

Complex of Federal and State Laws Regulates Franchise Operations As Their Popularity Grows

BY MITCHELL J. KASSOFF

Franchising is a huge and growing part of the nation's economy. More than 300,000 franchised small businesses operating in the United States account for an estimated \$1 trillion worth of income each year and provide jobs for some eight million Americans.¹ Franchising has also entered the Internet era.²

Franchising in the United States is governed by federal law administered by the Federal Trade Commission³ and by a variety of state statutes. Filing of documents with the Federal Trade Commission is not required to franchise.⁴ Applicable state statutes include franchising laws, business opportunity laws and "Little FTC Acts."⁵ In many cases, documentation demonstrating approval by the state must be filed before a franchise is offered for sale within the state. Some states⁶ have statutes specific to certain industries. A state is permitted to enact and enforce laws relating to franchising that add to the provisions of federal law.⁷ In addition, franchising is increasingly being regulated by other nations.⁸

Unlike securities laws, franchise-related statutes are not designed to be "Blue Sky" laws; instead their purpose is to provide prospective franchisees with information that can help them determine whether they should purchase a particular franchise.⁹ In some states, however, the laws analyze a franchisor's financial statements and franchise agreements and make value judgments about them. If these documents do not meet the requirements of some state agencies, "Risk Factor" notices,¹⁰ escrow requirements¹¹ and bonding requirements¹² may be imposed or the agencies may even refuse to register a franchise.¹³

Originally, franchisors had to use documents drafted according to the requirements of the Federal Trade Commission Disclosure Rule.¹⁴ This created a situation that required different versions of the franchise disclosure document to comply with different state disclosure requirements. To allow franchisors to use the same document on a nationwide basis, a Uniform Franchise Offering Circular (UFOC) was developed and has since been amended by the Midwest Securities Commissioners Association and its successor, the North American

Securities Administrators Association (NASAA). The Federal Trade Commission issued a franchise disclosure rule in 1978 allowing franchisors the option to use the UFOC in lieu of its document.¹⁵ For this reason, most franchisors now use the UFOC.

Although the states have different disclosure requirements, in some cases a franchisor can use one UFOC nationwide by adopting state-specific language internally in the UFOC and addendums to the disclosure section and the franchise agreement. Nevertheless, some states have contradictory disclosure rules that result in the need for a state-specific UFOC.¹⁶

The UFOC generally contains a federal cover page, a state-specific cover page (with different language depending on the state),¹⁷ a table of contents (listing the 23 required items¹⁸ that are sections of the UFOC, followed by a list of exhibits in the UFOC), the disclosures for the 23 required items, financial statements (audited financial statements for the past three fiscal years, with unaudited financial statements that are within 90 days of the filing of the UFOC, if necessary),¹⁹ copies of all agreements that the franchisee must execute, and a receipt page for the UFOC.²⁰

Additional documents must be filed to register a franchisor to sell in a state. In New York, franchising is regulated by the Investor Protection and Securities Bureau in the office of the state attorney general. The bu-



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reau requires a facing page, application page, two copies of the UFOC, supplemental information sheet, verification of the application, salesman disclosure forms, consent to service of process, consent to use the franchisor's financial statements in the UFOC signed by the Certified Public Accountant who prepared them and possibly additional forms depending on specific circumstances.²¹

In certain circumstances, state registration is not necessary. Some states do not require registration if a franchisor has a federally registered trademark or service mark and provides a UFOC to prospective franchisees,²²

or if a franchisor has a certain specified amount of net worth,²³ or an offer is made to a maximum of two persons,²⁴ or an offer is made to an existing franchisee.²⁵

The Federal Trade Commission has defined what constitutes "franchise."²⁶ In addition, each state that requires registration has its own definition of what is a "franchise"²⁷ to determine whether it requires registration or regulation.

