

MODEL BUSINESS OPPORTUNITY SALES ACT

Adopted by the North American Securities Administrators Association,
May 15, 1984

Article I – Titles and Definitions

Sec. 100. Title

This Act shall be known and may be cited as (name of jurisdiction) Business Opportunity Sales Act.

Sec. 101. Definitions

When used in this Act, unless otherwise provided:

- A. "Administrator" [substitute any other appropriate term, such as "Commissioner", "Commission", "Secretary", etc.] means any person appointed or designated by the [official or agency] to administer this Act.
- B. "Advertising" means any circular, prospectus, advertisement or other material or any communication by radio, television, pictures or similar means used in connection with an offer or sale of any business opportunity.
- C.
 - (1) "Business Opportunity" means a contract or agreement, between a seller and purchaser, express or implied, orally or in writing, wherein it is agreed that the seller or a person recommended by the seller shall provide to the purchaser any products, equipment, supplies or services enabling the purchaser to start a business and the seller represents directly or indirectly, orally or in writing, that:
 - (a) The seller or a person recommended by the seller will provide or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices, on premises neither owned nor leased by the purchaser or seller;

- (b) The seller or a person recommended by the seller will provide or assist the purchaser in finding outlets or accounts for the purchaser's products or services;
 - (c) The seller or a person specified by the seller will purchase any or all products made, produced, fabricated, grown, bred or modified by the purchaser;
 - (d) The seller guarantees that the purchaser will derive income from the business which exceeds the price paid to the seller;
 - (e) The seller will refund all or part of the price paid to the seller, or repurchase any of the products, equipment or supplies provided by the seller or a person recommended by the seller, if the purchaser is dissatisfied with the business; or
 - (f) The seller will provide a marketing plan.
- (2) "Business Opportunity" does not include:
- (a) Any offer or sale of an on-going business operated by the seller and to be sold in its entirety;
 - (b) Any offer or sale of a business opportunity to an on-going business where the seller will provide products, equipment, supplies or services which are substantially similar to the products, equipment, supplies or services sold by the purchaser in connection with the purchaser's on-going business;
 - (c) Any offer or sale of a business opportunity which is registered or exempt from registration pursuant to [this State's franchise registration and disclosure law];
 - (d) Any offer or sale of a business opportunity which is registered pursuant to [this State's securities registration and disclosure law];
 - (e) Any offer or sale of a business opportunity which involves a marketing plan made in conjunction with the licensing of a federally registered trademark or federally registered service

mark provided that the seller had a minimum net worth of one million dollars (\$1,000,000) as determined on the basis of the seller's most recent audited financial statement prepared within thirteen (13) months of the first offer in this State. Net worth may be determined on a consolidated basis where the seller is at least eighty percent (80%) owned by one person and that person expressly guarantees the obligations of the seller with regard to the offer or sale of any business opportunity claimed to be excluded under this subparagraph.

- (f) Any offer or sale of a business opportunity by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian or conservator or a judicial offer or sale of a business opportunity.

COMMENT: This Act defines business opportunity as a "contract or agreement." Some states define business opportunity in terms of a "sale". The sale of a business opportunity does not always involve written contracts or agreements. Therefore, this Act covers transactions involving express or implied, oral or written contracts or agreements and direct or indirect, oral or written representations.

In subparagraphs (a) and (b) of paragraph 101C(1), the phrase, "or some other person recommended by the seller" is included to cover situations where the seller will not provide or assist the purchaser in finding locations, outlets or accounts, but will direct the purchaser to an "independent" person who will do so. The language also covers situations where the person recommended by the seller is either an agent of the seller or an independent contractor.

Subparagraph (c) of paragraph 101C(1) provides coverage where it is agreed that "the seller or some other person specified by the seller" will purchase the product of the business opportunity. The term "specified" is used to cover the situation where the seller represents that a particular person will purchase the product of the business opportunity purchaser.

The exclusion provided in subparagraph (b) of paragraph 101C(2) is available when the purchaser operates an existing business and the seller provides only products, equipment, supplies or services which are substantially similar to those in the purchaser's existing line. For example, a seller of a business opportunity who makes a representation under paragraph 101C(1) involving the sale of a line of tires to a gas station owner who presently sells tires may not be offering or selling a business opportunity.

- D. "Franchise" means a contract or agreement between a seller and a purchaser, express or implied, orally or in writing, where it is agreed that:

- (1) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed in substantial part by a franchisor; and
- (2) The operation of the franchisee's business pursuant to such a plan is substantially associated with the franchisor's business and trademark, service mark, tradename, logotype, advertising or other commercial symbol designating the franchisor or its affiliate.

For the purposes of this subsection, "franchisee" shall mean a person to whom a franchise is granted and "franchisor" shall mean a person who grants a franchise.

COMMENT: The legislature in a state which has a franchise sales act may prefer to utilize the definition of franchise contained in that state's act.

- E. "Marketing plan" means advice or training, provided to the purchaser by the seller or a person recommended by the seller, pertaining to the sale of any products, equipment, supplies or services and the advice or training includes, but is not limited to, preparing or providing:
- (1) Promotional literature, brochures, pamphlets, or advertising materials;
 - (2) Training regarding the promotion, operation or management of the business opportunity; or
 - (3) Operational, managerial, technical or financial guidelines or assistance.

COMMENT: A state's legislature may prefer to allow the Administrator to define this term by rule. If so, the above language will provide guidance.

- F. "Offer" or "Offer to Sell" includes every attempt to dispose of a business opportunity for value or solicitation of an offer to purchase a business opportunity.
- G. An "on-going business" is an existing business that, for at least six (6) months prior to the offer, has been operated from a specific location, has been open for business to the general public and has substantially

all of the equipment and supplies necessary for operating the business.

