Franchising Questions and Answers
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I. Introduction

In the United States, sales of franchises are regulated by the Federal Trade Commission ("FTC") and various state statutes and regulations. This article will review the applicable state and federal laws and regulations governing the sale of franchises and distributorships. This article will also review laws governing the franchise or distributorship relationship after the initial sale has been consummated. These laws often cover issues such as termination, renewal, and assignment rights.

Q. What is a franchise?

It is difficult to define succinctly what constitutes a franchise, but under the FTC’s Amended Franchise Rule (the “FTC Rule”) and most of the state registration laws, there are three key elements to a franchise:

1. The franchisor and franchisee are mutually associated with a common trademark, logo, or trade name;
2. The franchisor must promise to give the franchisee significant assistance or the franchisor must impose significant controls over the franchisee; and
3. The franchisee is required to pay fees to the franchisor or its affiliates that will amount to over $500 during the first six months of the franchise relationship.

Substantively, state registration laws describe the definitional aspects of franchises in a similar manner, although the wording may appear quite different. Rather than talking in terms of “significant assistance” or “significant control,” most state statutes require that the franchisee be required to follow a prescribed or suggested “marketing plan,” or that a “continuity of interest” exist between the franchisee and the franchisor. In essence, the definitional differences between the FTC Rule and state statutes or regulations are not that significant, although that is not always the case.

Q. What is the difference between a franchise relationship and a trademark license?

A typical trademark licensing arrangement often satisfies most of the elements of the definition of a “franchise.” The trademark requirement is easily met, there is certainly some sort of license fee charged for use of the mark, and some controls are placed upon use of the mark. In fact, the Lanham Act virtually mandates that some control be imposed upon a licensee in order for the franchisor to retain the validity and ownership of the mark. These trademark controls alone, the FTC and state officials have stated, are not enough in themselves to create a franchise relationship. The difference between a trademark licensing relationship and a franchise relationship often turns on the amount of control that a franchisor exerts over a franchisee. Generally, the more assistance or control that a licensor exerts over its licensee, the more likely a relationship may be considered a franchise. But the lines of demarcation are quite gray.

Determining whether a licensing relationship is a franchise relationship requires a fact-specific analysis of each contractual obligation of a proposed relationship. Significant types of control include: (1) providing site approval or site selection for unestablished businesses; (2) implementing site design or appearance requirements; (3) controlling hours of operation; (4) mandating production techniques; (5) mandating accounting practices or personnel policies; (6) requiring franchisee participation or financial contribution to promotional campaigns; and (7) restricting customers, locale, or area of operation. Significant types of assistance include: (1) providing formal sales, repair, or business training programs; (2) establishing accounting systems; (3) furnishing management, marketing, or personnel advice; (4) furnishing system-wide networks and website; and (5) furnishing a detailed operating manual.2

Generally, the following items do not constitute significant control or assistance: (1) implementing “trademark controls designed solely to protect the trademark owner’s legal ownership rights in the mark under state or federal trademark laws (such as display of the mark or right of inspection);” (2) “furnishing a distributor with point-of-sale advertising displays, sales kits, product samples, and other promotional materials intended to help the distributor in making sales;” (3) providing advertising in various media; (4) implementing “health or safety restrictions required by federal or state law or regulations;” and (5) “assisting distributors in obtaining financing to be able to transact business.”3

Q. Are there other types of relationships that might be subject to regulation?

Even if a relationship does not meet the definition of a franchise, it is possible that it could be considered a “business opportunity.”4 Business opportunities, which include sales of vending machines and rack displays, are regulated by a federal rule. A “business opportunity” is a continuing commercial relationship in which the seller arranges for the purchaser to obtain a supply of goods, commodities, or services, and secures for the purchaser retail outlets or accounts for the goods, commodities, or services, or secures for the purchaser locations or sites for vending machines, rack displays, or any other product sales displays used in the offer or distribution of goods, commodities, or services.5 Twenty-five states also have laws covering the sale of business opportunities, which are defined differently under each state statute.6 The state law definitions are often expansive enough to include traditional franchises or distributorships, as well as vending machines and rack displays. Accordingly, these statutes must be taken into account in setting up any franchise or distributorship arrangement.

