

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

INITIAL COMMENTS

On

NOTICE OF PROPOSED RULEMAKING

**REGARDING A PROPOSED
BUSINESS OPPORTUNITY RULE**

R511993

(16 C.F.R. Part 437)

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thousands of dollars using schemes and evasions promising to offer high reward on little or no investment. Under such circumstances it is important for the Commission to establish clear rules governing conduct. Thus, we are strongly supportive of Proposed Rule 437.5, which clearly identifies prohibited practices.² In addition, disclosure obligations, such as those contained in the Proposed Rule can be appropriate, though as noted below, we believe that the specific disclosure obligations proposed are inconsistent with the individuals' reasonable expectations of privacy and must be modified accordingly.

There is a more fundamental issue however. The Commission has rightly concluded that it should adopt rules regulating business opportunities that "are permeated with fraud,"³ but in doing so it must define "Business Opportunity" clearly and in light of record evidence of specific threat of harm. As currently drafted, the proposed definition of "Business Opportunity" is simply too broad, and on its face could conceivably be interpreted to apply to the publication and sale of bona fide educational courses and related training materials. Thus, for the reasons discussed below, the Commission should modify the Proposed Rule to explicitly exempt or otherwise disclaim from application of the Rule the publication and sale of educational materials (e.g., books and audio visual materials) and the promotion and sale of educational coursework. The Firm also believes the record evidence is not currently sufficient and is unlikely to be sufficient

² The practices prohibited by Proposed Rule 437.5 are general and, therefore, have broad reach, yet at the same time are clear on their face (e.g., it is unfair or deceptive for a party to: misrepresent how or when commissions, bonuses, incentives or other payments will be calculated or distributed; misrepresent any material aspect of any assistance offered to a prospective purchaser; misrepresent any term or condition of the seller's refund or cancellation policies, etc.).

³ NPRM at 19057.

based upon the comments to be received, and requests below that that Commission undertake hearings on this important issue.

Lastly, these comments address certain other aspects of the Proposed Rule, including its provisions relating to what are termed "earnings claims" (and the disclosures triggered by such claims), the proposed requirement that information be disclosed seven calendar days before a prospective purchaser makes any payment, and other disclosure document-related issues.

DISCUSSION

II. The Proposed Definition of "Business Opportunity" is Overbroad

The Proposed Rule defines a "Business Opportunity" as (i) any commercial arrangement in which (ii) the seller solicits a prospective purchaser to enter into a new business where (iii) the prospective purchaser makes a payment, and (iv) the seller makes an earning claim or represents that the seller or another will provide the purchaser with "business assistance." Proposed Rule 437.1(d). "Business assistance" in turn, is defined as the offering of "material advice, information or support to a prospective purchaser in connection with the establishment or operation of a new business." Proposed Rule 437.1(c).

Importantly, key terms are not defined. For example, "commercial arrangement" is not defined, and no distinction is made between a "commercial arrangement" and "educational" arrangements. Taken literally and together, these rules are both vague and overbroad because they capture the publication and sale of educational materials and educational coursework, as described in more detail below.

Undoubtedly the drafters had in mind a common-sense reading of this definition consistent with the Commission's own experience of promoters failing to provide services necessary to make a Business Opportunity non-fraudulent. Read literally however, it would

appear to encompass a remarkable number of traditional business activities, including (for example), the sale of any kind of business advice, including books on how to make money on eBay, on the stock market, with real estate, or the like.⁴ Thus, the Proposed Rule needs to be more narrowly tailored so as to distinguish education related activities from schemes with a high probability of fraud, work-at-home scams and pyramid marketing schemes.

