

**AMERICAN BAR ASSOCIATION
FORUM ON FRANCHISING**

**THE BUSINESS OPPORTUNITY LAWS:
AN ENFORCEMENT AND LITIGATION TRAP?**

**James A. Meaney
ALKON MEANEY & HART**

**John R. F. Baer
SONNENSCHN NATH & ROSENTHAL**

**October 10-12, 2001
San Francisco Marriott
San Francisco, California**

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Table of Contents

I.	Introduction – “The Only Thing We Have To Fear Is Fear Itself”	1
II.	“They Come In All Shapes And Sizes”	3
III.	General Review Of Federal And State Business Opportunity Laws - “The Bones”	6
IV.	Review Of Reported Cases – “The Flesh”	18
V.	State And FTC Enforcement Activity	24
VI.	Strategies To Avoid Enforcement Or Litigation - Franchisor Perspective	29
VII.	Litigation Strategies For “Franchisees” And Business Opportunity Buyers	33
VIII.	What’s New On The Business Opportunity Horizon – FTC Rule And State Changes	36
IX.	Conclusion	37

Schedules

1. Federal and State Business Opportunity Authorities
2. Business Opportunity Laws: Definitional Elements of Representations
3. Business Opportunity Laws: Disclosure/Registration Requirements
4. Business Opportunity Laws: Other Elements
5. Business Opportunity Laws: Available Exclusions Or Exemptions For Franchisors
6. Survey of State Business Opportunity Examiners
7. Private, Civil Remedies Available Under Most Of The State Business Opportunity Laws
8. Business Opportunity Law Definitional Elements
9. Business Opportunity Law Obligations

The authors wish to thank Christopher Wallace, a summer associate, and Janet Reyes, a paralegal, at Sonnenschein Nath & Rosenthal for their valuable contributions to this article.

I. INTRODUCTION – “THE ONLY THING WE HAVE TO FEAR IS FEAR ITSELF”

Why should a “franchise lawyer” have any interest in business opportunity laws? Why should “franchisors” concern themselves with laws designed to apply to business opportunities? Do the remedy provisions of the business opportunity laws provide any value to “franchisees” or their lawyers?

Why should a franchise lawyer care about some law that covers “worm farming” and vending machine businesses? (What is “worm farming” anyway? And, did anyone ever sell a “worm farming” business?)

One answer comes from the Second Circuit. In a case concerning the application of Connecticut’s Business Opportunity Investment Act to the marketing of billing service systems to medical practices, the court said, “But like drift-net fishing the Connecticut legislature intended its cast to be wide and deep so that it might cover all business opportunities, not just those of unscrupulous operators promising the miracle of millions for an hour’s work. Although IncomRx may not have sought to sell Eye Associates a sham business opportunity -- such as the “worm farming” operations that the Connecticut Legislature sought to ferret out by this legislation – IncomRx still may be subject to the Act’s requirements.”¹

As one of our more popular presidents said – “*The only thing we have to fear is fear itself.*” Franklin D. Roosevelt, First Inaugural Address, Saturday, March 4, 1933. For franchise lawyers, “*the only fear we have is the fear of the unknown.*” Nothing strikes more terror in the hearts and minds of franchise lawyers than that call from a client telling you they were served with a lawsuit alleging a violation of law that you overlooked! This was no doubt the reaction of Schatz & Schatz, Ribcoff & Kotkin when they were contacted by their client Beverly Hills Concepts, Inc. concerning suits arising under Connecticut’s Business Opportunity Investment Act. They were later sued for malpractice. Although they managed to avoid a malpractice finding, the case is instructive.²

Because we all share “*the fear of the unknown,*” franchise practitioners endeavor to stay current on the latest cases and the newest laws. One area that we regularly read about is “*What is a franchise?*” Because the now well-known franchise relationship was not recognized at common law and modern franchise relationships are unique statutory creatures, this inquiry is constant.³

And although we often hear the clarion cry for uniformity among state and federal laws affecting franchising, uniformity remains an elusive goal. The intricate latticework of state and

¹ *Eye Associates, P.C. v. IncomRx Systems Limited Partnership*, 912 F.2d 23, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9670 at 21,513, 21,517 (2d Cir. 1990).

² *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin*, 1997 Conn. Super. LEXIS 178, [1996-1997 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 11,099 (1997), *aff’d in part and reversed in part*, [1997-1998 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 11,488 (Conn. 1998).

³ See the paper in the workshop at this Forum called the “The Accidental Franchise.”

federal franchise laws, rules and regulations makes one state's definition of a "franchise" another state's exception. Special industry laws operating at both the state and federal levels further complicate the regulatory landscape. Each relationship, each contract must be analyzed under various state or federal laws.

