclosure Document. A copy of this proposed final Disclosure Document is included as Attachment D to this Report.

1. Proposed section 437.3(a)(2): Earnings claims

As discussed in Section VIII, 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.²²⁴ If the seller makes no earnings claim, then section 437.3(a)(2) would direct the seller simply to check the "no" box on the on the disclosure document.²²⁵ If the seller does make an earnings claim, then the Rule would require the seller to check the "yes" box and attach to the basic disclosure document a second document, the earnings claim statement. The Disclosure

from offering refunds. Because companies with liberal refund policies are more likely to have refund requests than those offering no refunds, disclosure of refund requests could mislead consumers into thinking that a company offering liberal refunds is less reputable than the company offering no refunds. The Commission was persuaded by these commenters and omitted this required disclosure from the RPBOR. See 73 Fed. Reg. at 16,126. We agree with the Commission's decision.

²²⁴ This is consistent with analogous provisions in the Franchise Rule, 16 CFR 436.9, and the Interim Business Opportunity Rule, 16 CFR 437.1(c).

²²⁵ One panelist commented that an earnings claim is the most important selling feature of any business opportunity, and for that reason, sellers should not be permitted to state they make no earnings claim. Taylor, June 09 Tr at 68. The staff agrees that the earnings claim is important to purchasers' investment decisions. However, there is an important distinction between forcing sellers to make an earnings claims and requiring them to substantiate any claims they choose to make.

Document would advise the prospective purchaser of this requirement: “If the statement is yes, [the seller] must attach an Earnings Claim Statement to this form.”²²⁶

At the June 1, 2009 workshop, the DOJ representative approved of the form and language of this disclosure, noting that if a seller had checked the “no” box, but had, in fact, made an earnings claim, the claim that the seller had not made an earnings claim would be a misrepresentation in violation of Section 5 of the FTC Act, and the seller would be subject to civil penalties.²²⁷ Two Workshop panelists, however, found the language confusing and believed that a potential purchaser reading this disclosure might not know who should be completing this section of the form – him or herself, or the seller.²²⁸ The panelists had some suggestions for improving the language of the disclosure.²²⁹

The staff is not convinced that any revision to the proposed language of the earnings disclosure is necessary. The initial proposed Disclosure Document, including the earnings disclosure, underwent substantial revision based upon consumer testing.²³⁰ Testing of the current format and language of the earnings disclosure revealed that, contrary to the panelists’ concern, consumers did understand the meaning of the earnings disclosure, and realized that “a check in

²²⁶ See Section VIII. 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.”

²²⁷ Jost, June 09 Tr at 56.

²²⁸ Cantone, June 09 Tr at 55; Taylor, June 09 Tr at 56.

²²⁹ E.g., Cantone, June 09 Tr at 57 (“Does Acme products discuss, or allow its salespersons to discuss how much money purchasers of the business opportunity earn or have earned?”); Taylor, June 09 Tr at 57 (“Acme products or I as its representative have discussed how much money purchasers of the business opportunity earn or have earned? ‘Yes’ or ‘No’”).

²³⁰ See supra Section I.C.

the ‘No’ box would contradict any previous earnings claim that a salesperson had made.”²³¹

Indeed, the ultimate test for the effectiveness of the Disclosure Document is whether, in practice, the written form helps consumers detect a contradictory oral statement made by the seller. On that point, the revised proposed Disclosure Document proved effective – 9 out of 10 participants in the FTC study who heard a hypothetical oral sales presentation understood that it had included an earnings claim, and when they subsequently reviewed the Disclosure Document, correctly identified a written contradiction of the oral presentation.²³² Because the staff is not persuaded that the Workshop panelists’ suggestions improve the comprehension of this disclosure, it does not recommend any changes to this earnings claim disclosure.

2. Proposed section 437.3(a)(3): Legal actions

a. Background

Proposed section 437.3(a)(3)(i) would require business opportunity sellers to provide prospective purchasers with information about legal actions of the seller, including any affiliate or prior business of the seller, and its key personnel involving “misrepresentation, fraud, securities law violations, or unfair or deceptive practices, including violations of any FTC Rule.”²³³ Key personnel would include “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

²³¹ Macro Report at 15.

²³² Id.

²³³ The proposed Final Rule would add the phrase, “including violations of any FTC Rule,” to make the Rule language consistent with the proposed final Disclosure Document, which includes this language in the “Legal Actions” section of the form.

the seller.”²³⁴ Proposed 437.3(c)(ii) would require that if the seller has litigation to disclose pursuant to 437.3(c)(i), it must provide an attachment to the disclosure document with the full caption of each legal matter (names of the principal parties, case number, full name of court, and filing date).²³⁵ Under the RPBOR, it would have been a violation of the Rule to include any additional information.

b. The record and recommendation

The Workshop discussion on this section centered on two main issues.²³⁶ First, the panel addressed the concern that the legal action disclosure might unfairly tarnish the image of a seller who had meritless lawsuits filed against it. Second, the DOJ panelist recommended revising the form of the disclosure to enhance the government’s ability to prosecute violations of the Rule.

i. Additional information regarding legal actions disclosed

Workshop panelists discussed whether the required disclosure of legal actions may unfairly tarnish a seller if the Rule also prohibits the seller from providing a short truthful statement about the nature of the litigation or its ultimate settlement. One commenter stated that in some instances, litigation may be meritless and disposed of short of formal adjudication – for example, through dismissal or settlement of nuisance lawsuits – and sellers should have the opportunity to provide an explanation of any disclosed legal actions.²³⁷ A panelist agreed and

²³⁴ In the RNPR, the Commission solicited comment on whether this provision adequately captures the types of individuals whose litigation history should be disclosed. It received no comments responsive to that request.

²³⁵ 71 Fed. Reg. at 19,069.

²³⁶ See also supra Section V.A. (addressing the Workshop discussion on whether a seller’s bankruptcy history should be considered a legal action).

²³⁷ Gary Hailey (“Hailey”), Venable LLP, June 09 Tr at 122.

also noted that the FTC’s expert report of consumer testing revealed that consumers involved in the testing of the disclosure document had very negative reactions to the existence of legal actions against the seller.²³⁸ The DOJ panelist, on the other hand, expressed concern that if allowed to provide a description of disclosed legal actions, sellers might craft misleading descriptions.²³⁹ He stated that he has seen such abuse in the context of the Franchise Rule,²⁴⁰ although he did acknowledge that it might be unfair to prohibit sellers from providing an explanation when they have been sued.

The Commission’s stated intent in identifying information to be disclosed pursuant to 437.3(c)(ii) was to minimize compliance costs to sellers – the proposed Rule would not require sellers to detail the nature of each legal action, as in the Franchise Rule.”²⁴¹ The Commission reasoned that if “armed with the full caption, a prospective purchaser can seek additional information if he or she so chooses,” as “the public’s ability to review complaints in legal

²³⁸ MacLeod, June 09 Tr at 124. The panelist also argued that lawsuits are often overpled and that there may be instances where some claims (such as constitutional claims) are not really of particular materiality to a prospective purchaser.

²³⁹ Jost, June 09 Tr at 125.

²⁴⁰ The Franchise Rule requires that legal actions against franchise sellers be disclosed to potential purchasers. 16 CFR 436.5(c)(3) requires that franchisors summarize, “the legal and factual nature of each claim in the action, the relief sought or obtained, and any conclusion of law and fact,” and provide information about damages or settlement terms, terms of injunctive orders, dates of any convictions or pleas, and the sentence or penalty imposed. The Interim Business Opportunity Rule requires that sellers disclose only: 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 ruling. A seller may also include a summary opinion of counsel as to any pending litigation, but only if counsel’s consent to the use of such opinion is included in the disclosure statement. 16 CFR 437.1(a)(4)(ii).

²⁴¹ 71 Fed. Reg. at 19,069.

proceedings has become significantly easier since the advent of the Internet. Many legal documents are now routinely posted on court or related websites.”²⁴² It further noted that since the disclosure document itself instructs potential purchasers that the legal matters disclosed pertain to misrepresentation, fraud, securities law violation, or unfair or deceptive practices, potential purchasers would have a basic understanding of the subject matter of the action.²⁴³

The staff acknowledges that the existence of legal actions against the seller is not conclusive proof of fraud and that some legal actions may be meritless. We believe, however, that existence of the actions of the type enumerated – misrepresentation, fraud, securities law violations, or unfair or deceptive practices – against the business opportunity or its key personnel is critical to assessing the financial risk of the proposed investment. Indeed, discovering that a seller has a history of violating laws and regulations is perhaps the best indication that a particular business opportunity is a high-risk investment. In fact, in the Commission’s law enforcement experience, business opportunity promoters have failed to disclose such material information to prospective purchasers, to the detriment of those purchasers.²⁴⁴

²⁴² 71 Fed. Reg. at 19,069 & n.165.

²⁴³ 71 Fed. Reg. at 19,067.

²⁴⁴ E.g., FTC v. Success Vending Group, Inc., No. CV-S-05-0160-RCJ-PAL (D. Nev. 2005) (failure to disclose guilty plea for mail fraud of de facto corporate officer); FTC v. Netfran Development Corp., No. 1:05-cv-22223-UU (S.D. Fla. 2005) (failure to disclose FTC injunction against principal); FTC v. Am. Entm’t Distribs., Inc., No. 04-22431-Civ-Martinez (S.D. Fla. 2004) (failure to disclose prior FTC injunction); United States v. We The People Forms and Serv. Ctrs. USA, Inc., No. CV 04 10075 GHK FMOx (C.D. Cal. 2004) (failure to disclose prior lawsuits); FTC v. Joseph Hayes, No. Civ. 4:96CV02162SNL (E.D. Mo 1996) (failure to disclose prior state fines and injunctive actions); FTC v. WhiteHead, Ltd., Bus. Franchise Guide (CCH) ¶ 10062 (D. Conn. 1992) (failure to disclose fraud action); FTC v. Inv. Dev. Inc., Bus Franchise Guide (CCH) ¶ 9326 (E.D. La. 1989) (failure to disclose insurance fraud convictions).

Like the DOJ panelist, the staff is concerned that allowing sellers to provide a description of any disclosed legal action provides the opportunity for dishonest sellers to misrepresent or mischaracterize such actions, including their ultimate outcomes. Nevertheless, we acknowledge that legitimate sellers could potentially be harmed if not afforded the opportunity to address in writing the legal action they are required to disclose.²⁴⁵ We recommend, therefore, that proposed section 437.3(c)(ii) be revised to add the following sentence: “For each action, the seller may also provide a brief accurate statement not to exceed 100 words that describes the action.” Non-compliance with the restriction of this proposed provision (i.e., statements that exceed the word limitation or that mischaracterize the action or outcome) would be a violation of the Rule and a violation of Section 5 of the FTC Act.

ii. Amendments to the form of disclosure

During the Workshop, the DOJ panelist advocated amending the proposed language of the legal action disclosure to enhance the ability of DOJ to prove knowledge in cases against Rule violators. The revised proposed Disclosure Document published prior to the Workshop would require the seller to answer the following question: “Has [the seller] or any of its key personnel been the subject of a civil or criminal action involving misrepresentation, fraud, securities violation, or unfair or deceptive practices within the past 10 years?” The DOJ panelist recommended that the Commission modify slightly the language of this section of the Disclosure Document by adding the phrase “including violation of an FTC Rule” after “or unfair or

²⁴⁵ As the Commission noted in the RNPR, however, nothing in the RPBOR prevents the seller from speaking with the consumer to explain the nature or outcome of any legal action disclosed on the form. 73 Fed. Reg. at 16,125.

deceptive act or practice”²⁴⁶ The panelist noted that DOJ has the authority to seek civil penalties for violations of trade regulation rules issued pursuant to the FTC Act,²⁴⁷ but to obtain civil penalties for infractions of an FTC rule, the government must prove “actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.”²⁴⁸ The DOJ’s law enforcement experience shows that individuals who market business opportunities sometimes claim that they simply copied their required disclosure documents from a previous employer or another business opportunity marketer.²⁴⁹ Including the suggested language would prevent such a seller from arguing that he or she was unaware that violations of an FTC Rule are unfair and deceptive acts or practices that must be disclosed to potential purchasers.

The staff agrees that the proposed addition to the “Legal Actions” section of the disclosure document will assist enforcement efforts by eliminating any significant question as to whether the defendant had actual or implied knowledge that violation of an FTC rule constitutes an unfair and deceptive practice. The staff recommends, therefore, that the proposed final Disclosure Document include this language.²⁵⁰

²⁴⁶ Jost, June 09 Tr at 36.

²⁴⁷ See 15 U.S.C. § 56(a)(1); § 45(m)(1)(A) .

²⁴⁸ 15 U.S.C. § 45(m)(1)(A).

²⁴⁹ Jost, June 09 Tr at 16.

²⁵⁰ To make the proposed Final Rule consistent with the proposed final Disclosure Document, proposed Section 437.3 would also include the language “including violations of any FTC Rule.”