The NPRM itself acknowledges that the Rule is overbroad, and therefore unreasonably vague. The scope of the Rule is overbroad:

The proposed Business Opportunity Rules calls for streamlined disclosures that, compared to the Franchise Rule, substantially reduce the compliance burden. Therefore, the kinds of limits written into the Franchise Rule are not necessary to achieve an appropriate balance between prospective purchasers' need for pre-sale disclosure and the burden imposed on business opportunity sellers. ***Accordingly, the proposed Rule has no minimum cost threshold, no inventory exemption, and no limit on scope based upon the type of assistance promised as part of the offer.***⁵

The Commission has recognized that the rules must be narrowly tailored to minimize compliance costs (NPRM at 19057). Nevertheless, by the Commission's own admission, the rule is overly broad, rendering it susceptible to unreasonable interpretation.⁶ Consistent with this, the

⁴ More generally, the Proposed Rule would necessarily seem to apply to the sale of any small business or to any partnership. For example, as drafted the Proposed Rule would appear to apply each time a new partner elects to join a law firm.

⁵ NPRM at 19055 (emphasis added).

⁶ See *Arthur Murray Studio of Washington, Inc. v. F. T. C.*, 458 F.2d 622 (5th Cir. 1972) (holding that the FTC has the authority to restrict otherwise lawful practices and activities when they are likely to be used to carry out an unlawful purpose, but that the remedy should be no broader in restricting legitimate acts than is reasonably necessary under the circumstances). See also *Spiegel, Inc. v. Fed. Trade Comm'n.*, 411 F.2d 481 (7th Cir. 1969), and *Fed. Trade Comm'n v. Royal Milling Co.*, 288 U.S. 212 (S. Ct. 1933).

comments which follow are intended to provide guidance on how the Proposed Rule can be more narrowly tailored and thus be made a more effective tool for enforcement purposes.⁷

III. The Record Needs to Reflect Additional Facts Concerning the Predicate Fraudulent Behavior Intended to be Protected Against By the Proposed Rule and Hearings Should Be Held

The NPRM notes that the fraudulent business opportunities that have been the subject of Commission law enforcement initiatives have been work-at-home scams, pyramid marketing schemes, and schemes requiring the purchase of inventory from the business opportunity promoter. Work-at-home schemes typically promise buy-back assistance, pyramid schemes typically promise commission tracking and payment assistance, and inventory-purchase arrangements benefit the promoter through the tying of the sale of goods to the so-called business opportunity. In all of these cases the effectiveness of the business opportunity depends upon the promoter providing future and on-going assistance -- which often fails to materialize after the business opportunity has been "sold."

However the record currently contains virtually no information about actual fraudulent business opportunity practices -- and nothing about how they differ from legitimate business

⁷ The Commission has a proud history of opposing overbroad regulation. For example, in response to a 2002 American Bar Association ("ABA") request for comments on an ABA proposed Model Definition of the Practice of Law, the Commission and the U.S. Department of Justice filed joint comments remarking that the ABA's proposed definition of the practice of law was overbroad. Finding that it was, the Commission recommended that the Model Definition be "substantially narrowed or rejected" because the definition was not "appropriately tailored" to specific harms and thus, "[i]f adopted by state governments, the proposed Definition is likely to raise costs for consumers and limit their competitive choices." Perhaps most importantly, "[t]he Task Force provides no [record] evidence of consumer harm to be remedied," which is the precise point made in these comments vis-à-vis the publication and sale of educational materials and coursework. See December 20, 2002, Federal Trade Commission and Department of Justice joint letter comments to the ABA Model Task Force on the Practice of Law, at <http://www.usdoj.gov/atr/public/comments/200604.htm>

practices. For instance it does not include any information regarding the fraudulent business opportunities that have been the subject of successful (or unsuccessful) Commission, state and local enforcement activities.⁸ Nor does it include any meaningful information on the scope or subject of the business opportunity-type complaints the FTC or state and local officials have received (NPRM at 19058), nor does it include any analysis or categorization of the complaints. In order to distinguish between potentially offending conduct and non-offending conduct, such information must be included in the record. For example, a detailed analysis of the common characteristics of the business opportunity schemes enforced by the Commission would help industry understand better the predicate actions that reasonably fall within the scope of the Proposed Rule. The record currently provides no such assistance.

