

South Dakota State MLM Law

MLMLegal.com has tracked pyramid, consumer protection, endless chain, and MLM distribution statute legislation in each state.

The following is applicable legislation in South Dakota State:

A BRIEF MLM STATE LAW PRIMER

Every state has adopted laws regulating MLM companies. Although much enforcement activity has come from the federal government through the FTC, SEC and U.S. Postal Service, the vast majority of enforcement activity has occurred at the state level.

From a historical standpoint, state regulation of multilevel marketing programs is a relatively recent phenomenon. For the most part, the three major direct selling companies that laid a foundation for the multilevel marketing industry for decades to come, Amway, Mary Kay and Shaklee, began their operations in the late 1950s. From a legal standpoint, matters went relatively smoothly until the major pyramid cases of the early 1970s involving Glen Turner's Dare to be Great and Koscot Interplanetary.

The Turner programs were prosecuted substantially www.mlmlegal.com under securities laws and various consumer fraud laws. Along the way, most states adopted various forms of anti-pyramid legislation. Although generally targeting the same type of activity, state MLM legislation has taken its form as pyramid statutes, endless chain scheme statutes, lottery statutes, sales referral laws and, most recently, multilevel distribution statutes.

Pyramid Statutes/Endless Chain Schemes Statutes.

Most state regulation of MLM companies comes under the auspices of pyramid statutes and endless chain scheme statutes. The language in these statutes is often quite similar. The comparison of two of these type statutes illustrates this point. For instance, compare California's endless chain statute with Oregon's pyramid law.

California Endless Chain Statute, California Penal Code '327:

"327. Endless chain schemes

"Every person who contrives, prepares, sets up, proposes, operates any endless chain is guilty of a misdemeanor. As used in this section, an 'endless chain' means any scheme for the disposal or distribution of property whereby a participant pays a valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant. Compensation, as used in this section, does not mean or include payment based upon sales made to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme."

Oregon Pyramid Statute:

"pyramid club" means a sales device whereby a person, upon condition that the person make an investment, is granted a license or right to solicit or recruit for economic gain one or more additional persons who are also granted such license or right upon condition of making an investment and who may further perpetuate the chain of persons who are granted such license or right upon such condition. "Pyramid club" also includes any such sales device which does not involve the sale or distribution of any real estate, goods or services, including but not limited to a chain letter scheme. A limitation as to the number of persons who may participate, or the presence of additional conditions affecting www.mlmlegal.com eligibility for such license or right to recruit or solicit or the receipt of economic gain therefrom, does not change the identity of the scheme as a pyramid club. As used herein "investment" means any acquisition, for a consideration other than personal services, of property, tangible or intangible, and includes without limitation, franchises, business opportunities and services. It does not include sales demonstration equipment and materials furnished at cost for use in making sales and not for resale."

As a general matter, the pyramid and endless chain statutes prohibit the payment of a consideration for the right to recruit others for economic gain where the compensation is unrelated to the sale of products or services. This language is very ambiguous and has resulted in legions of cases, many inconsistent in outcome. The ambiguity of the statutes has also led to selective and inconsistent enforcement policies.

Two operative terms "consideration" and "compensation unrelated to sales" are often looked at as follows. A prohibited consideration is generally referring to: (1) an actual monetary fee for the right to engage in the multilevel business, (2) inflated product prices in which the excess product price is viewed as a prohibited consideration, (3) front-loading or inventorying of product in which excessive product purchases are viewed as prohibited consideration for the requirement that individuals make an initial investment of product purchased to engage in the opportunity, (5) where it appears that people are only buying product in order to "buy into the deal," and (6) many statutes, although not all statutes, exempt from the term "prohibited consideration," the purchase of an at cost sales kit or demonstration materials.

The receipt of compensation unrelated to sales typically references: (1) payment of actual headhunting fees for finding other recruits, (2) a program in which sponsors make all of their compensation from override commissions from loading recruits with unnecessary product, (3) a program in which there is no evidence of sales outside the network of distributors.