Business opportunity laws are no different. Just as parties to any distribution arrangement must be mindful of the possible application of the Federal Trade Commission Rule, the Petroleum Marketing Practices Act, The Dealers' Day in Court Act, among other state laws, they must be just as keenly aware of the possible application of business opportunity laws. While some state business opportunity laws facially exclude "franchises" from their grasp, others silently sweep them into their purview. Most business opportunity laws are written so broadly they require extensive exceptions to narrow their expansive scope. Finally, and perhaps most important of all, understanding that "business opportunity" laws may be broad enough to cover today's emerging relationships – maybe in a way that even the franchise laws were not designed to handle – makes the study of business opportunity laws an important matter for all business lawyers.

But, how often does counsel for a franchise company devote equal attention to the application of a state's business opportunity law as to a particular franchise law? How often do franchisors plan around – or even consider – the possible application of business opportunity laws? Are "franchise" buyers aware of protections afforded by certain business opportunity laws? And, most interesting, how many arrangements are entered into without either side ever considering the possible application of a business opportunity law?

Moreover, does it matter what "side" you are on in determining the importance business opportunity law may have to your practice? Too often we categorize lawyers practicing in the franchising area as a "franchisee-lawyer" or a "franchisor-lawyer." This overlooks the fact that most lawyers practicing in the area first represent businesses and serve commercial clients. Whether on the transactional side or the litigation side, most of the Forum lawyers have one thing in common – an interest in commercial relationships and the laws that govern them. Given the fact that the application of business opportunity laws may arise when we least expect it – when no one anticipated its application in a given transaction – it may be difficult to predict which side of a business opportunity matter you may find yourself.

Perhaps you represent a group of entrepreneurial doctors who enter into a marketing deal with their billing service, or a computer software-system developer that has entered into a value-added reseller agreement with a major software design company, or a client who participates in a web-networked business coordinated by an international consortium of computer data companies that provide services marketed by your client. Which side will you be on when a dispute arises? The doctors, the software designer, the seller, the buyer, the new web-business, the franchisee or franchisor? Can you predict in this changing world which party you would represent?

Have you considered the application of business opportunity laws to emerging businesses and the relationships they foster? With emerging technology businesses and the establishment of web-based relationships becoming dominant forces in our economy, business lawyers must think "outside of the box." We can no longer afford to view ourselves on different sides of franchising and distribution relationships. Today we may be on one side, tomorrow the other.

Despite the potentially expansive application of these laws to innumerable relationships, the authors surmise that most of these provisions are largely ignored – or at a minimum taken for granted – by serious business lawyers and franchise practitioners.

So, just as diligent franchise lawyers are preoccupied with the question, “*What is a franchise?*,” they should be correspondingly consumed with the question – “*What is a business opportunity plan?*”

II. “THEY COME IN ALL SHAPES AND SIZES”

Before we explore the technical side of business opportunity laws and the judicial decisions interpreting them, taking a sampling of the types of business opportunities that have appeared in the marketplace and found their way into the courtroom is instructive. Many of us may have a notion of what a typical business opportunity is, but what type of opportunities have actually been on the market?

Eons ago, when the Federal Trade Commission first adopted regulations pertaining to business opportunity ventures, it reported that

The most common types of business opportunity ventures are distributorships, rack jobbing and vending machine routes. In these ventures, the franchisor puts the franchisee into a business of distributing certain goods or services, usually those of a well known third party (such as film, juice, pantyhose etc.), by providing or suggesting a supplier for the goods and representing that the franchisor will establish retail accounts or place vending machines or rack displays in suitable locations. In some cases, the franchisor obtains the services of another person to secure accounts or locations.⁴

The FTC provided further explanation of the types of business opportunity it believed were in the marketplace in 1979: “For example, the franchisor may represent that he will secure ten gasoline stations to be retail outlets for automotive after-market products (e.g., oil filters, gas additives, etc.) or place vending machines in ten locations. The franchisee of a business opportunity venture is required to pay a fee or purchase goods or equipment (such as vending machines or display racks) in order to participate in the business opportunity offered by the franchisor.”⁵

These were the types of business opportunity ventures the FTC intended to cover in 1979 by the “Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures,” October 21, 1979 (16 C.F.R. Part 436; Bus. Franchise Guide (CCH)

⁴ Interpretive Guides to Franchising and Business Opportunity Ventures Trade Regulation Rule, Section I.A.2, Business Opportunity Ventures (dated July 25, 1979); 44 Fed. Reg. 49966, (August 24, 1979), Bus. Franchise Guide (CCH) ¶ 6208 (“Interpretive Guides”).