In light of these concerns, and given the breadth and complexity of the Proposed Rule, the Firm urges the Commission to hold hearings with cross-examination and post-hearing rebuttal submissions, as specified in Section 18(c) of the FTC Act. While holding one or more informal public workshops would be preferable to relying on written comments, the Firm believes that more formal rulemaking hearings is necessary to generate a comprehensive record and lead to a superior final outcome, one that enables the Commission to aggressively and confidently enforce the rule ultimately adopted. Such a record would also be of considerable benefit to state authorities, who look to the Commission for guidance in this area (*see* footnote 7, *infra*).

⁸ See Federal Trade Commission, *FTC in 2005: Standing Up for Consumers and Competition (2005)* (discussing "Project Biz Opp Flop."), at 18, at <http://www.ftc.gov/os/2005/04/0504abareportfinal.pdf>.

If hearings (or one or more workshops) are held in connection with this proposed rule, we would expect one or more of our clients to request the opportunity to testify and otherwise participate in those hearings (or workshops).

IV. The Commission Should Modify the Proposed Rule to Clarify That It Does Not Apply to the Publication and Sale of Educational and Training Materials

A. As Drafted the Proposed Rule Would Apply on its Face to the Activities of Many, if not Most, Colleges and Universities As Well As Individual Educational Programs

By way of illustration of the unreasonable breadth of the Proposed Rule, this section of the comments illustrate the degree to which the Proposed Rule could be interpreted to apply to activities traditionally undertaken by colleges, universities, for-profit educational companies, and to publishers and booksellers generally.

Colleges and universities universally emphasize the economic benefits of obtaining both undergraduate and graduate degrees. For example, as part of its marketing materials, Strayer University, one of the larger private, for-profit educational institutions in the country, prominently displays statistics showing the disparity in workforce earnings between high school graduates and those with university degrees:

In terms of average weekly earnings, a high school diploma is worth \$588, a bachelor's degree \$949, a master's degree \$1109, and a doctorate or professional degree \$1376.⁹

⁹ See Strayer University, *Financial Services: because you recognize the value of education*, <http://www.strayer.edu/handler.cfm?cid=08899D9F-F84A-424B-BF1A6BFE4E567FAF&sid=3524A52D-D71C-4792-8029BF3D51657E09> (last visited July 14, 2006).

This page proceeds to note (among other things) that "Your education at Strayer University could well be the best investment you'll ever make. Indeed, its value is hard to quantify in terms of the personal satisfaction and professional rewards you're likely to reap."

There is nothing remarkable or unique about Strayer University's citation of statistics regarding the earning power of education — except that it places Strayer University squarely within the ambit of the proposed Business Opportunity Rule. "Earnings claim" is defined in the proposed rule as

any oral, written or visual representation to an [sic] prospective purchaser that conveys, expressly or by implication, a specific level or range of actual or potential sales, or gross or net income or profit. 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 a year.'

The statistics cited by Strayer are specific and unambiguously establish an "earnings claim" under Proposed Rule 437.1(h). Further, Strayer satisfies all other predicates of a "business opportunity" seller if "commercial arrangement" is interpreted to apply to an educational program, particularly a private, for-profit educational program. It seems unlikely that the Proposed Rule was intended to capture bona fide educational programs. Given the size and complexity of the educational market in the U.S. (both public and private, and both non-profit and for-profit), the proposed Rule should, at a minimum, explicitly exempt or otherwise disclaim educational materials from the proposed Rule.

Other examples abound. The Cambridge Center for Adult Education is a non-profit organization¹⁰ that was incorporated in 1876 as the Cambridge Social Union and is currently

¹⁰ A question exists whether the FTC's jurisdiction would extend to the marketing of courses and other educational materials by non-profit entities such as colleges and universities. This could turn on the facts surrounding manner in which the courses are marketed and the use of any funds received. *See*

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supported by grants from the Cambridge, MA Arts Council and many well-known foundations and businesses. It offered a one-day course in June 2006 called "Starting Your Own Import Business." The online course catalog describes the course as follows:

This exciting seminar will introduce you to the lucrative business of importing. Whether you currently own a small business and are looking for new product lines, or simply want to explore an exciting new business, this course will cover the basics of importing at minimal cost. Discover how to locate overseas supplies, how to pay foreign suppliers without financial risk, and how to set up international transportation, documentation, and U.S. Customs regulations. You'll also learn about thousands of various products from around the world, many of which are not currently on the U.S. market. This course has been designed for first-time importers with no experience.¹¹

Also, in November 2006 the Arts Extension Service of the University of Massachusetts (Amherst) will offer a one-day course called "Getting Paid to Talk: An Introduction to Professional Voice-Over." Its online catalog described that course as follows:

Have you ever been told you have a great voice? Why not put it to work this Fall? Join professional voice-over producer John Gallogly for this introductory workshop designed to provide you with an opportunity to test the waters and exercise your skills in voice-over acting! Voice-over actors are needed for television, film, radio, books on tape, documentaries, video games and more. Discover what it takes to break into this exciting business, including how to prepare the all important demo, how to research potential employers, and how to adapt your abilities to the demands of the voice-over industry. Listen to examples of actual demos recorded by professionals and then record your own commercial script under the direction of our producer! This class is informative, lots of fun,

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National Fed. of the Blind v. Fed. Trade Comm'n, 420 F.3d 331 (4th Cir. 2005) (holding that FTC jurisdiction extends to a non-profit entity where marketing on behalf of the non-profit is conducted by a for-profit entity). Such facts should thus be included in the record. This supports our request that the Commission hold formal hearings in this proceeding.

¹¹ The Cambridge Center for Adult Education, *Courses: Starting Your Own Import Business*, http://www.ccae.org/catalog/courses/course_details.php?id=526095 (last visited July 14, 2006).

and a great first step to anyone interested in professional voice over work.¹²

Similarly, Northern Virginia Community College offers a number of courses that appear to squarely fall within the proposed Business Opportunity Rule. "Successful Real Estate Investing" is one such course ("Create wealth by investing in real estate, just as most self-made millionaires do. This course will show you the fundamentals of safe and successful real estate investing. Topics covered will include how to locate good buys, negotiate with sellers, creative financing, working deals with investors and much more").¹³ Another is "Learn to Buy and Sell on eBay" ("If you've ever dreamed of working from home or just earning extra income by buying and selling goods online, our experienced instructors will guide you every step of the way. You'll learn how to create titles that get noticed, how to craft advertising copy that sells items quickly and for top dollar, and how to create and upload photos of the items you are selling. You'll also learn how to safely conduct financial transactions, how to accept credit card payments, and how to pack and ship any item hassle-free").¹⁴ Yet another is "Publish It Yourself: How to Start and Operate Your Own Publishing Business" ("Convert manuscripts into extra income by starting

¹² University of Massachusetts Amherst, *Act 30 Getting Paid to Talk—An Introduction to Professional Voice Over*, <https://www.umasslearn.net/DCEsearch.asp?search=ACT&type=NcCourseList&cat=fall06> (last visited July 14, 2006). While the University of Massachusetts is clearly a non-profit entity, it is unclear whether, or to what extent, it is associated with for-profit activities. The same can be said with regard to many large, traditionally non-profit educational organizations.

¹³ Northern Virginia Community College Alexandria Campus, *Continuing Education and Workforce Development*, <http://www.nvcc.edu/alexandria/continuing/allcourses.asp> (last visited July 14, 2006).

¹⁴ Northern Virginia Community College Alexandria Campus, *Courses: Learn to Buy and Sell on eBay*, <http://www.ed2go.com/cgi-bin/oic3/newcrsdes.cgi?name=nvccal&course=eby&title=Learn^to^Buy^and^Sell^on^eBay&departmentnum=BP&path=1> (last visited July 14, 2006).

your own publishing company. Avoid common pitfalls that can slow the growth of your publishing enterprise. Learn how to format your works in a way that will save you hundreds of dollars. Find out everything you need to know to profit from your own publishing company: how to plan and design a cover, select paper, register your works, choose a printer, price your products, acquire barcodes, market your books, establish distribution channels, fulfill orders, and more").¹⁵