3. Proposed section 437.3(a)(4): Cancellation or refund policy

a. Background

Proposed section 437.3(a)(4) 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.²⁵¹ The RPBOR would not have required any seller to offer cancellation or a refund. However, if the seller does offer a refund or right to cancel the purchase, it must “state the terms of the refund or cancellation policy in an attachment to the disclose document.”²⁵² 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.

²⁵¹ 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 rank among the top 10 complaint allegations in Commission business opportunity cases brought under Section 5. See 71 Fed. Reg. 19,069.

²⁵² The Commission adopted a similar approach in the TSR. 16 CFR 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”).

b. The record and recommendation

Workshop panelists raised two issues related to disclosure of refund and cancellation policies. First, panelists questioned whether information about the percentage of purchasers requesting and obtaining refunds should be part of the disclosure, and second, whether proposed section 437.3(a)(4) should specify particular terms of a refund policy that must be disclosed to potential purchasers. The sections that follow address each of these concerns.

i. Percentage of purchasers requesting and obtaining refunds

One panelist stated that information concerning the percentage of purchasers requesting and obtaining refunds would be relevant information to potential purchasers.²⁵³ Another panelist disagreed, arguing that requiring disclosure of this information might have the unintended consequence of harming purchasers by discouraging sellers from offering refunds.²⁵⁴ This issue was previously considered by the Commission. The IPBOR would have required a seller that had a cancellation or refund policy to disclose the number of purchasers who had asked to cancel or who had sought a refund in the two previous years.²⁵⁵ In the INPR, the Commission specifically sought comment on the proposed disclosure of the seller's refund history, particularly on the likely effect this disclosure might have on the willingness of sellers to offer refunds.²⁵⁶ Based upon arguments articulated in the comments to the INPR, the Commission concluded that this

²⁵³ Taylor, June 09 Tr at 48. One commenter agreed. Brooks-Workshop comment.

²⁵⁴ MacLeod, June 09 Tr at 50.

²⁵⁵ IPBOR, 437.3(a)(5).

²⁵⁶ 71 Fed. Reg. at 19,070.

disclosure would not be useful to consumers, and that disclosure of refund history could be unduly prejudicial to business opportunities that offer and liberally provide refunds to prior purchasers.²⁵⁷ Indeed, a prospective purchaser might compare the refund requests of a fraudulent seller with no refund policy against a legitimate seller with a liberal refund policy and inappropriately conclude that the legitimate seller offers a riskier business venture. The Commission concluded that disclosure of refund history would not reliably remedy deception on this issue, and it was eliminated in the RPBOR.²⁵⁸

Panelists in favor of requiring disclosure of seller's refund histories presented no arguments other than those previously considered by the Commission. The staff is persuaded by the Commission's reasoning in concluding that this disclosure would not benefit potential purchasers, and therefore does not recommend requiring this disclosure in the proposed Final Rule.

**ii. Information to be disclosed about refund and
cancellation policies**

While Workshop participants agreed that information about a seller's cancellation and refund policies is an important component of a potential purchasers evaluation of a business opportunity, they were universally concerned that proposed 437.3(a)(4) does not contain enough specificity about what information must be disclosed to potential purchasers and argued that additional guidance from the Commission was necessary.²⁵⁹ The panelist from the Maryland

²⁵⁷ 73 Fed. Reg. at 16,126.

²⁵⁸ Id.

²⁵⁹ Lois Greisman ("Greisman"), FTC, Associate Director, Division of Marketing Practices, June 09 Tr at 42.

Attorney General's Office thought the Rule should specify that all material terms of a refund policy must be disclosed, because in the context of business opportunity sales, it has been his experience that the requirements to obtain a refund are often so onerous that as a practical matter, no one is ever eligible.²⁶⁰ Some panelists felt the Rule should identify specific information to be disclosed. For example, one commenter noted that the period of time a seller has to exercise a right to cancellation or refund, or any conditions on return of unsold goods are material and should be required to be disclosed to potential purchasers.²⁶¹ One panelist suggested that the DSA Code of Ethics' refund requirements could be looked at to identify types of information that should be disclosed to potential purchasers.²⁶² We agree that sellers should be provided with additional guidance and recommend clarifying that sellers must disclose all material terms of refund and repayment policies to prospective purchasers. The commentary to the IPBOR reveals that this was the Commission's intent.²⁶³

²⁶⁰ Cantone, June 09 Tr at 47 (providing as an example a company offering a 100% buy-back for vending machines and noting the company's failure to disclose that the cost of sending back the vending machine would be borne by the purchaser, and would often exceed any refund due, thereby rendering any potential refund worthless).

²⁶¹ Taylor, June 09 Tr at 43.

²⁶² Morrissey, June 09 Tr at 45. We have reviewed applicable provisions of the DSA Code of Ethics, but do not find them instructive. DSA dictates the specific terms of its members' refund policies. The RPBOR, in contrast, would not have specified the requirements of a seller's refund or cancellation policy, or even whether the seller has such policies. Instead, it attempted to ensure that if such policies exist, potential purchasers are aware of how they can exercise their rights under those policies.

²⁶³ See 71 Fed. Reg. 19,069 n.166.

The staff recommend, therefore, modifying proposed 437.3(a)(4), to track closely a similar disclosure requirement in the TSR.²⁶⁴ The TSR requires that if the seller or telemarketer makes a representation about a refund, cancellation, exchange or repurchase, it must provide the purchaser with a statement of all material terms and conditions of such statement. Requiring disclosure of all material terms of a refund or cancellation policy would most effectively accomplish the Commission's stated purpose of ensuring that potential purchasers are provided with information that would assist them in assessing the financial risk associated with the offer. We recommend, therefore, that the penultimate sentence of 437.3(a)(4), which would require disclosure of any refund policies, be clarified to read: "If so, state all material terms and conditions of the refund or cancellation policy in an attachment to the disclosure document." As discussed earlier, the staff recommends that the proposed Final Rule include a definition of "material" similar to the definition in section 310.2(q) of the TSR. Proposed section 437.1(i) would define "material" as "likely to affect a person's choice of, or conduct regarding, goods or services."²⁶⁵ Examples of material terms and conditions may include, for example, the period of time the purchaser has to cancel a purchase or request a refund; the specific steps necessary to cancel a purchase or request a refund; any fees or penalties incurred for cancellation; where unused inventory must be returned and by what method, etc. At this time, however, the staff

²⁶⁴ Indeed, that was the Commission's intent. In describing its approach regarding refund and cancellation policy disclosures, the Commission noted that it "adopted the same approach in the TSR." 71 Fed. Reg. at 19,069 n.166 (citing 16 CFR 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").

²⁶⁵ Section 310.2(q) of the TSR defines "material" to mean "likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution." The definition we proposed for the Business Opportunity Rule would exclude the phrase "or a charitable contribution."

declines to recommend that the Rule enumerate what terms are material, as materiality is likely to vary depending on the circumstances of the opportunity and the refund or cancellation policy.

4. Proposed section 437.3(a)(5): References

a. Background

Section 437.(a)(5)(i) of the RPBOR would have required that sellers of business opportunities disclose to potential purchasers the name, city, state, and telephone number of a limited number of prior purchasers as references.²⁶⁶ The proposed Final Rule would require the seller to provide this reference disclosure by listing each prior purchaser (if fewer than 10), or listing at least the 10 prior purchasers nearest to the prospective purchaser's location. The proposed Rule would limit the disclosure of references to those who have purchased the business opportunity within the last three years. In order to minimize compliance costs, the proposed Rule also provides sellers with an alternative disclosure option – in lieu of a list of the 10 prior purchasers nearest the prospect, a seller may furnish a prospect with a national list of all purchasers. In the INPR, the Commission noted that this option would allow the seller to maintain a master list of purchasers on its website that could be updated periodically, which would allow the seller to avoid having to tailor the disclosure to each prospective purchaser.²⁶⁷

²⁶⁶ Unlike the Interim Business Opportunity Rule, the proposed Rule does not require the disclosure of prior purchasers' street addresses. The Commission concluded that prospects could readily contact a prior purchaser if provided with the prior purchaser's name, city and state, and telephone number, and that this approach enables prospects to contact references while minimizing the intrusion into prior purchasers' privacy. 71 Fed. Reg. at 19,071 n.180.

²⁶⁷ 71 Fed. Reg. at 19,071.

The proposed Rule would specify that sellers selecting the national option must insert the words “See Attached List” and attach a list of the references to the disclosure document.²⁶⁸

Notwithstanding the fact that the type of information required by the reference disclosure is often readily available and in the public domain, in crafting this section of the proposed Rule, the Commission considered potential privacy concerns raised by the use of prior purchaser information.²⁶⁹ To address these concerns, proposed section 437.3(a)(5)(ii) would require that the disclosure document state the following language clearly 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.”

b. The record and recommendation

In response to the INPR, a number of commenters, primarily from the MLM industry, expressed concern that the reference disclosure requirement raised privacy and security concerns.²⁷⁰ The Commission, however, was not persuaded by the commenters. The Commission reasoned that disclosure of prior purchasers is important to prevent fraud because it enables prospects to evaluate the seller’s claims based on information from an independent source with relevant experience.²⁷¹ Further, it concluded that the very limited proposed reference disclosure did not raise security concerns because the required disclosures include no sensitive

²⁶⁸ In the RNPR, the Commission solicited comment on whether giving sellers the ability to provide prospective purchasers with a national list was a viable option. It received no comments responsive to that request.

²⁶⁹ See id.

²⁷⁰ See 73 Fed. Reg. at 16,126.

²⁷¹ See id.

personal information whatsoever – no social security numbers, birth dates, or financial account numbers.²⁷²

Following publication of the RNPR, one commenter continued to argue that the disclosures enumerated in proposed section 437.3(a)(5) would raise privacy and data security concerns.²⁷³ The commenter articulated three main concerns: (1) that requiring the seller to “store purchasers’ personal information in a single location or document creates a target ripe for theft and improper disclosure;” (2) that requiring disclosure of information of prior purchasers conflicts with the FTC’s Privacy of Consumer Information Rule (“Privacy Rule” or “GLB Privacy Rule”),²⁷⁴ promulgated under the Gramm-Leach-Bliley Act (“GLB”)²⁷⁵ because it does not allow those prior purchasers of the business opportunity the right to opt out of having their contact information disclosed to potential purchasers;²⁷⁶ and (3) that the mandatory disclosure of

²⁷² See id.

²⁷³ Planet Antares-RNPR at 18.

²⁷⁴ 16 CFR Part 313.

²⁷⁵ 15 U.S.C. § 6801 et seq.

²⁷⁶ The Commission received a few comments in response to the INPR in support of allowing individual business opportunity purchasers to opt out of having their contact information disclosed. DOJ, however, urged the Commission to reject any opt-out believing it would be an easy matter for sellers to talk purchasers into opting out, describing to them what a hassle it becomes for those who do not opt out because of all the demand that arises for their time and attention. The Commission agreed with DOJ and after analyzing all of the commentary to Section 437.3(a)(5), declined to make any changes to that section. See 73 Fed. Reg. at 16,126.

references violates privacy obligations under the California Constitution.²⁷⁷ The staff disagrees with each of these contentions.²⁷⁸

The staff does not believe that the disclosure of references creates an unnecessary risk of theft or improper disclosure. As an initial matter, we note that the reference disclosure has been required for business opportunities and business-format franchises covered by the Franchise Rule for more than 25 years, and it is required under the Interim Business Opportunity Rule.²⁷⁹ Moreover, the information to be collected and stored is not sensitive (e.g., no financial information, social security numbers, dates of birth, or street addresses). The commenter has not explained, nor do we understand, why the information would be particularly attractive to thieves. Moreover, business owners have myriad inexpensive, readily available methods for protecting information, regardless of whether the information is maintained in hard copy or electronically.

The staff is unpersuaded that proposed section 437.3(a)(5) would create potential conflicts with the GLB Privacy Rule, as we do not believe the protections afforded by the Privacy Rule extend to the contact information of business opportunity purchasers. Congress enacted GLB to protect personal financial information of individual consumers, but excluded from the ambit of the law the protection of information pertaining to businesses. The Privacy Rule requires that a “financial institution,” provide, under specified circumstances, notice to its consumers and

²⁷⁷ Planet-Antares- RNPR at 20.

²⁷⁸ This same commenter contends that the required reference information constitutes trade secrets that should be afforded special protections, but offers no support for this contention. Id. at 14.