3 Id.
5 Id. § 437.2(a)(1).
Distribution arrangements, too, are often subject to state franchise registration laws and the FTC Rule. While the trademark and control requirements are not usually the definitional aspects that create legal issues for distribution, the fee element can create controversy as to whether a distributorship will be classified as a franchise. Usually a distributor, unlike the classical franchisee, pays nothing up front to obtain his distribution rights, and the revenues from which the manufacturer will make his profit come solely from product markups. Both the FTC and all of the registration states have interpreted the term “franchise fee” broadly to include almost all revenue received by the franchisor or its affiliates from the franchisee, whatever the source. However, the term “franchise fee” has also been interpreted to exclude revenues derived from the sale of reasonable amounts of inventory in the ordinary course of business at bona fide wholesale prices. Thus, the traditional distributor who simply buys inventory from the manufacturer will not be deemed a franchisee. On the other hand, if the distributor is required to pay an up front fee, purchase excessive amounts of inventory, pay inflated prices for inventory, or purchase other items or services from the manufacturer or its affiliates, such as repair equipment or training, all of the federal and state regulatory burdens may apply.

II. Franchise Sales Laws

Q. How are franchise sales regulated?

Franchise sales are regulated at both the state and federal level. During the late 1960s, instances abounded in which franchisees, expecting to become part of valuable and well-respected chains, made considerable investments in business ventures only to find later that the rights they were granted were worthless and the costs involved in the purchase and operation of the franchise were considerably greater than anticipated. In many situations, expected gross or net income had been vastly exaggerated as well.

As a result of these instances, beginning in 1970, states took action to attempt to regulate the industry. Today, 15 states have franchise investment laws requiring pre-sale disclosures, including California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin. Although each of the state registration laws has its own peculiarities, the statutes are for the most part similar. All (1) contain definitions of the term “franchise,” (2) require franchises to be registered with designated state officials before being offered for sale, (3) require certain disclosures to be made to prospective franchisees, and (4) require a cooling-off period before the franchise offer may be accepted by a prospective franchisee. Each statute provides for civil and criminal remedies in the event a franchisor violates the statute. The civil remedies may be enforced either by designated state officials or by the affected franchisee.

In 1979, after almost a decade of investigation, the Federal Trade Commission, pursuant to Section 5 of the Federal Trade Commission Act, enacted its “Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures” (the “Franchise Rule”). In 2007, the FTC approved amendments to the Franchise Rule. Like the original Franchise Rule, the amended

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FTC Rule has many similarities with the state franchise registration statutes in that it requires certain disclosures to be made to prospective franchisees and requires a cooling off period before the franchise can actually be sold. However, two notable differences exist. First, there is no registration requirement under the FTC Rule. Second, there is no private right of action if the FTC Rule is violated. Only the FTC can bring civil or criminal actions if a franchisor fails to comply with the FTC Rule.

Q. How does the FTC Rule coexist with state sales statutes?

In states without franchise sales statutes, such as Georgia and North Carolina, franchisors must comply with the FTC Rule when selling franchises. In jurisdictions having registration statutes, such as New York, both the state statute and the FTC Rule must be adhered to before franchise sales can be commenced.

The FTC alleviated much of the complexity caused by dual levels of regulation by stating that its rule preempted state laws only to the extent that state laws provided less protection to prospective franchisees. Since most of the registration statutes afford greater protection to prospective franchisees, many of the problems created by dual federal and state regulation were eliminated.

States have also done their part to attempt to make most of their regulations more consistent with the requirements imposed by the Franchise Rule, and this consistency generally carries over to the amended FTC Rule. However, many states have retained their own idiosyncrasies which impose additional or different requirements on franchisors.

Q. Are there exemptions or exclusions available from the FTC Rule or state sales statutes?

Yes, both the FTC and the states have exempted or excluded certain activities or persons from the scope of regulation. The FTC Rule, for example, excludes certain types of relationships because they do not satisfy the three elements required to be a franchise: (1) single trademark and exclusive manufacturing agreements, (2) general partner relationships, (3) employer-employee relationships, (4) cooperative associations, and (5) certification or testing services arrangements. The FTC Rule provides for: (1) a large franchisee exemption (franchisee or an affiliate is an entity that has been in business for at least five years and has a net worth of at least $5 million); (2) a large franchise investment exemption (where at least one individual contributes a minimum of $1 million), (3) an exemption for franchise sales to insiders, (4) an exemption for department store leasing arrangements, (5) a fractional franchise exemption for franchisees that have more than two years of experience in that line of business, and sales from the new franchise line of business make up less than 20% of the business’s overall sales, (6) a minimum payment exemption where the required payment to the franchisor is less than $500 within the first six months, (7) an exemption for oral agreements for which there is no written evidence of a material term of the franchise relationship, and (8) an exemption for “petroleum marketers and resellers covered by the Petroleum Marketing Practices Act (“PMPA”). State laws, depending upon the jurisdiction, may exempt or exclude

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9 Id. at 15520–29, 15560.
large franchisors, isolated sales, or sales by established franchisors. A franchise sale may be exempt from disclosure requirements at the state level, but not at the federal level, and vice versa.