Educational courses are also offered by for-profit firms. In addition to the prior example of Strayer University, SEAK, Inc. offers a one-day course titled *How to Start and Build a Successful Expert Witness Practice*, which the company's website described as "an intensive introductory workshop that is designed to show prospective and novice expert witnesses exactly what will be expected of them and how to start and build a successful expert witness practice. This course is specifically designed for prospective and novice expert witnesses and requires no advanced knowledge or training. Attendees will learn from experienced faculty in a step-by-step fashion how to start and build a successful expert witness practice."¹⁶ This course includes sessions on "Spreading the Word – Marketing Your New Expert Witness Practice" ("In this segment, the faculty will show attendees numerous techniques to cost effectively market an expert witness practice and get high quality cases. Included, will be a frank discussion of what

¹⁵ Northern Virginia Community College Alexandria Campus, *Courses: Publish It Yourself: How to Start and Operate Your Own Publishing Business*, <http://www.ed2go.com/cgi-bin/oic3/newcrsdes.cgi?name=nvccal&course=piy&title=Publish^It^Yourself:^How^to^Start^and^Operate^Your^Own^Publishing^Business&departmentnum=BP&path=1> (last visited July 14, 2006).

¹⁶ SEAK, Inc., *How to Start and Build a Successful Expert Witness Practice*, <http://www.seak.com/seaug06expwitnesspractice.htm> (last visited July 14, 2006).

works and what doesn't work. Techniques discussed include networking, word of mouth, 24/7 marketing, internet marketing, directories, advertising, writing, speaking and expert witness referral agencies.") and "Essentials of Expert Witness Practice Management" ("In this section attendees will learn the nuts and bolts of expert witness practice management. Included will be a discussion of how much to charge, what to charge for, how and when to collect your fee, how to prepare a basic retention agreement, and expert witness risk management. Sample forms will be provided to attendees."). *Id.*

The Proposed Rule would also encompass the educational programs offered by eBay, a for-profit corporation. eBay offers training courses around the country to teach consumers how to use eBay for personal use and for the building commercial sales organizations. Its marketing includes the following:

Attend the **Selling Basics** course if you're just getting started and learn about:

- Basic selling techniques
- How to create listings
- How to accept online payments with PayPal, and more.

Attend **Beyond the Basics of Selling** to take your sales to the next level and learn:

- Advanced selling techniques
- How to market your eBay listings
- What selling tools will save you time and increase sales, and more.

Attend **eBay for Business** if you want to turn your eBay operation into a business entity. This curriculum will discuss:

- Tax issues that can affect your business
- Operations and inventory management
- How to maximize your sales with Internet marketing
- How to find new sources of inventory, and much more.¹⁷

¹⁷ eBay, *General Announcements: Original: Reminder to Attend eBay University in Miami, FL on September 17th (September 8, 2005)*, <http://www2.ebay.com/aw/core/200509141503462.html> (last visited July 14, 2006).

Each of the educational/training programs described above have the following characteristics in common: (1) a Seller (the educational institution) solicits a prospective buyer to enter into a new business (2) the prospective buyer (the student) makes a payment to the Seller,¹⁸ (3) the Seller makes an earning claim expressly or by implication, and (4) the Seller provides the Purchaser with "business assistance," by offering material, advice, information or support to the Purchaser in connection with the establishment of a new business. These are the legal predicates under the Proposed Rule necessary to a finding that the educational institution is providing a Business Opportunity. If such an interpretation were to prevail, the substantive provisions of the Proposed Rule would apply to those institutions -- a result which clearly could not have been the Commission's intention. If it was the Commission's intentions, that information should be explicitly included in the record.

B. The Publication and Sale of Self-Help Books and Other Materials Cannot Have Been Intended to be Covered by the Proposed Rule

The analysis above also applies to the publication and sale of any self-help book or video sold at counter by Borders or Barnes and Noble or on-line by Amazon and which is aimed at educating consumers about new business opportunities or bettering their careers. It would, for

¹⁸ Some of the statements relating to the income that can be derived from such businesses (e.g., "lucrative," "great income," etc.) might be too vague to meet the definition of "earnings claim," although others (e.g., "Create wealth by investing in real estate, just as most self-made millionaires do," "Learn how to format your works in a way that will save you hundreds of dollars," etc.) would appear to clearly meet that definition. However whether an earnings claim is made is immaterial if the "Seller" also offers "business assistance" --which all such educational institutions would clearly do under the Proposed Rule insofar as they offer "material advice [or] information . . . in connection with the establishment or operation of a new business."

example, apply to the sale of "Ken Trester's Complete Options Training Camp" a combined book and video described by a reviewer on Amazon.com as follows:

This comprehensive 16-hour video course by Ken Trester reveals tactics, strategies and profit-packed secrets and is accompanied by a 312 page course manual. This landmark video and course book package has everything you need to make serious money by risking little and hitting home run after home run. Trester's amazingly simple step-by-step system explains everything you need to earn phenomenal profits whether the market fluctuates up or down. Find how to win on 19 of every 30 trades.¹⁹

As drafted, the Proposed Rule could be interpreted to make Mr. Trester (and/or his publisher), as well as Amazon.com, a Business Opportunity Seller.²⁰ This is a stark, but accurate example of the problem with the unrestricted scope of the Proposed Rule. Additional examples (which are numerous) are unlikely to better illustrate the fundamental problem of the overbreadth of the Proposed Rule.

C. The Commission Should Revise the Proposed Rule to Disclaim Application of It to Bona Fide Educational, Instructional or Training Programs or Materials

As noted above, we believe the Proposed Rule is generally overbroad, and thus could be interpreted to apply a broad range of publications and traditional small business activities not

¹⁹ Amazon.com, *Customer Reviews (Anna Flowers): Ken Trester's Complete Option Trading System (December 14, 1999)*, http://www.amazon.com/gp/product/1883272068/qid=1152280735/ref=br_lf_v_3/104-5581071-9951110?n=290152&s=video&v=glance (last visited July 14, 2006).

²⁰ A "Seller" is "a person who offers for sale or sells a business opportunity." Proposed Rule 437.1(q) (NPRM at 19067). The other predicates of a Business Opportunity as defined in the Proposed Rule (discussed above) are also met. As is illustrated by this example, the Proposed Rule suffers from lack of certainty with regard to whether one or more entities qualify as a Business Opportunity "Seller" who must comply with the regulations. This is an independent basis arguing for the holdings of hearings in this matter to develop the record further.

properly subject to the Proposed Rule.²¹ With regard solely to the Firm's particular concern that the Proposed Rule disclaim application to bona fide education and training materials and programs, we believe that a simple, explicit limitation is appropriate. Specially, *we recommend that the proposed definition of "Business Opportunity" be modified by the addition of the following new Section 437.1(d) (4):*

Business Opportunity shall not include the publication or sale of any bona fide educational, instructional or training program or materials where the prospective purchaser makes a payment or provides other consideration for purpose of obtaining educational benefit.

V. Other Concerns

A. The Earnings Claim Provision is Inconsistent with the Commission's Existing Rules, Specifically the *Guides Concerning Use of Endorsements and Testimonials in Advertising*

The Proposed Rule provides that the making of an "earnings claim" in connection with an offer to sell a new business subjects the seller to the Proposed Rule. Such claims trigger certain disclosures – namely, "[t]he beginning and ending dates when the represented earnings were achieved" and "[t]he number and percentage of purchasers during that time period who achieved the represented earnings."

The NPRM states that the Commission's law enforcement history in this area demonstrates that *false or deceptive earnings representations underlie* virtually all of the fraudulent business opportunity schemes that it has investigated over the years. According to the NPRM, these claims have taken the form of purported historical earnings statistics (e.g., "Our

²¹ In its efforts to obtain broad applicability, the Proposed Rule can be likened to establishing a 20 MPH speed limit in order to ensure that enforcement authorities always have a basis in law to deter reckless speeding.

operators have earned X dollars a year") and unsupported earnings projections (e.g. "You will earn X dollars your first year").