²⁷⁹ 16 CFR 437.1(a)(16)(iii).

customers of its privacy policies and practices,²⁸⁰ including the consumers’ right to opt out of having their personal information shared with third parties.²⁸¹ For purposes of the Privacy Rule, a consumer is an individual who obtains financial products or services for personal, family or household purposes.²⁸² We need not consider the limited circumstances where a business opportunity seller might be considered a financial institution, because the Privacy Rule is aimed at protecting the non-public personal financial information of consumers, not businesses.²⁸³

The commenter argues that business opportunity operators should be considered consumers for purposes of the Privacy Rule, and thus should have the right to opt out of having their contact information disclosed to potential purchasers.²⁸⁴ The staff believes that the commenter’s interpretation is contrary to both prior Commission policy, and the plain meaning of the words of the Privacy Rule. As the Commission has previously stated, by investing in a business opportunity, purchasers are entering the world of commerce and embarking upon the

²⁸⁰ 73 Fed. Reg. at 16,127.

²⁸¹ 16 CFR 313.1(a)(3).

²⁸² 16 CFR 313.3(e). Similarly, a customer is a consumer with a continuing relationship with the financial institution. See 16 CFR 313.3(h).

²⁸³ Congress enacted GLB to protect personal financial information of individual consumers but excluded from the ambit of the law the protection of information pertaining to businesses. See 16 CFR 313.1(b) (expressly stating that the Privacy Rule “does not apply to information about companies or about individuals who obtain financial products or services for business, commercial, or agricultural purposes”). Indeed, federal law often focuses on privacy concerns affecting individuals, not businesses. See, e.g., the Fair Credit Reporting Act (“FCRA”) 15 U.S.C. § 1681(a)(4) (requiring various protections for consumer information, including provisions addressing identity theft). There is no comparable statute that protects business information.

²⁸⁴ The commenter argues that the purchase of a business opportunity might be intended to “provide a revenue stream” to a purchaser and “not necessarily a source of employment.” We find this distinction immaterial in the analysis.

establishment of a business.²⁸⁵ Financing a business venture is not “primarily for personal, family, or household purposes.”²⁸⁶ Our interpretation is consistent with previous Commission guidance in an analogous situation,²⁸⁷ and with the Commission’s interpretation of “consumer” in the context of other rules it enforces.²⁸⁸

Similarly, the reference disclosure is not in conflict with the California Constitution. A cause of action for invasion of privacy under the California Constitution exists only when a person has a reasonable expectation of privacy, which cannot exist if the person has been expressly informed that his or her contact information will be shared with prospective purchasers.²⁸⁹

²⁸⁵ 73 Fed. Reg. at 16,127 & n.210.

²⁸⁶ The Commission has not issued guidance about the meaning of “personal, family, or household purposes” because the plain meaning of the words seems abundantly clear. Courts’ interpretation of this phrase when used in other consumer protection laws is instructive. See, e.g., In re Runski, 102 F.3d 744, 747 (4th Cir. 1996) (noting in the bankruptcy context that courts have uniformly concluded that debt incurred for a business venture or with a profit motive does not fall into the category of debt incurred for “personal, family, or household purposes”).

²⁸⁷ See “Frequently Asked Questions for the Privacy Regulation,” Question B-2 (Dec. 2001), <http://www.ftc.gov/privacy/glbact/glb-faq.htm> (Privacy Rule does not apply when a financial institution makes a business loan to a sole proprietor; although an individual, a sole proprietor is not a “consumer” for purposes of the Privacy Rule where the financing is not for personal, family, or household purposes).

²⁸⁸ See, e.g., Preservation of Consumer’s Claims and Defenses, 16 CFR 433.1(b); Credit Practices, 16 CFR 444.1(d).

²⁸⁹ When personal information has been released without consent, a cause of action for invasion of privacy exists under the California Constitution only if: (1) the individual had a reasonable expectation that the information would be kept private, and (2) disclosure of the information is serious in nature, scope, and or potential impact to cause an “egregious breach of social norms.” See Pioneer Electronics, Inc. v. Olmstead, 40 Cal. 4th 360, 370-71 (2007). Even when these criteria are met, the individual’s privacy interest must be weighed against legitimate and important competing interests. Id. When measured against this standard, disclosure of purchaser information pursuant to proposed section 437.3(a)(5) would not give rise to a privacy

Privacy concerns relating to the reference disclosure were also articulated at the June 1, 2009 workshop. A panelist representing a large MLM company stated that at least some of its representatives expressed concern that under the proposed Rule, their addresses and home telephone numbers could be provided to persons they did not know. The panelist noted that representatives often use their home telephone number as their business number, and that the same telephone number is also used by other family members, including children. The panelist wondered if additional safeguards to protect purchasers' privacy could be taken and suggested requiring potential purchasers to contact a seller's references through a centralized telephone number to be administered by the seller.²⁹⁰ The DOJ panelist opposed this suggestion, arguing that communications with prior purchasers could be subject to manipulation by the seller.²⁹¹

The staff does not believe that requiring sellers to provide and administer a centralized phone number to screen references is necessary or advisable. The staff agrees with DOJ's comment that such a system could be ripe for manipulation. We also believe this would create an unjustified financial and administrative burden for sellers. Like the Commission, we do not believe that the disclosure of a purchaser's name, city, state, and telephone number creates privacy or security concerns, as this information is readily available in the public domain. The required disclosure does not include street address information, and therefore, we do not believe it

action. First, the disclosure document plainly notifies potential purchasers that their reference information will be provided to subsequent purchasers, thus they have no reasonable expectation that their information will be kept private. Next, the reference disclosure includes no sensitive personal information whatsoever, and the value to prospects of information about prior purchasers outweighs any potential detriment to those prior purchasers.

²⁹⁰ Morrissey, June 09 Tr at 87.

²⁹¹ Jost, June 09 Tr at 88.

provides the “road map” to a purchaser’s residence, as the commenter suggests. Moreover, potential purchasers are notified in writing, prior to the time of purchase that their reference information will be available to subsequent purchasers. Purchasers who have privacy concerns, therefore, can take steps to minimize personal exposure, such as, for example, designating a separate phone number for business purposes.

Nonetheless, the disclosure of information that some may consider private must be weighed against the benefits of providing that information to potential purchasers. After considering the purpose of providing reference information, the staff has concluded that disclosure of the city where the reference is located is not necessary.

The staff recommends, therefore, that the city where previous purchasers reside be eliminated from section 437.3(a)(5)(i), and correspondingly, from the “References” section of the proposed final Disclosure Document. The staff reiterates, however, that this proposed amendment is intended to alleviate privacy concerns, and it would not relieve a seller of its obligation either to provide a list of the 10 purchasers within the past 3 years that are nearest to the potential purchaser as an alternative to providing the full list of all prior purchasers.

5. Proposed section 437.3(a)(6): Receipt

a. Background

Proposed section 436.3(a)(6) would set forth a receipt requirement for the disclosure document. This requirement is designed to document proper disclosure. Specifically, the seller must attach a duplicate copy of the disclosure page to be signed and dated by the purchaser. A designation for the signature and date is included at the bottom of the disclosure document.²⁹²

²⁹² As described in supra Section I.C., the Commission engaged a consultant with expertise in document design and comprehension to evaluate the initial proposed Disclosure

The Commission believes that the receipt is especially important to prove proper disclosure with respect to electronic documents. The Commission has stated that a seller furnishing disclosures online, either through email or access to a website, has the burden of establishing that the prospect was actually able to access the electronic document.²⁹³ Completion and submission of the receipt serves that purpose. The proposed Rule does not impose any particular method of transmitting the receipt. The Commission has stated that in order to minimize compliance costs, sellers should have maximum flexibility to determine the best method to comply with this provision of the Rule.²⁹⁴ 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, to an email address, or by facsimile.

b. The record and recommendation

The Commission received no comment on this proposed requirement. Nonetheless, as noted above, we recommend adding a new definition of “signature” or “signed” to make clear, as is true with other rules enforced by the Commission,²⁹⁵ that the term “signature” or “sign” includes not only a person’s handwritten signature, but also an electronic or digital form of

Document. One of the changes suggested by the consultant was adding a note below the signature line of the disclosure document, stating that the FTC requires that all business opportunity sellers give the reader at least seven calendar days before asking him or her to sign a purchase contract. A copy of the revised proposed Disclosure Document was attached as Appendix A to the Federal Register Notice announcing the June 1, 2009 workshop. See 74 Fed. Reg. at 18,715.

²⁹³ 71 Fed. Reg. at 19,071.

²⁹⁴ Id.

²⁹⁵ See, e.g., Franchise Rule, 16 CFR 436.1(u); TSR, 16 CFR 310.3(a)(3)(i) and 310.4(b)(1)(iii).

signature to the extent that such signature is recognized as a valid signature under applicable federal law or state contract law.²⁹⁶

6. Proposed section 437.3(b): Updating

a. Background

To ensure that a seller's disclosures are current, proposed section 437.3(b) would require sellers to update their disclosures periodically. Modeled on the Franchise Rule and Interim Business Opportunity Rule,²⁹⁷ the provision would state that it would be a violation of the Rule and Section 5 of the FTC Act 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. The Commission believed that quarterly updating would strike the right balance between the need for accurate disclosure and the costs and burdens more frequent updating would entail.²⁹⁸

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 references. This is particularly necessary for start-up systems that may have few or no prior references when they commence business opportunity sales. The Commission concluded that prospective purchasers' ability to contact at least 10 references in their due diligence investigation of business

²⁹⁶ See supra Section V.R.

²⁹⁷ 16 CFR 436.7(b) and 437.1(a)(22).

²⁹⁸ 71 Fed. Reg. at 19,072.

opportunity offers outweighs any costs of more frequent updating until the list of 10 is compiled.²⁹⁹

b. The record and recommendation

No comments were received about this proposed requirement. The staff recommends, therefore, that section 437.3(b) be adopted in the form proposed in the RPBOR.

VIII. Proposed Section 437.4: Earnings Claims

Section 437.4 of the proposed Rule would address earnings claims, and is similar to the parallel sections of the Franchise Rule and Interim Business Opportunity Rule. Like each of those rules, 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 provisions of the Franchise Rule and Interim Business Opportunity Rule,³⁰⁰ 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; (2) have in its possession written materials that substantiate the claim at the time the claim is made; (3) make the written material available to the prospect and the Commission upon request; and (4) furnish the prospect with an earnings claim statement. Also, similar to the Franchise Rule, proposed section 437.4(b) would set forth the requirements for making earnings claims in the general media,³⁰¹ and would require that sellers 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

²⁹⁹ Id.

³⁰⁰ See 16 CFR 436.9 and 437.1(b), (c) and (e).

³⁰¹ 16 CFR 436.1(e).

party.³⁰² The proposed Rule would differ from the 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

1. Background

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. 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 or claims. The proposed Rule would not specify any particular format or formula for an earnings claim. The Commission intended that the proposed Rule allow 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.³⁰³

The proposed Rule also would require the seller making an earnings claim to disclose the beginning and ending dates when the represented earnings were achieved.³⁰⁴ This information is

³⁰² 16 CFR 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).

³⁰³ 71 Fed. Reg. at 19,072.

³⁰⁴ Proposed section 437.4(a)(4)(iv).

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 business opportunity purchasers in 2008. The Rule would not necessarily prohibit the use of that survey information in 2010, but 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).³⁰⁵

Further, this section of the proposed Rule would require the disclosure of the number and percentage of all purchasers who purchased the business opportunity prior to the end of the represented time period who have achieved at least the claimed earnings during that period. This information is material because it enables the prospect to determine whether the claimed earnings of prior purchasers are typical.³⁰⁶ 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.³⁰⁷

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

³⁰⁵ 71 Fed. Reg. at 19,072.

³⁰⁶ Id.

³⁰⁷ Id.

distinguish purchasers who achieved at least the represented level of earnings from those characteristics of the prospective purchasers.³⁰⁸ 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 material information because it enables a prospect to assess the relevance of an earnings claim to his or her particular market.³⁰⁹

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.³¹⁰ 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.³¹¹ 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.

In the RNPR, the Commission solicited comment on various aspects of the earnings claim statement including: (1) whether the requirement that sellers disclose the number and percentage of prior purchasers that achieved at least the stated level of earnings would create difficulties for sellers, or whether there were alternative approaches that could limit any such difficulties; and (2)

³⁰⁸ Proposed section 437.4(a)(4)(vi).

³⁰⁹ 71 Fed. Reg. at 17,073.

³¹⁰ Proposed section 437.4(a)(4)(vii).

³¹¹ See, e.g., 16 CFR 436.1(b)(2); 436.1(c)(2).

whether the requirement that sellers disclose any materially different characteristics of prior purchasers that attained at least the stated level of earnings adequately covered the relevant earnings information that should be disclosed.³¹²

2. The record and recommendation

No comments were received in response to the Commission's specific questions, nor were any comments directed to this proposed provision. We agree with the Commission's conclusions regarding the necessity of provisions of 437.4(a). We recommend, therefore, that section 437.4(a) be adopted in the form proposed in the RPBOR. However, the staff seeks additional comment on the requirements regarding earnings claims. Sections 437.4(a)(4)(iv) and (v) require that any business opportunity seller that makes an earnings claim must include in the Earnings Claim Statement both the beginning and ending dates of the time period when the earnings claim was achieved (§ 437.4(a)(4)(iv)) and the number and percentage of all purchasers who achieved the represented level of earnings (§ 437.4(a)(4)(v)).³¹³ Section 437.4(a)(4)(v) specifies that in calculating the number and percentage of purchasers who attained at least the represented level of earnings, the business opportunity seller must include all purchasers who purchased the opportunity prior to the ending date of the time period on which the representation is based. Would the results of such a calculation, which would include the experience during the relevant time period of those who purchased the business opportunity during the time period, present consumers with a realistic picture of the likelihood that they would earn an amount at least as great as the amount represented if they were to purchase this business opportunity? Does this

³¹² 73 Fed. Reg. at 16,133.

