

ERSP Review Program Guidance for Telemarketing & Live Seminar Events

Electronic Retailing Self-Regulation Program

Administered by the Council of Better Business Bureaus, Inc.
Policy and Procedures set by the Advertising Self-Regulatory Council
112 Madison Avenue, 3rd Floor, New York, NY 10016

Copyright 2015. Council of Better Business Bureaus, Inc.
Last revised: 12/12/17

INTRODUCTION

In 2004, the Electronic Retailing Self-Regulation Program (ERSP) was created in conjunction with the Electronic Retailing Association (ERA) and the Advertising Self-Regulatory Council (ASRC) as a self-regulatory program to promote responsible advertising in the direct response industry. The mission of ERSP is to promote truthful advertising and marketing by industry members, enhance consumer confidence in the industry, and demonstrate to government agencies and others the strong commitment of the industry participants to meaningful and effective self-regulation.

In 2012, ERSP expanded its purview to monitor and review lead generation advertising and telemarketing scripts and recordings of ERSP Review Program Participants. In 2013, ERSP also began to review substantive representations communicated during free live seminars for wealth creation products for program Participants. Accordingly, ERSP is responsible for reviewing telemarketing sales scripts, seminar power points, as well as phone call and live event recordings from participating companies.

More specifically, as part of its self-regulatory undertaking, ERSP evaluates the “*primary*” or “*core*” claims made in Participants’ advertising materials, scripts, telemarketing recordings, and presentations, i.e., those representations which are deemed by ERSP to be the most significant and fundamental in the communication of material attributes or characteristics of the advertised program. For purposes of the ERSP Review Program, the “*primary*” or “*core*” claims in a script, telemarketing call, or live seminar include, but are not limited to, claims relating to the objective benefits of the advertised program or service (especially financial benefits) and the qualifications of any related coaches or mentors or the nature of the assistance.

The following is provided for the guidance of program participants and is not and should not be viewed as advice on legal compliance obligations under state and federal law. Participants are also encouraged to consult the BBB Code of Advertising for additional guidance regarding issues about product and service claims.

SCOPE

This guidance was developed by ERSP to aid in the review and implementation of direct response marketing as related to the program (i.e., telemarketing calls, scripts, live seminar recordings, presentations, and corresponding marketing materials) and to provide guidance for Participants regarding the general principles of truthful and accurate claim dissemination. It should also be noted that the focus of this guidance is on the solicitation of prospective customers after the initial lead generation response. Often, lead generation communications are at the request of the prospective customer.

CORE PRINCIPLES

The following Core Principles apply to all practices covered by the self-regulatory program:

- Participants should not engage in deceptive marketing or make unsupported representations when marketing their programs to consumers.

- Marketing may be considered deceptive if it contains a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material.
- Marketing representations are inaccurate if there is not a reasonable basis for all objective claims made about an advertised service or program (or the benefits to be obtained from the participation in a service or program) during a call or live event. At a minimum, a marketer should always have the amount and type of substantiation that it claims to have prior to the dissemination of the advertising claim.

In assessing the appropriateness of representations made in marketing, the “net impression” of the entire phone call or event, must be considered, including, among other things, the express and implied claims disseminated and any material omissions.

- Whether a telesales call or live event leaves a misleading impression should be determined by assessing how reasonable consumers in the intended audience would interpret the message(s).
- Participants should be aware, and ensure their contractors are aware, of the federal and state laws and regulations that govern sales and marketing by telephone, and conduct their business in compliance with those laws and regulations. Participants should encourage their affiliates, agents, companies or individuals with whom they do business to follow the principles set forth in this document. For example, Participants should ensure that the telemarketing or live seminar service provides guidance and training to affiliates, agents, companies or individuals with whom they do business concerning the need to ensure that statements they make are truthful and substantiated.
- Participants should refrain from conducting business with any companies or individuals that they know are violating these principles or otherwise engaging in dishonest or unethical business practices. As this document cannot anticipate and answer all the issues and questions that may arise due to technological advancements and other future changes in the marketplace, Participants should look to the spirit as well as the letter of this guidance, always striving to be fair and reasonable in their dealings with consumers.

GENERAL PRINCIPLES REGARDING THE USE OF DISCLOSURES

Participants who conduct live seminars, who conduct their own in-house telemarketing, those who outsource telemarketing services, and those who provide telemarketing services to others each have a responsibility, consistent with their role in a particular solicitation, to ensure that all of the material terms and conditions of an offer are disclosed to prospective customers. Telemarketing sales and live seminar representatives, and any other agents working on the Participant’s behalf, as well as the telesales scripts and seminar presentations on which they rely, or, in some situations, a television ad or direct mail piece that precedes an inbound or outbound call, should disclose all material information. The terms of the offer should be sufficiently clear and complete so that the reasonable consumer will understand what is being offered, how much it costs, and what his or her ongoing commitments or obligations are, if any, before purchasing the advertised product or service.

