SPECIAL REPORT

The Federal Trade Commission's New Business Opportunity Rule

Effective March 1, 2012

The Federal Trade Commission has enacted final regulations for a "business opportunity rule" requiring the disclosure of certain information if a "business opportunity" is being offered.

Due to the breadth of the new rule this is something you should be aware of so you do not unknowingly find yourself the subject of a public and expensive FTC prosecution.

Since 1978 the FTC has had special disclosure rules for franchises, and in 2007 an interim business opportunity rule was initiated that tracked the franchise disclosure requirements for certain business opportunities.

Now, after receiving much feedback, on March 1, 2012, the final new rule comes into effect that is broad, encompasses more businesses, and requires significant disclosures.

One popular target of the FTC is envelope stuffing schemes. Although the government cannot outlaw envelope business opportunities, it has perhaps found a way to require disclosures that will either deter sellers, or deter buyers, or at least make filing government enforcement actions and lawsuits easier because defendants will be more readily identified.

But it would be a mistake to assume the new Biz Opp Rule only applies to envelope stuffing schemes and not your business.

The new rule encompasses work at home offers not previously included in the prior rules, and it includes addition prohibitions on making misrepresentations or omitting to disclose key information. The new rule also has no dollar floor. The original franchise rule only applied to payments of at least $500. Now, any payment is subject to the new rule.

What is a Business Opportunity?

The $64,000 question - what exactly is a "business opportunity" covered by the new FTC Biz Opp Rule?

There are three requirements and all must be met:

1. A seller solicits someone to enter into a new business.

A "new business" is any business the prospect is not currently engaged in, or a new line or type of business. Since a solicitation typically includes advertisements where the identity and background of the prospect is not known, you should assume any advertising will meet this requirement.

The FTC noted that "new business" does not mean a "newbie" and that even solicitations to veteran business persons will meet this requirement so long as the business is new to the prospect.

2. A prospect makes a required payment.

"Free" offers are not subject to the rule.

However, the FTC includes indirect payments to the seller as being a payment.

For example, if you offer a "free" report to someone who buys through your affiliate link that is an indirect payment to you and meets this Biz Opp requirement.

Obviously, these first two requirements are very generic and broadly include many offers. The third requirement is where the rubber meets the road.

3. The seller represents that they, or someone they recommend, will do any of the following:

A. Provide locations for the use or operation of devices paid for by the buyer.

B. Provide existing or **potential** outlets, accounts, or customers for the buyer's goods or services. Here the FTC rule specifically refers to Internet outlets, accounts, and customers. The FTC rule also says the following are included:

- Recommending or suggesting lead generating companies
- Providing a list of lead generating companies
- Collecting a fee from lead generating companies
- Assisting the buyer in getting outlets, accounts or customers

C. Buy back or pay for any products or services provided by the buyer.

An example is envelope stuffing where the seller is buying the envelopes stuffed by the buyer or is telling the buyer who will buy their stuffed envelopes.

***** **Note that the person recommended by the seller, called a "designated person" in the FTC rule, does not need any connection to the seller. They may not even know the seller has mentioned them.**

For example: Joe sells a package on how to quickly create products to sell *and* lets the buyer run an ad for their new product in Joe's newsletter. By assisting the buyer in getting customers Joe has created a "business opportunity" subject to the FTC Rule.

What is Not Covered Under the Biz Opp Rule

There are two significant types of businesses not included under the Business Opportunity Rule:

1. Affiliate programs involving the tracking and payment of commissions.

2. Providing general advice about business development and training.

One gray area will be distinguishing between providing general training and providing assistance in obtaining customers. This is not an area you want to 'get close to the line' about due to the demanding requirements if you assist in getting customers and become subject to the Biz Opp Rule.

You do not want to EVER become subject to the onerous Business Opportunity Rule.

The primary purpose of the rule is to eliminate many Business Opportunities, and most certainly to eliminate Business Opportunities that make earnings claims.

Anyone subject to the new Rule likely has a **high-risk** of an FTC investigation. With so many detailed requirements a violation is almost certain to occur.

What Disclosures Are Required?

If you are subject to the Business Opportunity Rule, you must disclose the following to prospective buyers:

1. Seller Information

- Your Name
- Business Address
- Telephone Number
- Name of the Sales Person Making the Offer
- Date the Disclosure is Being Made

2. Past Litigation

The buyer must be given information about any past legal actions against the seller, or any or any of its key personnel, including

Any civil case, arbitration, or criminal complaints that have involved a claim for :

- Misrepresentation
- Fraud
- Securities law violations
- Unfair or deceptive practices, or
- Any violations of any FTC Rule,

Within the past 10 years.

For example:

Traffic tickets, bankruptcy, and murders do not need to be disclosed.

But any action alleging fraud does.