III. Franchise Disclosures

Q. What must be disclosed to a prospective franchisee?

If a relationship meets the applicable state or federal definition of a franchise, the franchisor or its counsel must prepare a disclosure document known as a “Franchise Disclosure Document” (“FDD”), formerly known as a “Uniform Franchise Offering Circular” or “UFOC” until the 2007 revision of the FTC Rule. The FDD includes certain disclosures mandated by the FTC Rule and state statutes. While the form of the FDD is very similar among the various states, each state has its own peculiarities, which means that the document used to sell franchises in each registration state may be different in certain respects from that used in other jurisdictions. Typically, these state peculiarities are addressed in the form of addenda to the FDD and to related agreements so that a single FDD may be used in all fifty states.

Q. What is included in a FDD?

A FDD includes 23 Items and numerous exhibits. The body of a typical FDD can range from 30 to 50 pages. The entire FDD, including exhibits, often will be over 200 pages. Information relating to the franchise that must be found in the FDD includes, among other things, background information on the franchisor and its key management, officers, and directors; the amount of initial and subsequent franchise fees to be paid to the franchisor and its affiliates; the estimated cost to make the franchise operational; any requirements that the franchisee must purchase certain items from the franchisor or its affiliates or otherwise do business with designated suppliers; and a summary of certain material provisions of the franchise agreement (such as the term, renewal rights, restrictions on in-term and post-term competition, and territorial rights granted to the franchisee). Any agreements that are relevant to the franchise opportunity, such as the franchise agreement, must be included as exhibits to the FDD. Audited financial statements of the franchisor must also be included in the FDD, although the amended FTC Rule allows a phase-in period where a start-up franchisor does not need to include audited financial statements.

Q. Can a franchisor make representations or claims about a franchisee’s potential earnings?

Yes, if the information is included in Item 19 of the FDD. Item 19 includes “financial performance representations” (formerly known as “earning claims”) that a franchisor wishes to make about its franchise opportunity. A franchisor is not required to include any financial performance representations in its FDD. It is estimated that only 30% to 40% do so. However, with limited exceptions, a franchisor and its sales representatives may not make any other representations to a prospective franchisee about the earnings of other franchisees, projected earnings of franchises, or sales information, unless the representations are included in Item 19. Thus, if a franchisor does not include financial data in its FDD, the franchisor would be unable to answer questions regarding a franchisee’s potential income or earnings.
Financial performance representations included in Item 19 may be projections or based on historical results of existing outlets. In practice, the overwhelming majority of financial performance representations present data from existing outlets rather than projections. Data from subsets of outlets may be used, provided that appropriate disclosures are included that allow the franchisee to understand how representative the subset may be compared to the rest of the outlets in the system. There must be a reasonable basis for all claims made in Item 19 and a franchisor must be able to produce the data that was used to make the representations.

Q. When must a franchisor provide a FDD to a prospective franchisee?

Under the FTC Rule, a franchisor must provide its FDD to a prospective franchisee at least 14 calendar days before entering into any binding agreement with or receiving any payment from the franchisee. State rules may differ. In Maryland, New York, and Rhode Island, the FDD must be provided at the earlier of the first personal meeting or ten business days before the franchisee signs a binding agreement with, or makes a payment to, the franchisor.

IV. Franchise Registration

Q. What is the franchise registration process?

As stated above, there is no federal registration of franchise offerings. In the 13 states which require registration of franchise offerings, registration can be a difficult and often lengthy task that requires advanced planning by the franchisor and its legal counsel. The franchisor or his counsel must submit the FDD and various other forms to the appropriate state officials, typically the state’s Department of Corporations or Attorney General’s office. The entire package is referred to as the registration application. Registration applications must be accompanied by the applicable registration fee, which ranges from $250 to $750. Registrations are effective for one year and generally must be renewed before their expiration date. Renewal fees are usually approximately one-half of the initial registration fee.