The following is applicable legislation in South Dakota State:

South Dakota

CHAPTER 37-33

PYRAMID PROMOTIONAL SCHEMES

- 37-33-1 "Promote" defined.
- 37-33-2 "Appropriate inventory repurchase program" defined--"Inventory" defined--
"Commercially reasonable" defined--"Current and marketable" defined.
- 37-33-3 "Pyramid promotional scheme" defined.
- 37-33-4 "Compensation" defined.
- 37-33-5 "Consideration" defined.
- 37-33-6 "Inventory loading" defined.
- 37-33-7 Pyramid promotional schemes prohibited--Operation of scheme a felony--
Participation in scheme a misdemeanor.
- 37-33-8 Certain plans not defined as pyramid promotional schemes.
- 37-33-9 Attorney general may proceed against pyramid promotional schemes.
- 37-33-10 Civil proceedings by attorney general--Entry of orders--Injunctions--Hearings--
Penalties--Payment of costs.
- 37-33-11 Burden of proof.

37-33-1. "Promote" defined. For the purposes of §§ 37-33-1 to 37-33-11, inclusive, the term, promote, means contrive, prepare, establish, plan, operate, advertise, or otherwise induce or attempt to induce another person to participate in a pyramid promotional scheme.

Source: SL 2003, ch 213, § 1.

37-33-2. "Appropriate inventory repurchase program" defined--"Inventory" defined--
"Commercially reasonable" defined--"Current and marketable" defined. For the purposes of §§ 37-33-1 to 37-33-11, inclusive, the term, appropriate inventory repurchase program, means a program by which a plan or operation repurchases, upon request and upon commercially reasonable terms, when the salesperson's business www.mlmlegal.com relationship with the company ends, current and marketable inventory in the possession of the salesperson that was purchased by the salesperson for resale. Any such plan or operation shall clearly describe the program in its recruiting literature, sales manual, or contract with independent salespersons, including the disclosure of any inventory which is not eligible for repurchase under the program.

For the purposes of this section, the term, inventory, includes both goods and services, including company-produced promotional materials, sales aids, and sales kits that the plan or operation requires independent salespersons to purchase.

The term, commercially reasonable terms, means the repurchase of current and marketable inventory within twelve months from the date of purchase at not less than ninety percent of the original net cost, less appropriate set-offs and legal claims, if any.

The term, current and marketable, excludes inventory that is no longer within its commercially reasonable use or shelf-life period, that was clearly described to salespersons prior to purchase as seasonal, discontinued, or special promotion products not subject to the plan or operation's inventory repurchase program, or that has been used or opened.

Source: SL 2003, ch 213, § 2.

37-33-3. "Pyramid promotional scheme" defined. For the purposes of §§ 37-33-1 to 37-33-11, inclusive, the term, pyramid promotional scheme, means any plan or operation by which a person gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other persons into the plan or operation rather than from the sale and consumption of goods, services, or intangible property by a participant or other persons introduced into the plan or operation. The term includes any plan or operation under which the number of persons who may participate is limited www.mlmlegal.com either expressly or by the application of conditions affecting the eligibility of a person to receive compensation under the plan or operation, or any plan or operation under which a person, on giving any consideration, obtains any goods, services, or intangible property in addition to the right to receive compensation.

Source: SL 2003, ch 213, § 3.

37-33-4. "Compensation" defined. For the purposes of §§ 37-33-1 to 37-33-11, inclusive, the term, compensation, means a payment of any money, thing of value, or financial benefit conferred in return for inducing another person to participate in a pyramid promotional scheme.

Source: SL 2003, ch 213, § 4.

37-33-5. "Consideration" defined. For the purposes of §§ 37-33-1 to 37-33-11, inclusive, the term, consideration, means the payment of cash or the purchase of goods, services, or intangible property. The term does not include the purchase of goods or services furnished at cost to be used in making sales and not for resale, or time and effort spent in pursuit of sales or recruiting activities.