LEAD GENERATION

For purposes of this document, lead generation is defined as the process of collecting names and contact information about qualified prospects which will be contacted by the salespeople for generating orders involving direct response advertising and telemarketing.

ERSP Review Participants shall be responsible for the content of any and all lead generation advertising that they create for the purposes of obtaining sales. ERSP Review Participants are encouraged to create their own leads for the purposes of program and/or product sales and, in the event that leads are purchased from or sold to third parties, the marketer shall contractually require its providers to be truthful in their express and implied claims and to abide by industry best practices. ERSP Program Participants shall not purchase leads as a result of any advertising containing inaccurate or untruthful claims.

Accordingly, ERSP Review Program Participants shall at all times be responsible for how leads have been obtained from third party and should carefully review any lead generation advertising for purposes of truthfulness and accuracy as part of its ordinary due diligence in obtaining customer leads.

PRE-PURCHASE DISCLOSURES

Before a customer consents to pay for a service, product or program (by providing his or her credit card information or otherwise assenting to payment), the marketer must conspicuously disclose truthfully the following material information:

- The nature of the goods and services included in the program;
- The cost of the program (including shipping and handling or any additional fees, if any);
- The terms and conditions of any financing offer;
- Any material restrictions, limitations, or conditions to purchase the program;
- All material terms and conditions of the marketer's refund, cancellation, and/or exchange policy (or the fact that no refunds, cancellations, or exchanges are available); and
- If the offer includes a negative option feature, all material terms and conditions of the negative option plan, including, but not limited to, a description of the service, all fees and costs, length of any trial period, a mechanism to stop recurring charges, etc.

PROHIBITED TELEMARKETING MISREPRESENTATIONS

In accordance with the Telemarketing Sales Rule, Participant telemarketers should not:

- make any false or misleading statements or representations of material fact concerning the programs it sells, or the benefits of these programs;
- make false or unsubstantiated representations concerning the financial benefits of a service or program. Specifically, a telemarketer should not misrepresent that consumers who purchase a service or program:
 - o are likely to make a substantial amount of money;
 - o are likely to make money quickly and easily;
 - o can exert little or no effort and still achieve financial success;
 - o are likely to achieve a particular income, profit, or sales volume; and
 - o are likely to make enough money to pay for the cost of the program within a certain period of time;

- misrepresent the relevant expertise or experience of its coaches or mentors, the nature or quality of assistance offered by coaches or mentors, or the availability of coaches or mentors for consultations;
- represent that a consumer does not need to own a computer or other equipment or have high-speed internet access to benefit from any service or program it offers if the lack of such equipment or internet access would substantially limit the potential benefits attainable from such program;
- misrepresent the nature, duration, price, or payment terms of any service or program it offers;
- misrepresent any material aspect of the nature or terms of its refund, cancellation, or exchange policies;
- use undue sales pressure to encourage consumers to purchase a program or service;
- promise a prospective customer that his or her experience will be used as a “consumer testimonial” or “success story” should he or she participate in the training;
- claim affiliation with an individual or group when no such affiliation exists;
- represent that that he or she participated in the training and became successful, when the agent did not participate in the underlying training;
- provide false credentials to prospective customers in an attempt to establish a relationship of trust; or
- represent to prospective customers that the telemarketer is engaged in the same types of activities when he or she in fact is not.

IDENTIFICATION & CREDENTIALS OF COACHES

Participants should provide consumers with a public, easily accessible website that provides the names and credentials of the coaches affiliated with the company; this list should be regularly maintained and updated to ensure that it remains accurate.

Participants should have internal training and accreditation protocols for their coaches. Additionally, all coaches should go through an internal testing process to ensure they obtain the requisite knowledge to train clients on the relevant subject. Participants should also conduct biannual reviews of the coaches to ensure they stay up to date on any changes in the industry which may affect their clients and the content they are teaching.

Program Participants should have a mechanism in place to retrain or remove a coach if they are failing to maintain a sufficient knowledge on their given subject or fail to interact well with their clients.

AGENT IDENTIFICATION

Participants should comply with all aspects of section 16 C.F.R. 310.4(d)(1)&(2) of the Telemarketing Sales Rule which states in relevant part that, *“it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call...the identity of the seller...[and] that the purpose of the call is to sell goods or services”*

In an effort to avoid sending an inaccurate message to the customer, it is important for program Participants to properly identify themselves immediately and accurately and clearly describe the product or program that is being sold. If the representative is calling as a result

of an affiliated lead, the representative should inform the customer of the name of the company on whose behalf he or she is calling.