³¹³ Section 437.4(b)(3) requires similar disclosures, calculated in the same way, in conjunction with any earnings claim made in the general media.

calculation present prospective purchasers with information that would be useful in making an informed purchasing decision? Are there alternative approaches that might be more useful?

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

1. Background

Proposed section 437.4(b) addresses the making of earnings claims in the general media. 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; (2) has written material that substantiates the claim at the time the claim is made; 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 represented earnings in the given time period. 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.³¹⁴

2. The record and recommendation

The Commission received no comments about this provision. We agree with the Commission's conclusion that the requirements of proposed section 437.4(b) are necessary to prevent misleading earnings representations, and recommend, therefore, that the provision be adopted in the form proposed in the RPBOR.

³¹⁴ 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).

C. Proposed Section 437.4(c): Industry Statistics

1. Background

Proposed section 437.4(c) was intended to 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. The Commission's experience reveals that 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.³¹⁵ 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.³¹⁶

To prevent this type of deceptive earnings claim, RPBOR section 437.4(c) would have prohibited 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."

2. The record and recommendation

In response to the RNPR, one commenter noted that the proposed provision would prohibit sellers from using industry statistics in ways that could assist potential purchasers in

³¹⁵ E.g., FTC v. Tashman, 318 F.3d 1275 (11th Cir. 2003); FTC v. Nat'l Vending Consultants, Inc., No. CV-S-05-0160-RCJ-PAL (D. Nev. 2005); 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).

³¹⁶ 71 Fed. Reg. at 19,073.

making informed decisions.³¹⁷ For example, the performance experience of prior purchasers of a business opportunity might contrast favorably against the industry average and, if so, that information would help a prospective purchaser assess the value of the investment against other proposed businesses. We agree that there may be a limited number of situations in which providing industry statistics may be beneficial to potential purchasers. However, we remain concerned that industry statistics can be, and have been, used to imply to potential purchasers that their likely earnings with the promoted business opportunity will match the industry averages.³¹⁸

Staff recommends, therefore, a small change to proposed section 437.4(c) to state that it is an unfair or deceptive practice to “disseminate industry financial, earnings, or performance information unless the seller has written substantiation demonstrating that such information reflects, or does not exceed, the typical or ordinary financial, earnings, or performance experience of purchasers of the business opportunity being offered for sale.”

Accordingly, a seller could use industry information only if it is able to measure the performance of existing purchasers and document that the existing purchasers’ typical performance equals or exceeds the average performance of others in the industry. A start-up business opportunity with no or very limited prior sales, therefore, 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.

³¹⁷ Planet Antares-RNPR.

³¹⁸ See supra note 314.

D. Proposed Section 437.4(d): Material Changes

1. Background

Proposed section 437.4(d) addresses post-disclosure changes in earnings information. 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. “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.”³¹⁹ In crafting proposed section 437.4(d) the Commission was cognizant of the high degree of materiality of earnings information for prospective purchasers, but attempted to minimize compliance costs.³²⁰ “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.”³²¹ The Commission stated that this approach strikes the right balance between accurate disclosure to prevent deception and compliance costs that would result from a more frequent updating requirement.

2. The record and recommendation

In response to the RNPR, the Commission received no comments about this provision. We agree with the Commission’s analysis regarding the benefits and burdens of this provision. We recommend, therefore, that section 437.4(d) be adopted in the form proposed in the RPBOR.

³¹⁹ Id.

³²⁰ Id.

³²¹ 73 Fed. Reg. at 19,073.

IX. Proposed Section 437.5: Spanish and Other Non-English Language Sales (New Proposed Requirement)

On its own initiative, the staff recommends adding a new provision to the proposed Final Rule that would require sellers to provide the Disclosure Document and the disclosures required by sections 437.3(a) and 437.4(b) to potential purchasers in the same language the seller uses to market the business opportunity. The Commission has long recognized that “with increasing intensity, advertisers are making special efforts to reach foreign-language speaking consumers,” and that disclosures required by orders, rules, or guides should be made in the predominant language of the advertisement or sales material.³²² Similarly, the staff believes that when a business opportunity seller purposefully reaches out to a particular population by marketing in the foreign-language spoken by members of that community, all of the disclosures required by the Rule should be accessible and comprehensible to each of those potential purchasers.

The Commission’s law enforcement history demonstrates that fraudulent business opportunities have specifically targeted Spanish-speaking communities.³²³ But the staff

³²² FTC Enforcement Policy Statement Concerning Clear and Conspicuous Disclosures in Foreign Language Advertising and Sales Materials, 16 CFR 14.9.

³²³ E.g., FTC v. Zoilo Cruz, No. 3:08-cv-01877-JP (D.P.R. 2008) (envelope stuffing scheme marketed in Spanish-language newspapers and on a website available in Spanish and English); FTC v. Integrity Mktg. Team, Inc., No. 07-cv-61152 (S.D. Fla. 2007) (envelope stuffing scheme marketed in Spanish-language classified advertisements); FTC v. Hispanexo, Inc., No. 1:06-cv-00424-JCC-TRJ (E.D. Va. 2006) (assistance in starting a construction, gardening, or cleaning business marketed through Spanish-language television and radio stations); FTC v. Juan Matos, No. 06-61429-CIV-Altonaga (S.D. Fla. 2006) (craft assembly business marketed through Spanish-language advertisements); FTC v. Nat’l Vending Consultants, Inc., CV-S-05-0160-RCJ (PAL) (D. Nev. 2005) (deceptively marketed vending machine business opportunities – with many marketing efforts specifically targeting Spanish-speaking consumers); FTC v. Amada Guerra, No. 6:04-CV-1395 (M.D. Fla. 2004) (product assembly scheme telemarketed to Spanish-speaking consumers); FTC v. USS Elder Enter., Inc., No. SACV-04-1039 AHS (Anx) (C.D. Cal. 2004) (work at home assembly scheme offered

recognizes that business opportunities may be marketed in dozens of languages besides English and Spanish. The staff recommends, therefore, that business opportunity sellers be required to provide the disclosure document to potential purchasers in the language the seller used to conduct the offer for sale, sale, or promotion of the business opportunity. Because the Commission's law enforcement history demonstrates the sale of business opportunities in Spanish, a translation of the basic Disclosure Document is attached as Appendix B to the Rule. Should a seller use a language other than English or Spanish, the seller would be responsible for obtaining an accurate translation of the Disclosure Document.

A new section 437.5, entitled "Spanish and Other Non-English Language Sales" would require:

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

through Spanish-language newspapers and magazines); FTC v. Esteban Barrios Vega, No. H-04-1478 (S.D. Tex. 2004) (deceptive product assembly opportunity marketed through Spanish-language newspaper and magazine advertisements).

The staff further recommend revising section 437.3(a) to conform with this requirement.³²⁴

The staff seeks public comment about whether this new provision adequately promotes the Commission's goal of ensuring that potential purchasers be provided with information necessary to make an informed purchasing decision. Why or why not? What alternatives, if any, should the Commission consider? What would be the costs and benefits of each alternative?

The staff also seeks comment about whether the translation into Spanish of Appendix A is adequate to convey to Spanish-speaking potential purchasers the meaning of the required disclosures. Would different word choices make the disclosures more meaningful? Additionally, the staff seeks comment on its recommendation to require sellers that market business opportunities in languages other than English or Spanish to provide translations of the disclosure document and required disclosures.

X. Proposed Section 437.6: Other Prohibited Practices

Section 437.6 of the proposed Rule would prohibit sellers from engaging in a number of deceptive practices, whether directly or through a third party, that are common in the sale of fraudulent business opportunity ventures. Violation of any provision of this section would be a violation of the Rule and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act. Each of the proposed prohibitions is discussed below.

³²⁴ See supra Section VII.C. Section 437.3 of the proposed Rule would make it an unfair or deceptive act or practice for any seller to fail to disclose to a prospective purchaser material information required by sections 437.3 and 437.4 in a single written document in the form and using the language set forth in Appendix A to this part; or if the offer for sale, sale, or promotion of a business opportunity is conducted in Spanish, in the form and using the language set forth in Appendix B to this part; or if the offer for sale, sale, or promotion of a business opportunity is conducted in a language other than English or Spanish, using the form and an accurate translation of the language set forth in Appendix A to this part.

A. Proposed Section 437.6(a): Disclaimers

1. Background

Proposed section 437.6(a) 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. This provision would prohibit a business opportunity seller from disclaiming, or requiring “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.”³²⁵ The Commission has stated that the purpose of this provision is 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.”³²⁶

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission’s conclusions and recommends, therefore, that section 437.6(a) be adopted in the form proposed in the RPBOR.

B. Proposed Section 437.6(b): Inconsistent or Contradictory Information

1. Background

Proposed section 437.6(b) would prohibit sellers from making any representation, whether orally, visually, or in writing, that is inconsistent with or that contradicts any statement made in

³²⁵ This provision is parallel to the anti-disclaimer prohibition in the Amended Franchise Rule. See 16 CFR 436.9(h).

³²⁶ 71 Fed. Reg. at 19,073.

the basic disclosure document or in any earnings claim disclosures required by the Rule.³²⁷

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.³²⁸ The Commission's law enforcement experience shows that this is a prevalent problem.³²⁹ According to the Commission, this provision, like the anti-disclaimer provision noted above, is necessary to preserve the reliability and integrity of the required disclosures.

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees that the prohibition against contradictory or inconsistent representations is necessary, and recommends, therefore, that section 437.6(b) be adopted in the form proposed in the RPBOR.

C. Proposed Section 437.6(c): Extraneous Materials

1. Background

Proposed section 437.6(c) would prohibit the inclusion of any additional information in the disclosure document that is not explicitly required or permitted by the Rule. The point of the prohibition is to preserve the clarity, coherence, readability, and utility of the disclosures by ensuring that the seller does not clutter the disclosure document with extraneous materials that

³²⁷ This provision is similar to the Amended Franchise Rule prohibition against the making of statements that contradicts any required disclosure. See 16 CFR 436.9(a).

³²⁸ 71 Fed. Reg. at 19,074.

³²⁹ E.g., FTC v. Am. Entm't Distributions, 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).

may overwhelm purchasers, distracting them from the required disclosures.³³⁰ To facilitate a prospective purchaser's ability to maneuver through an electronic version of the disclosure document, the proposed provision would expressly permit the use of common navigational tools, such as scroll bars and internal links that facilitate review of an electronic document. The proposed provision would prohibit, however, other electronic features – such as audio, video, animation, or pop-up screens – that may distract attention from the core disclosures.³³¹

The prohibition on including extraneous materials would extend to information required or permitted by state law. In contrast, the Amended Franchise Rule permits the inclusion of state mandated disclosures in the federal disclosure document.³³² The Commission reasoned that because the Franchise Rule requires a very lengthy disclosure, including more than 20 categories of information, any additional state disclosures that afforded greater protections to prospective purchasers were generally minor additions that could be easily accommodated.³³³ One important goal of revising and tailoring the disclosure requirements of the Franchise Rule for business opportunity promoters is to simplify and streamline the disclosures into a single page document. The Commission concluded that allowing business opportunity promoters to mix federal and state

³³⁰ Indeed, in response to the INPR, DOJ urged the Commission to exclude state disclosures from the proposed form. In DOJ's experience, "[p]urveyors of fraudulent business opportunities will seek every opportunity to water down this document with extraneous information to hide any negative information it may contain." See 73 Fed. Reg. at 16,128. The Commission's experience supports DOJ's conclusions.

³³¹ This is the same approach used in the Amended Franchise Rule. See 16 CFR 436.6(d).

³³² See 16 CFR 436.10.

³³³ See Informal Staff Advisory Opinion, Bus. Franchise Guide (CCH) ¶ 6410 (April 15, 1980) (noting that there were only three additional disclosures that Florida required affording greater protection than the Franchise Rule).

disclosures into one document would be an invitation to sellers to present lengthy and confusing information to prospective purchasers.³³⁴ Such a result would be contrary to the Commission's goal of providing a simple, clear, and concise disclosure document.

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission's conclusions, and recommends, therefore, that section 437.6(c) be adopted in the form proposed in the RPBOR.

D. Proposed Section 437.6(d): False Earnings Claims

1. Background

As previously noted, the making of false earnings claims is the most prevalent problem in the offer and sale of business opportunities. Proposed section 437.6(d) would prohibit sellers from misrepresenting the amount of sales, gross or net income, or profits a prospective purchaser may earn or that prior purchasers have earned. This prohibition complements 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.