Source: SL 2003, ch 213, § 5.

37-33-6. "Inventory loading" defined. For the purposes of §§ 37-33-1 to 37-33-11, inclusive, the term, inventory loading, means that the plan or operation requires or encourages its independent salespersons to purchase inventory in an amount, which exceeds that which the salesperson can expect to resell for ultimate consumption or to consume in a reasonable time period, or both.

Source: SL 2003, ch 213, § 6.

37-33-7. Pyramid promotional schemes prohibited--Operation of scheme a felony-- Participation in scheme a misdemeanor. No person may establish, promote, operate, or participate in any pyramid promotional scheme. A limitation as to the number of persons who may participate or the presence of additional conditions affecting eligibility for the opportunity to receive compensation under the plan does not change the identity of the plan as a pyramid promotional scheme. It is not a defense under this section that a person, on giving consideration, obtains goods, services, or intangible property in addition to the right to receive compensation.

Any person who establishes or operates a pyramid promotional scheme is guilty of a Class 5 felony. Any person who knowingly participates in a pyramid promotional scheme is guilty of a Class 1 misdemeanor.

Source: SL 2003, ch 213, § 7.

37-33-8. Certain plans not defined as pyramid promotional schemes. Nothing in §§ 37-33-1 to 37-33-11, inclusive, may be construed to prohibit a plan or operation, or to define a plan or operation as a pyramid promotional scheme, based on the fact that participants in the plan or operation give consideration in return for the right to receive compensation based upon purchases of goods, services, or intangible property by participants for personal use, consumption, or resale so long as the plan or operation does not promote or induce inventory loading and the plan or operation implements an appropriate inventory repurchase program.

Source: SL 2003, ch 213, § 8.

37-33-9. Attorney general may proceed against pyramid promotional schemes. The provisions of §§ 37-33-1 to 37-33-11, inclusive, do not www.mlmllegal.com preclude, preempt, or prohibit the attorney general from proceeding against any plan or scheme or any person involved with such plan or scheme under any other provision of law.

Source: SL 2003, ch 213, § 9.

37-33-10. Civil proceedings by attorney general--Entry of orders--Injunctions--Hearings--Penalties--Payment of costs. If it appears to the attorney general that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of §§ 37-33-1 to 37-33-11, inclusive, or any order under §§ 37-33-1 to 37-33-11, inclusive, the attorney general may do one or more of the following:

(1) Issue a cease and desist order, with or without prior hearing, against any person engaged in the prohibited activities, directing such person to cease and desist from further illegal activities;

(2) Bring an action in the circuit court to enjoin the acts or practices to enforce compliance with §§ 37-33-1 to 37-33-11, inclusive, or any order under §§ 37-33-1 to 37-33-11, inclusive; or

(3) Impose by order and collect a civil penalty against any person found in an administrative action to have violated any provision of §§ 37-33-1 to 37-33-11, inclusive, or any order issued under §§ 37-33-1 to 37-33-11, inclusive, in an amount not to exceed ten thousand dollars per violation per person. The attorney general may bring actions to recover penalties pursuant to this subdivision in circuit court. All civil penalties received shall be deposited in the state general fund.

Any person named in a cease and desist order issued pursuant to §§ 37-33-1 to 37-33-11, inclusive, shall be notified of his or her right to file, within fifteen days after the receipt of the

order, a written notice for a hearing with the attorney general. If the attorney general does not receive a written request for a hearing within the time specified, the cease and desist order shall be permanent and the person named in the order deemed to have waived all rights to a hearing. Every such order shall state its effective date and shall concisely state its intent or purpose and the grounds on which it is based. Any person aggrieved by a final order issued pursuant to §§ 37-33-1 to 37-33-11, inclusive, may obtain a review of the order in the circuit court pursuant to the provisions of chapter 1-26.