To offer to sell a franchise in or from New York, a franchisor must first be registered.²⁸ This applies when an offer to sell a franchise is made in New York, when an offer to buy is accepted in New York, when the franchisee is domiciled in New York, or when the franchised business is or will be operated in New York. An offer to sell is made in New York when the offer either originated from New York or is directed by the offeror to New York and is received at the place where it is directed. An offer to sell is accepted in New York when acceptance is communicated to the offeror from New York.²⁹ Effectively this means that if a franchisor is located in New York it must register in New York to sell franchises either within or without New York State.

If a franchisor wishes to advertise, many states require that the advertisement first be filed with the state.³⁰ Many states³¹ also require that reports be filed on sales. The federal rule³² requires that a UFOC be given at least five business days before the date that agreements are to be executed, but many states require that the UFOC be given to the franchisee earlier.³³

Advantages and Disadvantages of Franchising

Franchising allows a business to expand its operations and grow geographically. Unlike a chain system, the franchisor does not have to provide capital, man-

agement or employees for each location. This allows a franchisor to increase its profits more rapidly than by expanding on its own.

The franchisees, as individuals who own their own business, have every possible incentive to work hard to make their businesses a success. Because they are owners, their motivation is likely to be greater than that of a manager, even one who receives a percentage of the profits of the business.

With each new location, the franchisor immediately earns a profit in the form of the initial franchise fee, typically \$5,000 to \$25,000. The franchisor also receives a

continuing royalty, usually 8% to 10% of the gross income of the franchisee.

One disadvantage is that after franchisees have learned how to operate a business they resent continued royalty payments. In some cases they look for a way to terminate the franchise contract. In other cases they may try to violate the terms of the franchise arrangements because they believe the franchisor is receiving more benefits than it deserves.

Another disadvantage is that the franchisor may be named in litigation involving the franchisee. Typically, this occurs when the franchisee is sued for injuries to its personnel or customers³⁴ or for various types of alleged discrimination. In these circumstances, if the franchisor has not detailed how the franchisee should act in the particular area affected, the franchisor has usually been successful in defending the lawsuit.

1. International Franchise Association.
2. Devin Klein and David Koch, *The Electronic Franchise Agreement [Became] Reality October 1*, Franchising World (Oct. 2000) p. 21. With the deadline for the pending Electronic Signatures in Global and National Commerce Act (E-SIGN) passing its Oct. 1 implementation date, businesses will now be allowed to complete their contracting process online. E-SIGN legislation makes electronic records and electronic signatures as legally binding as ink signatures.
3. 16 C.F.R. pt. 436, (effective October 21, 1979).
4. Federal Trade Commission Interpretive Guides to Franchising and Business Opportunity Ventures Trade Regulation Rule, 44 Fed. Reg. 49, 966 (August 24, 1979).
5. Arkansas (Franchise Practices Act, Ark. Code of 1987, Title 4, Chap. 72, § 4-72-207), California (Franchise Investment Law, Cal. Corporations Code, Div. 5, Parts 1 to 6, §§ 31000 to 31516 and Contracts for Seller Assisted Marketing Plans, Cal. Civ. Code, Div. 3, Part 4, Title 2.7, §§ 1812.200 to 1812.221), Connecticut (Business Opportu-

