



*Guiding You Through the Legal Maze.<sup>SM</sup>*

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**10 THINGS YOU NEED TO KNOW  
ABOUT THE FTC'S NEW BIZ OP RULE**

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## **10 THINGS YOU NEED TO KNOW ABOUT THE FTC'S NEW BIZ OP RULE**

On March 1, 2012, the FTC's new Business Opportunity Rule (16 CFR. Part 437) (the "New Biz Op Rule") became effective. It replaces the FTC's Interim Business Opportunity Rule [previously codified at 16 CFR Part 437] and the business opportunity provisions in the FTC's old Trade Regulation Rule titled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (the "Original Rule"). [16 CFR Part 436]. Here are 10 things you need to know.

### **1. Know That the New Biz Op Rule Applies in All States**

The new Biz Op Rule applies throughout the United States and its Territories including the 25 states that do not have state business opportunity laws. However, the 25 states having business opportunity laws are not preempted. [16 CFR § 437.9(b)]

### **2. Know the Elements of a "Business Opportunity"**

The definition of a "business opportunity" under the New Biz Op Rule involves a commercial arrangement that includes the following elements:

(a) The seller must solicit a prospective purchaser to enter into a new business (one in which the prospective purchaser is not currently engaged or a new line or type of business).

(b) The purchaser must make a "required payment," that is, all consideration paid by the purchaser to the seller or an affiliate as a condition to obtaining or commencing the operation of the business opportunity. There remains the exception for payments for the purchase of a reasonable amount of inventory at bona fide wholesale prices for resale or lease.

(c) The seller must represent that the seller or a designated person (such as a locator or lead generating company) will: (i) provide locations for the purchaser's use or operation of equipment, displays, vending machines, or similar devices that the purchaser controls; (ii) provide outlets, accounts or customers to the purchaser; or (iii) buy back any of the goods or services that the purchaser makes, including providing payment for such services such as stuffing envelopes from home or jewelry assembly. [16 CFR § 437.1(c)]

### **3. Know That More Companies Are Now Subject to the New Biz Op Rule**

The New Biz Op Rule not only applies to business opportunity that were covered by the Interim Business Opportunity Rule, including vending machines, rack displays (such as greeting cards), payphones and Internet kiosks, but also may apply to work-at-home programs, such as jewelry assembly and envelope stuffing, as the result of its expanded definition of a business opportunity. [16 CFR § 437.1(c)] The New Biz Op Rule eliminates the definitional element of the "payment of \$500 or more on or before the first 6 months of operations" that was a required element of a "business opportunity venture" under the previous rules. [16 CFR § 437.1(p)] Franchisors covered by the FTC Franchise Rule and multi-level marketing arrangements, however, are not covered by the New Biz Op Rule. (16 CFR § 437.8)

#### **4. Know That the FTC Disclosure Statement Can No Longer Be Used**

The FTC Disclosure Statement under the Interim Business Opportunity Rule and Original FTC Franchise Rule, which required the disclosure of 20 items of information, can no longer be used. (16 CFR § 437.3)

#### **5. Know That the FTC's One-Page Disclosure Statement Must Now Be Used**

The New Biz Op Rule requires a business opportunity seller to use a one-page form, titled "Disclosure of Important Information About Business Opportunity" (the "New Biz Op Disclosure Document"), which requires the disclosure of five items of information and possibly certain attachments. (16 CFR § 437.3) The five items relate to:

(a) The seller's identifying information including its name, business address, telephone number, the name of the salesperson offering the business opportunity, and the date when the New Biz Op Disclosure Document is furnished to the purchaser.

(b) Whether the seller makes an earning claim. The seller is not obligated to make an earning claim and can check the "no" box. However, if the seller does make an earnings claim, the seller must check the "yes" box and provide the purchaser with a separate earnings claim statement titled "EARNINGS CLAIM STATEMENT REQUIRED BY LAW" (see 16 CFR § 437.4).

(c) Whether the seller, its affiliates (including a parent or subsidiary) or key personnel (including in a prior business) have been involved in any civil or criminal "legal action" against the seller or its representatives (any sales manager, or individual who occupies a position or performs a function similar to an officer, director or sales manager of the seller) within the past 10 years that "involve fraud, misrepresentation, securities law violations, or deceptive or unfair practices including violation of any FTC rule."

(d) The seller's cancellation or refund policies, if any.

(e) A list of the 10 purchasers of the business opportunity closest to the prospective purchaser's home, or in the alternative, a list of all purchasers during the last three years. The list must include only each prior purchaser's name, state (not address) and telephone number.

#### **6. Know That There is No Filing or Approval Process**

The seller does not file the New Biz Op Disclosure Document with the FTC or any state. Neither the FTC nor any state approves it but the seller has the burden of proving compliance with the New Biz Op Rule.

#### **7. Know the Disclosure and Delivery Requirements**

The seller must deliver the New Biz Op Disclosure Document at least 7 calendar days (instead of the previous 10 business days) before a prospective purchaser signs any documents with, or pays any money to, the seller. (16 CFR § 437.2) The seller is required to attach a duplicate copy of the New Biz Op Disclosure Document and any attachments to be signed and dated by the purchaser. [16 CFR § 437.3(a)(6)] The seller can send the New Biz Op Disclosure Document to the purchaser electronically and allow for an electronic or digital signature of the purchaser. [16 CFR §

437.1(s)] If the seller conducts sales of its business opportunities in languages other than in English, the New Biz Op Disclosure Document must be in the same language. (16 CFR § 437.5)

## **8. Know That State Business Opportunity Laws May Also Apply**

The New Biz Op Rule does not preempt state business opportunities laws. [16 CFR § 437.9(b)] A seller cannot include disclosures required by state law in the New Biz Op Disclosure Document. [16 CFR § 437.6(c)] If a seller is subject to both the New Biz Op Rule and a state's business opportunity law, it must comply with both and will have to prepare and provide the purchaser with both the FTC and the state's disclosure documents. A state's business opportunity law may apply if: (a) the seller is located in a biz op state; (b) the seller advertises in, or offers a business opportunity in, a biz op state; (iii) the purchaser is a resident of the biz op state; (c) or the purchaser intends to operate the business opportunity in a biz op state. As a result, sellers of business opportunities that operate in biz op states will need two types of disclosure statements: (i) the New Biz Op Disclosure Document; and (ii) a state-specific disclosure document. Sellers operating in multiple states may need even more state-specific disclosure documents. Unlike the New Biz Op Rule, the state business opportunity laws have minimum dollar investment thresholds ranging \$200 to \$500 that may enable sellers to avoid their application if the required payment amount is below the applicable threshold.

## **9. Know the Updating Requirements**

The New Biz Op Disclosure Document must be updated quarterly (January 1, April 1, July 1 and October 1) except, if the seller has fewer than 10 purchasers, the seller must update the list of purchasers monthly until the seller has at least 10 purchasers. [16 CFR § 437.3(b)] If there has been a material change in an earnings claim given to a prospective purchaser before he or she purchases the business opportunity, the seller must disclose the material change to the prospective purchaser before finalizing the purchase. [16 CFR § 437.3(b)]

## **10. Analyze Your Clients' Business Arrangements**

You may have clients that were complying with the Interim Business Opportunity Rule and have an FTC Disclosure Statement. This must cease and they must begin using the New Biz Op Disclosure Document. You may have other clients that market and sell products or services to persons to enable them to start a business. You need to analyze the elements of their business arrangements to determine if these arrangements now meet the three elements of a business opportunity.

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