⁵ *Id.*

¶ 6090)(“FTC Rule”).⁶ To some extent, the FTC’s view of the types of troublesome business opportunity in the marketplace remains valid to this day. With “Project Biz-illion\$” (discussed in Section V), the FTC and the Department of Justice have brought 35 cases as part of a multi-prong state and federal attack on traditional business opportunity scams. The focus of “Project Biz-illion\$” is to take action against companies advertising the sale of vending machines, display racks, work-at-home scams and payphone scams in the classified section of daily newspapers. Most recently in one action, a federal judge permanently banned a group of defendants from selling franchises and business opportunity plans due to their fraudulent marketing of phony payphone route ventures.

While “Project Biz-illion\$” is strong testimony for the continued application of the FTC Rule to business opportunity venture plans, does it provide a complete picture of what may be covered by business opportunity laws?

Given the panoply of state laws adopted around the same time as the FTC Rule, a full picture is not possible without looking at business opportunity ventures that have been the subject of state law. And because some of the state laws sweep “traditional franchises” into the mix, an endless variety of businesses appear to be covered by business opportunity laws.⁷

Reported decisions and state regulators’ advisory opinions display the plethora of “business opportunities” that have made their way into the marketplace, the mail pouches of regulators and the courthouse. As you review the list, consider just how blurry the line between “franchises” and “business opportunity” may be:

- Agreement to market computerized office systems
- Offer by nationally-recognized moving company to become an owner-operator of long-haul trucking business
- Sale and marketing of solar energy devices
- Loan brokerage business
- Training seminars intended to teach purchasers how to own their own business as an account receivable broker and factor
- Muffler shops
- Vending machine business

⁶ *Id.*

⁷ See Ohio’s Business Opportunity Purchasers Protection Act, Ohio Rev. Code, Title 13, Chapter 1334, Bus. Franchise Guide (CCH) ¶ 3358; James A. Meaney, *Ohio’s Business Opportunity Law: A Practical Guide*, 11 Ohio N.U.L. Rev. 651 (1984); and James A. Meaney, *Ohio: The Unknown Franchise Law*, 11 Franchise L.J. 38 (1991).

- Home health care services
- Janitorial services
- Manufacture of plastic specialty items – “work-at-home”
- Frozen pizza distributorships
- Paper converting business – buying and selling of paper products and converting them into paper by-products
- “Independent” chicken grower’s relationship with nationally-recognized poultry producer
- Catalog outlet
- Italian fast food restaurants
- Consulting services to “Start Your Own Trucking Business”
- Arthur Treacher’s Fish and Chip’s restaurants
- Bagel stores
- Merchandise discount card program
- A nonprofit organization’s licensing of a diet/health food program for the treatment of heart disease
- Display rack business for hardware stores
- Chemical distributorships
- Rabbit breeding kits
- Barter exchange program
- Letter of intent between forklift manufacturer and intended dealer
- Shopping center lease pertaining to operation of seafood restaurant in food court arrangement which contained provisions for equipment and services in addition to leased space – U.S. District Court considers certifying to state’s highest court question of application of state’s business opportunity law
- Temporary personnel services business

Sound familiar? Over half of the businesses here could just as easily be characterized as “franchises” under the FTC Rule or one state law or another. Clearly, in the marketplace little

distinction exists between the two regulatory concepts. So how do franchise lawyers and their clients sort out this confusion?

As was noted earlier, modern franchise relationships and business opportunity are unique statutory creatures. We turn to the source – the statutes and regulations themselves.

III. GENERAL REVIEW OF FEDERAL AND STATE BUSINESS OPPORTUNITY LAWS - “THE BONES”

Twenty-four states and the FTC have adopted so-called business opportunity laws or seller-assisted marketing plan laws and at least three other states specifically address business opportunities in their consumer protection laws. In the early days when they were first adopted, they were often described (or misdescribed) as distributorship laws. As noted above, these laws originally were designed to protect innocent investors from being lured on the basis of false or misstated information into buying a business to sell goods or services at retail using racks or vending machines at locations procured by the seller, such as greeting card displays, candy machines and the like, or entering into other types of questionable business ventures, such as worm or mink farming.

Most of these laws were adopted between 1973 and 1985, except for the Illinois law, which was adopted in 1995.⁸ As a result, these laws were adopted long before many of the business forms and methods that are common today were even thought about, including electronic commerce in all its various manifestations, and at about the same time as most of the franchise disclosure and registration laws, which may explain why the business opportunity laws seem to mimic those franchise disclosure and registration laws in many respects. Unlike most of the franchise laws, however, trademark association is not required. If a person sells products or services to enable a purchaser to start a business and makes certain types of representations or offers a marketing plan in connection with such sale, these laws are likely to apply to the relationship. As will be seen from a review of the definitions used in many of these laws, many commercial business sellers may have to be more concerned about the applicability of these laws to their business programs than the franchising laws.

