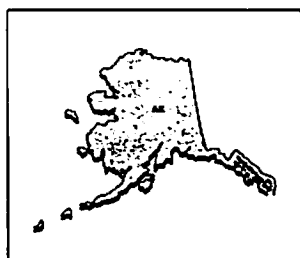
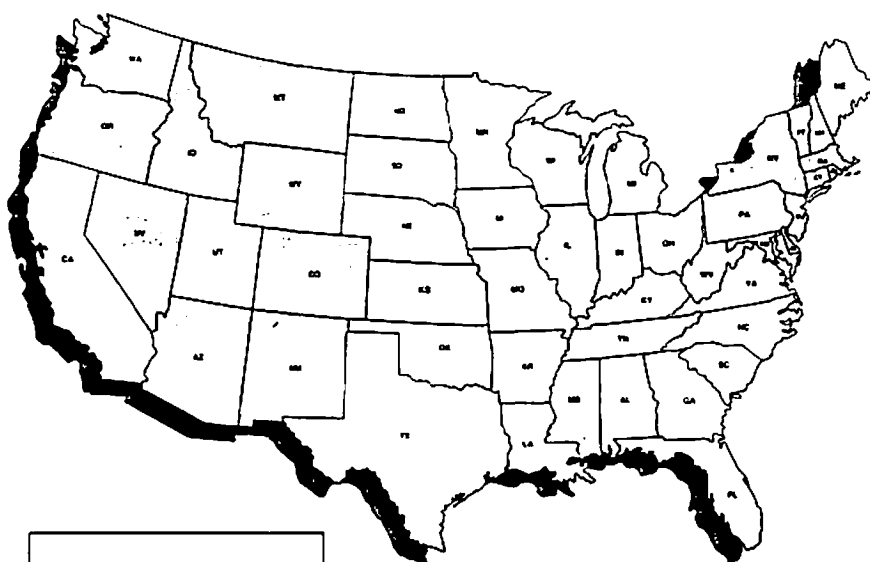


Know Your Rights

LAW AND OPPORTUNITY



Before buying or selling a business opportunity, map out a strategy to benefit from the regulatory laws in 24 states.

Business opportunity regulation might very well be called the great unknown body of law. While the federal government and as many as 24 states regulate the sale of business opportunities, both sellers and buyers are usually virtually unaware of these laws. Until recently, in fact, several state regulatory agencies charged with the administration

of business opportunity laws were only dimly aware of their own regulations.

This is changing. A number of state enforcement agencies are starting to pick up the pace. At the same time, business opportunity buyers are finding they have new legal muscle available to them when they are disappointed in the investments they've made.

WHAT IS A BUSINESS OPPORTUNITY?

With the federal government and 24 states—Alabama, California, Connecticut, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia and Washington—in this game, you can imagine the variety of definitions of the term “business opportunity.” Some states do not even use the term “business opportunity” but regulate “Seller Assisted Marketing Plans” (the underlying concept is virtually the same).

In its most general sense, a business opportunity is a sale of goods or services enabling the purchaser to begin a business, and where the seller makes certain statements, representations, or guarantees in the course of the sale. The statements described in most state statutes usually refer to the seller promising to assist in locating accounts or vending machine sites, guaranteeing the business opportunity will generate income in excess of the purchase price, offering to buy back any goods assembled or fabricated by the purchaser, or promising to deliver a “marketing plan.”

The definitions include a fascinating variety of sales programs, including breeding and marketing programs for chinchillas, earthworms, rabbits, minks and vicuñas; distribution of water filtration devices; mate-

BY ANDREW A. CAFFEY

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rials for operating your own travel agency; and vending machine routes for the distribution of everything from candy to cigarette lighters.

RULES AND REGULATIONS

A company fitting the definition of "business opportunity" is generally required—depending on the state in which the business opportunity is offered—to prepare and deliver a disclosure document to every buyer, register the business opportunity offering with state authorities, and provide a substantial bond in conjunction with the registration.

Business opportunity sellers are subject to a variety of sanctions for failing to comply—everything from the threat of a lawsuit from an injured buyer to criminal liability. In some cases, the Federal Trade Commission (FTC) can bring enforcement actions against violators, seek civil damages on behalf of injured consumers, and assess fines up to \$10,000 per violation.

These serious sanctions notwithstanding, business opportunity sellers have, for the most part, ignored the law. Take the state of Maryland, for example. While more than 600 franchisors have registered under the franchise registration law, only eight companies are currently registered under the state's business opportunity law. Maryland's experience is not uncommon. Where are all the business opportunity sellers?

The answer is not an easy one. Historically, the regulation of business opportunity sales has been targeted at dishonest scam artists. Most state legislators have assumed business opportunities were by definition illegitimate and suspect. During lobbying campaigns on behalf of franchisors, legislators often asked why they should be concerned about the burdens imposed by a business opportunity bill when "we're talking about sleazy, fraudulent business activity here."

Why, indeed? There is no organized voice of legitimate businesses to appear before the legislature and be heard. It is a hard reality of legislative life that legislative proposals take the path of least resistance offered.