However the Proposed Rule (at 437.1(h)) defines "earnings claim" as "any representation" "that conveys, expressly or by implication, a specific level or range of actual or potential sales, or gross or net income or profits." An "earnings claim" includes, but is not limited to "any statements from which a prospective purchaser can reasonably infer that he or she will earn a minimum level of income." Proposed Rule 437.1(h)(2). On its face the definition of "earning claim" would include individual testimonials and success stories, and thus the Proposed Rule would be triggered by testimonials even when accompanied by clear and conspicuous typicality disclaimer.

In this respect the Proposed Rule is inconsistent with the Commission's well-established *Guides Concerning Use of Endorsements and Testimonials in Advertising* (16 C.F.R. Part 255). ("*Guides*"). One or a small number of specific testimonials – which often relate unique particulars of the testimonial's individual experience or present variable and not entirely consistent outcomes achieved by different individuals – do not necessarily convey the claim that all prospective purchasers will achieve the same or similar results. In fact, the use of testimonials that contain specific statements about consumers' experiences communicate the message that consumer experiences with a product or service are varied and individual. This is especially true when such testimonials comply with Part 255.2 of the *Guides* by including statements that "clearly and conspicuously disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve."

The *Guides* take the position that such disclosures are sufficient to prevent any possible misimpression that a testimonial's experience is representative of what consumers generally will

achieve when such is not the case. That principle should apply to testimonials concerning business opportunities as it applies to all other testimonials – there is no apparent logical distinction that justifies different treatment for business opportunity testimonials. Therefore, any final Business Opportunity Rule should make it clear that properly qualified testimonials are not "earnings claims" as that term is defined in the rule.

B. The Earnings Claim Provision Is Impractical

Proposed Rule 437.4 requires that if "earning claims" are made by a Business Opportunity Seller that the Seller must provide to prospective purchasers an "Earning Claims Statement." That Statement must include considerable information supporting the particular testimonial, and must also compare that individual experience represented by the testimonial with the experience of all others who have purchased the good or service.

On a practical level, if the Proposed Rule were to apply to publishers of educational and training materials – whom we have argued should be generally exempt from rule coverage – they would simply never be able to comply with the disclosure requirements contemplated by Section 437.4 . This is because they simply do not maintain – and are unable to maintain – sufficiently comprehensive information concerning the experiences of "all" their "customers" to satisfy that Proposed Rule. It is common sense to recognize that a marketer of a product like a book or a CD, is not capable of extracting from its customers comprehensive information concerning its customers' subsequent experience with its product. The collection of fragmentary information is the best that can reasonably be expected. Thus, Proposed Rule 437.4 would effectively eliminate the use of testimonial information in any activity that would fall under the definition of a business opportunity. This would cause Rule 437.4 to be in direct conflict with *Guides*. It is black-letter law that the Commission cannot adopt a rule that is in conflict with an existing rule.

C. The Obligation to Provide the Disclosure Document Seven Days Before Accepting Payment

Propose Rule 437.3 would require business opportunity sellers to provide a disclosure document to prospective purchasers at least seven calendar days before accepting payment. The disclosure document would provide information on the seller, on earnings claims, on whether legal actions have been lodged against the seller and related parties, cancellation and refund policies and, most importantly, references. This requirement is modeled on a similar requirement in the Commission's Franchise Rule, even though the NPRM acknowledges that franchise sales are usually "more complex" than business opportunity sales, and that franchise purchasers may need more time to review the much lengthier and more detailed franchise disclosure document.²²

If the Proposed Rule were to apply to sellers of publications and other educational or training materials or services, this seven-day waiting period would be extraordinarily burdensome and inconsistent with consumer expectations. If a customer called an 800 number to order a publication with his or her credit card, the seller would have to prepare the disclosure document, mail or e-mail it to the purchaser, and wait at least seven days before charging the credit card and shipping the publication. Yet consumers have come to expect delivery of books, CDs, DVDs, and similar products overnight – or a day or two at the latest. Using the Dave Trester illustration discussed above, would Amazon.com be obligated to wait seven days before

²² The NPRM asserts that the scope of coverage of the proposed rule is much broader than that of the Franchise Rule, but "the compliance burden is much lighter." That statement is not consistent with the proposed seven-day disclosure timing requirement, which is essentially the same as the one contained in the Franchise Rule.

shipping the book and video to the customer? With regard to the offering of educational courses, (whether in-person classes, workshops, teleconferences, or video conferences), would this require that enrollment be cut off seven days before the offering of the course? If so, what would the rationale for this be? None currently exists in the record, and thus the record needs to be supplemented with regard to the impact of the seven day waiting requirement on speech that is protected by the First Amendment.

Even if the waiting period was not inconsistent with consumer expectations and even if there were not First Amendment issues, there is another, more practical and simpler concern with the Disclosure Statement rule: the stated purpose of the provision is to require that prospective purchasers be given relevant disclosures before putting their money at risk. However providing information about the seller's background, the number of refund requests, references, etc., is of no practical consequence until the purchaser is in receipt of the materials he or she has requested. Until then the purchaser will not have a sense of whether her or she has received the product that was promised.²³

Thus, we encourage the Commission to reconsider the notion of a pre-sale disclosure requirement. A better, more effective, less intrusive alternative would be requiring a mandatory three day cancellation and refund policy. Such an alternative would protect consumers who are actually deceived by fraudulent schemes without burdening consumers and sellers of non-fraudulent goods and services. The three-day cancellation and refund period would be analogous

²³ If one is in the market for a used car, it may be valuable to know whether the different used car dealers in the area have been the subject of law enforcement investigations, have generated an unusual number of complaints and/or refund requests, etc. However none of that is a substitute for a test drive of the car one is considering purchasing.

to the three-day mandatory cancellation period in most state Door-to-Door home solicitation laws.²⁴

D. Other Comments Concerning the Disclosure Document

Employees Prior Legal History. Proposed Rule 437.3(a)(3) requires that Business Opportunity Sellers disclose legal actions (civil and criminal) involving the Seller and certain related parties, including employees. Disclosure of certain employees' past legal history could expose sellers to charges of unlawful employment practices. It is our understanding that one or more states prohibit hiring decisions based on a criminal arrest that does not result in a conviction. The proposed rule requires the disclosure of criminal charges against sales personnel even if those charges were dismissed or the defendant was found not guilty after a trial. Asking prospective employees to disclose such information may be inconsistent with state law.

Disclosure of Refund Requests. Proposed Rule 437.3(a)(5) would require disclosure of the total number of refund requests during the prior two years. This rule may work to encourage consumer-unfriendly refund policies. Sellers with liberal free-trial periods and refund policies who seek to be responsive to consumer returns and refund requests might attract casual purchasers who decided not to finalize purchases – and the result would be an apparently large number of dissatisfied customers. By contrast, sellers with a limited refund policy would appear to have a higher satisfaction rate. Also, the Proposed Rule provides for disclosure of absolute numbers. Absolute numbers are not generally revealing. Requiring disclosure of the percentage

²⁴ See e.g., N.Y. Per. Prop. Law § 428.

of refunds versus finalized sale would provide consumers greater information than would absolute numbers.

Customer Privacy. Proposed Rule 437.3(a)(6) would require the mandatory disclosure of customer names and telephone numbers to prospective purchasers. This proposal, particularly that aspect which would permit Business Opportunity Sellers to furnish prospective buyers with a list disclosing all prior purchasers nationwide over the past three years, is inconsistent with consumers' reasonable expectations of privacy with respect to goods or services purchases and, accordingly, should be eliminated or reconsidered to more narrowly achieve the intended purpose.

Conclusion

For the foregoing reasons, we believe that the current proposed definition of a "Business Opportunity" is unconstitutionally overbroad and vague. The Commission should reconsider the definition in light of more detailed record evidence regarding the specific harms for which protections are sought. For this reason alone we believe that hearings are warranted before any final rule is adopted. In addition, we believe that various sections of the proposed rules are impracticable or unwise and we believe that hearings would provide important additional guidance on these issues as well.

With regard to educational issues, we believe that any final rule adopted must exempt or otherwise disclaim application of the any final rule to the publication and sale of bona fide educational materials and related coursework, and we have proposed herein specific language to effect this.

Respectfully submitted,

/ s / Dana Frix

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