The purpose of this section of the paper is to provide a general review rather than a detailed analysis of these laws. All the statutes are printed in the Business Franchise Guide (CCH). Two other excellent recent sources of detailed information are James R. Sims III and Mary Beth Trice, *Hidden Franchises*, ABA Forum on Franchising (October 22-24, 1997) (“Sims”) and Martin D. Fern, Richard M. Asbill, Kenneth R. Costello & W. Andrew Scott, *Franchising Law & Practice*, Chapter 3 (STP Specialty Technical Publishers, 1997) (“Fern”).

⁸ See James R. Sims, III and Mary Beth Trice, *Hidden Franchises*, ABA Forum on Franchising (October 22-24, 1997), Appendix C, for a listing of the various effective dates. The Florida statute was amended on June 13, 2001, to be effective on October 1, 2001. Florida S.B. 784, approved by the Governor on 6/13/01; Laws of 2001, Chapter No. 2001-214.

Definitional Elements

The FTC Rule, promulgated in 1978 and effective in 1979, regulates certain kinds of business opportunity operations in the same manner as franchises.⁹ It even calls the seller a “franchisor” and the purchaser a “franchisee”. The FTC Rule does not preempt the state laws except to the extent that the disclosures required to be made under the FTC Rule provide greater protection to purchasers and in a few other limited areas.¹⁰ While the FTC Rule attempts to create a minimum federal standard of disclosure applicable to business opportunity ventures, its definition is more limited in coverage than most of the state definitions (perhaps reflecting the nature of the complaints in its files at the time of adoption).

The FTC Rule applies when there is a continuing commercial relationship whereby: (i) a person, defined as a “franchisee”, offers, sells or distributes to any person other than the franchisor goods, commodities or services which are either supplied by the franchisor or by another person with whom the franchisee is required or advised to do business; (2) the franchisor secures for the franchisee retail outlets or accounts for the goods, commodities or services, or locations or sites for vending machines, rack displays or other product sales displays used by the franchisee, or provides to the franchisee the services of a person to secure those outlets or sites; and (3) there is a required payment of \$500 or more within six months after the business is commenced as a condition of obtaining or commencing the operation.¹¹ All three elements must be present to have a business opportunity (*i.e.*, a “franchise”).

The FTC Rule, which applies in all states, requires the seller (*i.e.*, franchisor) to provide a disclosure document to the purchaser (*i.e.*, franchisee) prior to the time the sale is consummated in the same manner as a franchise. It is an unfair or deceptive act or practice under Section 5 of the FTC Act to fail to furnish the information. Reflecting the era in which the FTC Rule was adopted, the FTC says in its Interpretive Guides that the most common types of business opportunity ventures are distributorships, rack jobbing and vending machine routes, and expects that most business opportunity ventures will be covered by the FTC Rule.¹² In Section V of this paper, we discuss how the FTC has been applying this 1978 Trade Regulation Rule to modern

⁹ In 1979, John Baer, one of the authors, had occasion to review all 312 complaints in the FTC public records relating to the promulgation of the FTC Rule. At that time, over 55% of the complaints in the FTC records supporting the need for the FTC Rule related to so-called distributorships and business opportunity ventures, not franchises. Ironically, in a report just issued by the FTC in June, 2001, 75% of the complaints received by the FTC from 1993 through 1999 involved business opportunity. The GAO report released on July 31, 2001 says that 92% of the complaints received by the FTC from January 1993 through June 1999 related to business opportunities. See Section V of this paper, p. 24.

¹⁰ The FTC Rule will preempt the states with respect to (a) scope of the FTC Rule, (b) persons covered by the FTC Rule, (c) timing of disclosures, (d) contracts to be executed, (e) certain prohibitions and (f) refunds. Interpretive Guides, § I.D.1, Bus. Franchise Guide (CCH) ¶ 6227.

¹¹ 16 C.F.R. § 436.2(1)(ii); Bus. Franchise Guide (CCH) ¶ 6162.

¹² Interpretive Guides § I.A.2; Bus. Franchise Guide (CCH) ¶ 6208.

business practices. In Section VIII, we discuss the proposed promulgation of a new separate FTC business opportunity rule.