- H. "Person" means an individual, corporation, trust, partnership, incorporated or unincorporated association or any other entity.
- I. "Purchaser" means a person who enters into a contract or agreement for the acquisition of a business opportunity or a person to whom an offer to sell a business opportunity is directed.
- J. "Sale" or "Sell" includes every contract or agreement of sale, contract to sell, disposition of a business opportunity or interest in a business opportunity for value.

COMMENT: A lease is included in the definition of a sale in that the sale involves a contract or agreement for the disposition of a business opportunity or interest in a business opportunity.

- K. "Seller" means a person who sells or offers to sell a business opportunity or any agent or person who directly or indirectly acts on behalf of such person.

Article II – Exemptions From Registration and Disclosure

Sec. 200. Exemptions

The following business opportunities are exempt from Article III.

- A. Any offer or sale of a business opportunity for which the immediate cash payment made by the purchaser for any business opportunity is at least twenty-five thousand dollars (\$25,000) if the immediate cash payment does not exceed twenty percent (20%) of the purchaser's net worth as determined exclusive of principal residence, furnishings therein, and automobiles; provided, however, the Administrator may by rule withdraw or further condition the availability of this exemption.

COMMENT: The exemption provided by subsection 200A is for business opportunities requiring a substantial purchase price. The threshold level of twenty-five thousand dollars (\$25,000) is established for the purpose of distinguishing wealthier purchasers from others. The assumption is that a purchaser, that can afford a twenty-five thousand dollar (\$25,000) investment not exceeding twenty percent (20%) of the purchaser's "liquid" net worth, is of substantial means and should have a degree of financial sophistication such that the purchaser is capable of fending for

himself or herself. A jurisdiction may desire to increase the dollar amount or decrease the percentage of net worth; however, a relaxation of the amount set out in the exemption is not advised in that these standards should represent a minimum level necessary to accomplish the objective of this exemption.

It is recommended that the Administrator consider further conditioning the availability of this exemption by providing safeguards that should more appropriately be provided by rule. Such conditions may include purchaser sophistication standards. For example, the seller must reasonably ascertain that the purchaser or his or her representative is capable of reasonably appraising and appreciating the merits and risks of the business opportunity. The State may want to require a preoffering notice filing to afford the opportunity to revoke the exemption where such administrative action is appropriate. Further, this Act provides the Administrator with the authority to withdraw this exemption in the event of unforeseen substantial abuse.

If necessary the Administrator may define by rule the term "immediate cash payment". "Cash payment" is not intended to include promissory notes, letters of credit, loans, installment sales payments, payments in-kind, or securities. "Cash payment" includes cash, currency, money orders, cashier's checks, or personal checks.

- B. Any offer or sale of a business opportunity for which the purchaser is required to make a payment to the seller or a person recommended by the seller not to exceed two hundred fifty dollars (\$250) during the period from any time before commencing operation to within six (6) months after commencing operation of the business opportunity.

COMMENT: Subsection 200B provides an exemption for business opportunities requiring an insubstantial or "de minimis" payment. A jurisdiction may desire to lower the amount of the payment; however, increasing the amount would jeopardize the purpose of this exemption.

The time period of payment is based upon federal franchise law and therefore federal interpretations may provide guidance to both industry and the Administrator.

- C. Any offer or sale of a business opportunity where the seller has a net worth of not less than one million dollars (\$1,000,000) as determined on the basis of the seller's most recent audited financial statement, prepared within thirteen (13) months of the first offer in this State. Net worth may be determined on a consolidated basis where the seller is at least eighty percent (80%) owned by one person and that person expressly guarantees the obligations of the seller with regard to the offer or sale of any business opportunity claimed to be exempt under this subsection. The Administrator may by rule withdraw or further condition the availability of this exemption.

COMMENT: The figure of one million dollars (\$1,000,000) net worth has been set as the appropriate threshold to distinguish a seller who presents a sound financial statement. The assumption here is that the civil, criminal and administrative provisions of this Act provide adequate remedies and safeguards such that registration is generally unnecessary.

- D. Any offer or sale of a business opportunity where the purchaser has a net worth of not less than two hundred fifty thousand dollars (\$250,000). Net worth shall be determined exclusive of principal residence, furnishings therein, and automobiles. The Administrator may by rule withdraw or further condition the availability of this exemption.

COMMENT: The purchaser with a "liquid" net worth of two hundred fifty thousand dollars (\$250,000) should in most instances possess the financial sophistication to fend for him or herself. The Administrator may by rule condition the exemption as deemed appropriate or necessary.

- E. Any offer or sale of a business opportunity where the purchaser is a bank, savings and loan association, trust company, insurance company, credit union, or investment company as defined by the Investment Company Act of 1940, pension or profit sharing trust, or other financial institution or institutional buyer or a dealer registered pursuant to [this State's securities act], where the purchaser is acting for itself or in a fiduciary capacity.

COMMENT: The Administrator may further define "... other financial institution or institutional buyer ..." by exercising his or her rulemaking authority pursuant to subsection 404A. This exemption is based on paragraph (8) of subsection 402(b) of the Uniform Securities Act.

- F. Any offer or sale of a business opportunity which is defined as a franchise in subsection 101D provided that the seller delivers to each purchaser at the earlier of the first personal meeting, or ten (10) business days prior to the earlier of the execution by a purchaser of any contract or agreement imposing a binding legal obligation on the purchaser or the payment by a purchaser of any consideration in connection with the offer or sale of the business opportunity, one of the following disclosure documents:

- (1) A Uniform Franchise Offering Circular prepared in accordance with the guidelines adopted by the North American Securities Administrators Association, Inc., as amended through September 21, 1983; or

- (2) A disclosure document prepared pursuant to the Federal Trade Commission rule entitled Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. §436 (1979).