Except in Indiana, Michigan, South Dakota, and Wisconsin (where the review process has been eliminated), the state officials are given a period of time—usually about 30 calendar days—to review the registration application and furnish comments to the franchisor. The franchisor must then respond to these comments, either by making the suggested changes, or by convincing the officials that their concerns are unwarranted and that no changes are necessary. While deficiencies can often be corrected with only one revision, it is not unusual for a franchise registration application to be revised two or more times before the state will register the offering and for the entire registration process to take two to three months from the date the registration application is first submitted for review. When the registration process is successfully completed, an order declaring the registration effective is issued by the state. The order does not indicate that the registration has been endorsed by the state, and any representation to that effect can be a criminal offense.

Q. Do states apply the same standards of review?

10 See http://www.ftc.gov/bcp/franchise/netdiscl.shtm. Two of the fifteen states that have franchise investment laws do not require filings.
No. The review process by each state has traditionally been independently conducted, and because of other variations in state regulations, the different training programs given to franchise registration examiners, and in some cases the different philosophies of state officials toward review, the registration process can take different turns in each jurisdiction, thereby increasing the likelihood that the offering documents will be different in each state. In several jurisdictions, for example, the state officials may simply compare the submitted documents to their state statutes and regulations, and their comments will only reflect variations between the two. In other states, the examiners will give the FDD closer scrutiny and in some cases make comments about the merits of the offering itself. Oftentimes, changes requested by one state will result in a franchisor filing amendments in other states so that it can offer a single FDD in all states rather than having a handful of state-specific versions.

There are other differences among states in the registration process. All states can require that initial franchise fees be escrowed until the prospective franchisee’s business becomes operational, but not all will do so, even in identical factual settings. In many registration jurisdictions, franchise sales literature must be cleared by the state in advance. Again, different standards of review may be applied. The bottom line is that the offering documents and the registration process can vary considerably from state to state, making franchise-selling a cumbersome and expensive process.

V. Non-Compliance

Q. What are the penalties for non-compliance under the FTC Rule?

Failure to comply with the FTC Rule can have severe results. For violations of the FTC Rule, the penalty per violation has recently been raised to $16,000.\textsuperscript{11} Other remedies include equitable remedies, assessment of damages incurred by the public, and criminal sanctions.

In practice, the FTC has been viewed somewhat as a toothless tiger. Because of budget limitations and other factors, the FTC has not taken a very aggressive role in prosecuting FTC Rule violations. As a general rule, the FTC seriously investigates situations only when the franchisor has not provided a disclosure statement or has made financial performance representations in an unlawful manner, when the FTC Rule has been flouted flagrantly, or when widespread harm has been inflicted on the public. Isolated FTC Rule violations are generally ignored, as are technical violations such as violation of the FTC Rule’s waiting period before consummation of the franchise sale. The FTC has been more aggressive in prosecuting business opportunities sellers who do not comply with the FTC Rule.

When the FTC has taken on franchisors, it has been very aggressive in seeking relief. It has imposed pre-judgment freezes on the assets of the franchisor and its principal officers. It has also imposed hefty fines on some FTC Rule violators. As for minor or technical violations, the FTC has addressed this problem by implementing a program under which offenders may agree to participate in a remedial program rather than face prosecution. Under this program, the franchisor’s management must participate in programs designed to assure that the franchisor is aware of its responsibilities under the FTC Rule, and the FTC will indirectly monitor the franchisor’s sales activities for a

\textsuperscript{11} 74 Fed. Reg. 857, 858 (Jan. 9, 2009).
limited time, typically three years. All things considered, participation in this program is clearly a far more lenient and less expensive alternative than defending an action brought by the FTC, even when the franchisor is arguably in the right.

The absence of a right in an aggrieved franchisee to pursue a claim considerably reduces the risks of lawsuits resulting from FTC Rule violations. However, many states have adopted so-called “Baby FTC Acts” which, in essence, give franchisees causes of action for FTC Rule violations. Franchisees may also have state actions available for fraud or unfair or deceptive practices if the FTC Rule has been violated.

Q. What are the penalties for non-compliance under state registration laws?

The consequences for violations of state registration laws can also be dire. The remedies generally include civil penalties, including fines, provable damages, and injunctive relief. Criminal penalties, which may include fines or imprisonment, are also possible. State statutes grant franchisees the right to pursue their remedies by themselves, and in most states, grant franchisees the right to rescind their franchise purchases, even if they have suffered no provable damages. Some states have also adopted remedial programs that are similar to the FTC’s.

