

FTC Puts Pedal to the Metal to Release Proposed Rule on MLM Earnings Claims, Changes to Business Opportunity Rule—but Republican Commissioners Pump the Brakes in Potential Foreshadowing

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The FTC [released](#) two Notices of Proposed Rulemaking (NPR) and an Advance Notice of Proposed Rulemaking (ANPR) that would establish a new Earnings Claims Rule and expand the existing Business Opportunity Rule – changes that according to the FTC’s release “would strengthen the agency’s tools to curb deceptive earnings claims in industries where they are pervasive: multi-level marketing (MLM) programs and money-making opportunities.” Notably, the proposed Earnings Claims Rule is limited to MLM programs (with different definitions proposed for consideration) and would not cover the gig economy, notwithstanding that the Commission’s recent enforcement actions related to earnings claims have not involved direct selling companies.

All of this, however, may be for naught, as Commissioners Andrew Ferguson and Melissa Holyoak voted “no” on all three proposals. Commissioner Ferguson—who President-elect Trump announced will serve as the next FTC Chair (discussed [here](#))—issued a [dissenting statement](#) joined by Commissioner Holyoak making clear his position that whether the proposed rules “are lawful, and whether they are prudent and sound policy choices, are decisions that belong to the incoming Trump Administration,” and, “because these are notices of future rulemaking, the Trump Administration will decide whether they will ever become final rules.”

We provide an overview of key components of each proposed rule and the supplemental ANPR below, along with predictions for the fate of the latest “midnight rulemakings.”

NPR on Business Opportunity Rule

This [proposal](#) would expand the scope of the Business Opportunity Rule (summarized in our post on the preceding ANPR [here](#)) to cover other money-making opportunities, such as business coaching and investment opportunities for which a purchaser makes a required purchase. (Reflecting that new scope, the rule would be re-titled the “Business and Money-Making Opportunity Rule.”) The NPR notes several alternatives being considered as to the scope of “coaching” covered by the rule:

- ***Business coaching opportunity.*** The proposed amendments define “business coaching opportunities” broadly to include any program, plan, or product that is represented to train or teach a person how to establish or operate a business,” but the Commission is considering whether and how to define “business” as well as whether to instead use the term “new business” defined elsewhere in the rule.
- ***Coaching opportunity.*** The Commission is considering whether to use the term “coaching opportunity” instead of “business coaching opportunity,” with the former being more broadly defined to include any program, plan, or product that is represented, expressly or by implication, to train or teach a person how to generate or increase earnings.
- ***Potential earnings claims requirement.*** The Commission is considering narrowing the scope of covered opportunities to those that are marketed, at least in part, through earnings claims.

The proposed modifications would subject sellers of any such money-making opportunities to the rule’s prohibitions on material misrepresentations and its recordkeeping and substantiation requirements. Sellers of money-making opportunities would not be covered by the full scope of the obligations imposed on sellers of business opportunities, however, including the requirement to provide the prescribed disclosure document and earnings statement to prospective purchasers.

The proposed amendments would also include a definition of “earnings” to include gross or net sales, income, profit, appreciation, or other financial gain. “Earnings,” then, would replace “sales, or gross or net income” in the rule’s definition of “earnings claim.”

MLMs would be exempted from the scope of the rule.

NPR on Earnings Claim Rule Regarding Multi-Level Marketing

The [proposal](#) would create a new “Earnings Claim Rule Regarding Multi-Level Marketing” that would address false or misleading earnings claims in the MLM industry. The proposed rule would prohibit the following conduct in connection with the offering of MLMs:

- making misleading earnings claims;
- directly or indirectly providing participants with recruitment materials containing false, misleading, or unsubstantiated earnings claims;
- making earnings claims without having reasonable basis to substantiate earnings claims (although the notice states that “[t]he kind of evidence needed depends on the claim,” it cautions: “In almost every circumstance, anecdotal information or data about a small number of participants will not be sufficient to show a reasonable basis”);
- making earnings claims without having “in its possession written materials that substantiate the earnings claim at the time the claim is made” and making the written substantiation available upon request to to-be-specified parties, including potentially to the Commission, to anyone within six months of the date the claim is made, and/or to any actual or potential recruit;
- misrepresenting the opportunity to become an MLM participant as an employment opportunity; and
- making any misrepresentation or unsubstantiated claim to contradict, dispel, or otherwise prevent consumers from benefiting from truthful information about earnings.