For the purposes of this subsection, a personal meeting shall mean a face-to-face meeting between the purchaser and the seller or their representatives, which is held for the purpose of discussing the offer or sale of a business opportunity. The Administrator may by rule adopt any amendment to the Uniform Franchise Offering Circular that has been adopted by the North American Securities Administrators Association, Inc. or any amendment to the disclosure document prepared pursuant to the Federal Trade Commission rule entitled Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. §436 (1979), that has been adopted by the Federal Trade Commission.

COMMENT: This exemption is provided for franchises that are not excluded from coverage of this Act. The critical event triggering the availability of the exemption is the timely delivery of a prescribed disclosure document. The time of delivery parallels the Federal Trade Commission's requirements and, therefore, federal interpretations may provide guidance to the Administrator and industry.

The prescribed disclosure documents are: (1) The Uniform Franchise Offering Circular (UFOC) as originally adopted by the Midwest Securities Commissioners' Association (an organization later merged into the North American Securities Administrators Association, Inc. (NASAA)) on September 2, 1975, and subsequent amendments thereto. Note that any amendments adopted by NASAA subsequent to the amendments of September 21, 1983 may be adopted by rule. The language "through September 21, 1983" is intended to include the NASAA amendments adopted on that date. Should NASAA adopt amendments prior to a state's adoption of this Act, the state may want to consider changing the date of September 21, 1983 to reflect incorporation of the NASAA amendments; and (2) The Federal Trade Commission (FTC) disclosure document originally promulgated December 21, 1978 effective October 21, 1979 and as may be subsequently amended by the FTC if the Administrator adopts such amendments by rule.

Both disclosure documents are widely recognized and used in the franchise industry, therefore little benefit would be gained by providing administrative authority to adopt a new disclosure document for the purposes of this exemption. On the other hand, since it may be important for this exemption to accommodate amendments to either disclosure document by NASAA or the FTC, the Administrator is provided with rulemaking authority for the purpose of adopting NASAA or FTC amendments.

- G. Any offer or sale of a business opportunity for which the cash payment made by a purchaser for any business opportunity does not exceed five hundred dollars (\$500) and the payment is made for the not-for-profit sale of sales demonstration equipment, material, or samples or the payment is made for product inventory sold to the purchaser at a bona-fide wholesale price.

COMMENT: A state's legislature may want to consider the imposition of a buy-back guarantee as a requirement for this exemption.

- H. Any offer or sale of a business opportunity which the Administrator exempts by order or a class of business opportunities which the Administrator exempts by rule upon the finding that such exemption would not be contrary to public interest and that registration would not be necessary or appropriate for the protection of purchasers.

COMMENT: The flexibility of this exemption allows for some accommodation for industry changes, new types of business opportunities or alleviation of undue hardships.

Sec. 201. Denial or Revocation of Exemptions

- A. The Administrator may by order deny or revoke any exemption specified in section 200 with respect to a particular offering of one or more business opportunities. No such order may be entered without appropriate prior notice to all interested parties, opportunity for hearing, and written findings of fact and conclusions of law.
- B. If the public interest or the protection of purchasers so requires, the Administrator may by order summarily deny or revoke any of the specified exemptions pending final determination of any proceedings under this section. Upon the entry of the order, the Administrator shall promptly notify all interested parties that it has been entered and of the reasons therefor and that within fifteen (15) days of the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the Administrator, the order will remain in effect until it is modified or vacated by the Administrator. If a hearing is requested and none is ordered by the Administrator, the order will remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice of an opportunity for hearing to all

interested persons, may not modify or vacate the order or extend it until final determination.

- C. No order under this section may operate retroactively.
- D. No person may be considered to have violated section 300 by reason of any offer or sale effected after the entry of an order under subsection 300B if he or she sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the order.

COMMENT: This language is standard under state securities laws and is based on subsection 402(c) of the Uniform Securities Act.

Sec. 202. Burden of Proof

In any administrative, civil, or criminal proceeding related to this Act, the burden of proving an exemption, an exception from a definition or an exclusion from this Act is upon the person claiming it.

COMMENT: Placing the burden of proof on the person claiming the availability of an exemption, exception from a definition or an exclusion, is necessary since that person has access to the pertinent facts and evidence. This provision is based on the Uniform Securities Act, subsection 402(d).

Article III – Registration and Disclosure

Sec. 300. Registration Requirement

It is unlawful for any person to offer or sell any business opportunity in this State unless the business opportunity is registered under this Act or is exempt under section 200 of this Act.

Sec. 301. Registration

- A. In order to register a business opportunity, the seller shall file with the Administrator one of the following disclosure documents with the appropriate cover sheet as required by subsection 302B, a consent to service of process as specified in subsection B, and the appropriate fee as required by subsection C:

- (1) A Uniform Franchise Offering Circular prepared in accordance with the guidelines adopted by the North American Securities Administrators Association, Inc. as amended through September 21, 1983. The Administrator may by rule adopt any amendment to the Uniform Franchise Offering Circular that has been adopted by the North American Securities Administrators Association, Inc.;
- (2) A disclosure document prepared pursuant to the Federal Trade Commission rule entitled Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures; 16 C.F.R. §436 (1979). The Administrator may by rule adopt any amendment to the disclosure document prepared pursuant to 16 C.F.R. §436 (1979), that has been adopted by the Federal Trade Commission; or
- (3) A disclosure document prepared pursuant to subsection 302B of this Act.

COMMENT: The prescribed disclosure documents, in addition to the subsection 302B disclosure document, are the UFOC as originally adopted by the Midwest Securities Commissioners' Association (an organization later merged into NASAA) on September 2, 1975 and subsequent amendments thereto, and the FTC disclosure document originally promulgated December 21, 1978, effective October 21, 1979 and as may be subsequently amended. See the comment to exemption 200F for a discussion of the Administrator's authority to adopt by rule any amendments to the UFOC and FTC disclosure document.