While the possibility of FTC enforcement has not been much of a deterrent, state enforcement is viewed with a higher level of fear by legitimate franchisors. Relatively speaking, most states have comparatively devoted more resources than the FTC to enforcing their acts, especially when the violation is the failure of the franchisor to register. However, when a franchisee claims that the franchisor has misrepresented what is being sold, the state may be more reluctant to bring its enforcement powers to bear, absent compelling evidence verifying the aggrieved franchisee’s position. Also, isolated technical violations of state law, if handled properly, generally do not bring about the state’s full wrath, absent clearly demonstrable damages resulting from the violation.

VI. Franchise Relationship Statutes

Q. Are there federal regulations regulating franchise relationships?

The federal government does not regulate franchise relationships generally. There are two exceptions to this statement—federal laws do regulate franchise relationships involving petroleum dealers and automobile dealers. The relationship between retailers and parties at higher levels in the petroleum distribution structure are regulated under the Petroleum Marketing Practices Act,12 which imposes restrictions on the termination, renewal, and transfer of petroleum franchises. The only federal statute governing the manufacturer-dealer relationship in the automotive industry is the Automobile Dealer Franchise Act,13 more commonly known as the “Automobile Dealer Day-In-Court Act.” The statute requires automobile manufacturers to deal in good faith—that is, to refrain from coercing or intimidating, and from threatening to coerce or intimidate. In practice, the Act has had little importance and has produced few judicial decisions.

There are other federal laws—for example, the antitrust laws and the Racketeer Influenced and Corrupt Organizations Act (known as “RICO”)—that can affect franchise relationships. However, these statutes are not aimed specifically at the franchise arena, but instead at general commercial practices.

Q. Are there state laws regulating franchise relationships?

In contrast to the federal government, 18 states have regulations governing franchise relationships generally. These states include Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Rhode Island, Virginia, Washington, and Wisconsin. Puerto Rico and the Virgin Islands also have franchise relationship laws. In addition, there are many state statutes regulating franchise relationships in specific industries such as beer, wine, and farm and heavy construction equipment.

Q. What do franchise relationship laws cover?

While there has been a considerable effort to standardize, from state to state, regulation of the franchise sales process, there is no well discerned pattern of state franchise relationship regulations. Aspects of the franchise relationship that may be covered by these statutes include terminations, renewals, transfers, encroachment, freedom of association, and purchasing restrictions, but no two statutes are substantially identical, except Rhode Island’s and Wisconsin’s. Most of them focus on only one, two, or three of these areas, and in many instances the regulatory approach among the states is dramatically different. The result is a very complicated regulatory scheme.

This disparity among the states begins with the fundamental issue of how franchises are defined. Typically, the definition of “franchise” is similar to the definition of “franchise” under the FTC Rule and include three elements. Virtually all of the statutes provide that the relationship must include the use of a trademark, logo, commercial symbol or the like, and that the franchisor must charge the franchisee a fee in order for a franchise to exist. It is the third prong of the definition where the statutes diverge. In some states, there must be a “community of interest” between the franchisor and the franchisee; in others, the franchisor must prescribe or suggest to the franchisee a “marketing plan.” Not all states—New Jersey and Wisconsin, for example—require all three elements to be present in order for the relationship to be subject to the statute. New Jersey, for example, has no fee requirement.

Q. How are franchisee terminations regulated under state laws?

Most franchise relationship statutes require a franchisor to have “good cause” before terminating a franchisee. “Good cause” is usually defined to include the failure of a franchisee to adhere to the provisions of the franchise agreement. In addition, most statutes require the franchisor to give the franchisee notice of a breach or default and an opportunity to cure. This notice requirement is generally not applicable to certain types of defaults such as bankruptcy, insolvency, or abandonment.

Today, in practice, these statutes usually have little effect on the termination process, for it is more common than not for the franchise agreement to contain provisions that substantially parallel these statutory requirements. Thus, even if the termination provisions of the relationship statutes
were repealed, practice in the industry would remain largely unaffected. Most franchisors follow these termination procedures in large measure even in states where terminations have remained unregulated. This is probably due to a desire to maintain uniformity in the administration of the franchise system as well as the fact that courts in many jurisdictions have a predilection to prevent forfeitures, absent compelling circumstances, even though freedom of contract is the general rule in the United States’ judicial system.

Q. How are franchise renewals regulated under state laws?

In franchising, mandatory renewal rights are typically granted to franchisees, but there are some very well-known chains (McDonald’s, for example) in which renewals are granted only at the franchisor’s discretion. Some franchise relationship statutes have been designed to deal with these situations. In some states, such as Wisconsin, non-renewals are not permitted absent good cause. This, in effect, may require a franchisor to continue a relation beyond the bargained-for period. Other states, such as Missouri, simply impose procedural requirements upon the franchisor (e.g., 180 days advance notice of a decision not to renew). A third group of statutes imposes various burdens on the franchisor if it elects not to renew. For example, the franchisor may have to compensate the franchisee under Washington law, and in Iowa, the franchisor must agree not to enforce the post-term noncompetition provision of the franchise agreement.

Q. How are franchise transfers regulated under state laws?

Most franchise agreements permit transfers, but vest varying degrees of control in the franchisor over such transactions. The most stringent agreements provide that transfers may only be made with the franchisor’s consent, and such consent may be arbitrarily withheld. Other agreements simply state that consent may not be unreasonably withheld. It is also quite common for the franchise agreement to delineate some of the reasons which would permit the franchisor to deny transfers. These may include financial or technical inability, poor character, or existing interests in competing businesses. It is also common for the franchisor to impose varying conditions upon the transfer. These may include execution of a new form of franchise agreement, payment of a transfer fee (which may be substantial), execution of a general release by the transferor in favor of the franchisor, and completion of requisite training.

Generally, statutes regulating transfers require the franchisor to have good cause for withholding consent. Some statutes also require the franchisor to approve a transfer if the transferee meets the criteria for new franchisees. Other states have flip-flopped the approach and require the franchisee to notify the franchisor of the proposed transfer and to furnish it with specified types of information; the franchisor is then required to respond to the request within a specified period. And finally, in at least one state—California—the statute protects the rights of a deceased franchisee’s heirs to take over the business.

Q. Do the franchise statutes protect a franchisee’s freedom of association?

Ten states (Arkansas, California, Hawaii, Illinois, Iowa, Michigan, Minnesota, Nebraska, New Jersey, and Washington) have adopted provisions limiting the franchisor’s right to intervene in
collective conduct by franchisees. Freedom of association statutes tend to take one of two forms. They prohibit a franchisor from either (1) restricting or inhibiting the rights of franchisees to join an association, or (2) prohibiting, directly or indirectly, the right of association among franchisees for any lawful purpose. Interestingly, there have been few cases to date that discuss any of these statutes. The leading precedent is 30 years old. That decision—McAlpine v. AAMCO Automatic Transmissions, Inc.—suggests that freedom of association is a constitutionally protected right of franchisees, which in turn might suggest that state regulation in this area may be unnecessary—a contention to which franchisee advocates would certainly object.14

Q. Are there limitations on a franchisor’s ability to encroach on a franchisee’s territory?

From a regulatory standpoint, the states have been notably silent on the encroachment issue where a franchisor has infringed upon his franchisee’s arguably exclusive territorial or customer rights. Only four states—Hawaii, Indiana, Minnesota and Washington—have statutes or regulations prohibiting encroachment. Iowa hampers, but does not prohibit, encroachment. Numerous court decisions, however, have addressed franchisee claims of encroachment.

VII. Conclusion

For the company planning to enter into distribution or licensing arrangements in the United States, care must be taken to consider the applicability of federal and state franchise and business opportunities laws and regulations. Compliance is not difficult to achieve, but it requires management of time and financial resources, as well as close association with competent counsel familiar not only with the published statutes and regulations, but with the unwritten “folklore” of franchising, the registration process, and, in some instances, the state administrators themselves. Once a franchise system is up and running, franchisors must be cognizant of state regulations which impair a franchisor’s freedom of contract. Designed to remedy early abuses in franchise relationships, these statutes result in franchisors being handcuffed in certain respects in the manners in which they deal with franchisees, such as terminations, non-renewals, transfers, and freedom of association. While the regulatory framework can be cumbersome, given that franchising has continued to flourish, it appears that a proper balance has been struck between the needs of franchisees for protection against power-hungry franchisors and the need for franchisors to be able to practice the entrepreneurial skills that have made them successful.