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff recommends, therefore, that section 437.6(d) be adopted in the form proposed in the RPBOR.

³³⁴ 73 Fed. Reg. at 16,129.

E. Proposed Section 437.6(e): Misrepresentations Regarding the Law as to Earnings Claims and the Identity of Other Business Opportunity Purchasers

1. Background

The IPBOR section 437.6(e) would have prohibited sellers from stating that any law or regulation prohibits seller from furnishing earnings information. The Commission intended that this provision address a recurring problem identified in the rulemaking record – sellers misrepresenting that federal law or the FTC prohibits the making of earnings claims.³³⁵ In effect, this prohibition would ensure that prospective purchasers are not misled into believing that earnings information is unavailable to them as a matter of law.³³⁶ The RPBOR added a second prohibition to section 437.6(e) that would have prevented sellers from misrepresenting that any law or regulation prohibits a seller from disclosing to prospective purchasers the identity of other purchasers of the business opportunity. The Commission made this proposed change in response to DOJ’s request because in its experience, fraudulent business opportunity sellers frequently deflect potential purchasers’ requests for contact information of current distributors by falsely claiming that the law forbids disclosing those identities.³³⁷ The Commission agreed that the

³³⁵ In the Amended Franchise Rule, the Commission addressed 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 preamble makes clear that franchisors can make financial performance information available, assuming they have a reasonable basis for their claims. See 16 CFR 436.5(s)(1). In an effort to streamline the business opportunity disclosure document and reduce compliance costs, the Commission proposed this different approach for the Business Opportunity Rule, believing it sufficient to address deceptive business opportunity sales. The Commission noted that “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.” 71 Fed. Reg. at 19,075 n.211.

³³⁶ 73 Fed. Reg. at 16,127.

³³⁷ Id.

prohibition is appropriate, because “it will help consumers understand that if the seller supplies no references, it is because none exist, or because the seller chooses not to make such information available, which would contravene the RPBOR.”³³⁸

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission’s conclusions and recommends, therefore, that section 437.6(e) be adopted in the form proposed in the RPBOR

F. Proposed Section 437.6(f): Written Substantiation for Earnings Claims

1. Background

Proposed section 437.6(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.³³⁹ Rather than mandating that business opportunity sellers include documentation for earnings claims – which could be voluminous – in the earnings claim statement itself, the proposed Rule would reduce compliance costs by requiring only that such materials be provided when requested. Purchasers could then review the documentation if they so choose.

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission’s conclusion that although substantiation for earnings claims must exist, in writing, at the time any such claims are made, that substantiation need be provided to

³³⁸ Id.

³³⁹ The Amended Franchise Rule and Interim Business Opportunity Rule have similar requirements. See 16 CFR 436.5(r)(3)(v); 437.1(b)(2); and 437.1(c)(2).

potential purchasers (or to the Commission) only upon request. We recommend, therefore, that section 437.6(f) be adopted in the form proposed in the RPBOR.

G. Proposed Section 437.6(g): Payments from the Seller

1. Background

Proposed section 437.6(g) would prohibit sellers from misrepresenting how or when commissions, bonuses, incentives, premiums, or other payments from the seller to the purchaser will be calculated or distributed. The Commission's law enforcement experience shows that these kinds of misrepresentations underlie work-at-home opportunities, where prospective purchasers rely on the seller as the source of income, or where the seller manages the system's cash flow.³⁴⁰ The Commission concluded that absent this prohibition, the Rule would not address false promises about the compensation sellers will provide post-sale.³⁴¹

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission's conclusions and recommends, therefore, that section 437.6(g) be adopted in the form proposed in the RPBOR.

³⁴⁰ E.g., FTC v. Indep. Mktg. Exch., Inc., No. 10-CV-00568-NLH-KMW (D.N.J. 2010); FTC v. Preferred Platinum Servs. Network, Inc., No.10-CV-00538-MLC-LHG (D.N.J. 2010); 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).

³⁴¹ 71 Fed. Reg. at 19,075.

H. Proposed Section 437.6(h): Costs and Material Characteristics

1. Background

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.³⁴² 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).³⁴³ Proposed section 437.6(h) makes such deception actionable as a violation of the proposed Rule.

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission's conclusions and recommends, therefore, that section 437.6(h) be adopted in the form proposed in the RPBOR.

³⁴² 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). Pre-sale disclosure of cost information is a remedial approach taken in many Commission trade regulation rules. E.g., 900 Number Rule, 16 CFR 308.3(b); TSR, 16 CFR 310.3; Funeral Rule, 16 CFR 453.2.

³⁴³ 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).

I. Proposed Section 437.6(i): Assistance

1. Background

Proposed section 437.6(i) would prohibit business opportunity sellers from misrepresenting any material aspect of assistance provided to purchasers.³⁴⁴ The Commission's enforcement experience shows that misrepresentation of post-sale assistance offered to a prospective purchaser is an element common to many business opportunity frauds targeted in FTC cases.³⁴⁵ 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.³⁴⁶ The Commission concluded that the best way to address this deceptive practice is through a direct prohibition.³⁴⁷

³⁴⁴ 71 Fed. Reg. at 19,075 n.216.

³⁴⁵ The Commission has 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." See, 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); United States v. QX Int'l, Inc., No. 398-CV-0453-D (N.D. Tex. 1998).

³⁴⁶ 71 Fed. Reg. at 19,075 n.218.

³⁴⁷ 71 Fed. Reg. at 19,075.

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission's conclusions and recommends, therefore, that section 437.6(i) be adopted in the form proposed in the RPBOR.

J. Proposed Section 437.6(j): Locations, Outlets, Accounts, or Customers

1. Background

Proposed section 437.6(j) would prohibit sellers from misrepresenting “the likelihood that a seller, locator, or lead generator will find locations, outlets, accounts, or customers for the purchaser.” Fraudulent business opportunity sellers often promise that the seller or some other third party will find locations or outlets for purchasers' equipment, or accounts or customers for the purchasers' services.³⁴⁸ Such 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.³⁴⁹ The Commission has found that these types of representations are material to a prospective purchaser, because they

³⁴⁸ 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 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).

³⁴⁹ 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).

foster the expectation that a profitable market exists for the goods or services the purchaser will sell.³⁵⁰

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission's conclusions and recommends, therefore, that section 437.6(j) be adopted in the form proposed in the RPBOR.

K. Proposed Section 437.6(k): Cancellation or Refund Policy

1. Background

Proposed section 437.6(k) would prohibit a seller from misrepresenting, directly or through a third party, the terms and conditions of any cancellation or refund policy. As explained in supra Section VII.C.3, this prohibition would not compel any seller to offer cancellation or a refund, nor would it dictate the terms and conditions under which a seller may offer such relief. Rather, it simply would ensure that any cancellation or refund offer a seller makes before the sale is truthful and accurate. The Commission's law enforcement experience demonstrates that, in many instances, business opportunity sellers falsely 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

³⁵⁰ 71 Fed. Reg. at 19,076.

a purchaser.³⁵¹ These representations have lured prospective purchasers into believing that the investment is either low-risk or even risk-free.³⁵²

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission's conclusions and recommends, therefore, that section 437.6(k) be adopted in the form proposed in the RPBOR.

L. Proposed Section 437.6(l): Failure to Cancel or Make a Refund

1. Background

Proposed section 437.6(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.³⁵³ As noted above, proposed section 437.6(k) would prohibit a seller from misrepresenting, pre-sale, the seller's cancellation or refund policy. Proposed section 437.6(l) would complement that section and was 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 Disclosure Document for obtaining such

³⁵¹ 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).

³⁵² 71 Fed. Reg. at 19,076.

³⁵³ This is consistent with the Interim Business Opportunity Rule approach. See 16 CFR 437.1(h).

relief.³⁵⁴ In the Commission’s 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.³⁵⁵

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission’s conclusions and recommends, therefore, that section 437.6(l) be adopted in the form proposed in the RPBOR.

M. Proposed Section 437.6(m): Employment Opportunity

1. Background

Proposed section 437.6(m) would prohibit business opportunity sellers from misrepresenting a business opportunity as an employment opportunity. 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 other business opportunities. For example, in some 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 those products.³⁵⁶

³⁵⁴ 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).

³⁵⁵ 73 Fed. Reg. at 19,076.

³⁵⁶ 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

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees that this prohibition is necessary to protect consumers against false representations of employment opportunities. We recommend, therefore, that section 437.6(m) be adopted in the form proposed in the RPBOR.

N. Proposed Section 437.6(n): Territories

1. Background

As described in supra Section V.G., proposed section 437.6(n) would prohibit misrepresentations about the terms of any territorial exclusivity or limited territorial protection offered to a prospective purchaser.³⁵⁷ In the Commission's experience, false promises about territories are a common deceptive practice reported by business opportunity purchasers.³⁵⁸ The Commission has stated that representations about territorial exclusivity or more limited territorial protections are material because they often induce a prospective purchaser into believing that he

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).

³⁵⁷ 71 Fed. Reg. at 19,076. 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 telemarketing or Internet sales in the territory. Regardless of the scope of the territorial protection, section 437.6(n) prohibits business opportunity sellers from misrepresenting the nature of the territory.

³⁵⁸ See supra note 126.

or she will not be competing for customers with the seller or other purchasers, thereby increasing the purchaser's likelihood of success.³⁵⁹

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission's conclusions and recommends, therefore, that section 437.6(n) be adopted in the form proposed in the RPBOR.

O. Proposed Section 437.6(o): Assignment of Territories

1. Background

Proposed section 437.6(o) would prohibit a seller from assigning a single "exclusive" territory to more than one purchaser. This prohibition would complement section 437.6(n), which would prohibit 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.³⁶⁰ 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.

³⁵⁹ 71 Fed. Reg. at 19,075.

³⁶⁰ E.g., FTC v. Am. Safe Mktg., No. 1:89-CV-462-RLV (N.D. Ga. 1989).

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees that this prohibition regarding post-sale conduct by the seller is necessary and recommends, therefore, that section 437.6(o) be adopted in the form proposed in the RPBOR.

P. Proposed Section 437.6(p): Third-Party Endorsements and Affiliation

1. Background

To prevent endorsement fraud, proposed section 437.6(p) would prohibit business opportunity sellers from misrepresenting 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.”³⁶¹ The Commission’s 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.³⁶² 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.³⁶³ The Commission concluded that such claims are material to a purchaser because an

³⁶¹ Cf. TSR, 16 CFR 310.3(a)(vii) (prohibiting misrepresentations concerning “affiliation with, or endorsement or sponsorship by, any person or government entity”).

³⁶² 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).

³⁶³ E.g., FTC v. Global Assistance Network for Charities, No. 96-2494 PHX RCB (D. Ariz. 1996).

alleged endorsement or shared-profit arrangement may create the impression that the opportunity is legitimate or that the affiliation will enhance sales and profits.³⁶⁴

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission's conclusions and recommends, therefore, that section 437.6(p) be adopted in the form proposed in the RPBOR.

Q. Proposed section 437.6(q): Shills

1. Background

Proposed section 437.6(q) addresses one of the most pernicious practices common in fraudulent business opportunity sales – the use of “shill” references to lure unsuspecting consumers to invest in a business opportunity.³⁶⁵ 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.³⁶⁶ The use of paid shills to give false reports induces prospective purchasers into believing that the opportunity is a safe and lucrative investment.

³⁶⁴ 71 Fed. Reg. at 19,077.

³⁶⁵ See *id.* (“After earnings claims, false testimonials and shill references are the most common Section 5 allegations in Commission business opportunities cases.”).

³⁶⁶ E.g., *FTC v. Am. Entm't Distribs., Inc.*, No. 04-22431-CIV-Martinez (S.D. Fla. 2004); *United States 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).

To address this deceptive practice, proposed section 437.6(q) would contain two related prohibitions. First, it would prohibit any seller from misrepresenting 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” prong of this provision.³⁶⁷

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission’s conclusions and recommends, therefore, that section 437.6(q) be adopted in the form proposed in the RPBOR.

R. Proposed Section 437.6(r): Paid Consideration or Prior Relationship

1. Background

Proposed section 437.6(r) was intended to complement the prohibition in section 437.6(q) regarding skills. Proposed section 437.6(r) would prohibit a seller from failing to disclose payments to individuals identified as references, as well as any personal relationships the seller

³⁶⁷ 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 also 71 Fed. Reg. at 19,077 & n.238.

has with such individuals. The Commission reasoned that these prohibitions are necessary, because an individual with a personal relationship with the seller, or who has been paid for his or her assessment of an opportunity is likely to be biased, and any story of success or high earnings from any such person is suspect.³⁶⁸ The proposed Rule would clarify that the term “consideration” is to be interpreted broadly to include 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.³⁶⁹

The RPBOR would have modified slightly the language of this section of the IPBOR to make clear that the information that must be disclosed to a potential purchaser is not only the payment of any consideration to the reference by the seller, but also the existence of any relationship between the seller and the reference.³⁷⁰ Therefore, the RPBOR would have added clarifying language to the opening clause of section 437.6(r).