One of the FTC's purposes in including 'key personnel' is to prevent a fraudster from hiding their identity behind a new corporation or another person. "Key personnel" include the seller's:

- Officers
- Directors
- Sales managers
- Any prior business owned in part by the seller
- Any entity controlled by the seller

The litigation history of regular sales staff does not need to be disclosed.

Note the information you must collect from officers, directors, and sales managers. You should inform them their prior litigation history is subject to public disclosure.

*** Note that **a conviction or judgment is not required**. If some idiot files a frivolous lawsuit against you and one of the claims is fraud or an unfair business practice, the lawsuit needs to be disclosed even if it was immediately dismissed, settled , or you won the case.

It is not sufficient to merely state there have been actions filed. A list of actions must be provided that includes the:

- Caption of the case
- Names of the parties
- Case Number
- Court
- Filing date

Although the seller can also include a description of the case and what happened, this cannot exceed 100 words. The FTC has said using 101 words to explain yourself is itself a Rule violation.

3. Cancellation of Refund Policy

You must disclose whether or not you have a cancellation or refund policy. If you have one, the terms must be attached to the disclosure.

The number or percentage of refunds you have does not need to be disclosed.

4. Earnings Disclosure

Even if your offer or program does not fall within the new Biz Opp Rule, pay attention to these statements by the FTC and the importance of earnings claim disclosures:

> **"[T]he Commission's experience demonstrates that earnings claims are highly relevant to consumers in making their investment decisions and are often the <u>single most decisive factor</u> in such decisions."**
>
> **...**
>
> **"Earnings claims lie at the heart of business opportunity fraud, and are typically the enticement that persuades consumers to invest their money."**
>
> **...**
>
> **"By far, the most frequent allegations in Commission business opportunity cases pertain to false or unsubstantiated earnings claims."**

If there is any claim about how much money can be made then an earnings statement must be attached. This includes any implied claims about how much income, sales, or profit can be made.

If an earnings claim is made then all of the following must be done:

- There must be a reasonable basis for making the claim.
- You can support the claim with written documents.

- You make the written documents available to the prospect **or the FTC** upon request.

- Provide the prospect with the following earnings disclosure in a single document which has this information:

1. The following title in capital and bold letters:

EARNINGS CLAIM STATEMENT REQUIRED BY LAW

2. The name of the person making the claim.

3. The date of the claim.

4. The beginning and ending dates when the earnings were made.

5. The number and percentage of purchasers achieving that level of earnings during the range of dates.

6. Any characteristic of the persons achieving the earnings claim if that is materially different from the prospect's characteristics.

7. A statement that written proof of the earnings claim will be made available upon request.

The FTC says a chart, table, or anything visual that implies actual or potential money is an earnings claim. This would include the popular "screen shots" from ClickBank accounts showing weekly earnings.

The FTC also considers any money equivalents as being an earnings claim. If you say buyers will make enough to buy a Porsche, or that buyers will make enough to earn back their investment, then you have made an earnings claim.

Additionally, If you advertise an earnings claim in general media more pre-disclosure form disclosures must be made. The "general media" includes the Internet, email, websites, offline marketing, and mobile marketing. In your media advertising you must:

- Have a reasonable basis for making the claim
- Be able to support the claim with written documents
- State the beginning and ending dates when the earnings were achieved and the number of percentage of buyers who obtained those earnings

5. List of References

If you buy a business opportunity the FTC is forcing you to give up your privacy rights. The FTC's goal here is to prevent the use of paid or fake references. Pending almost guaranteed lawsuits against the FTC and a possible court ruling prohibiting enforcement of this part of the Biz Opp Rule, this is what the seller must disclosure to prospective buyers:

- Name,
- State, and
- Telephone number

of at least 10 people who bought the business opportunity within the last three years.

If there are less than 10 buyers then this information about all buyers must be disclosed.

If you have at least ten buyers the Rule says you must select the ten closest to the prospect's location. Presuming you are marketing online and have no idea where the prospect is located, then randomly pick ten buyers to disclose.

You also have the option of attaching a list of all buyers in the US during the last three years.

If you have less than ten buyers then all must be disclosed. This includes anyone who has requested a refund because they are still a buyer.

Note that by implication of the Rule referring to a "state" and all buyers in the US, it appears only US buyers need to be disclosed. You may be violating the privacy rights of non-US buyers if you improperly disclose their private information.

Due to the privacy intrusion the disclosure form must state:

> "If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers."

The Rule implies sellers must require buyers to provide their telephone number. The Rule is silent about what happens if a buyer provides a fake number to protect their privacy, or if they do not have a telephone number or refuse to provide one.

Note also that because of the Rule your website privacy policy needs to disclose this information is being collected, stored, and may be disclosed.

A sample disclosure form provided by the FTC is attached to the end of this Special Report.

Note the disclosure form can only be 1-page long, although it can also have attachments. No information not required by the rule can be included in the disclosure.