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 defendant's assets. In addition, upon a proper showing by the attorney general, the court may enter an order of rescission, restitution, or disgorgement directed to any person who has engaged in any act constituting a violation of any provision of §§ 37-33-1 to 37-33-11, inclusive, or any order under §§ 37-33-1 to 37-33-11, inclusive. The court may not require the attorney general to post a bond. In addition to fines or penalties, the attorney general shall collect costs and attorney fees.

Source: SL 2003, ch 213, § 10.

37-33-11. Burden of proof. The burden of showing compliance with the provisions of §§ 37-33-1 to 37-33-11, inclusive, lies with the plan, scheme, or person involved with such plan or scheme.

Source: SL 2003, ch 213, § 11.

Deceptive Sales Referral Practices:

SOUTH DAKOTA

37-24-6. Deceptive practice as misdemeanor -- Acts declared deceptive. It is a deceptive act or practice for any person to:

(1) Knowingly and intentionally act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any www.mlmlegal.com merchandise, regardless of whether any person has in fact been misled, deceived, or damaged thereby;...

(4) Give or offer a rebate, discount, or anything of value to an individual as an inducement for selling consumer property or services in consideration of giving the names of prospective purchasers or otherwise aiding in making a sale to another person, if the earning of the rebate, discount, or other thing of value is contingent upon the occurrence of an event subsequent to the time the individual agrees to the sale;

(5) Engage in any scheme or plan for disposal or distribution of merchandise whereby a participant pays a valuable consideration for the chance to receive compensation primarily for introducing one or more additional persons into participation in the planner's scheme or for the

chance to receive compensation when the person introduced by the participant introduces a new participant;

On any given day you can catch Jeffrey Babener, editor of www.mlmlegal.com, lecturing on Network Marketing at the University of Texas or the University of Illinois, addressing thousands of distributors in Los Angeles, Bangkok, Tokyo and Russia, or writing a new book on Network Marketing, an article for Entrepreneur Magazine or a chapter for a University textbook. Over two decades he has served as marketing and legal advisor to some of the world's largest direct selling companies, the likes of Avon, Nikken, Shaklee, Tupperware, Prepaid Legal, Longaberger, Melaleuca, Discovery Toys, Usana, Amazon Herb, NuSkin, Cell Tech, Sunrider.... and he has provided counsel to the most successful telecom network marketing companies...Excel, ACN, World Connect, ITI, Acceris, AOL Select and Network 2000. An active spokesperson for the industry, he has assisted in new legislation and served on the Lawyer's Council, Government Relations Committee and Internet Task Force of the Direct Selling Association (DSA) as well as serving as General Counsel for the Multilevel Marketing International Association. He is an MLM attorney supplier member of the DSA and has served as legal counsel and MLM consultant on MLM law issues for many DSA companies. He is author of multiple books, including, Network Marketing: What You Should Know, Network Marketer's Guide To Success, Tax Guide for MLM/Direct Sellers, Starting and Running the Successful MLM Company, The MLM Corporate Handbook and Window of Opportunity. He is author of countless articles on network marketing, many of which can be found at www.mlmlegal.com where he is the editor. You will see his articles and interviews in such publications as Money, Atlantic Monthly, Success, Entrepreneur, Business Startups, Home Office Computing, Inc., Money Makers Monthly, etc. He has been chairman of numerous industry conference series, including, Starting and Running the Successful MLM Company, The MLM Entrepreneur Series and The MLM Masters series. He has served as the close advisor to scores of MLM Companies and their distributors, comprising millions of distributors and billions of dollars in sales. Mr. Babener is a graduate of the University of Southern California Law School, where he served as editor of the USC Law Review. After an appointment to be an advisor law clerk to a U.S. Federal Judge, he went on to become a member of the California and Oregon State Bar, where he has also served as chairman of the Oregon State Bar Committee on Judicial Administration. He has exclusively practiced in the area of direct selling for over 20 years. A Regulatory Update for MLM, Direct Selling, Network Marketing, Direct Sales, Party Plan Independent Distributors and Companies.