At the state level, the following twenty-four states have laws of one type or another covering business opportunity: California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia and Washington. The laws in California and Nebraska refer to the business opportunity as seller-assisted marketing plans. Three other jurisdictions, Alabama, the District of Columbia and Tennessee, cover these types of arrangements in their consumer protection laws. Interestingly, only nine of these states also have a franchise disclosure or registration law,¹³ and only twelve have a franchise relationship law.¹⁴

The definitions used in the twenty-four state business opportunity laws vary considerably. Although some are quite narrow in scope or coverage, most have much broader coverage than the FTC Rule. While it is difficult and dangerous to generalize, most of the statutes call the parties the “seller” and “purchaser” and have in common a requirement that there be an oral or written contract whereby the seller provides or offers to provide or sell products, equipment, supplies or services to enable the purchaser to start or operate a business.¹⁵ Some states have minimum and/or maximum dollar thresholds, although oftentimes these dollar thresholds relate only to certain types of representations. The critical element in determining whether a business opportunity exists is whether the seller makes certain kinds of representations. There is a considerable variance in the state definitions in the types of representations that also have to be made in order to trigger the applicability of the local law.

Two groups of states have adopted similar definitions. Seven states (Connecticut, Florida, Louisiana, Michigan, North Carolina, South Carolina and Virginia) have adopted a

¹³ California, Illinois, Indiana, Maryland, Michigan, Minnesota, South Dakota, Virginia and Washington. In some of these states the same state agency regulates both franchises and business opportunity (Maryland, Michigan, Minnesota, South Dakota and Washington). In others, however, the authority is bifurcated; for example, the Illinois Attorney General regulates franchises and the Securities Division of the Illinois Secretary of State regulates business opportunity. See **Schedule 1** attached; Bus. Franchise Guide (CCH) ¶¶3050, 3130, 3140, 3200, 3220, 3230, 3410, 3460 and 3470.

¹⁴ California, Connecticut, Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, Nebraska, South Dakota, Virginia and Washington. See Bus. Franchise Guide (CCH) ¶¶4050, 4070, 4130, 4140, 4150, 4200, 4220, 4230, 4270, 4410, 4460, 4470. All of these laws are part of the states’ disclosure/registration laws except for California, Connecticut, Indiana, Iowa, Maryland and Nebraska.

¹⁵ All of the states require that the goods or services be used to start or begin a business, except that California covers beginning, maintaining or operating a business, Indiana covers beginning or operating a business, and Nebraska covers beginning or maintaining a business. Kentucky, New Hampshire and the consumer protection statutes in Alabama, the District of Columbia and Tennessee do not address the issue. See **Schedule 4**; Fern, note 2.

version of the so-called North Carolina definition of business opportunity, although with differing dollar threshold amounts.¹⁶ The North Carolina definition is as follows:

For purposes of this Article, “business opportunity” means the sale or lease of any products, equipment, supplies or services for the purpose of enabling the purchaser to start a business, and in which the seller represents:

- (1) That the seller will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices, or currency-operated amusement machines or devices, on premises neither owned nor leased by the purchaser or seller; or
- (2) That it may, in the ordinary course of business, purchase any or all products made, produced, fabricated, grown, bred or modified by the purchaser using in whole or in part, the supplies, services or chattels sold to the purchaser; or
- (3) The seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid for the business opportunity; or that the seller will refund all or part of the price paid for the business opportunity, or repurchase any of the products, equipment, supplies or chattels supplied by the seller, if the purchaser is unsatisfied with the business opportunity and pays to the seller an initial, required consideration which exceeds two hundred dollars (\$200.00); or
- (4) That it will provide a sales program or marketing program which will enable the purchaser to derive income from the business opportunity which exceeds the price paid for the business opportunity, provided that this subsection shall not apply to the sale of a marketing program made in conjunction with the licensing of a federally registered trademark or a federally registered service mark, or when the purchaser pays less than two hundred dollars (\$200.00).

Provided, that “business opportunity” does not include the sale of an on-going business when the owner of that business sells and intends to sell only that one business opportunity; nor does it include the not-for-

¹⁶ We call it the “North Carolina” definition because North Carolina has been particularly active over the years in enforcing its statute. See Section IV of this paper.

profit sale of sales demonstration equipment, materials, or samples, for a total price of two hundred dollars (\$200.00) or less.¹⁷

The other group consists basically of several primarily midwestern states (Illinois, Iowa, Maryland, Oklahoma and South Dakota) that have adopted what at first seems like a somewhat broader definition, but in reality is largely a reorganization of the North Carolina model, with one additional element (finding outlets or accounts), but again with differing dollar thresholds. The Illinois definition is as follows:

(a) "Business opportunity" means a contract or agreement, between a seller and purchaser, express or implied, orally or in writing, wherein it is agreed that the seller or a person recommended by the seller shall provide to the purchaser any product, equipment, supplies or services enabling the purchaser to start a business when the purchaser is required to make a payment to the seller or a person recommended by the seller of more than \$500 and the seller represents directly or indirectly, orally or in writing, that:

- (1) The seller or a person recommended by the seller will provide or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices, on premises neither owned nor leased by the purchase or seller;
- (2) The seller or a person recommended by the seller will provide or assist the purchaser in finding outlets or accounts for the purchaser's products or services;
- (3) The seller or a person specified by the seller will purchase any or all products made, produced, fabricated, grown, bred or modified by the purchaser;
- (4) The seller guarantees that the purchaser will derive income from the business which exceeds the price paid to the seller;
- (5) The seller will refund all or part of the price paid to the seller, or repurchase any of the products, equipment or supplies provided by the seller or a person recommended by the seller, if the purchaser is dissatisfied with the business; or
- (6) The seller will provide a marketing plan, provided that this Law shall not apply to the sale of a marketing plan made in

¹⁷ N.C. Gen. Stat. §66-94 to §66-100 (Michie 1992), Bus. Franchise Guide (CCH) ¶ 3338.

conjunction with the licensing of a federally registered trademark or federally registered service mark.¹⁸

The fact that the states in each of these two groups have similar definitions of what constitutes a business opportunity does not mean that their respective filing and registration, disclosure and other substantive requirements are identical. In fact, each state's law is unique, and each state law has to be individually examined if your client is thinking of selling in the states that have such laws.

The other state definitions vary. Some are quite limited in their scope of coverage (e.g., New Hampshire only applies to distributors of vending machines, racks, display sales or similar devices) and others are even broader. Like the FTC Rule, the Minnesota business opportunity provisions are part of the state's franchises law. One state that historically has been particularly aggressive is Ohio. Its definition reads as follows:

"Business opportunity plan" means an agreement in which a purchaser obtains the right to offer, sell, or distribute goods or services under all of the following conditions:

- (1) The goods or services are supplied by the seller, a third person with whom the purchaser is required or advised to do business by the seller, or an affiliated person;
- (2) The purchaser is required to make an initial payment greater than five hundred dollars, but less than fifty thousand dollars, to the seller or an affiliated person to begin or maintain the business opportunity plan.
- (3) The seller makes any of the following representations:
 - (a) That the purchaser will be provided with retail outlets or accounts, or assistance in establishing retail outlets or accounts, for the sale or distribution of the goods or services;

¹⁸ 815 ILCS 602/5-5.10, Bus. Franchise Guide (CCH) ¶ 3138.04. The Illinois act provides that it is to be "construed as to effectuate its general purpose to make uniform the law of those states which enact it." *Id.* at 602/5-85, Bus. Franchise Guide (CCH) ¶ 3138.28. The Illinois Act is based largely on the Model Business Opportunity Sales Act adopted by NASAA on May 15, 1984. See Bus. Franchise Guide (CCH) ¶ 3650. The Model Act has commentary by NASAA indicating that large portions of the Act were taken from the Uniform Securities Act. Illinois seems to be the only state to have adopted the Model Act; the other states with similar laws adopted them before the Model Act was issued by NASAA.

- (b) That the purchaser will be provided locations, or assistance in finding locations, for vending machines, electronic games, rack displays, or any other equipment or display for use in the sale or distribution of the goods or services;
- (c) That the purchaser can earn a profit in excess of the initial payment;
- (d) That there is a market for the goods or services;
- (e) That there is a buy-back arrangement.¹⁹

There are at least three other states that reference business opportunities in their consumer protection laws.²⁰ Alabama prohibits deceptive acts or practices in the conduct of any trade or practice, including making certain misrepresentations in connection with a seller-assisted marketing plan. A “seller-assisted marketing plan” is any “plan, scheme, or system in which for consideration a buyer acquires goods or services, or both, together with a plan, scheme, or system for the resale of such goods or services or both.”²¹ The definition of “goods” includes “any franchise, license, distributionship, or other similar right, privilege or interest.”²² The District of Columbia says it is a violation for a person to make certain representations relating to goods and services. “Goods and services” is defined to include franchises and “business opportunity ... of all types.”²³ Tennessee prohibits unfair and deceptive acts or practices affecting the conduct of any trade or commerce and defines “consumer” to include any natural person who seeks or acquires “a franchise or distributorship agreement or any similar type of business opportunity.”²⁴

¹⁹ Ohio Rev. Code, Tit. 13, §1334.01(D), Bus. Franchise Guide (CCH) ¶ 3358.01.

²⁰ Michigan references business opportunity in its Consumer Protection Act, but because it also has a filing requirement, we have grouped it with the twenty-four registration and disclosure states. Consumer Protection Act, Mich. Compiled Laws 1979 §§ 445.902, 445.903(b), Bus. Franchise Guide (CCH) 3228.