Updating the Disclosures

The disclosure statement must be updated quarterly on January 1st, April 1st, July 1st, and October 1st.

Until you have 10 buyers the list of references must be updated monthly.

Proof the Disclosure Has Been Made

Your prospects must be given two copies of the disclosure. One for their records and a second so they can return a signed and dated document / receipt to you. You can only use a digital signature if the method is recognized as a valid signature per state or federal law.

Example: The FTC says you can send a prospect to a web page containing a digital copy of the disclosure and require the prospect to type their name in a form before submitting the web form back to you. Typing in their name constitutes a signature. The form should automatically email the buyer a copy for their records.

Delayed Payment Requirement

**** **The disclosure must be provided at least 7 days before the buyer pays money or signs a document agreeing to buy.**

Disclaimers And More Prohibited Actions

The Business Opportunity Role has a long list of additional prohibited activities. These include:

Using a disclaimer of anything required by the Rule, or allowing a buyer to waive any of the Rule's requirements.

Any advertising that is inconsistent with the disclosures.

Including additional information in a disclosure or earnings statement not required by the Rule. That is, you cannot bury the required disclosures in other documents. The FTC also says "multimedia tools such as audio, video, animation, or pop-up screens" are prohibited in disclosures.

Sellers also cannot claim any government or law prohibits them from providing earnings information.

Sellers cannot state any government or law prevents them from disclosing buyer identity information.

All costs associated with the business opportunity must be disclosed.

The new Rule prohibits a seller from using trademarks or claiming anyone approves, authorizes, or is associated with what is being sold if not true.

The new Rule prohibits shills, persons paid to provide earnings claims or other favorable statements, or undisclosed personal relationships.

Record Keeping

All documents referenced by the Rule must be kept for 5 years. This includes every version of disclosure statements, as well as each buyer's disclosure receipt, each purchase contract, each cancellation or refund request, and all earnings substantiation.

More Information …

The FTC publishes its rules and regulations, and as well as supporting analysis in the Federal Register. The Business Opportunity Rule can be found in Volume 76 Number 236 of the December 8, 2011, Federal Register (16 CFR Part 437):

http://www.ftc.gov/os/fedreg/2011/11/111122bizoppfm.pdf

APPENDIX A to PART 437

DISCLOSURE OF IMPORTANT INFORMATION ABOUT BUSINESS OPPORTUNITY

Required by the Federal Trade Commission, Rule 16 C.F.R. Part 437

Name of Seller: Address:

Phone: Salesperson: Date:

[Name of Seller] has completed this form, which provides important information about the business opportunity it is offering you. The Federal Trade Commission, an agency of the federal government, requires that [Name of Seller] complete this form and give it to you. However, the Federal Trade Commission has not seen this completed form or checked that the information is true. **Make sure that this information is the same as what the salesperson told you about this opportunity.**

LEGAL ACTIONS: Has [Name of Seller] or any of its key personnel been the subject of a civil or criminal action involving misrepresentation, fraud, securities law violation, or unfair or deceptive practices, including violations of any FTC Rule, within the past 10 years?

☐ **YES** → *If the answer is yes,* [Name of Seller] *must attach a list of all such legal actions to this form.*

☐ **NO**

CANCELLATION OR REFUND POLICY: Does [Name of Seller] offer a cancellation or refund policy?

☐ **YES** → *If the answer is yes,* [Name of Seller] *must attach a statement describing this policy to this form.*

☐ **NO**

EARNINGS: Has [Name of Seller] or its salesperson discussed how much money purchasers of this business opportunity can earn or have earned? In other words, have they stated or implied that purchasers can earn a specific level of sales, income, or profit?

☐ **YES** → *If the answer is yes,* [Name of Seller] *must attach an Earnings Claims Statement to this form. Read this statement carefully. You may wish to show this information to an advisor or accountant.*

☐ **NO**

REFERENCES: In the section below, [Name of Seller] must provide you with contact information for at least 10 people who have purchased a business opportunity from them. If fewer than 10 are listed, this is the total list of all purchasers. **You may wish to contact the people below to compare their experiences with what** [Name of Seller] **told you about the business opportunity**.

Note: If you purchase a business opportunity from [Name of Seller], your contact information can be disclosed in the future to other potential buyers.

	Name	State	Telephone Number		Name	State	Telephone Number
1.				6.			
2.				7.			
3.				8.			
4.				9.			
5.				10			

Signature: ______________________________ Date: ______________

By signing above, you are acknowledging that you have received this form. This is not a purchase contract. To give you enough time to research this opportunity, the Federal Trade Commission requires that after you receive this form, [Name of Seller] must wait at least seven calendar days before asking you to sign a purchase contract or make any payments.

For more information about business opportunities in general: Visit the FTC's website at www.ftc.gov/bizopps or call 1-877-FTC-HELP (877-382-4357). You can also contact your state's Attorney General.