ELECTRONIC SURVEILLANCE (CALL RECORD NOTICE)

While a notice that a call is being recorded may not be legally required in each state, it is considered a best practice for telemarketers to make a concerted effort to inform consumers that a call may be recorded for quality assurance and/or training purposes.

TESTIMONIALS AND ENDORSEMENTS

Pursuant to the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising ("FTC Guides") testimonials and endorsements (which are sometimes presented in advertising as "Success Stories") may not make representations that would be deceptive or could not be substantiated if the advertiser made them directly. All testimonials from consumers shall reflect the honest opinions, findings, beliefs or experiences of the consumer and be generally representative of the results to be expected by the average consumer. If the advertiser doesn't have substantiation to support the express or implied claim that the testimonial's results are typical, the advertiser should disclose the generally expected performance of the product in the circumstances depicted. If an advertisement represents that an endorser uses the endorsed product, then the endorser must have been a bona fide user of the product at the time the endorsement was made. The advertiser should not continue to use an endorsement without reason to believe that the endorser remains a bona fide user of the product. If a consumer providing a testimonial has taken advanced courses or relied on any additional materials to obtain the stated results, this must be disclosed clearly and conspicuously in the advertising. Similarly, any "material connection" between an advertiser and an endorser that is not reasonably expected by the audience and that would have a significant effect on the weight or credibility given to the endorsement by that audience — e.g., a family or business relationship, the receipt of free product or services — must be disclosed. Audiences expect expert or celebrity endorsers to be compensated, so payments to expert or celebrity endorsers need not be disclosed.)

EARNINGS CLAIMS & DISCLOSURES

As many earnings claims in the direct response advertising industry are communicated by virtue of product users or company spokespersons attesting to a particular level of success from using the product or program, adherence to the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising ("FTC Guides") is imperative. Further, because most advertisements relating to wealth creation products and programs implement testimonials that make reference to earnings that may be considered "atypical," and because these claims are often the most persuasive representations in the minds of consumers, the direction provided by the FTC Guides is especially germane.

Although the FTC does not explicitly prohibit express and/or implied earnings claims, earnings claims are considered highly suggestive to the consumer regarding the amount of money they may expect to earn from using the product or service. All claims, however, must be true and accurate or they should not be disseminated. Consequently, a promise that the consumer will earn a specific amount of money, in a specific period of time becomes an issue particularly if the typical consumer does not make that amount in the prescribed period of time. All express and/or implied earnings claims should be

substantiated by competent and reliable evidence of what the average or typical consumer will achieve and are strictly prohibited without concrete substantiation.

All testimonials from consumers should reflect the honest opinions, findings, beliefs or experiences of the consumer and be generally representative of the results to be expected by the average consumer using the product and/or service in the manner in which it is advertised. Testimonial claims should not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser and, unless otherwise indicated, must reflect what other users of the program and/or product can generally expect to experience.

When disseminating an advertisement that features a product user who explicitly or implicitly conveys that his or her experience with a product or service may be “typical” when that is not the case, the advertiser should clearly and conspicuously provide consumers with additional information that will provide some indication of how they ascertain what is typical in the depicted scenario. Accordingly, when using testimonials, a marketer should either possess substantiation that the user’s stated experience is “typical” or, conversely, if the net impression of the testimonial is that the result is “atypical,” the marketer should include additional information that will assist the consumer in determining what can be considered a “typically expected result.” A disclosure should not be used to contradict the message conveyed by the advertising claim, but to qualify the claim with material information.

In helping discern what constitutes a “typically expected result,” it is recommended that Participants make a concerted effort to maintain ongoing communication with purchasers of its product or service in order to ascertain their level of success and satisfaction with the product or service.

It is also recommended that Participants keep such data on file and make it available to potential customers on request.

Any “material connection” between an advertiser and an endorser that is not reasonably expected by the audience and that would have a significant effect on the weight or credibility given to the endorsement by that audience — e.g., a family or business relationship, compensation, the receipt of free product or services — must be disclosed.

DISCLOSURE OF COSTS AND OTHER MATERIAL TERMS OF AN OFFER

The terms of a communicated offer regarding products or services should be sufficiently clear and complete so that the average consumer will understand what is being offered, how much it costs, and what his or her ongoing commitments or obligations are, if any, prior to purchase of the advertised product or service.

