

Buying a Business Opportunity



THE FLORIDA BAR

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A NOTE OF CAUTION

The information contained in this pamphlet is believed to be accurate at the time of printing. However, it is general in nature. It is not a legal opinion of The Florida Bar, but merely a summary of legal issues regarding the topic covered. No part of this pamphlet should be relied upon as legal advice. You should consult an attorney familiar in these matters, such as a franchise attorney, when considering the purchase of 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 is regulated at both the federal and state levels. Under federal law, (the “FTC Franchise Rule”) sellers of business opportunity ventures where location assistance is suggested or provided, or accounts or routes are given, must give you a lengthy disclosure document called an FTC Disclosure Statement at least 10 business days before you sign an agreement or give the seller any money. The FTC Disclosure Statement provides important information about the sellers and the type of business to be operated. It includes information regarding:

1. Identity of the seller.
2. Identity and business experience of the seller’s directors and executive officers, and their occupations and employers within the past 5 years.
3. Business experience of the seller and its parent related to business operations.
4. Litigation history of the seller, its parent and its director and officers during previous 7 fiscal years.
5. Bankruptcy history of the seller, its parent and its officers and directors for the previous

7 fiscal years.

6. Factual description of the business opportunity.
7. Initial investment requirements of the business opportunity.
8. Recurring funds to be paid by the purchaser.
9. The seller's affiliates that the purchaser is required or advised to do business.
10. Identification of products which the purchaser is obligated to buy and the sellers of products
11. Consideration received by the seller from suppliers to the purchaser.
12. Financing arrangements offered by the seller.
13. Limits on the purchaser regarding products or services sold, and territorial protection granted by the seller.
14. Requirements for the purchaser to personally participate in operating the franchise.
15. Duration of the purchase agreement or purchase order; conditions affecting renewal, termination or sale; the seller's right to repurchase the business opportunity; the parties' rights after termination of the purchase agreement or purchase order; and the provisions of any covenant not to compete.
16. Statistical information concerning the number of business opportunities sold including the names, addresses and telephone numbers of the purchasers.
17. Site selection assistance.
18. Training program descriptions.
19. Descriptions of public figure involvement.

20. Financial information concerning the franchisor. There is a 3-year phase-in of audited financials statements.

This FTC Disclosure Statement is required if the proposed relationship constitutes a business opportunity venture under federal law. A proposal to start a business will be considered a business opportunity venture under federal law if:

- you are required to pay the seller \$500 or more when you sign the contract or within 6 months after you begin operations;
- you will sell or distribute goods or services that are supplied by the seller or someone the seller designates; and
- the seller offers to help you by securing locations, sites or accounts for the products.

Although the seller is required to provide you with the FTC Disclosure Statement, it is **not** required to register with any federal agency. However, if the business opportunity is located in Florida or is selling the business opportunity to a Florida resident it is also regulated by Florida law, and the seller must register with the Florida Division of Consumer Services of the Department of Agriculture and Consumer Services.

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 less information that contained in an FTC 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.[When will the info be on a web site?]

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 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.

The Florida Bar's statewide Fee Arbitration Program is available and authorized by the Florida Supreme Court to settle fee matters. The arbitration process was designed as an alternative to the court system for the resolution of fee disputes. The sole purpose of a fee arbitration hearing is to decide the fair and reasonable value of the legal services performed for a client by an attorney. As the program is voluntary, binding arbitration, the process cannot be put into effect unless both parties agree to arbitrate. If you would like additional information on the Fee Arbitration Program, please forward a written request to: Fee Arbitration Administrator, The Florida Bar, 651 E. Jefferson St., Tallahassee, Florida 32399-2300.

The material in this pamphlet represents general legal advice. Since the law is continually changing, some provisions in this pamphlet may be out of date. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.

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