2. The record and recommendation

No comments received in response to the RNPR were directed to this provision. We agree with the Commission’s conclusion that the small clarification to proposed 437.6(r) more accurately identifies the information that must be disclosed to a potential purchaser. We recommend, therefore, that section 437.6(r) be adopted in the form proposed in the RPBOR.

³⁶⁸ Indeed, the Commission has long held that the failure to disclose compensation paid to an endorser is a deceptive practice in violation of Section 5. See 71 Fed. Reg. at 19,077.

³⁶⁹ 71 Fed. Reg. at 19,078.

³⁷⁰ 73 Fed. Reg. at 16,136.

XI. Proposed Section 437.7: Record Retention

A. Background

Proposed section 437.7 would establish the minimal record retention requirements necessary to document compliance and permit effective Rule enforcement. This section would apply to both the business opportunity seller, as well as its principals, to ensure that records required by the Rule are not destroyed if the seller goes out of business or otherwise ceases operations.³⁷¹ 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 437.7(a)	Each materially different version of all documents required by the Rule;
Proposed section 437.7(b)	Each purchaser's disclosure receipt;
Proposed section 437.7(c)	Each executed written contract with a purchaser;
Proposed section 437.7(d)	Each oral or written cancellation or refund request received from a purchaser; and
Proposed section 437.7(e)	All substantiation upon which the seller relies from the time an earnings claim is made.

The Commission concluded that these limited recordkeeping requirements strike the right balance, requiring no more than necessary for effective law enforcement, while reducing compliance costs.³⁷²

³⁷¹ 71 Fed. Reg. at 19,078.

³⁷² Id.

B. The record and recommendation

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission's conclusions, and recommends, therefore, that section 437.7 be adopted in the form proposed in the RPBOR.

XII. Proposed Section 437.8: Franchise Exemption

A. Background

Proposed section 437.8 was 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.³⁷³ Proposed section 437.8 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 were 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;³⁷⁴ and, simultaneously, to obviate any loophole that could be exploited by certain other types of business

³⁷³ Id.

³⁷⁴ For example, businesses exempt from Franchise Rule coverage pursuant to the exemption for fractional franchises would not be subjected to coverage by the proposed Business Opportunity Rule because such businesses would meet the criteria of proposed section 437.8. The Commission concluded that 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., 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. See 71 Fed. Reg. at 19,078.

opportunities that are exempt from the Franchise Rule but that should be regulated by the proposed Business Opportunity Rule.

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 exemption³⁷⁵ or the oral agreement exemption.³⁷⁶ The Commission concluded that 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.³⁷⁷

In the RNPR, the Commission solicited comment on whether the exemption was overly broad or overly narrow.³⁷⁸

B. The record and recommendation

In response to the RNPR, some commenters, primarily from the MLM industry, suggested limitations on the Rule by granting a safe harbor to exempt firms that require very low registration fees;³⁷⁹ firms that offer refunds on inventory purchases;³⁸⁰ firms that are publicly-

³⁷⁵ 16 CFR 436.2(a)(3)(iii).

³⁷⁶ 16 CFR 436.2(a)(3)(iv).

³⁷⁷ 71 Fed. Reg. at 19,078.

³⁷⁸ 73 Fed. Reg. at 16,133.

³⁷⁹ See, e.g., Babener-RNPR; Pre-Paid Legal-RNPR.

³⁸⁰ See, e.g., Pre-Paid Legal-RNPR; Tupperware-RNPR; IBA-RNPR.

traded;³⁸¹ firms that have a high net worth;³⁸² or firms that are members of a self-regulatory body, such as the DSA.³⁸³ These are not novel suggestions; each was also made in response to the INPR.³⁸⁴ In the RNPR, the Commission concluded that none of these factors is determinative of whether a company is, in fact, a pyramid scheme or otherwise engaged in deceptive conduct. Furthermore, the Commission noted that the effort to craft a workable rule using these criteria could undermine law enforcement efforts, as it would, at least in the case of minimum payment thresholds, provide scam operators with a means to circumvent the Rule.³⁸⁵ We agree with the Commission's conclusions and therefore do not recommend broadening the Rule's exemptions beyond those identified in the proposed Rule.

XIII. Proposed Section 437.9: Outstanding Orders; Preemption

Proposed section 437.9 would address the effect the proposed Rule may have on outstanding Commission orders. It also would address preemption of state business opportunity laws.

A. Proposed section 437.9(a): Effect on Prior Commission Orders

The Commission has recognized that the proposed Rule would significantly change the disclosure obligations for those sellers who are now under order in prior Commission actions.

³⁸¹ Id.

³⁸² See, e.g., IBA-RNPR.

³⁸³ See, e.g., DSA-RNPR.

³⁸⁴ 73 Fed. Reg. at 16,119-20. Moreover, none of the commenters offered any new rationale for expanding the proposed categories of exemption that had not previously been considered by the Commission.

³⁸⁵ 73 Fed. Reg. at 16,120.

For example, the proposed Business Opportunity Rule contemplates greatly streamlined disclosures, as compared to the Franchise Rule's extensive disclosures.

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 437.9(a) would permit persons under order to petition the Commission for relief consistent with the provisions of the new Rule. The RPBOR would have allowed business opportunities required by FTC or court order to follow the Franchise Rule, 16 CFR Part 436, to petition the Commission to amend the order so that the business opportunity could follow the provisions of the Business Opportunity Rule.

No comments received in response to the RNPR were directed to this provision. However, the staff notes that while the Commission could modify an FTC administrative order, it does not have the authority to modify any order entered by a court. In the case of a court order, the Commission could, however, stipulate to an amendment of the order by the court to allow the business opportunity to follow the provisions of the Business Opportunity Rule. The staff recommends, therefore, that section 437.9(a) be revised to add the phrase "or to stipulate to an amendment of the court order" as follows: "A business opportunity required by prior FTC or court order to follow the Franchise Rule, 16 CFR Part 436, may petition the Commission to amend the order or to stipulate to an amendment of the court order so that the business opportunity may follow the provisions of this part." In addition, the staff notes that the first sentence of section 437.9(a) proposed in the RPBOR is superfluous, and recommends deleting it. The staff agrees with the Commission's previous conclusion that all such determinations regarding the amendment of orders should be made on a case-by-case basis.

B. Proposed Section 437.9(b): Preemption

Proposed section 437.9(b) adopts the preemption policy of the Amended Franchise Rule.³⁸⁶ It provides 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.³⁸⁷

One commenter suggested that the FTC should preempt conflicting state business opportunity rules, noting its belief that “enforcement of a nationwide standard by the FTC is preferable to a patchwork series of laws and regulations.”³⁸⁸ The staff believes the commenter is suggesting that all state laws and regulations that do not mirror exactly the proposed Business Opportunity Rule would be in conflict with the Rule, and should therefore be preempted. We disagree. The Commission has long recognized that state laws and regulations that afford equal or greater protections than do FTC trade regulations are not subject to preemption.³⁸⁹ The staff

³⁸⁶ 16 CFR 436.10. This approach is consistent with other Commission trade regulation rules. See, e.g., Appliance Labeling Rule, 16 CFR 305.17; Cooling-Off Rule, 16 CFR 429.2; Mail Order Rule, 16 CFR 435.3(b)(2).

³⁸⁷ Although state laws offering equal or greater protections are not preempted, section 437.6(c) of the proposed Rule would prohibit providing the state and federal disclosures together. See supra Section X.C.

³⁸⁸ Tupperware-RNPR (5/28/2008). No other comments were received. At the June 2009 Workshop, however, the panelist from the Maryland Attorney General’s Office expressed appreciation that states were not preempted from requiring that business opportunity sellers provide information in addition to that required by the proposed Rule. Cantone, June 2009 Tr at 20.

³⁸⁹ See, e.g., Mail Order Rule, 16 CFR 435.3(b)(2) (rule does not preempt state or local laws that afford equal or greater protections).

agrees with the Commission's conclusions, and recommends, therefore, that section 437.9(b) be adopted in the form proposed in the RPBOR.

XIV. Proposed Section 437.10: Severability

Finally, proposed section 437.10 would adopt the severability provision currently found in the Franchise Rule at 16 CFR 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.³⁹⁰

No comments received in response to the RNPR were directed to this provision. The staff agrees with the Commission's conclusions, and recommends, therefore, that section 437.10 be adopted in the form proposed in the RPBOR.

XV. Conclusion

The Commission's law enforcement history and the record developed during the course of this rulemaking demonstrate the need to update the Business Opportunity Rule. This Report analyzes the entire record to date, and sets forth the staff's recommendation as to the form of the proposed Final Rule and the proposed final Disclosure Document. We welcome comment on this Report, the proposed Final Rule, and the proposed final Disclosure Document, during the next 75 days, as provided by the Commission's Rules of Practice, 16 CFR § 1.13(h).

³⁹⁰ This provision is comparable to the severability provisions in other Commission trade regulation rules. E.g., 900-Number Rule, 16 CFR 308.8; TSR, 16 CFR 310.9.

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Cited INPR, RNPR and Workshop Notice Commenters

Aird, Gail
Avon Products, Inc. (“Avon”)
Babener and Associates (“Babener”)
Bates, Kenneth
Brooks, Douglas
Big Ear, Inc. (“Big Ear”)
Consumer Awareness Institute (“CAI”)
The Cosmetic, Toiletry and Fragrance Association (“CTFA”)
Direct Selling Association (“DSA”)
Durand, Justin
Independent Bakers Association (“IBA”)
Integrative Health Concepts LLC (“Integrative”)
Jafra Cosmetics International, Inc. (“Jafra Cosmetics”)
Lia Sophia
The Longaberger Company (“Longaberger”)
Princess House
Shaklee Corporation (“Shaklee”)
Johnson, Scott
Lopez, Nicole
Larkin Hoffman Daly & Lindgren Ltd. (“LHD&L”)
Maclay Murray and Spens LLP (“MMS”)
MarketWave, Inc. (“MarketWave”)
Mary Kay, Inc. (“Mary Kay”)
Melaleuca, Inc. (“Melaleuca”)
National Black Chamber of Commerce (“NBCC”)
Parrington, Reid
Planet Antares, Inc. (“Planet Antares”)
Pre-Paid Legal Services, Inc. (“Pre-Paid Legal”)
Primerica Financial Services, Inc. (“Primerica”)
Pyramid Scheme Alert (“PSA”)
Pyramid Watch
Rotolante, Steven
Sonnenschein
The Timberland Co. (“Timberland”)
Tupperware Brands (“Tupperware”)
Venable, LLP (“Venable”)
Whittle, Bill

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Section __ Text of 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.

437.1 Definitions.

437.2 The obligation to furnish written documents.

437.3 Disclosure document.

437.4 Earnings claims.

437.5 Spanish and other non-English language sales.

437.6 Other prohibited practices.

437.7 Record retention.

437.8 Franchise exemption.

437.9 Outstanding orders; preemption.

437.10 Severability.

Appendix A to Part 437: Business Opportunity Disclosure Document

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

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§ 437.1 Definitions.

The following definitions shall apply throughout this part:

- (a) *Action* means a criminal information, indictment, or proceeding; a civil complaint, cross claim, counterclaim, or third-party complaint in a judicial action or proceeding; arbitration; or any governmental administrative proceeding, including, but not limited to, an action to obtain or issue a cease and desist order, an assurance of voluntary compliance, and an assurance of discontinuance.
- (b) *Affiliate* means an entity controlled by, controlling, or under common control with a business opportunity seller.
- (c) *Business opportunity* means:
 - (1) A commercial arrangement in which the seller solicits a prospective purchaser to enter into a new business; and
 - (2) The prospective purchaser makes a required payment; and
 - (3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:
 - (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices, owned, leased, controlled or paid for by the purchaser; or
 - (ii) Provide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser's goods or services; or
 - (iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but

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not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home.

- (d) *Designated person* means any person, other than the seller, whose goods or services the seller suggests, recommends, or requires that the purchaser use in establishing or operating a new business.
- (e) *Disclose or state* means to give information in writing that is clear and conspicuous, accurate, concise, and legible.
- (f) *Earnings claim* means any oral, written, or visual representation to a prospective purchaser that conveys, expressly or by implication, a specific level or range of actual or potential sales, or gross or net income or profits. Earnings claims include, but are not limited to:
 - (1) Any chart, table, or mathematical calculation that demonstrates possible results based upon a combination of variables; and
 - (2) Any statements from which a prospective purchaser can reasonably infer that he or she will earn a minimum level of income (e.g., "earn enough to buy a Porsche," "earn a six-figure income," or "earn your investment back within one year").
- (g) *Exclusive territory* means a specified geographic or other actual or implied marketing area in which the seller promises not to locate additional purchasers or offer the same or similar goods or services as the purchaser through alternative channels of distribution.
- (h) *General media* means any instrumentality through which a person may communicate with the public, including, but not limited to, television, radio, print, Internet, billboard, website, commercial bulk email, and mobile communications.