nity Investment Act, Conn. Gen'l Stat., Title 36b, Chap. 672c, §§ 36b-60 to 36b-80), Florida (Franchises and Distributorships, Fla. Stat., 1995, Chap. 817, § 817.416 and Sale of Business Opportunities Act, Fla. Stat., 1995, Chap. 559 §§ 559.80 to 559.815), Georgia (Business Opportunity Sales, Code of Ga., Title 10, Chap. 1, Art. 15, Part 3, §§ 10-1-410 to 10-1-417), Hawaii (Franchise Investment Law, Haw. Rev. Stat., Title 26, Chap. 482E, §§ 482E-1 to 482E5, 482E8, 482E9, 482E11 and 482E12), Illinois (Franchise Disclosure Act of 1987, Ill Laws of 1987, Chap. 85-551 and Business Opportunity Sales Law of 1995, Ill Compiled Statutes of 1996, Chap. 815, §§ 602/5-1 to 602/5-135), Indiana (Ind. Code, Title 23, Art. 2, Chap. 2.5, §§ 1 to 51 and Business Opportunity Transactions, Ind. Code, Title 24, Art. 5, Chap. 8, §§ 1 to 21), Iowa (Business Opportunity Promotions Law, Iowa Code, 1995, Title XX, Chap. 523B, §§ 523B.1 to 523B.13), Kentucky (Sale of Business Opportunities Law, Ky. Rev. Stat. and 1988 Supp., Title XXIX, Chap. 367, §§ 367.801 to 367.819 and 367.990), Louisiana (Business Opportunity Sellers and Agents, Lou. Rev. Stat. of 1950, Title 51, Chap. 21, §§ 51:1801 to 51:804), Maine (Sale of Business Opportunities, Maine Rev. Stat. and 1990 Cum. Pocket Part, Title 32, Chap. 69-B, §§ 4691 to 4700-B), Maryland (Franchise Registration and Disclosure Law, Code of Md. Article-Business Regulation, Title 14, §§ 14-201 to 14-233 and Business Opportunity Sales Act, Code of Md., Title 14, §§ 14-101 to 14-129), Michigan (Franchise Investment Law, Mich. Comp. Laws, 1979, Chap 445, §§ 445.1501 to 445.1545 and Business Opportunities, incorporated into the Consumer Protection Act, Mich. Comp. Laws, 1979, §§ 445.901 to 445.922), Minnesota (Franchises, Minn. Stat. 1996, Chap. 80C, §§ 80C.01 to 80C.22), Mississippi (Miss. Code 1972, Title 75, Chap. 24, § 75-24-55), Nebraska, Seller-Assisted Marketing Plan Act, Rev. Stat. of Neb. 1943, Chap. 59, Art. 17, §§ 59-1701 to 59-1761), New Hampshire (Distributorship Disclosure Act, N.H. Rev. Stat., Title XXXI, Chap 358-E, §§ 358-E:1 to 358-E:8), New York (General Business Law, Art. 33, §§ 680 to 695), North Carolina (Business Opportunity Sales Law, Gen. Stat. of N.C., Chap. 66, Art. 19, §§ 66-94 to 66-100), North Dakota (Franchise Investment Law, N.D. Century Code, Title 51, Chap. 51-19, §§ 51-19-01 to 51-19-17), Ohio (Business Opportunity Purchasers Protection Act, Ohio Code, Title 13, Chap. 1334, §§ 1334.01 to 1334.15 and 1334.99), Oklahoma (Business Opportunity Sales Act, Ok. Stat., 1991, Title 71 Chap. 4, §§ 801 to 828), Oregon (Franchise Transactions, Or. Stat., Title 50, Chap 650, §§ 650.005 to 650.085), Rhode Island (Franchise Investment Act, Gen'l Laws of R.I., 1956, Title 19, Chap. 28.1, §§ 19-28.1-1 to 19-28.1-34), South Carolina (Business Opportunity Sales Act, Code of Laws of S.C. 1976, Title 39, Chap. 57, §§ 39-57-10 to 39-57-80), South Dakota (Franchises for Brand-Name Goods and Services, S.D. Codified Laws and 1971 Pocket Supp., Title 37, Chap. 37-5A, §§ 37-5A-1 to 37-5A-87 and Business Opportunities, S.D. Cod. Laws and 1989 Pocket Supp., Chap. 37-25A, §§ 37-25A-1 to 37-25A-54), Tennessee ("Little FTC Act," Tenn. Code, Title 47, Chap. 18, §§ 47-18-101 to 47-18-117), Texas (Business Opportunity Act, Business & Commerce Code, Title 4, Chap. 41, §§ 41.001 to 41.303), Utah ("Little FTC Act," Utah Code of 1953 and 1987 Supp., Title 13, Chap. 11, §§ 13-11-1 to 13-11-23 and Business Opportunity Disclosure Act, Utah Code 1953, 1989 Cum. Supp., Title 13, Chap. 15, §§ 13-15-1 to 13-15-6), Virginia (Retail Franchising Act, Va. Code of 1950, Title 13.1, Chap. 8, §§ 13.1-557 to 13.1-574 and "Little FTC Act," Code of 1950, 1987 Replacement Vol., Title 59.1, Chap. 17, §§ 59.1-196 to 59.1-207 and Business Opportunity Sales Act, Code of 1950,

