

## ALTERNATIVES TO FRANCHISING

There are basically 2 ways to avoid having to comply with franchise laws:

- Structure the relationship so that one or more of the 3 elements of the legal definition of a franchise is missing (See “What is a Franchise”, an article accessible from the Franchise Law page of this site), or:
- Create a relationship that is subject to an *exception* under franchise law.

### Structure

There are several types of business structures that can allow a business relationship to avoid a franchise designation. Some of the more common examples are: i) Trademark License, ii) Distributorship, iii) Business Opportunity, iv) Multi-Level Marketing, and v) Sales Agent. Typically, each of these relationships is missing one or more of the required elements of a “franchise” under federal and state laws. However, be careful, as franchise laws can be interpreted very broadly. If a court finds that your relationship meets the technical definition of franchise, it makes no difference which of the other types of relationships mentioned above that you may have intended.

Even when it is possible to structure a business relationship to exclude one or more of the legal elements of a franchise, many businesses choose not to do this because some of the desirable characteristics of franchises would have to be sacrificed. For example, to structure the relationship as a trademark license, the franchisor may have to give up the right to impose significant controls on the franchisees to protect the brand. In addition there could be complications with state laws if you are contemplating a multi state offering. Although an experienced franchise attorney can lay out all of your options for you, sometimes it not possible to accomplish all of the franchisor’s business objectives and still avoid application of franchise laws.

### Exceptions

Unfortunately, federal and state exceptions are often of little use unless a very limited franchise offering is envisioned. If you are planning a multi-state offering it may be difficult to find an exception to both the federal franchise rule and the laws of each state in which you will be operating. Federal and state franchise laws are not uniform. Moreover, laws vary from state to state. An exception granted in one state may not exist in another state. It is entirely possible for a business relationship to be a franchise under state law in one state, but not be a franchise under the laws of another state or under the Federal Trade Commission (“FTC”) Franchise Rule. Often it is impossible to rely on exceptions to avoid franchise law.

Another problem with exemptions is that they can be lost if laws change. When this happens, a non-franchise business relationship can be automatically transformed into a franchise.

### Choosing to Comply with Franchise Law

Because of the complexity of franchise laws and exemptions, many businesses that might not be a franchise under the FTC Franchise Rule or under the franchise laws in a few states may choose to comply with federal and state laws anyway. This approach may ultimately save money. A state-by-state legal analysis of the franchise laws and exemptions can be expensive. Typically, a state-by-state analysis indicates that the planned business relationship would be a franchise in some states anyway. In addition, some non-franchise business relationships are still subject to a complex system of federal and state laws. Examples of these are business opportunities, distributorships, and multi-level marketing companies.