- B. Every seller shall file, in the form as the Administrator may prescribe, an irrevocable consent appointing the Administrator or the successor in office to be the seller's attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against the seller or the seller's successor, executor or administrator which arises under this Act after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. Service may be made by leaving a copy of the process in the office of the Administrator, but is not effective unless the plaintiff or petitioner, who may be the Administrator or the Attorney General in a suit, action or proceeding, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant's or respondent's address on file with the Administrator, and the plaintiff's affidavit of compliance with this subsection is filed in the case on

or before the return date of the process, if any, or within such further time as the court allows.

- C. [Insert a provision, if desired, covering filing and/or registration fees.]
- D. A registration automatically becomes effective upon the expiration of the tenth full business day after a complete filing, provided that no order has been issued or proceeding pending under section 304. The Administrator may by order waive or reduce the time period prior to effectiveness, provided that a complete filing has been made. The Administrator may by order defer the effective date until the expiration of the tenth full business day after the filing of any amendment.
- E. The registration is effective for one year commencing on the date of effectiveness and may be renewed annually upon the filing of a current disclosure document accompanied by any documents or information that the Administrator may by rule or order require. [Insert a provision regarding an annual renewal fee, if desired]. Failure to renew upon the close of the one-year period of effectiveness will result in expiration of the registration. The Administrator may by rule or order require the filing of a sales report.
- F. The Administrator may by rule require the filing of all proposed literature or advertising prior to its use.

Sec. 302. Disclosure Requirements

- A. It shall be unlawful for any person to offer or sell any business opportunity required to be registered under this Act unless a written disclosure document as filed under subsection 301A is delivered to each purchaser at least ten (10) business days prior to the execution by a purchaser of any contract or agreement imposing a binding legal obligation on the purchaser or the payment by a purchaser of any consideration in connection with the offer or sale of the business opportunity.

COMMENT: This subsection coincides with the timing requirements of the FTC rule, 16 C.F.R. §436 (1979).

- B. The disclosure document shall have a cover sheet which is entitled, in at least ten-point bold type, "DISCLOSURE REQUIRED BY [insert this State's

name]." Under the title shall appear the statement in at least ten-point type that "The registration of this business opportunity does not constitute approval, recommendation or endorsement by [insert this State's name]. The information contained in this disclosure document has not been verified by this State. If you have any questions or concerns about this investment, seek professional advice before you sign a contract or make any payment. You are to be provided ten (10) business days to review this document before signing any contract or agreement or making any payment to the seller or the seller's representative". The seller's name and principal business address, along with the date of the disclosure document shall also be provided on the cover sheet. No other information shall appear on the cover sheet. The disclosure document shall contain the following information unless the seller uses a disclosure document as provided in paragraphs (1) or (2) of subsection 301A:

- (1) The names and residential addresses of those salespersons who will engage in the offer or sale of the business opportunity in this State.
- (2) The name of the seller; whether the seller is doing business as an individual, partnership or corporation; the names under which the seller has done, is doing or intends to do business; and the name of any parent or affiliated company that will engage in business transactions with purchasers or which will take responsibility for statements made by the seller.
- (3) The names, addresses and titles of the seller's officers, directors, trustees, general managers, principal executives, agents, and any other persons charged with responsibility for the seller's business activities relating to the sale of the business opportunity.
- (4) Prior business experience of the seller relating to business opportunities including:
 - (a) The name, address, and a description of any business opportunity previously offered by the seller;
 - (b) The length of time the seller has offered each such business opportunity; and

- (c) The length of time the seller has conducted the business opportunity currently being offered to the purchaser.
- (5) With respect to persons identified in paragraph (3) of subsection 302B:
- (a) A description of the persons' business experience for the ten-year period preceding the filing date of this disclosure document. The description of business experience shall list principal occupations and employers; and
 - (b) A listing of the persons' educational and professional backgrounds including, the names of schools attended and degrees received, and any other information that will demonstrate sufficient knowledge and experience to perform the services proposed.
- (6) Whether the seller or any person identified in paragraph (3) of subsection 302B:
- (a) Has been convicted of any felony, or pleaded nolo contendere to a felony charge, or has been the subject of any criminal, civil or administrative proceedings alleging the violation of any business opportunity law, securities law, commodities law, franchise law, fraud or deceit, embezzlement, fraudulent conversion, restraint of trade, unfair or deceptive practices, misappropriation of property or comparable allegations;
 - (b) Has filed in bankruptcy, been adjudged bankrupt, been reorganized due to insolvency, or was an owner, principal officer or general partner or any other person that has so filed or was so adjudged or reorganized during or within the last seven (7) years.
- (7) The name(s) of the person(s) identified in paragraph (6) of subsection 302B, nature of and parties to the action or proceeding, court or other forum, date of the institution of the action, docket references to the action, current status of the action or proceeding, terms and

conditions or any order or decree, the penalties or damages assessed and terms of settlement.

