

## **The FTC's Business Opportunity Rule: Does It Apply To Realtors?**

By John Dolgetta, Esq.

The Federal Trade Commission ("FTC") has enacted the Business Opportunity Rule (the "Rule" or the "BOR") which became effective on March 1, 2012 (the text of the BOR can be found at <http://ftc.gov/os/fedreg/2011/11/111122bizoppfrn.pdf>). The Rule requires that certain disclosures be made by persons who sell or offer business opportunities to others. One of the FTC's main objectives is to protect consumers. The FTC amended the existing interim Business Opportunity Rule to require expanded disclosure by those offering or selling a business opportunity to members of the public. The new and final Rule now covers a wider variety of business opportunities which on its face seems to extend to the solicitation of salespersons by brokerage firms. The Rule provides for a more simplified and straightforward disclosure process.

### **The Scope of the Business Opportunity Rule**

The Rule applies to any commercial arrangements where: (1) a seller (for example, a brokerage firm) solicits a prospective purchaser to enter into a new business or offers a prospective purchaser a business opportunity; (2) a prospective purchaser of the business opportunity must make a "required payment" to the seller; and (3) the seller must represent that the seller or one or more designated persons will provide any of three types of business assistance. All three of the above conditions need to be met in order for the Rule to apply. The three types of business assistance are: (1) the seller provides locations for the purchaser's use or operation of equipment, displays, vending machines or similar devices; (2) the seller provides the prospective purchaser outlets, accounts, or customers; or (3) the seller buys back any or all of the goods or services that the purchaser makes (*see* <http://ftc.gov/os/fedreg/2011/11/111122bizoppfrn.pdf>).

While the Rule provides certain examples of what is covered, such as "stuffing envelopes", "work-at-home business", assembling of products and medical billing, among others, the above criteria now brings under its scope almost any commercial business opportunity, including a broker or brokerage firm soliciting and providing a business opportunity to salespersons or agents. The FTC states in the Rule that "[a]fter careful consideration...[it] has crafted the final Rule's business opportunity definition to ensure that it is broad enough to encompass many business opportunities that historically were not covered under the Original Franchise Rule or the interim Business Opportunity Rule, but which have routinely been shown to be associated with unfair or deceptive practices."

It is clear that a broker (i.e., a potential "seller" under the Rule) soliciting an agent or salesperson to join its firm whereby the broker promises to assist the agent in setting up or running a brokerage business could be subject to the Rule. The Rule may also apply in instances where a broker or brokerage firm (i.e., a "seller") provides the "prospective purchaser" with customers, customer lists, accounts or locations to offer products or services to the public as described above. Ultimately, if a brokerage firm actively solicits salespeople entering the field as licensed salespersons then the brokerage will have satisfied the first prong. Once the first prong is satisfied, the broker or brokerage firm must determine if items 2 and 3 above have also been met.

### **How the Rule May Affect and Apply To Realtors**

The Rule will apply to those brokers and/or brokerage firms that solicit salespeople entering the business and go on to meet the other two prongs of the BOR. As pointed out in an article published in NAR's *Letter of the Law*, entitled "FTC's Business Opportunity Rule," once the first prong is met then a

brokerage firm must carefully assess whether its actions relating to the business opportunity also satisfy the “assistance” and “payment” prongs.

The “assistance” prong requires a careful analysis of what type of assistance is being offered. NAR points out that “[g]eneral advice and advertising is usually not considered assistance under the BOR.” However, if a brokerage firm provides salespeople with “accounts, including but not limited to, Internet outlets, accounts, or customers...” then this could be seen as providing the requisite assistance that would satisfy this prong.

A brokerage firm must then determine the type of payment to be received in return for the business opportunity. As discussed in NAR’s article, the “payment” prong could be met simply by the brokerage firm retaining a portion of the salesperson’s commission or making some other payment arrangement with the salesperson. While the commentary in the Rule does not directly discuss the issues involving real estate brokerage firms, it is something all brokers must consider when soliciting new salespersons or establishing and offering any type of business opportunity.