Title 59.1, Chap. 21, §§ 59.1-262 to 59.1-269), Wash. (Franchise Investment Protection Act, 1989 Rev. Code of Wash., Title 19, Chap 19.100, §§ 19.100.010 to 19.100.940 and Business Opportunity Fraud Act, 1989 Rev. Code of Wash., Title 19, Chap 19.110, §§ 19.110.010 to 19.110.930), Wisconsin (Franchise Investment Law, Wisc. Stat., 1993-94, Chap 553, §§ 553.01 to 553.78 and Wisc. Organized Crime Control Act, Wisc. Stat., 1993-94, Chap 946, § 946.82) and Washington, D.C. ("Little FTC Act," D.C. Code, 1981, Title 28, Chap 39, §§ 28-3901 to 28-3908).

Regulations—California Administrative Code, Title 10, Chapter 3, Subchapter 2.6, §§ 310.000 to 310.505; Hawaii Department of Commerce and Consumer Affairs, Title III, Business Registration, Title 16, Chapter 37, §§ 16 to 37-1-16-37-8; Illinois Administrative Code, Title 14, Subtitle A, Chapter II, Part 200, §§ 200.100 to 200.901; Iowa Administrative Code, Insurance Division (191), Chapter 55, §§ 55.1 (523B) to 55.9 (523B); Maryland Code of Regulations, State Law Department, Division of Securities, Title 02, Subtitle 02, Chapter 8, §§ 02.02.08.01 to 02.02.08.17; Minnesota Rules, 1995, Department of Commerce, Chapter 2860, §§ 2860.0100 to 2860.9930; New York Department of Law, Bureau of Investor Protection and Securities—Codes, Rules and Regulations of the State of New York, Title 13, Chapter VII, §§ 200.1 to 201.16; Oklahoma Business Opportunity Regulations, Rules 660:25-1-1 to 660:25-1-3, 660:25-3-1, 660:25-3-2, 660:25-5-1 and 660:25-7-1; Oregon Administrative Rules, Department of Consumer and Business Services, Division of Finance and Securities, Chapter 441, Division 325, §§ 441-325-010 to 441-325-055 and Division 13, §§ 441-13-040; Texas Administrative Code, Title I, Part IV, Chapter 97, §§ 97.1 to 97.42; Virginia Administrative Code, Title 21, Chapter 110, §§ 5-110-10 to 5-110-90; Washington Administrative Code, Department of Financial Institutions, Securities Division, Chapter 460-80, §§ 460-80-100 to 460-80-910 and Chapter 460-82, §§ 460-82-200 and Wisconsin Administrative Code, Chapters SEC 31 to SEC 36, §§ SEC 31.01 to SEC 36.01.