²¹ Deceptive Trade Practice Act, Ala. Code 1975 §8-19-5(20) (2000 Supp.).

²² *Id.* §8-19-3(3).

²³ Consumer Protection Procedures, D.C. Code 1981 §§28-3901(7), 28-3904 (2001 Supp.).

²⁴ Tennessee Consumer Protection Act of 1977, T.C.A. §§ 47-18-103, 47-18-104.

Attached as **Schedule 2** is a chart listing the definitional elements of the types of representations that will trigger the applicability of these laws. For a detailed discussion of the various definitional elements, *see* Fern, Appendix 3A, reprinted as **Schedule 8**.²⁵

While these laws were adopted around the same time as most of the franchise disclosure and registration laws and mimic many aspects of those laws, do not assume that the definitions used in the business opportunity laws (in many states there may not be definitions) are identical to the definitions used in the franchise laws. For example, a marketing plan for business opportunity law purposes may be more encompassing than the marketing plan definition under the franchise laws. In Illinois, the Franchise Disclosure Act of 1987 defines "marketing plan" as:

[A] plan or system relating to some aspect of the conduct of a party to a contract in conducting business, including but not limited to (a) specification of price, or special pricing systems or discount plans, (b) use of particular sales or display equipment or merchandising devices, (c) use of specific sales techniques, (d) use of advertising or promotional materials or cooperation in advertising efforts; provided that an agreement is not a marketing plan or system solely because a manufacturer or distributor of goods reserves the right to occasionally require sale at a special reduced price which is advertised on the container or packaging material in which the product is regularly sold, if the reduced price is absorbed by the manufacturer or distributor.²⁶

On the other hand, the Illinois Business Opportunity Sales Law of 1995 defines "marketing plan" as:

[A]dvice or training, provided to the purchaser by the seller or a person recommended by the seller, pertaining to the sale of any product; equipment, supplies or services and the advice or training includes, but is not limited to, preparing or providing:

- (1) Promotional literature, brochures, pamphlets, or advertising materials;
- (2) Training, regarding the promotion, operation or management of the business opportunity; or
- (3) Operational, managerial, technical or financial guidelines or assistance.²⁷

²⁵ Reprinted with the permission of STP Specialty Technical Publishers. Copyright in the Fern work is held jointly by STP Specialty Technical Publishers and the authors Martin D. Fern, Richard M. Asbill, Kenneth R. Costello and W. Andrew Scott.

²⁶ 815 ILCS 705/3(18), Bus. Franchise Guide (CCH) ¶ 3130.03.

²⁷ 815 ILCS 602/5-5.15, Bus. Franchise Guide (CCH) ¶ 3138.05.

Similarly, some exemptions found in some of the franchise laws do not exist in most business opportunity laws. These include, for example, partnerships²⁸, a solicitation requirement²⁹ and a single sale.³⁰ On the other hand, most of the state business opportunity laws have an extensive list of exemptions that need to be examined. See the discussion below at page 16.

Most of the business opportunity laws have some minimum dollar threshold to trigger applicability of the law, ranging from a low of \$200 to \$500, although in some states the dollar threshold may only relate to certain types of representations. Three states have a maximum dollar threshold of less than \$50,000. See **Schedule 4**.

Scope of the Laws

The business opportunity laws were designed to prevent fraud and deception. However, only the Alabama, District of Columbia and Tennessee statutes, which are a part of their respective consumer protection laws, focus simply on preventing deceptive acts or practices in connection with the sales of business opportunities. The other twenty-four state laws and the FTC Rule impose a regiment similar or identical to that required for franchises. In the balance of this paper, we will discuss how effective these other laws have been in preventing fraud. A fraudulent seller is likely to sell and run without ever registering or giving a disclosure document, so one wonders whether the elaborate format of the twenty-four registration and disclosure laws and the FTC Rule is necessary to and will effectively prevent fraud in the sales of business opportunities or whether simple fraud statutes like the other three states have are just as effective in stopping abusive practices.

In any event, most of the twenty-four state business opportunity laws require the seller to submit a filing or to register with state authorities and then to disclose certain specified categories of information to the purchaser prior to the time the purchaser pays any money or signs a contract. The seller usually must be able to substantiate by documentation any earnings claims. Some states require the seller to post a bond or establish an escrow or trust if certain representations are made, and a few states have minimum net worth requirements for the seller. If the seller violates these laws, the purchaser can usually void the contract and obtain a rescission. In most states, the injured purchaser can also sue for injunctive relief and/or damages and usually can recover attorney's fees. On the other hand, the FTC Rule essentially only requires that the seller give a disclosure document prior to sale and not engage in certain prohibited practices. Under the FTC Rule, there is no private right of action for an injured purchaser and only the FTC can seek consumer redress.