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- (i) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services.
- (j) *New business* means a business in which the prospective purchaser is not currently engaged, or a new line or type of business.
- (k) *Person* means an individual, group, association, limited or general partnership, corporation, or any other entity.
- (l) *Prior business* means:
 - (1) A business from which the seller acquired, directly or indirectly, the major portion of the business' assets; or
 - (2) Any business previously owned or operated by the seller, in whole or in part.
- (m) *Providing locations, outlets, accounts, or customers* means furnishing the prospective purchaser with existing or potential locations, outlets, accounts, or customers; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies; collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers, provided, however, that advertising and general advice about business development and training shall not be considered as "providing locations, outlets, accounts, or customers."
- (n) *Purchaser* means a person who buys a business opportunity.
- (o) *Quarterly* means as of January 1, April 1, July 1, and October 1.
- (p) *Required payment* means all consideration that the purchaser must pay to the seller or an affiliate, either by contract or by practical necessity, as a condition of obtaining or

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commencing operation of the business opportunity. Such payment may be made directly or indirectly through a third-party. A required payment does not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease.

- (q) *Seller* means a person who offers for sale or sells a business opportunity.
- (r) *Signature* or *signed* means a person's affirmative steps to authenticate his or her identity. It includes a person's handwritten signature, as well as an electronic or digital form of signature to the extent that such signature is recognized as a valid signature under applicable federal law or state contract law.
- (s) *Written* or *in writing* means any document or information in printed form or in any form capable of being downloaded, printed, or otherwise preserved in tangible form and read. It includes: type-set, word processed, or handwritten documents; information on computer disk or CD-ROM; information sent via email; or information posted on the Internet. It does not include mere oral statements.

§ 437.2 The obligation to furnish written documents.

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

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

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§ 437.3 The disclosure document.

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

- (a) Fail to disclose to a prospective purchaser the following material information in a single written document in the form and using the language set forth in Appendix A to this part; or if the offer for sale, sale, or promotion of a business opportunity is conducted in Spanish, in the form and using the language set forth in Appendix B to this part; or if the offer for sale, sale, or promotion of a business opportunity is conducted in a language other than English or Spanish, using the form and an accurate translation of the language set forth in Appendix A to this part:
 - (1) Identifying information. State the name, business address, and telephone number of the seller, the name of the salesperson offering the opportunity, and the date when the disclosure document is furnished to the prospective purchaser.
 - (2) Earnings claims. If the seller makes an earnings claim, check the “yes” box and attach the earnings statement required by § 437.4. If not, check the “no” box.
 - (3) Legal actions.
 - (i) If any of the following persons has been the subject of any civil or criminal action for misrepresentation, fraud, securities law violations, or unfair or deceptive practices, including violations of any FTC Rule, within the 10 years immediately preceding the date that the business opportunity is offered, check the “yes” box:
 - (A) The seller;

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- (B) Any affiliate or prior business of the seller; or
 - (C) Any of the seller's officers, directors, sales managers, or any individual who occupies a position or performs a function similar to an officer, director, or sales manager of the seller.
- (ii) If the "yes" box is checked, disclose all such actions in an attachment to the disclosure document. State the full caption of each action (names of the principal parties, case number, full name of court, and filing date). For each action, the seller may also provide a brief accurate statement not to exceed 100 words that describes the action.
- (iii) If there are no actions to disclose, check the "no" box.
- (4) Cancellation or refund policy. If the seller offers a refund or the right to cancel the purchase, check the "yes" box. If so, state all material terms and conditions of the refund or cancellation policy in an attachment to the disclosure document. If no refund or cancellation is offered, check the "no" box.
- (5) References.
 - (i) State the name, state, and telephone number of all purchasers who purchased the business opportunity within the last three years. If more than 10 purchasers purchased the business opportunity within the last three years, the seller may limit the disclosure by stating the name, state, and telephone number of at least the 10 purchasers within the past three years who are located nearest to the prospective purchaser's location. Alternatively, a seller may furnish a prospective buyer with a list disclosing all purchasers nationwide within the last three years. If

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choosing this option, insert the words “See Attached List” without removing the list headings or the numbers 1 through 10, and attach a list of the references to the disclosure document.

(ii) Clearly and conspicuously, and in immediate conjunction with the list of references, state the following: “If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers.”

(6) Receipt. Attach a duplicate copy of the disclosure 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, 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;

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- (3) Makes the written substantiation available upon request to the prospective purchaser and to the Commission; and
- (4) Furnishes to the prospective purchaser an earnings claim statement. The earnings claim statement shall be a single written document and shall state the following information:
 - (i) The title “EARNINGS CLAIM STATEMENT REQUIRED BY LAW” in capital, bold type letters;
 - (ii) The name of the person making the earnings claim and the date of the earnings claim;
 - (iii) The earnings claim;
 - (iv) The beginning and ending dates when the represented earnings were achieved;
 - (v) The number and percentage of all persons who purchased the business opportunity prior to the ending date in paragraph (a)(4)(iv) of this section who achieved at least the stated level of earnings;
 - (vi) Any characteristics of the purchasers who achieved at least the represented level of earnings, such as their location, that may differ materially from the characteristics of the prospective purchasers being offered the business opportunity; and
 - (vii) A statement that written substantiation for the earnings claim will be made available to the prospective purchaser upon request.
- (b) Make any earnings claim in the general media, unless the seller:
 - (1) Has a reasonable basis for its claim at the time the claim is made;

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- (2) Has in its possession written material that substantiates its claim at the time the claim is made;
- (3) States in immediate conjunction with the claim:
 - (i) The beginning and ending dates when the represented earnings were achieved; and
 - (ii) The number and percentage of all persons who purchased the business opportunity prior to the ending date in paragraph (b)(3)(i) of this section who achieved at least the stated level of earnings.
- (c) Disseminate industry financial, earnings, or performance information unless the seller has written substantiation demonstrating that the information reflects, or does not exceed, the typical or ordinary financial, earnings, or performance experience of purchasers of the business opportunity being offered for sale.
- (d) Fail to notify any prospective purchaser in writing of any material changes affecting the relevance or reliability of the information contained in an earnings claim statement before the prospective purchaser signs any contract or makes a payment or provides other consideration to the seller, directly or indirectly, through a third party.

§ 437.5 Spanish and non-English language sales.

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

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required by § 437.3(a) using the form and an accurate translation of the language set forth in Appendix A to this part, and the disclosures required by §§ 437.3(a) and 437.4(a) must be made in that language.

§ 437.6 Other prohibited practices.

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

- (a) Disclaim, or require a prospective purchaser to waive reliance on, any statement made in any document or attachment that is required or permitted to be disclosed under this Rule;
- (b) Make any claim or representation, orally, visually, or in writing, that is inconsistent with or contradicts the information required to be disclosed by §§ 437.3 (basic disclosure document) and 437.4 (earnings claims document) of this Rule;
- (c) Include in any disclosure document or earnings claim statement any materials or information other than what is explicitly required or permitted by this Rule. For the sole purpose of enhancing the prospective purchaser's ability to maneuver through an electronic version of a disclosure document or earnings statement, the seller may include scroll bars and internal links. All other features (e.g., multimedia tools such as audio, video, animation, or pop-up screens) are prohibited;
- (d) Misrepresent the amount of sales, or gross or net income or profits a prospective purchaser may earn or that prior purchasers have earned;
- (e) Misrepresent that any governmental entity, law, or regulation prohibits a seller from:
 - (1) furnishing earnings information to a prospective purchaser; or
 - (2) disclosing to prospective purchasers the identity of other purchasers of the

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business opportunity;

- (f) Fail to make available to prospective purchasers, and to the Commission upon request, written substantiation for the seller's earnings claims;
- (g) Misrepresent how or when commissions, bonuses, incentives, premiums, or other payments from the seller to the purchaser will be calculated or distributed;
- (h) Misrepresent the cost, or the performance, efficacy, nature, or central characteristics of the business opportunity or the goods or services offered to a prospective purchaser;
- (i) Misrepresent any material aspect of any assistance offered to a prospective purchaser;
- (j) Misrepresent the likelihood that a seller, locator, or lead generator will find locations, outlets, accounts, or customers for the purchaser;
- (k) Misrepresent any term or condition of the seller's refund or cancellation policies;
- (l) Fail to provide a refund or cancellation when the purchaser has satisfied the terms and conditions disclosed pursuant to § 437.3(a)(4);
- (m) Misrepresent a business opportunity as an employment opportunity;
- (n) Misrepresent the terms of any territorial exclusivity or territorial protection offered to a prospective purchaser;
- (o) Assign to any purchaser a purported exclusive territory that, in fact, encompasses the same or overlapping areas already assigned to another purchaser;
- (p) Misrepresent that any person, trademark or service mark holder, or governmental entity, directly or indirectly benefits from, sponsors, participates in, endorses, approves, authorizes, or is otherwise associated with the sale of the business opportunity or the goods or services sold through the business opportunity;
- (q) Misrepresent that any person:

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- (1) Has purchased a business opportunity from the seller or has operated a business opportunity of the type offered by the seller; or
 - (2) Can provide an independent or reliable report about the business opportunity or the experiences of any current or former purchaser.
- (r) Fail to disclose, with respect to any person identified as a purchaser or operator of a business opportunity offered by the seller:
 - (1) Any consideration promised or paid to such person. Consideration includes, but is not limited to, any payment, forgiveness of debt, or provision of equipment, services, or discounts to the person or to a third party on the person's behalf; or
 - (2) Any personal relationship or any past or present business relationship other than as the purchaser or operator of the business opportunity being offered by the seller.

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§ 437.7 Record retention.

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

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

§ 437.8 Franchise exemption.

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

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

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§ 437.9 Outstanding orders; preemption.

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

§ 437.10 Severability.

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

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Section __ Text of 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.

437.1 Definitions. |

437.2 The obligation to furnish written documents.

437.3 Disclosure document.

437.4 Earnings claims. |

437.5 Spanish and other non-English language sales. |

437.56 Other prohibited practices. |

437.67 Record retention. |

437.78 Franchise exemption. |

437.89 Outstanding orders; preemption. |

437.9–10 Severability. |

Appendix A to Part 437: Business Opportunity Disclosure Document

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

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§ 437.1 Definitions.

The following definitions shall apply throughout this part:

- (a) *Action* means a criminal information, indictment, or proceeding; a civil complaint, cross claim, counterclaim, or third-party complaint in a judicial action or proceeding; arbitration; or any governmental administrative proceeding, including, but not limited to, an action to obtain or issue a cease and desist order, ~~and~~ an assurance of voluntary compliance, and an assurance of discontinuance. |
- (b) *Affiliate* means an entity controlled by, controlling, or under common control with a business opportunity seller.
- (c) *Business opportunity* means:
 - (1) A commercial arrangement in which the seller solicits a prospective purchaser to enter into a new business; and
 - (2) The prospective purchaser makes a required payment; and
 - (3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:
 - (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices, ~~on premises neither owned nor~~ leased, controlled or paid for by the purchaser; or |
 - (ii) Provide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser's goods or services; or
 - (iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but

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not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home.

- (d) *Designated person* means any person, other than the seller, whose goods or services the seller suggests, recommends, or requires that the purchaser use in establishing or operating a new business.
- (e) *Disclose or state* means to give information in writing that is clear and conspicuous, accurate, concise, and legible.
- (f) *Earnings claim* means any oral, written, or visual representation to a prospective purchaser that conveys, expressly or by implication, a specific level or range of actual or potential sales, or gross or net income or profits. Earnings claims include, but are not limited to:
 - (1) Any chart, table, or mathematical calculation that demonstrates possible results based upon a combination of variables; and
 - (2) Any statements from which a prospective purchaser can reasonably infer that he or she will earn a minimum level of income (e.g., “earn enough to buy a Porsche,” “earn a six-figure income,” or “earn your investment back within one year”).
- (g) *Exclusive territory* means a specified geographic or other actual or implied marketing area in which the seller promises not to locate additional purchasers or offer the same or similar goods or services as the purchaser through alternative channels of distribution.
- (h) *General media* means any instrumentality through which a person may communicate with the public, including, but not limited to, television, radio, print, Internet, billboard, website, ~~and~~ commercial bulk email, and mobile communications.

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- (i) Material means likely to affect a person's choice of, or conduct regarding, goods or services.
- (j) *New business* means a business in which the prospective purchaser is not currently engaged, or a new line or type of business.
- (k) *Person* means an individual, group, association, limited or general partnership, corporation, or any other entity.
- (l) *Prior business* means:
- (1) A business from which the seller acquired, directly or indirectly, the major portion of the business' assets; or
 - (2) Any business previously owned or operated by the seller, in whole or in part, ~~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.~~
- (m) *Providing locations, outlets, accounts, or customers* means furnishing the prospective purchaser with existing or potential locations, outlets, accounts, or customers; requiring, recommending, or suggesting one or more locators or lead generating companies; providing a list of locator or lead generating companies; collecting a fee on behalf of one or more locators or lead generating companies; offering to furnish a list of locations; or otherwise assisting the prospective purchaser in obtaining his or her own locations, outlets, accounts, or customers, provided, however, that advertising and general advice about business development and training shall not be considered as "providing locations, outlets, accounts, or customers."
- (n) *Purchaser* means a person who buys a business opportunity.

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- (q) *Quarterly* means as of January 1, April 1, July 1, and October 1. |
- (p) *Required payment* means all consideration that the purchaser must pay to the seller or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the business opportunity. Such payment may be made directly or indirectly through a third-party. A required payment does not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease. |
- (g) *Seller* means a person who offers for sale or sells a business opportunity. |
- (r) *Signature or signed means a person's affirmative steps to authenticate his or her identity. It includes a person's handwritten signature, as well as an electronic or digital form of signature to the extent that such signature is recognized as a valid signature under applicable federal law or state contract law.* |
- (s) *Written or in writing* means any document or information in printed form or in any form capable of being downloaded, printed, or otherwise preserved in tangible form and read. It includes: type-set, word processed, or handwritten documents; information on computer disk or CD-ROM; information sent via email; or information posted on the Internet. It does not include mere oral statements. |

§ 437.2 The obligation to furnish written documents.

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

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

§ 437.3 **The disclosure document.**

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

- (a) Fail to disclose to a prospective purchaser the following material information in a single written document in the form and using the language set forth in Appendix A to this part: or if the offer for sale, sale, or promotion of a business opportunity is conducted in Spanish, in the form and using the language set forth in Appendix B to this part; or if the offer for sale, sale, or promotion of a business opportunity is conducted in a language other than English or Spanish, using the form and an accurate translation of the language set forth in Appendix A to this part:

- (1) Identifying information. State the name, business address, and telephone number of the seller, the name of the salesperson offering the opportunity, and the date when the disclosure document is furnished to the prospective purchaser.
- (2) Earnings claims. If the seller makes an earnings claim, check the “yes” box and attach the earnings statement required by § 437.4. If not, check the “no” box.
- (3) Legal actions.
 - (i) If any of the following persons has been the subject of any civil or criminal action for misrepresentation, fraud, securities law violations, or unfair or deceptive practices, including violations of any FTC Rule, within

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the 10 years immediately preceding the date that the business opportunity is offered, check the “yes” box:

- (A) The seller; |
- (B) Any affiliate or prior business of the seller; or |
- (C) Any of the seller’s officers, directors, sales managers, or any individual who occupies a position or performs a function similar to an officer, director, or sales manager of the seller. |

(ii) If the “yes” box is checked, disclose all such actions in an attachment to the disclosure document. State the full caption of each action (names of the principal parties, case number, full name of court, and filing date). For each action, the seller may also provide a brief accurate statement not to exceed 100 words that describes the action. |

(iii) If there are no actions to disclose, check the “no” box.

(4) Cancellation or refund policy. If the seller offers a refund or the right to cancel the purchase, check the “yes” box. If so, state the all material terms and conditions of the refund or cancellation policy in an attachment to the disclosure document. If no refund or cancellation is offered, check the “no” box. |

(5) References.

(i) State the name, 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 |

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past three years who are located nearest to the prospective purchaser's location. Alternatively, a seller may furnish a prospective buyer with a list disclosing all purchasers nationwide within the last three years. If choosing this option, insert the words "See Attached List" without removing the list headings or the numbers 1 through 10, and attach a list of the references to the disclosure document.

(ii) Clearly and conspicuously, and in immediate conjunction with the list of references, state the following: "If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers."

(6) Receipt. Attach a duplicate copy of the disclosure 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, 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:

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- (1) Has a reasonable basis for its claim at the time the claim is made;
- (2) Has in its possession written materials that substantiate its claim at the time the claim is made;
- (3) Makes the written substantiation available upon request to the prospective purchaser and to the Commission; and
- (4) Furnishes to the prospective purchaser an earnings claim statement. The earnings claim statement shall be a single written document and shall state the following information:
 - (i) The title “EARNINGS CLAIM STATEMENT REQUIRED BY LAW”- in capital, bold type letters;
 - (ii) The name of the person making the earnings claim and the date of the earnings claim;
 - (iii) The earnings claim;
 - (iv) The beginning and ending dates when the represented earnings were achieved;
 - (v) The number and percentage of all persons who purchased the business opportunity prior to the ending date in paragraph (a)(4)(iv) of this section who achieved at least the stated level of earnings;
 - (vi) Any characteristics of the purchasers who achieved at least the represented level of earnings, such as their location, that may differ materially from the characteristics of the prospective purchasers being offered the business opportunity; and
 - (vii) A statement that written substantiation for the earnings claim will be made

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available to the prospective purchaser upon request.

- (b) Make any earnings claim in the general media, unless the seller:
 - (1) Has a reasonable basis for its claim at the time the claim is made;
 - (2) Has in its possession written material that substantiates its claim at the time the claim is made;
 - (3) States in immediate conjunction with the claim:
 - (i) The beginning and ending dates when the represented earnings were achieved; and
 - (ii) The number and percentage of all persons who purchased the business opportunity prior to the ending date in paragraph (b)(3)(i) of this section who achieved at least the stated level of earnings.
- (c) Disseminate industry financial, earnings, or performance information unless the seller has written substantiation demonstrating that the information reflects or does not exceed the typical or ordinary financial, earnings, or performance experience of purchasers of the business opportunity being offered for sale.
- (d) Fail to notify any prospective purchaser in writing of any material changes affecting the relevance or reliability of the information contained in an earnings claim statement before the prospective purchaser signs any contract or makes a payment or provides other consideration to the seller, directly or indirectly, through a third party.

§ 437.5 Spanish and non-English language sales.

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

§ 437.6 Other prohibited practices.

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

- (a) Disclaim, or require a prospective purchaser to waive reliance on, any statement made in any document or attachment that is required or permitted to be disclosed under this Rule;
- (b) Make any claim or representation, orally, visually, or in writing, that is inconsistent with or contradicts the information required to be disclosed by ~~§§ 437~~ §§ 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

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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;

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- (e) Misrepresent that any governmental entity, law, or regulation prohibits a seller from:
 - (1) furnishing earnings information to a prospective purchaser; or
 - (2) disclosing to prospective purchasers the identity of other purchasers of the business opportunity;
- (f) Fail to make available to prospective purchasers, and to the Commission upon request, written substantiation for the seller's earnings claims;
- (g) Misrepresent how or when commissions, bonuses, incentives, premiums, or other payments from the seller to the purchaser will be calculated or distributed;
- (h) Misrepresent the cost, or the performance, efficacy, nature, or central characteristics of the business opportunity or the goods or services offered to a prospective purchaser;
- (i) Misrepresent any material aspect of any assistance offered to a prospective purchaser;
- (j) Misrepresent the likelihood that a seller, locator, or lead generator will find locations, outlets, accounts, or customers for the purchaser;
- (k) Misrepresent any term or condition of the seller's refund or cancellation policies;
- (l) Fail to provide a refund or cancellation when the purchaser has satisfied the terms and conditions disclosed pursuant to § 437.3(a)(4);
- (m) Misrepresent a business opportunity as an employment opportunity;
- (n) Misrepresent the terms of any territorial exclusivity or territorial protection offered to a prospective purchaser;
- (o) Assign to any purchaser a purported exclusive territory that, in fact, encompasses the same or overlapping areas already assigned to another purchaser;
- (p) Misrepresent that any person, trademark or service mark holder, or governmental entity,

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directly or indirectly benefits from, sponsors, participates in, endorses, approves, authorizes, or is otherwise associated with the sale of the business opportunity or the goods or services sold through the business opportunity;

(q) Misrepresent that any person:

- (1) Has purchased a business opportunity from the seller or has operated a business opportunity of the type offered by the seller; or
- (2) Can provide an independent or reliable report about the business opportunity or the experiences of any current or former purchaser.

(r) Fail to disclose, with respect to any person identified as a purchaser or operator of a business opportunity offered by the seller:

- (1) Any consideration promised or paid to such person. Consideration includes, but is not limited to, any payment, forgiveness of debt, or provision of equipment, services, or discounts to the person or to a third party on the person's behalf; or
- (2) Any personal relationship or any past or present business relationship other than as the purchaser or operator of the business opportunity being offered by the seller.

§ 437.67 Record retention.

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

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

§ 437.78 Franchise exemption.

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

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

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§ 437.~~89~~9 Outstanding orders; 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,~~A business ~~opportunities~~opportunity required by prior FTC or court order to follow the Franchise Rule, 16 CFR Part 436, may petition the Commission to amend the order or to stipulate to an amendment of the court order so that the business opportunity may follow the provisions of this part.
- (b) The FTC does not intend to preempt the business opportunity sales practices laws of any state or local government, except to the extent of any conflict with this part. A law is not in conflict with this Rule if it affords prospective purchasers equal or greater protection, such as registration of disclosure documents or more extensive disclosures. All such disclosures, however, must be made in a separate state disclosure document.

§ 437.~~910~~10 Severability.

The provisions of this part 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.

DISCLOSURE OF IMPORTANT INFORMATION ABOUT BUSINESS OPPORTUNITY

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

Name of Seller:

Address:

Phone:

Salesperson:

Date:

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

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

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

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

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

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

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

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

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

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

Signature: _____

Date: _____

By signing above, you are acknowledging that you have received this form. This is not a purchase contract. To give you enough time to research this opportunity, the Federal Trade Commission requires that after you receive this form, [Name of Seller] must wait at least seven calendar days before asking you to sign a purchase contract or make any payments.

For more information about business opportunities in general: Visit the FTC's website at www.ftc.gov/bizopps or call 1-877-FTC-HELP (877-382-4357). You can also contact your state's Attorney General.

DISCLOSURE OF IMPORTANT INFORMATION ABOUT BUSINESS OPPORTUNITY

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

Name of Seller:

Address:

Phone:

Salesperson:

Date:

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

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

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

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

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

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

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

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

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

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

Signature: _____

Date: _____

By signing above, you are acknowledging that you have received this form. This is not a purchase contract. To give you enough time to research this opportunity, the Federal Trade Commission requires that after you receive this form, [Name of Seller] must wait at least seven calendar business days before asking you to sign a purchase contract or make any payments.

For more information about business opportunities in general: Visit the FTC's website at www.ftc.gov/bizopps or call 1-877-FTC-HELP (877-382-4357). You can also contact your state's Attorney General.

DIVULGACIÓN DE INFORMACIÓN IMPORTANTE SOBRE OPORTUNIDAD DE NEGOCIO

Formulario requerido por la Comisión Federal de Comercio (FTC)

Regla 16 de la Parte 437 del Código de Regulaciones Federales

Nombre del Vendedor:

Domicilio:

Teléfono:

Representante de Ventas:

Fecha:

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

ACCIONES LEGALES: ¿La compañía [Nombre del Vendedor] o alguno de los principales miembros de su personal ha sido sujeto de una acción civil o penal, que involucre falsedad, fraude, infracción de las leyes de títulos y valores, o prácticas desleales o engañosas, incluyendo infracciones de las Reglas o Normas de la FTC, dentro de los 10 últimos años?

☐ **SI** → Si la respuesta es afirmativa, [Nombre del Vendedor] debe adjuntar al formulario una lista completa de dichas acciones legales.

☐ **NO**

POLÍTICA DE CANCELACIÓN O REINTEGRO: ¿Ofrece [Nombre del Vendedor] una política de cancelación o reintegro?

☐ **SÍ** → Si la respuesta es afirmativa, [Nombre del Vendedor] debe adjuntar al formulario una declaración con la descripción de dicha política.

☐ **NO**

INGRESOS: ¿La compañía [Nombre del Vendedor] o alguno de sus representantes de ventas ha manifestado la cantidad de dinero que pueden ganar o que han ganado los compradores de esta oportunidad de negocio? ¿Dicho en otras palabras, han expresado de manera explícita o implícita que los compradores pueden alcanzar un nivel específico de ventas, o ganar un nivel específico de ingresos?

☐ **SÍ** → Si la respuesta es afirmativa, [Nombre del Vendedor] debe adjuntar a este formulario una Declaración de los Ingresos Proclamados. Lea esta declaración atentamente. Puede que desee analizar esta información con un asesor o contador.

☐ **NO**

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

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

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

Firma: _____

Fecha: _____

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

Para más información sobre oportunidades de negocio en general: Visite el sitio Web de la FTC www.ftc.gov/bizopps o llame al 1-877-FTC-HELP (877-382-4357). Usted también puede establecer contacto con el Fiscal General de su estado de residencia.