6. California (Real Estate Licenses, Business and Professions Code, Div. 4, Part 1, Chap 3, Art. 3, § 10177(m)), Maryland (Gasohol and Gasoline Marketing, Code of Md., Article—Commercial Law Title 11, § 11-303), New York (Motor Fuels, General Business Law, Art. 11-B, § 199-b and Cigarettes, Tax Law, Art. 20-A, §§ 485 to 489), Tennessee (Motor Fuel Franchise, Tenn. Code, Title 47, Chap. 25, §§ 47-25-601 to 47-25-607), Vermont (Service Station Operators and oil companies, Vt. Stat., Title 9, Chap. 109, §§ 4103), Virginia (Motor Vehicles, Va. Code of 1950, Title 46.2, Chap. 15, Art. 7, §§ 46.2-1566 and 46.2-1567) and Washington, D.C. (Retail Service Stations, D.C. Code, 1981, Title 10, Chap 2, § 10-222).
7. 44 Fed. Reg. 49, 966 (August 24, 1979).
8. Australia, Brazil, Canada (Alberta, Ontario and Quebec provinces), China, France, Indonesia, Italy, Korea, Malaysia, Mexico, Romania, Russia, Spain and the European Union.
9. Federal Trade Commission Interpretive Guides to Franchising and Business Opportunity Ventures Trade Regulation Rule, 44 Fed. Reg. 49, 966 (August 24, 1979).
10. *E.g.*, New York—N.Y. Comp. Codes R. & Regs. tit. 13, § 200.4 (hereinafter "N.Y.C.R.R.").
11. *E.g.*, N.Y. General Business Law, Art. 33, § 685 (hereinafter "Gen. Bus. Law"); 13 N.Y.C.R.R. 200.6(a).
12. Gen. Bus. Law, Art. 33, § 685; 13 N.Y.C.R.R. 200.6(i).

13. *E.g.*, Minnesota and North Dakota.
14. 16 C.F.R. pt. 436.
15. 16 C.F.R. pt. 436.
16. *E.g.*, Indiana has required its agent to receive service of process to be listed in Item 1 of the UFOC and Minnesota has required that this information not be included in Item 1 of the UFOC for any sales of franchises to be made in its state for the same franchisor.
17. *E.g.*, New York—13 N.Y.C.R.R. § 200.4(a).
18. *E.g.*, New York—13 N.Y.C.R.R. § 200.4(b),(c)—Franchisor, Its Predecessors and Affiliates; Business Experience; Litigation; Bankruptcy; Initial Franchise Fee; Other Fees; Initial Investment; Restrictions on Sources of Products and Services; Franchisee's Obligations; Financing; Franchisor's Obligations; Territory; Trademarks; Patents, Copyrights and Proprietary Information; Obligation to Participate In The Actual Operation of the Franchise Business; Restrictions on What the Franchisee May Sell; Renewal, Termination, Transfer and Dispute Resolution; Public Figures; Earnings Claims; List of Outlets; Financial Statements; Contracts and Receipt.
19. *E.g.*, New York—13 N.Y.C.R.R. § 200.4(c).
20. NASAA guidelines adopted on April 25, 1993.
21. *E.g.*, New York—13 N.Y.C.R.R. § 200.10.
22. *E.g.*, Connecticut (Business Opportunity Investment Act, Conn. Gen'l Stat., Title 36b, Chap. 672c, §§ 36b-61(6)) provided a copy of the trademark or service mark is filed with the state prior to an offer or sale of the franchise in the state.
23. *E.g.*, New York—net worth of at least \$5 million (Gen. Bus. Law, Art. 33, § 684(2)) and an exemption form is filed with the Attorney General prior to offering a franchise for sale.
24. *E.g.*, New York—Gen. Bus. Law, Art. 33, § 684(3)(c) (with additional conditions).
25. *E.g.*, New York—Gen. Bus. Law, Art. 33, § 684(3)(d) (with additional conditions).
26. 16 C.F.R. 436.2 Definitions.

As used in this part, the following definitions shall apply:

(a) The term "franchise" means any continuing commercial relationship created by any arrangement or arrangements whereby:

(1)(i)(A) a person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" (as hereinafter defined), goods, commodities, or services which are:

(1) Identified by a trademark, service mark, trade name, advertising or other commercial symbol designating another person (hereinafter "franchisor"); or

(2) Indirectly or directly required or advised to meet the quality standards prescribed by another person (hereinafter "franchisor") where the franchisee operates under a name using the trademark, service mark, trade name, advertising or other commercial symbol designating the franchisor; and

(B)(1) The franchisor exerts or has authority to exert a significant degree of control over the franchisee's method of operation, including but not limited to, the franchisee's business organization, promotional activities, management, marketing plan or business affairs; or

Franchising in England

The franchising phenomenon is not limited to the United States. In England, for example, franchising is one of the fastest growing sectors of the economy. During the most recent reporting year, the number of franchisees in England rose 17% to 35,200, with yearly turnover reaching 8.9 billion British pounds. Approximately 317,000 people are employed in franchising in England, with 29.3% of all retail trade in England being carried out by franchised businesses.¹

1. *Be Your Own Boss and Cut the Risks*, Birmingham Post (09/27/00) p. 24, Philip Williams.