The proposed rule would require MLMs to maintain substantiation for earnings claims for three years and provide substantiation to anyone upon request in the language of the earnings claim.

The 157-page NPR has many interesting observations and assertions and is worth the read both for industry stakeholders and general followers of the FTC. Kelley Drye submitted comments and survey evidence in response to the previous ANPR that were cited heavily in the record – with Staff acknowledging that the survey “establishes . . . that consumers can read and recall what a disclosure said,” but questioning whether the disclosure was sufficient to “change the impression about likely earnings created by a true but atypical, earnings claim.”

Ultimately the Proposed Rule declined to “require the use of specific disclosures or disclaimers to qualify atypical earnings claims” and Staff reiterated the fact-intensive nature of such inquiries and the net impression to consumers. At the same time, Staff separately issued a supplemental ANPR that suggested the potential for more prescriptive and granular requirements beyond what was already proposed.

ANPR on Additional Components of the Proposed Earnings Claim Rule Regarding Multi-Level Marketing

In addition to the NPR on the proposed Earnings Claim Rule Regarding Multi-Level Marketing, the FTC issued an [ANPR](#) seeking comment on the need for additional rule requirements addressing deceptive earnings claims and related conduct. The ANPR seeks comment on:

- whether to require MLMs to provide earnings data to potential recruits and current MLM participants or to post such data on their websites (and whether data about expenses incurred by participants should be included and, if so, the types of expenses to be included);
- whether all MLM earnings claims should be accompanied by clear and conspicuous information about the earnings MLM participants can generally expect;
- whether there should be a waiting period before a recruit pays any money to the MLM or otherwise joins the MLM (and the duration of that period);
- whether to prohibit misrepresentations relating to expenses, benefits, or the compensation plan;
- whether certain other earnings-related misrepresentations are prevalent and whether to prohibit these practices (specifically: misrepresentations or unsubstantiated claims concerning any term or condition of the seller’s refund or cancellation policies, misrepresentations or unsubstantiated claims relating to the relationship between work and success, misrepresentations or unsubstantiated claims concerning the cost, performance, efficacy, nature, or central characteristics of the MLM or its goods or services, misrepresentations or unsubstantiated claims concerning real or purported earnings data or statistics concerning a particular industry, or misrepresentations concerning whether the company operates as a multi-level marketing company); and
- whether to prohibit MLMs from using non-disparagement or similar contract terms to prohibit participants from communicating truthful negative information to the government/regulators, prospective participants, or others.

What’s Next?

The fate of all three notices remains uncertain with Commissioner Ferguson slated to take over as FTC Chair next week. Once Trump is inaugurated on January 20, it is possible – if not likely – that Trump will direct the Office of the Federal Register (OFR) to refrain from publishing any rule that remains pending before the OFR, which would leave the notices in limbo unless and until the Commission rescinds them. The rescission would require a new vote of the Commission, which may be deadlocked for some time until Mark Meador is confirmed to outgoing Chair Lina Khan’s Commissioner spot.

If the notices do end up being published in the Federal Register, either before or after inauguration, stakeholders will have 60 days after publication to provide comments. The FTC is proceeding under its so-called “Mag-Moss” rulemaking authority, which, as we describe [here](#), entails several steps and hurdles—but resulting rules provide another avenue for monetary relief and civil penalties post-*AMG*. Much to follow in the coming days and weeks.