### **Key Requirements of the Business Opportunity Rule**

The FTC summarizes that if a business opportunity does falls within the scope of the FTC’s Rule, a “seller” is then required to comply with the following three (3) key legal responsibilities:

- “1. A “seller” must provide the “buyer” with a one-page disclosure document (“Disclosure Document”) entitled “Disclosure of Important Information About Business Opportunity” (the form may be downloaded at [http://www.ftc.gov/os/2011/11/111122\\_bizoppappendixa.pdf](http://www.ftc.gov/os/2011/11/111122_bizoppappendixa.pdf)). This form must be provided seven (7) days before a “buyer” signs a contract or pays any money for the business opportunity.
2. If any earnings claim is made by a “seller” of a business opportunity, the “seller” must provide the “buyer” with a separate document that states across the top “EARNINGS CLAIM STATEMENT REQUIRED BY LAW.”
3. A “seller” must comply with general truth-in-advertising principles, including avoiding misleading or deceptive practices. The Rule provides a detailed list of requirements.”

### **The Disclosure Document**

Once a seller of a business opportunity has met all of the conditions above then a seller must provide the Disclosure Document to all “prospective purchasers.” The FTC recommends the use of the form annexed to and made a part of the Rule. The following are six (6) key components contained in Section 437.3 of the Rule which are required to be included in the form:

(1) *Identifying information.* The seller is required to provide all pertinent identifying information, such as the seller’s name, business address and telephone number, the name of the salesperson or other person offering the opportunity, and the date when the disclosure document is furnished to the prospective purchaser.

(2) *Earnings claims.* If the seller makes an earnings claim, then the seller must provide and attach the “Earnings Statement” required by §437.4.

(3) *Legal actions.* Seller must disclose if the seller, the business of seller, affiliates or prior businesses of seller or “any of the seller’s officers, directors, sales managers, or any individual who occupies a position or performs a function similar to an officer, director, or sales manager of the seller,” have been the subject of any civil or criminal action for misrepresentation, fraud, securities law violations or unfair or deceptive practices, including violations of any FTC Rule, within the 10 years immediately preceding the date that the business opportunity is offered. If applicable, the seller must disclose all such actions in an attachment to the Disclosure Document and provide the “...full caption of each action” (names of the principal parties, case number, full name of court and filing date).

(4) *Cancellation or refund policy.* If the seller offers a refund policy or a right to cancel policy then the seller must state all material terms and conditions of the refund or cancellation policy in an attachment to the Disclosure Document.

(5) *References.* A seller must also furnish the “prospective purchaser” with references. A seller must state the name, state and telephone number of all purchasers who purchased the business opportunity within the last three years. If there were more than 10 purchasers, the seller may limit the disclosure by stating the name, state and telephone number of at least the 10 purchasers within the past three years who are located nearest to the prospective purchaser’s location. Alternatively, a seller may also furnish the buyer with a list disclosing all purchasers nationwide within the last three years. If there are less than 10 references, then the seller must continue to provide the purchaser with an update list monthly until the seller reaches 10 purchasers.

(6) *Receipt.* The seller must also attach a duplicate copy of the Disclosure Document to be signed and dated by the purchaser. The seller should provide the prospective purchaser with instructions as to how to return the signed receipt (e.g., e-mail, mail, fax, etc.).

With regard to “References”, a seller must “[c]learly and conspicuously”, and in immediate conjunction with the list of references, state the following: “**If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers.**” Further, if the business opportunity is being offered in another language or to a person who does not speak English, then the Disclosure Document, along with all additional disclosure materials referenced in this article or required under the Rule, must be provided in that language. There is also a Spanish version of the form available on the FTC website.

### **An Earnings Claim Statement**

If a seller or brokerage firm makes a claim, whether it is express or implied, about how much money a “prospective purchaser” can earn, such claim must be disclosed in writing and delivered to the prospective “buyer” at the time the Disclosure Document above is provided to the “buyer”. The Rule makes it illegal to make an “earnings claim” unless there are written materials substantiating the claims.

The “EARNINGS CLAIM STATEMENT” needs to include the following information:

“(i) The title “EARNINGS CLAIM STATEMENT REQUIRED BY LAW” in capital, bold type letters;

- (ii) The name of the person making the earnings claim and the date of the earnings claim;
- (iii) The earnings claim;
- (iv) The beginning and ending dates when the represented earnings were achieved;
- (v) The number and percentage of all persons who purchased the business opportunity prior to the ending date in paragraph (iv) of this section who achieved at least the stated level of earnings;
- (vi) Any characteristics of the purchasers who achieved at least the represented level of earnings, such as their location, that may differ materially from the characteristics of the prospective purchasers being offered the business opportunity; and
- (vii) A statement that written substantiation for the earnings claim will be made available to the prospective purchaser upon request.”

### **Illegal and Deceptive Practices**

In the event all of the prongs are met and a seller offering a business opportunity falls under the scope of the Rule, the Rule makes it clear that it is illegal to engage in deceptive or unfair practices in the promotion, marketing or sale of any business opportunity.

The FTC explains that “business opportunity sellers are prohibited from misrepresenting: (1) earnings; (2) the cost, efficacy, nature, or central characteristics of the business opportunity or the goods or services sold to the purchaser as part of the business opportunity; (3) their cancellation or refund policies; (4) promised assistance; (5) the calculation and distribution of commissions, bonuses, incentives, premiums, or other payments from the seller; (6) the likelihood of finding locations for equipment or accounts for services; (7) that the business opportunity is an offer of employment; (8) territorial exclusivity or more limited territorial protections; (9) endorsements; and (10) references.” The Rule also prohibits business opportunity sellers from “...assigning to any purchaser a purported exclusive territory that has been sold to another purchaser.”

### **Record-Keeping Requirements and Penalties**

The FTC Rule requires that records be kept for a period of three (3) years. Section 437.7 of the final Rule requires that “sellers of a covered business opportunity, and their principals, must retain for at least three years the following types of documents: (1) each materially different version of all documents required by the Rule; (2) each purchaser’s disclosure receipt; (3) each executed written contract with a purchaser; and (4) all substantiation upon which the seller relies for each earnings claim made.” The Rule does generally exempt business opportunities that meet the definition of a “franchise.” Franchises must provide detailed offering circulars required by Federal and State Franchise Laws. The new BOR should be reviewed carefully and legal counsel should be consulted to ensure whether or not an exemption applies.

In the event a “seller” fails to comply with the seven (7) day disclosure requirements relating to the Disclosure Document, this can be deemed to constitute an “unfair and deceptive trade practice.” The FTC, in instances where there are “deceptive and unfair” trade practices, can impose fines of up to \$16,000 per day per violation. Further, the FTC is also permitted to seek equitable monetary relief for consumers harmed by sellers who violate the Rule.

It is important that all real estate brokers or real estate brokerage firms carefully review their practices and determine whether or not the BOR applies to them. As is evident, the penalties are extremely harsh and one must not be caught off guard.

### **Don't Panic Yet!**

In conversations with the National Association of Realtors, Edward I. Sumber, has confirmed the following:

1. The FTC has indicated in discussions with the NAR that the Business Opportunity Rule is not intended to be applicable to persons who have already engaged in the Real Estate Brokerage business. Accordingly, active salespersons who are solicited for a change of office would not be subject to the Business Opportunity Rule Disclosures. Only persons who are entering the business and had not had previous licensed activity would be required to receive the Disclosures.
2. The National Association of Realtors did not provide comments to the Federal Trade Commission regarding the Business Opportunity Rule because it evolved and was revised numerous times over a thirteen year period before the Rule was finalized. The National Association of Realtors is seeking specific guidance from the Federal Trade Commission regarding the applicability of the Rule to the Real Estate industry and in particular under what circumstances Realtors will be required to comply with the Rule.
3. For Realtors who are actively soliciting new persons entering the Real Estate business and who are offering significant help or may have an incentive marketing program as part of their business model, it is strongly recommended that such firms seek the advice of counsel with respect to the applicability of the Business Opportunity Rule.

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