- (8) The initial payment required, or when the exact amount cannot be determined, a detailed estimate of the amount of the initial payment to be made to the seller.
- (9) A detailed description of the actual services the seller agrees to perform for the purchaser.
- (10) A detailed description of any training the seller agrees to provide for the purchaser.
- (11) A detailed description of services the seller agrees to preform in connection with the placement of equipment, products or supplies at a location, as well as any agreement necessary in order to locate or operate equipment, products or supplies on a premises neither owned nor leased by the purchaser or seller.
- (12) A detailed description of any license(s) or permit(s) that will be necessary in order for the purchaser to engage in or operate the business opportunity.
- (13) The business opportunity seller that is required to secure a bond pursuant to section 305, shall state in the disclosure document "As required by the State of [insert name of State], the seller has secured a bond issued by [insert name and address of surety company], a surety company, authorized to do business in this State. Before signing a contract or agreement to purchase this business opportunity, you should check with the surety company to determine the bond's current status."
- (14) Any representations made by the seller to the purchaser concerning sales or earnings that may be made from this business opportunity, including, but not limited to:
 - (a) The bases or assumptions for any actual, average, projected or forecasted sales, profits, income or earnings;

- (b) The total number of purchasers who, within a period of three (3) years of the date of the disclosure document, purchased a business opportunity involving the product, equipment, supplies or services being offered to the purchaser; and
 - (c) The total number of purchasers who, within three (3) years of the date of the disclosure document, purchased a business opportunity involving the product, equipment, supplies or services being offered to the purchaser who, to the seller's knowledge, have actually received earnings in the amount or range specified.
- (15) Any seller who makes a guarantee to a purchaser shall give a detailed description of the elements of the guarantee. Such description shall include, but shall not be limited to, the duration, terms, scope, conditions and limitations of the guarantee.
- (16) A statement of:
- (a) The total number of business opportunities that are the same or similar in nature to those that have been sold or organized by the seller;
 - (b) The names and addresses of purchasers who have requested a refund or rescission from the seller within the last twelve (12) months and the number of those who have received the refund or rescission; and
 - (c) The total number of business opportunities the seller intends to sell in this State within the next twelve (12) months.
- (17) A statement describing any contractual restrictions, prohibitions or limitations on the purchaser's conduct. Attach a copy of all business opportunity and other contracts or agreements proposed for use or in use in this State including, without limitation, all lease agreements, option agreements, and purchase agreements.

COMMENT: The inclusion of copies of the contracts or agreements is consistent with the UFOC and FTC disclosure statement requirements.

- (18) The rights and obligations of the seller and the purchaser regarding termination of the business opportunity contract or agreement.
- (19) A statement accurately describing the grounds upon which the purchaser may initiate legal action to terminate the business opportunity contract or agreement.
- (20) A copy of the most recent audited financial statement of the seller, prepared within thirteen (13) months of the first offer in this State, together with a statement of any material changes in the financial condition of the seller from that date. The Administrator may allow the seller to submit a limited review in order to satisfy the requirements of paragraph (13) of this subsection 302B.

COMMENT: This paragraph provides the Administrator with discretionary authority to accommodate businesses for which an audit would be cost prohibitive, by permitting a limited review.

- (21) A list of the states in which this business opportunity is registered.
- (22) A list of the states in which this disclosure document is on file.
- (23) A list of the states which have denied, suspended or revoked the registration of this business opportunity.
- (24) A section entitled "Risk Factors" containing a series of short concise statements summarizing the principal factors which make this business opportunity a high risk or one of a speculative nature. Each statement shall include a cross-reference to the page on which further information regarding that risk factor can be found in the disclosure document.
- (25) Any additional information as the Administrator may require by rule or order.

Sec. 303. Contract or Agreement Provisions

- A. It is unlawful for any person to offer or sell any business opportunity required to be registered unless the business opportunity contract or

agreement is in writing and a copy of the contract or agreement is given to the purchaser at the time the purchaser signs the contract or agreement.

- B. Contracts or agreements shall set forth in at least ten-point type or equivalent size, if handwritten, the following:
- (1) The terms and condition of any and all payments due to the seller;
 - (2) The seller's principal business address and the name and address of the seller's agent in this State authorized to receive service of process;
 - (3) The business form of the seller, whether corporate, partnership, or otherwise;
 - (4) The delivery date or, when the contract provides for a periodic delivery of items to the purchaser, the approximate delivery date of the product, equipment, or supplies the seller is to deliver to the purchaser to enable the purchaser to start his or her business; and
 - (5) Whether the product, equipment, or supplies are to be delivered to the purchaser's home or business address or are to be placed or caused to be placed by the seller at locations owned or managed by persons other than the purchaser.

Sec. 304. Denial, Suspension or Revocation of Registration

- A. The Administrator may issue an order denying effectiveness to, or suspending or revoking the effectiveness of, any registration if the Administrator finds that the order is in the public interest and that:
- (1) The registration as of its effective date or as of any earlier date in the case of an order denying effectiveness, or any amendment as of its effective date, or any report is incomplete in any material respect or contains any statement which was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact;

- (2) Any provision of this Act or any rule, order, or condition lawfully imposed under this Act has been wilfully violated, in connection with the business opportunity:
 - (a) By the person filing the registration; or
 - (b) By the seller, any partner, officer, or director of the seller, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling or controlled by the seller, but only if the person filing the registration is directly or indirectly controlled by or acting for the seller;
- (3) The business opportunity registered or sought to be registered is the subject of an administrative order denying, suspending or revoking a registration or a permanent or temporary injunction of any court of competent jurisdiction; but the Administrator
 - (a) May not institute a proceeding against an effective registration under this paragraph more than one year from the date of the order or injunction relied on; and
 - (b) May not enter an order under this paragraph on the basis of an order or injunction entered under any other state act unless that order or injunction was based on facts which would currently constitute a ground for an order under this section;
- (4) The seller's enterprise or method of business, or that of the business opportunity, includes or would include activities which are illegal where performed;
- (5) The business opportunity or the offering of a business opportunity has worked or tended to work a fraud upon purchasers or would so operate;
- (6) There has been a failure to file any documents or information required by section 301;