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Linda Kemp



SELLER BEWARE

These questions will help identify if your business is a business opportunity:

1. Do you sell a program, materials or equipment that enables the purchaser to start a business? (Some states include enhancement or maintenance of an existing business.)
2. Is there a payment in excess of \$500 for goods, supplies, equipment or services? (Some definitions have a smaller threshold.)
3. Do you make any of the following representations?
("Representations" include not only oral statements and written promises, but also advertising copy and promotional brochures.)
 - a) You will provide assistance in locating sites for vending machines (or any coin-operated devices).
 - b) The business opportunity is a "secured investment."
 - c) There is a market for any goods or services to be marketed or fabricated by the purchaser.
 - d) You will buy back any products made, grown, or bred by the business opportunity buyer.
 - e) The buyer will operate a profitable business, or will generate revenues in excess of his or her investment.
 - f) The seller guarantees money can be made. (A guarantee has been construed by one federal court where the word "guarantee" was never used, but the company's advertising conveyed that impression).
 - g) The seller will provide a "marketing plan."
 - h) You will refund the purchase price if the purchaser is dissatisfied.

There are exemptions and exclusions in these laws, but they change from state to state. Consult experienced counsel if you see your business described here.

—A.A.C.

opportunity regulation were clear. State enforcement agencies, faced with a number of fraudulent operators offering moneymaking schemes, found their hands tied by the limitations of the narrowly drawn franchise and securities laws. They needed a means of taking quick action when they received complaints from investors in business opportunities that were neither securities nor franchises. The registration requirement would tell enforcement agents immediately if a given sales program was operating illegally in the state, so they could move in.

And move in they do . . . when they have a clear-cut case against the seller. State attorney generals' offices send an assistant attorney general to the place of the sales offering, with a state trooper escort, and demand the sales effort shut down immediately.

But in most instances, the case is not so clear-cut. Instead of a threatening visit, the business opportunity seller receives an almost friendly let-

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BUYER BEWARE

What should you do before buying a business opportunity?

1. *Read.* If you receive a disclosure document or are asked to sign any legally binding contract, read it carefully. You may want to take it to an attorney or financial advisor.

2. *Stay cool.* Don't lose your head to the allure of easy profits. There are no easy profits. Contact some current owners—are they satisfied with their investment? The old expression is still helpful: If it looks too good to be true, it probably is.

3. *Check the company out.* If your state has a business opportunity statute, contact state officials to check on the company's registration status. Ask if there are any complaints on file. Do the same with your local Better Business Bureau.

4. *Get it in writing.* If you hear any promises of delivery, guarantees of satisfaction, money-back offers, or the like, ask for confirmation in writing. If a shipment of supplies or equipment is promised on a certain date, have the company send a letter of confirmation.

5. *Negotiate.* Be careful about paying large sums of money on the promise of future delivery of equipment or supplies, especially if you don't know the company well. Negotiate the terms of purchase. For instance, suggest two-thirds of your payment be deferred until most of your product is delivered. You could even suggest placing the purchase price in escrow or asking your personal attorney to hold the check until delivery is made.

6. *Be assertive.* If you have a complaint, take it up with the seller first. Like all business owners, business opportunity sellers don't want unhappy customers. Put your complaint or request in writing and keep a copy. If you get no response, consult a lawyer. Contact state authorities if you feel you have been defrauded. —A.A.C.

ter requesting he or she submit some information to the state. The seller is then told he or she is selling a business opportunity under state law definitions and has 30 days to demonstrate to the state why it should not issue a cease-and-desist order and seek other remedies against the company.

ALL THE RIGHT MOVES

If your company offers business opportunities, what can you do to avoid these messy complications in your life? First, become knowledgeable about this body of law.

Next, work with an attorney who's knowledgeable and experienced in this area. You will be surprised at the number of lawyers who have never even heard of business opportunity laws.

Finally, double-check and control statements you make during the course of all sales presentations so certain representations and proscribed catch phrases (the terms "buy-back" and "secured investment"

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are strictly regulated by Nebraska law, for instance) are not used by your salespeople (see "Seller Beware" on page 121).

BE AWARE OF YOUR RIGHTS

Business opportunity buyers are granted important rights under these laws. Not only must a full pre-sale disclosure document be delivered, with a "cooling-off" period to follow, but the state statutes typically allow a dissatisfied buyer who does not receive the requisite information or is defrauded in some way to bring a lawsuit in state court. Many business opportunity laws also allow the buyer to recover court costs and attorneys' fees, so there is built-in incentive for pursuing the company violating the state law.

Business opportunity buyers must still be cautious in making investment decisions, though. If a disclosure document is made available to you, read it carefully. If you are in a state with a business opportunity statute, check with state agencies for the company's registration record. The Better Business Bureau is also a good resource.

Remember, even though the pattern of federal and state business opportunity laws gives the appearance this is a regulated form of doing business, it's not. Do not expect to find widespread compliance. For good or bad, the world of business opportunities is still "buyer beware." And for businesses offering any program enabling the buyer to start a business, it is also "seller beware."

The business opportunity laws are still developing, but they pose a difficult dilemma for a great number of regional and national companies. Compliance can be expensive, but failure to comply can be even more expensive.

For a listing of state business opportunity laws and enforcement agencies, contact Andrew A. Caffey at 1201 New York Ave. N.W., #1000, Washington, DC 20005. ■

Andrew A. Caffey is a partner in the Washington, DC, office of Venable, Baetjer, Howard & Civiletti, where he heads a national practice team specializing in distribution, franchising, and business opportunity law.

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