

New FTC Rule Concerning the Sale of a Business Opportunity Goes Into Effect

By Bradley S. Wooldridge

On November 22 of last year, the Federal Trade Commission ended a nearly six year process of developing a new federal business opportunity rule. The new rule goes into effect on March 1, 2012. According to the FTC, the new rule balances the need for sufficient and beneficial disclosures to prospective purchasers of a business opportunity with the need to minimize burdensome compliance obligations for the seller of such opportunity. The new rule does not preempt state business opportunity laws, but is in addition thereto. Thus, for those business located in states that have their own business opportunity laws, such as North Carolina, there may be compliance requirements from both the state and federal level.

As of March 1st, a seller of a business opportunity must disclose the following 5 items in a 1 page business opportunity disclosure document:

- the seller's identifying information,
- whether or not the seller makes earnings claims,
- legal actions concerning the seller, its affiliates and their key employees,
- existence, or lack thereof, of a cancellation or refund policy, and
- a list of purchasers within the previous 3 years.

In addition to simplifying the disclosure requirements, the new rule expanded those transactions that fall within the definition of a "business opportunity." A "business opportunity" under the new rule consists of a commercial arrangement meeting the following 3 criteria:

- the seller must solicit the prospective purchaser into a new business,
- the prospective purchaser must make a payment to the seller or an affiliate in order to commence the business, and
- the seller or affiliate must represent that they will provide the prospective purchaser assistance with either locations to operate, accounts or customers, or by buying back the purchaser's goods or services.

The new rule altered the definition of a business opportunity, in part, to extend its reach to certain work-at-home business opportunities. Some examples of business opportunities include investments in opportunities such as vending machines, craft assembly and telemarketing. For the most part, opportunities or business investments that fell under the old rule continue to be covered. The old rule, however, provided a safe harbor whereby business opportunities that required payment of \$500 or less during the first 6 months were relieved from compliance with the rule ("\$500 Safe Harbor"). The \$500 Safe Harbor was not included in the new rule. The new rule does however retain the exemption for wholesale bona-fide purchases of reasonable amounts of inventory from Seller and exempts multi-level marketing arrangements.

Sellers subject to the new rule are prohibited from certain actions which include disclaiming or requiring a purchaser to waive reliance on the business opportunity disclosure document,

making false earnings claims or fail to provide substantiation upon a purchaser's request, making representations that contradict the disclosure document, misrepresenting seller's post-sale assistance, and misrepresenting exclusivity of a purchaser's territory, among others. In addition, the new rule has a record retention requirement whereby sellers must retain certain records for a period of at least 3 years, including disclosure documents, signed contracts with a purchaser, a purchaser's disclosure receipt, substantiation of earnings claims and oral or written cancellation or refund request received by a purchaser.

Businesses offering opportunities or potential business opportunities, including those business that sell products or services to enable others to start a business, should contact their legal counsel seeking guidance with respect to applicability of the new rule and to ensure any necessary compliance prior to March 1st.

For more information on the new FTC business opportunity rule, feel free to contact



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