- (7) The seller has failed to pay the proper [filing or registration fee] but the Administrator may enter only a denial order under this paragraph and the Administrator shall vacate any such order when the deficiency has been corrected;
 - (8) The seller's literature or advertising is misleading, incorrect, incomplete or deceptive.
- B. The Administrator may not institute a proceeding under this section against an effective registration on the basis of a fact or transaction known to the Administrator when the registration became effective unless the proceeding is instituted within the next thirty (30) days.
- C. The Administrator may by order summarily postpone or suspend the effectiveness of the registration pending final determination of any proceeding under this section. Upon the entry of the order, the Administrator shall promptly notify the seller that the order has been entered and of the reasons therefor and that within fifteen (15) days after the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the Administrator, the order will remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice of an opportunity for hearing to the seller, may modify or vacate the order or extend it until final determination.
- D. No stop order may be entered under any part of this section, except the first sentence of subsection C, without appropriate prior notice to the seller, opportunity for hearing, and written findings of fact and conclusions of law.
- E. The Administrator may vacate or modify an order issued under this section 304 if the Administrator finds that the conditions which prompted its entry have changed or that it is otherwise in the public interest to do so.

COMMENT: This section is based on section 204 of the Uniform Securities Act.

Sec. 305. Minimum Net Worth or Bond Requirement

- A. In connection with the offer or sale of a business opportunity, no seller may make or use any of the representations set forth in subparagraphs (d) and

(e) of paragraph 101C(1) unless the seller has at all times a minimum net worth of twenty-five thousand dollars (\$25,000) as determined in accordance with generally accepted accounting principles. In lieu of the minimum net worth requirement, the Administrator may, by rule or order, require a business opportunity seller to obtain a surety bond issued by a surety company authorized to do business in this State. The surety bond shall be in an amount not less than twenty-five thousand dollars (\$25,000) and shall be in favor of this State for the benefit of any purchaser. The Administrator may by rule or order increase the amount of the bond for the protection of purchasers and may require the seller to file reports of all sales in this State to determine the appropriate amount of bond.

- B. Where the seller is required to obtain a surety bond, the seller shall maintain a surety bond for the duration of the guarantee or representation giving rise to the surety bond requirement. Upon expiration of the period of the guarantee, the seller may allow the surety bond to lapse provided that the seller shall give notice to the Administrator and all business opportunity purchasers in this State at least thirty (30) days prior to the lapse of the bond.

COMMENT: The requirement of a surety bond is designed to provide a remedy for a purchaser when a seller makes representations or guarantees described in subparagraphs (d) and (e) of paragraph 101C(1). A bond must be obtained by the seller only when the business opportunity is required to be registered and the seller makes a representation described in subparagraphs (d) or (e) of paragraph 101C(1) and the seller's net worth does not at all times equal or exceed twenty-five thousand dollars (\$25,000).

Article IV – Administration

Sec. 400. Administration of This Act

- A. This Act shall be administered by the Administrator.
- B. It is unlawful for the Administrator or any of his or her officers or employees to use for personal benefit any information which is filed with or obtained by the Administrator and which is not made public. No provision of this Act authorizes the Administrator or any of the Administrator's officers or employees to disclose any such information except among themselves or when necessary or appropriate in a proceeding or investigation under this

Act. No provision of this Act either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under a subpoena directed to the Administrator or any of the Administrator's officers or employees.

COMMENT: This section is based on section 406 of the Uniform Securities Act.

Sec. 401. Investigations and Subpoenas

A. The Administrator:

- (1) May make such public or private investigations within or outside of this State as the Administrator deems necessary to determine whether any person has violated or is about to violate any provision of this Act or any rule or order hereunder, or to aid in the enforcement of this Act or in the prescribing of rules and forms hereunder;
- (2) May require or permit any person to file a statement, under oath or otherwise as the Administrator determines, as to all the facts and circumstances concerning the matter to be investigated; and
- (3) May publish information concerning any violation of this Act or any rule or order hereunder.

B. For the purpose of any investigation or proceeding under this Act, the Administrator or any officer designated by the Administrator may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the Administrator deems relevant or material to the inquiry.

C. In case of contumacy by, or refusal to obey a subpoena issued to any person, the [insert name of appropriate court] upon application by the Administrator, may issue to the person an order requiring him or her to appear before the Administrator, there to produce documentary evidence if so ordered or to give evidence touching upon the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt of court.

- D. No person is excused from attending and testifying or from producing any document or record before the Administrator or any officer designated by the Administrator, or in any proceeding instituted by the Administrator, on the grounds that the testimony or evidence, documentary or otherwise, required by the Administrator may tend to incriminate him or her or subject him or her to a penalty or forfeiture; but no individual may be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he or she is compelled, after claiming his or her privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying.

COMMENT: This section is based on section 407 of the Uniform Securities Act.

Sec. 402. Remedies

Whenever it appears to the Administrator that any person has engaged in or is about to engage in any act or practice constituting a violation of any provision of this Act or any rule or order hereunder, the Administrator may:

- A. Issue an order directing the person to cease and desist from continuing the act or practice. Any person named in a cease and desist order issued by the Administrator may, within fifteen (15) days after receipt of the order, file a written request for a hearing with the Administrator. If the Administrator does not receive a written request for a hearing within the time specified, the cease and desist order will be permanent and the person named in the order will be deemed to have waived all rights to a hearing.
- B. Bring an action in [insert name of appropriate court] to enjoin the acts or practices and to enforce compliance with this Act or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets or the court may order rescission, which shall include restitution plus the legal interest rate, for any sales of business opportunities determined to be unlawful under this Act or any rule or order hereunder. The court shall not require the Administrator to post a bond.

- C. The Administrator may refer such evidence as may be available concerning violations of this Act or any rule or order hereunder to [the Attorney General or the appropriate county attorney], who may, with or without such a reference, institute the appropriate proceedings under this section.