(2) The franchisor gives significant assistance to the franchisee in the latter's method of operation, including, but not limited to, the franchisee's business organization, management, marketing plan, promotional activities, or business affairs; Provided, however, That assistance in the franchisee's promotional activities shall not, in the absence of assistance in other areas of the franchisee's method of operation, constitute significant assistance; or

(ii)(A) A person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" (as hereinafter defined), goods, commodities, or services which are:

(1) Supplied by another person (hereinafter "franchisor"), or

(2) Supplied by a third person (*e.g.*, a supplier) with whom the franchisee is directly or indirectly required to do business by another person (hereinafter "franchisor"); or

(3) Supplied by a third person (*e.g.*, a supplier) with whom the franchisee is directly or indirectly advised to do business by another person (hereinafter "franchisor") where such third person is affiliated with the franchisor; and

(B) The franchisor:

(1) Secures for the franchisee retail outlets or accounts for said goods, commodities, or services; or

(2) Secures for the franchisee locations or sites for vending machines, rack displays, or any other product sales display used by the franchisee in the offering, sale, or distribution of said goods, commodities, or services; or

(3) Provides to the franchisee the services of a person able to secure the retail outlets, accounts, sites or locations referred to in paragraphs (a)(1)(ii)(B) (1) and (2) of this section; and

(2) The franchisee is required as a condition of obtaining or commencing the franchise operation to make a payment or a commitment to pay to the franchisor, or to a person affiliated with the franchisor.

(3) Exemptions. (not listed here).

(4) Exclusions. (not listed here).

27. *E.g.*, New York—Gen. Bus. Law, Art. 33, § 681:

3. "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

(a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, and the franchisee is required to pay, directly or indirectly, a franchise fee, or

(b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate, and the franchisee is required to pay, directly or indirectly, a franchise fee. A franchise under this article shall not include any agreement, contract, or franchise subject to the provisions of article eleven-B of this chapter or section one hundred ninety-nine of this chapter, or any agreement or contract for the sale of motor fuel.

28. New York—Gen. Bus. Law, Art. 33, § 683(1)

<http://www.jdsupra.com/post/documentviewer.aspx?fid=2f825ae2-4c04-4803-98db-961d2c09a635>

29. New York—Gen. Bus. Law, Art. 33, § 681(12).

30. *E.g.*, New York (a minimum of seven days prior to use)—13 N.Y.C.R.R. § 200.09.

31. *E.g.*, New York (annually)—13 N.Y.C.R.R. § 200.08; Maryland (quarterly)—Code of Md. Regulations, additional Title 02, Subtitle 02, Chap. 8, § .02.02.08.14.

32. 16 C.F.R. § 436.1(g).

33. *E.g.*, New York (the earlier of (a) the first personal meeting with the franchisee to discuss the franchise or (b) ten business days before the franchisee signs any binding agreements or pays any money)—13 N.Y.C.R.R. § 200.4(c).

34. See *Walters v. Ramada Franchise Systems, Inc.*, 2000 Tex. App. LEXIS 5673 (Court of Appeals of Texas, Fifth District, Dallas August 24, 2000) in which a franchisor was denied summary judgment because it retained some control over the franchisee's operations.

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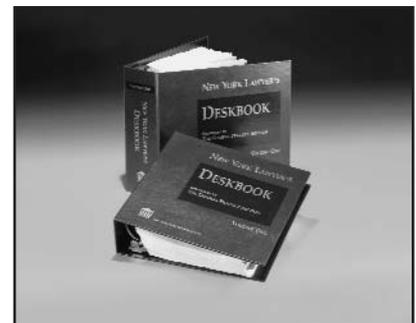
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