While it is not the purpose of this paper to list in detail all of the various obligations imposed by these laws, we will briefly summarize some of the key requirements that seem to be

²⁸ See, e.g., *People v. Mott*, 140 Cal. App. 3d 394, 189 Cal. Rptr. 589 (1983).

²⁹ See e.g., *Eye Associates, P.C. v IncomRx Systems Limited Partnership*, 912 F.2d 23, [1995-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9670 (2d Cir. 1990) (applying Connecticut law).

³⁰ *Id.*

generally adopted by a majority of the states. See **Schedule 3** attached and Fern, Appendix 3B, reprinted as **Schedule 9**, for a more detailed list of some of the compliance requirements imposed by the state statutes. See **Schedule 4** for a listing of other elements in these laws.

All of the business opportunity laws (except those of the FTC, Alabama, District of Columbia, Georgia, Louisiana, Ohio, Tennessee and Virginia) require the seller to register or make a filing with the state authority prior to conducting sales in the state.

A large number of the states require the seller to post a bond, certificate of deposit, letter of credit or set up an escrow or trust for all sales or, more commonly, only if certain kinds of representations are going to be made (California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Minnesota, Nebraska, New Hampshire, North Carolina, Ohio, South Carolina, South Dakota, Texas, Virginia and Washington). A few states require the seller to meet certain net worth requirements if certain promises are made (Illinois, Oklahoma and South Dakota).

All of the business opportunity laws (except those of Alabama, District of Columbia, Kentucky, Louisiana, Michigan and Tennessee) require that a disclosure document be given to the prospective purchaser a certain time period prior to purchase. If the business opportunity meets the FTC Rule definition, the FTC Rule's ten business day and five business day rules need to be followed. The content of the disclosure document varies by state, but most states will allow the use of one that is a modified Uniform Franchise Offering Circular ("UFOC") and/or in the FTC Rule disclosure format. The FTC allows use of its own disclosure format or the UFOC format.

A number of the states have a cooling off or cancellation period.³¹

Most of the jurisdictions require the contract to be in writing and to cover certain specified subject matters.³²

Almost all of the jurisdictions have a detailed list of prohibited acts.³³

Almost all of the laws give some government entity enforcement powers.³⁴

³¹ California, Indiana, Iowa, Kentucky, Maine, Nebraska and Ohio.

³² Except the FTC, Alabama, District of Columbia, Maine, Michigan, Minnesota, New Hampshire, Tennessee and Utah.

³³ Except Utah.

³⁴ Except Georgia, Louisiana, Maryland, New Hampshire, North Carolina, South Carolina and Virginia.

Almost of the jurisdictions provide for criminal penalties.³⁵

All of the laws (except the FTC) explicitly give the buyer a private remedy for violation of the law. In each of those states, the prevailing party gets attorneys' fees and in many of the states treble damages can be awarded. A detailed discussion of these private remedies are described in Section VII of this paper and in attached **Schedule 7**. One interesting quirk appears in these statutes. Many states provide a rescission remedy, but often the statute of limitations period to claim rescission is one year even though other claims can be brought within a multi year period. States with one year rescission statutes of limitation include California, Connecticut, Florida, Georgia, Indiana, Maryland, Nebraska, North Carolina, South Carolina and Virginia. New Hampshire permits it only for 90 days after knowledge of the violation.

Finally, there are a few other surprising things about these laws. Only several of the states have provisions prohibiting waiver of the benefits of the law (California, Connecticut, Illinois, Iowa, Kentucky, Minnesota, Nebraska, Ohio, South Dakota, Tennessee and Texas). Only a few of the states explicitly reference the liability of directors, officers or other controlling persons.³⁶

Application to Distributorships and Franchises

As noted above, the business opportunity laws were originally intended to protect individuals from being fraudulently induced to invest their money in get-rich-quick schemes. The definitions used in these laws are such that they probably would not apply to the common kind of selective distribution agreement which a manufacturer of goods would use to distribute its goods through selected wholesalers or retailers. However, if the manufacturer makes certain representations or a marketing plan is involved, the manufacturer may be surprised to find its distribution program covered by these laws. Remember, no trademark association is required to trigger the applicability of these laws.

Most state business opportunity laws do apply to many types of franchise programs.³⁷ Generally, however, franchisors with federally registered trademarks (in some states, just a state registered trademark is enough) or those that comply with the FTC Rule or the state's own franchise disclosure or registration law are exempt from the state business opportunity laws, but the exemptions may not apply if the franchisor makes earnings claims in connection with its

³⁵ Except the District of Columbia, Michigan, Nebraska, New Hampshire, North Carolina, South Carolina, Texas and Utah.

³⁶ The FTC, