



Guiding You Through the Legal Maze.™

BUYING A BUSINESS OPPORTUNITY

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BUYING A BUSINESS OPPORTUNITY

THE APPEAL OF BUSINESS OPPORTUNITIES

The appeal of business opportunities is that the seller generally offers to purchasers a chance to be their own boss by providing a "turn-key" business including materials needed to produce goods or provide services as well as training in the field coupled with some type of continuing support. As with franchises, sellers of business opportunities are primarily offering purchasers their "formula for success." Purchasers rely on the expertise of the seller in an effort to avoid costly mistakes that new business owners routinely make. Business opportunities are now offered in a myriad of fields too numerous to mention. They are marketed through advertisements placed in national magazines, newspapers, trade publications as well as through television and seminars at local hotel meeting facilities. As in any other field, there are honest and dishonest sellers.

The reasons to start your own business can be compelling either as a full-time venture, or on a part-time basis to supplement your income. Offers to assist you in these endeavors can be equally compelling. But you need to be cautious. There are many legitimate promoters of business opportunities and there are many who are not. You should be fully aware that starting any new business is a risky venture; regardless of any guarantees or assurances you receive from the seller.

Business Opportunities come in many forms. In some states they are called seller-assisted marketing plans. They may involve vending machines for a variety of products; coin-operated games or devices, display racks for toys, greeting cards or cosmetics; or some new technology such as ATMs and Internet Kiosks. They also include distributorships or dealerships that offer sales or marketing programs not related to a trademark license; or the operation of a "buy-back" program like chinchilla farms or "sew-at-home" businesses. The locations for these businesses can be virtually anywhere, including work-at-home programs. Typically, the sellers promise to help you with getting with your new business by finding locations for vending machines or rack displays, or accounts or giving you the name of a locating company; purchasing the products you make, or promising your money back if you are dissatisfied

REGULATION OF BUSINESS OPPORTUNITIES

The offer and sale of business opportunities are regulated at both the federal and state levels.

FTC Business Opportunity Rule

The FTC Business Opportunity Rule defines a "business opportunity" as a commercial arrangement that has the following 3 required elements:

1. The seller must solicit a prospective purchaser to enter into a new business (one in which the prospective purchaser is not currently engaged or a new line or type of business).
2. The purchaser must make a "required payment," that is, all consideration paid by the purchaser to the seller or an affiliate as a condition to obtaining or commencing the operation of the business opportunity except for payments for the purchase of a reasonable amount of inventory at bona fide wholesale prices for resale or lease.

3. The seller must represent that the seller or a designated person (such as a locator or lead generating company) will provide any of 3 types of assistance:

(i) providing locations for the purchaser's use or operation of equipment, displays, vending machines, or similar devices that the Purchaser controls;

(ii) providing outlets, accounts or customers to the purchaser; or (iii) buying back any of the goods or services that the purchaser makes.

The FTC Business Opportunity Rule requires the business opportunity seller to provide to a prospective purchaser a 1-page written FTC Business Opportunity Disclosure Document containing 5 items of information at least 7 calendar days before a prospective purchaser may sign any documents or pay any money to the seller. The FTC Business Opportunity Disclosure Document must include:

1. **Information Regarding Seller.** The seller's identifying information including its name, business address, telephone number, the name of the salesperson offering the business opportunity and the date when the FTC Business Opportunity Disclosure Document is furnished to the purchaser.

2. **Earnings Claim.** The seller must disclose whether it makes an earnings claim. The seller is not obligated to make an earnings claim and can check the "no" box. However, if the seller does make an earnings claim, the seller must check the "yes" box and provide the purchaser with a separate earnings claim statement titled 'EARNINGS CLAIM STATEMENT REQUIRED BY LAW' setting forth:

(i) the name of the person making the claim;

(ii) the date of the claim;

(iii) the actual earnings claim;

(iv) the beginning and ending dates during which the represented earnings were achieved;

(v) the number and percentage of purchasers who achieved the represented level of earnings;

(vi) any characteristics that distinguish purchasers who have achieved the represented level of earnings from those characteristics of the prospective purchasers; and

(vii) other substantiating information.

The seller must have a reasonable basis for the claim at the time the earnings claim is made. The seller can make an earnings claim in the general media. A seller can use industry information only if the seller is able to measure the performance of existing purchasers and documents those the existing purchasers' typical performance equals or exceeds the average performance of other business opportunities available in the industry. The use of a chart, table or mathematical calculation that demonstrates possible results based on a combination of variables constitutes an earnings claim.

3. **Legal Actions.** Whether the seller, its affiliates (including a parent or subsidiary) or key personnel (including in a prior business) have been involved in any civil or criminal “legal action” against the seller or its representatives (any sales manager, or individual who occupies a position or performs a function similar to an officer, director or sales manager of the seller) within the past 10 years that “involve fraud, misrepresentation, securities law violations, or deceptive or unfair practices including violation of any FTC rule.” This includes matters in arbitration or governmental actions. It does not include a bankruptcy filing. If there is any such legal action, the seller must include a separate page setting forth the full caption of each action and may choose to include a brief (not to exceed 100 words) description of the action.

4. **Cancellations or Refunds.** The seller must disclose its cancellation or refund policies, if any. The FTC Business Opportunity Rule does not give a purchaser a post-sale right to rescind. If the seller does not have a cancellation or refund policy, it will mark the “no” box. If the seller has a cancellation or refund policy, it will mark the “yes” box and attach a separate page describing the material terms of the seller’s cancellation or refund policy. This includes 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; and where unused inventory must be returned to and by what method.

5. **List of Purchasers.** The seller must provide a list of the 10 purchasers of the business opportunity closest to the prospective purchaser’s home, or in the alternative, a list of all purchasers during the last 3 years. The list must include only the prior purchasers’ name, state (not address) and telephone number.

The seller does not file the FTC Business Opportunity Disclosure Document with the FTC and the FTC does not approve it but the seller has the burden of proving compliance with the Rule. The Rule does not preempt (eliminate) state business opportunities laws. A seller cannot include disclosures required by state law in the FTC Business Opportunity Disclosure Document. If a seller is subject to both the FTC Business Opportunity Rule and a state’s business opportunity law, it must prepare and provide the purchaser with both disclosure documents. The seller is required to attach a duplicate copy of the FTC Business Opportunity Disclosure Document and any attachments, which are to be signed and dated by the Purchaser. The seller can send the FTC Business Opportunity Disclosure Document to the Purchaser electronically and an electronic or digital signature of the purchaser is allowed. If the seller conducts sales of its business opportunities in languages other than in English, the FTC Biz Op Disclosure Document must be in the same language.

Florida Sale of Business Opportunities Act

If the business opportunity is located in Florida or the seller is selling the business opportunity to a Florida resident it is also regulated by Florida law Under the Florida Sale of Business Opportunities Act (contained in Chapter 559, Part IX of the Florida Statutes), a "business opportunity" is defined as: the sale or lease of any products, equipment, supplies, or services to enable you to start a business for a price or fee that exceeds \$500 and the seller promises that it:(or anyone affiliated with or referred by it) will do **any one** of the following:

- provide locations, or assist you in finding locations, for the use of vending machines, racks, display cases, or other similar devices, or currency operated amusement machines or devices, on premises that neither you nor the seller own or lease; or

- will buy any of the things you make, produce, fabricate, grow, breed, or modify using supplies, services, or goods sold to you;
- guarantees in writing that you will earn income exceeding the price or rent you pay;
- will refund all or part of the price or rent paid;
- will repurchase any of the products, equipment, supplies, or goods supplied by it, if you are unsatisfied; **or**
- will provide a sales or marketing program enabling you to earn income.

Excluded from the definition of "business opportunities" are the sale of ongoing businesses with some conditions, the not-for-profit sale of sales demonstration equipment, materials or samples for a price that does not exceed \$500; any sales training course offered by the seller that does not exceed \$500; the sale or lease of laundry and dry cleaning equipment; certain franchise offerings; and sales or marketing programs accompanied by the licensing of a registered trademark.

The disclosure document required by Florida for a business opportunity is not regulated by federal law and contains more information than contained in an FTC Business Opportunity Disclosure Statement and must be given at least 3 working days for you sign any contract or give the seller any money. Its requirements are:

1. The name of the seller; whether the seller is doing business as an individual, partnership, corporation, or other business entity; the names under which the seller has done business; and the name of any parent or affiliated company that will engage in business transactions with the purchasers or who takes responsibility for statements made by the seller.

2. The names, addresses, and titles of the seller's officers, directors, trustees, general partners, general managers, and principal executives and of any other persons charged with the responsibility for the seller's business activities relating to the sale of business opportunities.

3. The length of time the seller has:

(a) Sold business opportunities; or

(b) Sold business opportunities involving the products, equipment, supplies, or services currently being offered to the purchaser.

4. A full and detailed description of the actual services that the business opportunity seller undertakes to perform for the purchaser.

5. A copy of a current (not older than 13 months) financial statement of the seller, updated to reflect material changes in the seller's financial condition.

6. If training is promised by the seller, a complete description of the training, the length of the training, and the cost or incidental expenses of that training, which cost or expense the purchaser will be required to incur.

7. If the seller promises services to be performed in connection with the placement of the equipment, product, or supplies at a location, the full nature of those services as well as the nature of the agreements to be made with the owners or managers of the location where the purchaser's equipment, product, or supplies will be placed.

8. If the business opportunity seller is required to secure a bond, guaranteed letter of credit, or certificate of deposit pursuant to § 559.807, either of the following statements:

(a) "As required by Florida law, the seller has secured a bond issued by _____, a surety company authorized to do business in this state. Before signing a contract to purchase this business opportunity, you should confirm the bond's status with the surety company."; or

(b) "As required by Florida law, the seller has established a guaranteed letter of credit or certificate of deposit (number of account) with (name and address of bank or savings institution). Before signing a contract to purchase this business opportunity, you should confirm with the bank or savings institution the current status of the guaranteed letter of credit or certificate of deposit."

9. The following statement: "If the seller fails to deliver the product, equipment, or supplies necessary to begin substantial operation of the business within 45 days of the delivery date stated in your contract, you may notify the seller in writing and cancel your contract."

10. If the seller makes any statement concerning sales or earnings or a range of sales or earnings that may be made through this business opportunity, a statement disclosing:

(a) The total number of purchasers of business opportunities involving the product, equipment, supplies, or services being offered who have actually achieved sales of or received earnings in the amount or range specified within 3 years prior to the date of the disclosure statement.

(b) The total number of purchasers of business opportunities involving the product, equipment, supplies, or services being offered within 3 years prior to the date of the disclosure statement.

11. (a) The total number of persons who purchased the business opportunity being offered by the seller within the past 3 years.

(b) The names, addresses, and telephone numbers of the 10 persons who previously purchased the business opportunity from the seller and who are geographically closest to the potential purchaser.

12. A statement disclosing who, if any, of the persons listed in subsections (1) and (2):

(a) Has, at any time during the previous 10 fiscal years, regardless of adjudication, been convicted of, or found guilty of, or pled guilty or nolo contendere to, or has been incarcerated within the last 10 years as a result of having previously been convicted of, or found guilty of, or pled guilty or nolo contendere to, a felony or a crime involving fraud, theft, larceny, violation of any franchise or business opportunity law or

unfair or deceptive practices law, embezzlement, fraudulent conversion, misappropriation of property, or restraint of trade.

(b) Has, at any time during the previous 7 fiscal years, been held liable in a civil action resulting in a final judgment or has settled out of court any civil action or is a party to any civil action involving allegations of fraud (including violation of any franchise or business opportunity law or unfair or deceptive practices law), embezzlement, fraudulent conversion, misappropriation of property, or restraint of trade or any civil action which was brought by a present or former franchisee or franchisees and which involves or involved the franchise relationship. However, only material individual civil actions need be so listed pursuant to this paragraph, including any group of civil actions which, irrespective of the materiality of any single such action, in the aggregate is material.

(c) Is subject to any currently effective state or federal agency or court injunctive or restrictive order, or has been subject to any administrative action in which an order by a governmental agency was rendered, or is a party to a proceeding currently pending in which such order is sought, relating to or affecting business opportunities activities or the business opportunity seller-purchaser relationship or involving fraud (including violation of any franchise or business opportunity law or unfair or deceptive practices law), embezzlement, fraudulent conversion, misappropriation of property, or restraint of trade.

Such statement shall set forth the identity and location of the court or agency; the date of conviction, judgment, or decision; the penalty imposed; the damages assessed; the terms of settlement or the terms of the order; and the date, nature, and issuer of each such order or ruling. A business opportunity seller may 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.

13. A statement disclosing who, if any, of the persons listed in subsections (1) and (2) at any time during the previous 7 fiscal years has:

- (a) Filed in bankruptcy.
- (b) Been adjudged bankrupt.
- (c) Been reorganized due to insolvency.

(d) Been a principal, director, executive officer, or partner of any other person that has so filed or was so adjudged or reorganized during or within 1 year after the period that such person held such position in relation to such other person. If so, the name and location of the person having so filed or having been so adjudged or reorganized, the date thereof, and any other material facts relating thereto shall be set forth.

14. A copy of the business opportunity contract which the seller uses as a matter of course and which is to be presented to the purchaser at closing.