COMMENT: This section is based on section 408 of the Uniform Securities Act. Subsection C is directed at the Administrator who does not have prosecutorial authority. The subsection should be deleted or modified if the Administrator has such authority.

Sec. 403. Judicial Review of Orders

- A. Any person aggrieved by a final order of the Administrator may obtain a review of the order in the [insert name of appropriate court] by filing in court, within sixty (60) days after the entry of the order, a written petition praying the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the Administrator and thereupon the Administrator shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these have been filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the Administrator as to the facts, if supported by competent, material and substantial evidence, are conclusive. If either party applies to the court for leave to adduce additional material evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearing before the Administrator, the court may order the additional evidence to be taken before the Administrator and to be adduced upon the hearing in the manner and upon the conditions as the court considers proper. The Administrator may modify his or her findings and order by reason of the additional evidence and shall file in court the additional evidence together with any modified or new findings or order. The judgment of the court is final, subject to review by the [insert name of appropriate court].
- B. The commencement of proceedings under subsection A does not, unless specifically ordered by the court, operate as a stay of the Administrator's order.

COMMENT: This section is based on section 411 of the Uniform Securities Act. This section may be deleted by a state which has an Administrative Procedures Act which includes or encompasses these provisions.

Sec. 404. Rules, Forms, Orders and Hearings

- A. The Administrator may make, amend and rescind rules, forms, and orders as are necessary to carry out the provisions of this Act including rules and forms governing disclosure documents, applications and reports, and defining any terms, whether or not used in this Act insofar as the definitions are not inconsistent with the provisions of this Act. For the purpose of rules and forms, the Administrator may classify business opportunities, persons, and matters within his or her jurisdiction, and prescribe different requirements for different classes.
- B. No rule, form, or order may be made, amended, or rescinded unless the Administrator finds that the action is necessary or appropriate in the public interest or for the protection of the purchaser. In prescribing rules and forms the Administrator may cooperate with the Administrators of other jurisdictions with a view to effectuating the policy of this Act to achieve maximum uniformity in the form and content of disclosure statements, applications, and reports whenever practicable.
- C. No provision of this Act imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form or order of the Administrator, notwithstanding that the rule, form, or order may later be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

COMMENT: This section is based on section 412 of the Uniform Securities Act.

Sec. 405. Administrative Files and Opinions

- A. A document is filed when it is received by the Administrator.
- B. The Administrator shall keep a register of all applications for registration and disclosure documents which are or have been effective under this Act and all orders which have been entered under this Act. The register shall be open for public inspection.
- C. Unless otherwise provided by law, any registration statement, filing, application, or report filed with the Administrator shall be open for public inspection.

- D. The Administrator may honor written requests from interested persons for interpretative opinions upon the payment of [insert the appropriate fee].

COMMENT: This section is based on section 413 of the Uniform Securities Act.

Sec. 406. Scope of the Act; Service of Process

- A. The provisions of this Act concerning sales and offers to sell apply to persons who sell or offer to sell when:
 - (1) An offer to sell is made in this State;
 - (2) An offer to purchase is made and accepted in this State; or
 - (3) The purchaser is domiciled in this State and the business opportunity is or will be operated in this State.
- B. For the purpose of this section, an offer to sell is made in this State, whether or not either party is then present in this State, when:
 - (1) The offer originates from this State; or
 - (2) The offer is directed by the offeror to this State and received at the place to which it is directed or at any post office in this State in the case of a mailed offer.
- C. For the purpose of this section, an offer to sell is accepted in this State when acceptance:
 - (1) Is communicated to the offeror in this State; and
 - (2) Has not previously been communicated to the offeror, orally, or in writing, outside this State; and acceptance is communicated to the offeror in this State, whether or not either party is then present in this State when the offeree directs it to the offeror in this State reasonably believing the offeror to be in this State and it is received at the place to which it is directed or at any post office in this State in the case of a mailed acceptance.
- D. An offer to sell is not made in this State when:

- (1) The publisher circulates or there is circulated on his or her behalf in this State any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this State, or which is published in this State but has had more than two-thirds (2/3) of its circulation outside this State during the past twelve (12) months; or
 - (2) A radio or television program originating outside this State is received in this State.
- E. When any person, including any nonresident of this State, engages in conduct prohibited or made actionable by this Act or any rule or order hereunder, and the person has not filed a consent to service of process and personal jurisdiction over the person cannot otherwise be obtained in this State, that conduct shall be considered equivalent to the person's appointment of the Administrator or the Administrator's successor in office to be the person's attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against the person or the person's successor, executor or administrator which grows out of that conduct and which is brought under this Act or any rule or order hereunder with the same force and validity as if served on the person personally. Service may be made by leaving a copy of the process in the office of the Administrator, and it is not effective unless:
- (1) The plaintiff, who may be the Administrator in a suit, action, or proceeding instituted by the Administrator, forthwith sends notice of the service and a copy of the process by certified or registered mail to the defendant's or respondent's last known address or takes other steps which are reasonably calculated to give actual notice; and
 - (2) The plaintiff's affidavit of compliance with this subsection E is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.
- F. When process is served under this section, the court, or the Administrator in a proceeding before the Administrator, shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.

COMMENT: This section is based on section 414 of the Uniform Securities Act.

Sec. 407. Statutory Policy

This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

COMMENT: This section is based on section 415 of the Uniform Securities Act.

Sec. 408. Severability of Provisions

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

COMMENT: This section is based on section 417 of the Uniform Securities Act.

