

Next Stop on the FTC's Rulemaking Train: Proposed Revisions to the Business Opportunity Rule

[Donnelly L. McDowell](#), [John E. Villafranco](#), [Katrina Hatahet](#)

November 17, 2022

In today's open meeting, the FTC voted unanimously to [issue](#) an Advance Notice of Proposed Rulemaking (ANPR) considering expansions to and revisions of the FTC's existing Business Opportunity Rule ("BOR"). This will be the first review of the BOR since it was promulgated back in December 2011. In her [statement](#) announcing the ANPR, Chair Khan indicated that "[t]he rule had served the public well over the years," but "several varieties of scams . . . fall outside the scope of the existing rule, [including] certain kinds of business coaching and work-from-home programs, investment programs, and e-commerce opportunities." In a familiar refrain in the FTC's push for rulemaking, Chair Khan argued that "case-by-case enforcement has key limitations—especially after the Supreme Court's AMG decision" finding that the FTC lacked authority to obtain equitable monetary redress under Section 13(b).

Notably, the ANPR did not identify specific proposals under consideration for expanding the scope of the Rule other than to highlight work-from-home programs, investment coaching programs, and e-commerce opportunities as generally outside the scope of the current BOR. The ANPR also notes that the Commission may consider comments previously submitted in response to the ANPR on Earnings Claims as an admittedly related endeavor (which we discussed [here](#)) and noted that it "solicited and received comments about the following industries: multilevel marketers, for-profit schools, and gig platforms" for that ANPR. Today's ANPR does not otherwise specifically address direct selling companies, for-profit schools, and/or the gig economy, although it remains possible that revisions to the BOR could potentially sweep in practices of those groups.

What is the "Business Opportunity Rule"?

The BOR as currently written applies a "commercial arrangement" in which a "seller solicits a prospective purchaser to enter into a new business"; the "prospective purchaser makes a required payment"; and the "seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will" either (1) provide locations for the purchaser's equipment, such as a vending machine; (2) provide outlets, accounts, or customers for the purchaser's goods or services; or (3) buy back any or all of the goods or services that the purchaser makes or provides. The BOR was an outgrowth of the initial Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures Rule, which was later divided into the Franchise Rule and the BOR.

The BOR requires sellers of business opportunities to provide a highly prescriptive disclosure document that includes information about possible earnings and related substantiation, involvement

in certain legal actions, cancellation or refund policies and related terms, and a list of references who have purchased the business opportunity in the last three years. The current BOR also includes a list of prohibited claims and misrepresentations and prescribes requirements for sales in languages other than English.

What is the FTC Seeking Comment on?

The ANPR seeks comments on a series of specific and general issues related to the BOR, including:

- Whether the BOR or any specific provisions of the BOR should be retained, eliminated, or modified;
- Whether the BOR should be expanded to more broadly cover other types of moneymaking or business opportunities, including coaching or mentoring programs, e-commerce opportunities, and investment opportunities;
- Whether the BOR overlaps or conflicts with other federal, state, or local laws or regulations;
- Whether there amendments are necessary to address practices that disproportionately affect low-income communities, communities of color, and other historically underserved communities.

Interested parties will have 60 days after the ANPR is published in the Federal Register to provide comments and feedback. While Commissioner Wilson has not consistently voted for new ANPRs, she voted affirmatively for this ANPR and highlighted in the open meeting the need to correct information symmetries of the market and allow potential investors to make better decisions.