The Disclosure Statement must also include a copy of the business opportunity contract or purchase order that the seller uses which will be presented to the purchaser at closing. All contracts must be in writing and must contain the terms of payment, a full and detailed description

of the acts or services that the seller is to perform for the purchaser, the seller's principal business address, the name and address of its agent in the State of Florida who is authorized to accept service of process as well as the approximate delivery date of products and supplies which the seller is to deliver to the purchaser. A copy of the seller's current (not older than 13 months) financial statement must also be included, but it does not need to be audited.

HOW MUCH MONEY CAN I MAKE?

This is probably your first and most important question. However, sellers are not legally obligated to tell you anything about it. This is where many sellers get into trouble. Some sellers say they do not provide a written earnings claim disclosure statement and say in the disclosure document they make no earnings claims but the salesperson gives you numbers orally. This is a violation of the law. Other sellers make outrageous claims such as "Make \$100,000 in your spare time" or use a multiplication table that are totally untrue and unsubstantiated. Talk to the existing purchasers and ask them how they are doing. Do industry research and hire an accountant to assist you in preparing a business plan. Put everything in writing including any earnings claim they make.

WHO REGULATES BUSINESS OPPORTUNITIES IN FLORIDA?

The task of regulating business opportunities in Florida is handled by the Florida Division of Consumer Services. Sellers who offer business opportunities in Florida must register their business opportunity with the Division before doing so. Before investing in a business opportunity, purchasers should first call the Division to verify that the seller has registered. The Division's phone numbers are presently (800) HELP-FLA or (850) 488-2221. The Division can confirm registration and give you the complaint history on all registered companies. The Division reports complaints received without making any findings as to the merits of any complaints on file

ARE THERE ANY PENALTIES FOR A SELLER'S FAILURE TO COMPLY WITH THE SALE OF BUSINESS OPPORTUNITIES ACT?

Yes. Under Florida law, if a business opportunity seller uses untrue or misleading statements in the sale of a business opportunity, fails to give the proper disclosures, or fails to deliver the materials necessary to begin substantial operation of the business within 45 days of the date stated in the contract, the purchaser may, within one year of the date of signing the contract, rescind the contract and be entitled to receive a refund of all monies paid from the seller. Any purchaser who is the victim of a violation of the Florida law may also file suit against the seller for damages including their reasonable attorney's fees for up to 4 years. The Division can order the seller to cease and desist from selling business opportunities until the seller complies with Florida law, impose a fine of up to \$5,000 per violation, or turn the matter over to other law enforcement authorities to seek injunctions or criminal prosecution.

The federal law is administered by the Federal Trade Commission (the "FTC"). There is no private right to sue for a violation of the federal law governing business opportunities, but the FTC frequently enforces it on both a civil and criminal basis. However, a violation of the FTC Franchise Rule is a violation of the Florida Unfair or Deceptive Practices Act (Chapter 501, Part II of the Florida Statutes) entitling you to sue for rescission and/or damages.

HOW TO PROTECT YOURSELF

Make certain that you obtain an FTC Business Opportunity Disclosure Statement if the business opportunity involves vending machines, coin-operated devices or rack displays or a Florida Business Opportunity Disclosure Document for all other types of business opportunities from the seller before you sign any contract or pay any money whatsoever to the seller. Beware of any seller that does not provide you a Disclosure Statement before you have to ask for it. Call the Division to make certain that the seller is registered. You may also want to check additional sources of information, such as the Better Business Bureau located in the seller's area. Check with the National Fraud Information Center ("NFIC") at 1-800-876-7060, or at [HTTP://www.fraud.org](http://www.fraud.org). The NFIC is a private, non-profit organization that operates a consumer hotline to provide service and assistance in filing complaints. It enters complaints into a computerized database to help track and identify fraud operators. You may also want to contact the FTC's Bureau of Consumer Protection at 202-326-2222 or one of its many regional offices. Although the FTC will not resolve your dispute, your information may demonstrate a pattern of violations of federal law that may prompt the FTC to take enforcement action. You should verify claims made by the seller and check its references. The seller must provide you with the names, addresses and telephone numbers of at least 10 prior purchasers of the business opportunity. Ask these other operators of the business opportunity about their experiences. How many business opportunities does the seller own and operate? If none, maybe they are really in the business of selling overpriced products and don't care if you are successful. **Don't believe promises that are not made in writing.**

The purchase of a business opportunity is a large investment of time and money. You should seek the assistance of a qualified lawyer who is familiar with franchise and business opportunity laws. You may also want to seek the advice of a qualified accountant to review any financial information provided by the seller. If you do not already have a lawyer, you may want to seek a referral through your local bar association or The Florida Bar at 1-800-342-8011 or one of Florida's lawyer referral services listed under "Attorneys" in the yellow pages of your telephone book.

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