Article V – Fraudulent Practices and Criminal Penalties

Sec. 500. Fraudulent Practices

It is unlawful for any person, in connection with the offer or sale of any business opportunity in this State, directly or indirectly:

- A. To employ any device, scheme or artifice to defraud;
- B. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- C. To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Sec. 501. Misleading Filings

It is unlawful for any person to make or cause to be made, in any document filed with the Administrator or in any proceeding under this Act any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect or, in connection with such statement, to omit

to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

COMMENT: Since the registration process may not uncover all material omissions and an offering may be completed prior to discovery of the omission, section 501 provides the Administrator with the enforcement tool to seek criminal penalties where necessary or appropriate.

Sec. 502. Unlawful Representations

Neither the fact that an application for registration has been filed nor the fact that a business opportunity is effectively registered constitutes a finding by the Administrator that any document filed under this Act is true, complete and not misleading. Neither any such fact nor the fact that an exemption or exception is available for a business opportunity means that the Administrator has passed in any way upon the merits or qualifications of, or recommended or given approval to, any person or business opportunity. It is unlawful to make, or cause to be made, to any purchaser any representation inconsistent with the foregoing.

COMMENT: This comment is based on subsection 405(b) of the Uniform Securities Act. Since the definition of "purchaser" includes an "offeree", this Act cites "purchaser" as opposed to "prospective purchaser" as found in the Uniform Securities Act.

Sec. 503. Advertising

It is unlawful for any person, in connection with the offer or sale of any business opportunity in this State, to publish, circulate or use any advertising which contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

Sec. 504. Criminal Penalties

- A. Any person who wilfully violates section 300, 302A, 303A, 305, 500, 502 or 503 or who wilfully violates any rule under this Act or who wilfully violates any order of which the person has notice, or who violates section 501 knowing that the statement made was false or misleading in any material respect, may be fined not more than ten thousand dollars (\$10,000) or imprisoned not more than five (5) years or both for each offense. Each of the acts specified shall constitute a separate offense and a prosecution or

conviction for any one of such offenses shall not bar prosecution or conviction for any other offense.

COMMENT: This subsection is based on the Uniform Securities Act section 409. The term “wilfully” requires only proof that the person acted intentionally, and that the person was aware of what the person was doing. Proof of evil motive or intent to violate the law or knowledge that the law was being violated is not required. This concept is derived from securities law.

- B. No prosecution for any crime under this Act may be commenced more than six (6) years after the alleged violation.
- C. Nothing in this Act limits the power of the state to punish any person for any conduct which constitutes a crime under any other statute.
- D. The Administrator may refer such evidence as may be available concerning violations of this Act or any rule or order hereunder to the [Attorney General or appropriate county attorney], who may, with or without such a reference, institute the appropriate criminal proceedings under this Act.

Article VI – Civil Remedies

Sec. 600. Rescission; Surety Bond

- A. Any person who violates section 300, 302A, 303A or 305, is liable to the purchaser who may sue either at law or in equity for rescission, for recovery of all money or other valuable consideration paid for the business opportunity and for actual damages, together with interest at [the legal rate or appropriate statutory section] from the date of sale, reasonable attorney's fees and court costs.
- B. Any person who violates section 500, 502 or 503 is liable to the purchaser who may sue either at law or in equity for rescission, for recovery of all money or other valuable consideration paid for the business opportunity and for treble the actual damages, together with interest at [the legal rate or appropriate statutory section] from the date of sale, reasonable attorney's fees and court costs.
- C. Any person who violates section 302A, 500, 502 or 503 or who breaches any business opportunity contract or agreement or any obligation arising under the contract or agreement is liable to the purchaser who may sue the

surety of the bond, either at law or in equity to recover all money or other valuable consideration paid for the business opportunity and actual damages, together with interest at [the legal rate or appropriate statutory section] from the date of sale, reasonable attorney's fees and court costs. The liability of the surety shall not exceed the amount of the bond.

COMMENT: Section 600 establishes several remedies for a purchaser to use in the event an offer or sale is made in violation of the enumerated sections of this Act. Some states with business opportunity laws preclude a purchaser from obtaining any unjust enrichment when utilizing a civil remedy. Each state legislature should consider the need for a provision pertaining to unjust enrichment. The bracketed language in each subsection concerns the appropriate interest rate that should be allowed a successful plaintiff. Many states have a statutory interest rate and each state legislature should decide whether to enumerate the interest rate "at the legal rate" or by reference to the appropriate statutory section.

Sec. 601. Persons Liable

Every person who directly or indirectly controls a person liable under section 600 or 601, every partner in a partnership so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions and every employee of a person so liable who materially aids in the act or transaction constituting the violation is also liable jointly or severally with and to the same extent as such person, unless the person liable under this section proves that he or she did not know, and in the exercise of reasonable care could not have known of the existence of the facts constituting the alleged liability. There is contribution, as in cases of contract, among the several persons held liable.

COMMENT: This section is based on subsection 410(b) of the Uniform Securities Act.

Sec. 602. Miscellaneous Provisions

- A. No action shall be maintained under section 600 unless commenced before three (3) years after the act or transaction constituting the violation.

COMMENT: This subsection is based on section 410 of the Uniform Securities Act. Several states have added a further limitation to the Uniform Securities Act which reads: "... or the expiration of one year after the discovery of the facts constituting the violation, whichever first expires." This additional language has been the subject of several court cases dealing with the question of when the purchaser knew or should have known of the violation. Individual state legislature should consider the propriety of adopting the additional language.

- B. The rights and remedies under this Act are in addition to any other rights or remedies that may exist at law or in equity.

COMMENT: This subsection is based on subsection 410(h) of the Uniform Securities Act.

- C. Any condition, stipulation or provision binding any purchaser of a business opportunity to waive compliance with or relieving a person from any duty or liability imposed by or any right provided by this Act or any rule or order issued pursuant to this Act is void.

COMMENT: This subsection is based on subsection 410(g) of the Uniform Securities Act.