The advertiser should make it clear if accessories or other items depicted or mentioned in an advertisement are optional and not included in the advertised price. However, if the results depicted in the advertising are in any way attributable to these optional components or services, the use of these additional materials must be disclosed as being integral to the results depicted in the claim. All costs related to an offer (including postage and handling, taxes, etc.) should be disclosed simultaneously.

SELECTIVE ENROLLMENT & QUALIFICATION

Selective or qualified enrollment claims often persuade a customer to make a decision to purchase a product based on the implication that they are being selected from a large pool of applicants, or, alternatively, meeting certain qualifications. ERSP believes that claims of selective or qualified enrollment, if such enrollment in a program is not indeed part of some dedicated selection or qualification process, may be considered disingenuous and inaccurate. This style of advertising can be especially concerning, particularly in this product category, because a reasonable consumer may interpret the claim to mean he or she has *earned* or *merited* a spot in the program, akin to a college acceptance process.

Keeping in mind the vulnerable nature of the customer base in this product category, such claims could give prospective students the impression that they had been hand-picked to participate in a special, exclusive program. Participants should not use references to selective enrollment or a qualification process, unless they can prove that they strictly abide by such a process or procedure. For example, the marketer should not state, "We only allow a few qualified individuals into our program" when in fact anyone who wants to buy is able to purchase. Conversely, a marketer may suggest selectivity if they can demonstrate that only individuals who meet certain criteria have been chosen to participate.

In addition, prospective purchasers of a program or service should not be misled to believe that they have been specifically chosen or qualified to participate simply because they may have the time, financial wherewithal, and motivation to make a purchase.

SALES PRESSURE & ENROLLMENT URGENCY

Marketers should refrain from applying undue sales pressure or using overly persuasive and/or misleading tactics to enroll consumers.

Participants' representatives should not harass, mislead or be intentionally ambiguous with any prospective customers and should maintain a professional demeanor at all times. All Participants should, at a minimum, allow a purchaser a reasonable period of time as prescribed by relevant Federal, State and/or local law to cancel their purchase without penalty. In addition, Participants should exercise their discretion and apply a reasonableness standard in granting refunds or allowing cancellation beyond the legal cancellation periods that takes into account the purchaser's circumstances

Participants should not encourage potential customers to make a purchase immediately, by suggesting that the opportunity to purchase the product or services will be lost if the prospective customer does not make the purchase immediately, unless that is a factual representation.

Participants are encouraged to reassure prospective customers that they have an adequate time period to contemplate the purchase of a program or service and to invite prospective customers to call back should they need additional information

CREDIT CARD FACTORING

Credit card factoring is the act of processing transactions through a merchant account for a business or entity other than the specific business that was screened for the merchant account.

It is a violation of the Telemarketing Sales Rule (TSR) for anyone

- with a merchant account to deposit into the credit card system any credit card sales draft generated by a telemarketing transaction that is not the result of a sale to the buyer by the person who has the merchant account.
- to use or solicit someone who has a merchant account (or an employee, representative, or agent of someone who has a merchant account) to deposit into the credit card system any credit card sales draft generated by a telemarketing transaction that is not the result of a sale to the buyer by the person who has the merchant account.
- to obtain access to the credit card system through a business relationship or an affiliation with a merchant, when the access is not authorized under the terms of the merchant account or by the applicable credit card system.

The TSR also prohibits a person from providing substantial assistance or support to any seller or telemarketer when that person “knows or consciously avoids knowing” that the seller or telemarketer is engaged in any of the abovementioned acts or practices.

LIMITED TIME OFFERS

Telemarketers of programs and services should refrain from making “limited time only” offers unless that particular offer is in fact available for the limited time advertised.

CONSUMER USAGE/SATISFACTION SURVEYS

If a Participant uses consumer usage or satisfaction surveys in presentations or refers to them in telesales calls, the results of those surveys should be verified, audited, and/or collected by an independent third party who can validate the results. All such reports should be submitted to ERSP prior to a Participant using these results in their marketing materials.

ENFORCEMENT

This guidance for ERSP Review Program Participants are predicated on improving the confidence of consumers regarding telemarketing offers, products and services that originate from lead generation advertising, telemarketing scripts, and representations communicated during free, live seminars for wealth creation products. As the marketing of wealth creation products and services is becoming more prevalent, fraud and deception continues to erode consumer confidence in the marketplace. To the extent that ERSP becomes aware that Participants are failing to make a good faith attempt to adhere to this guidance, it may take such steps as appears appropriate to address such behavior including, but not limited to, the commencement of a self-regulatory inquiry pursuant to the ERSP Policy & Procedures and, if necessary, referral of the matter to the appropriate law enforcement agencies.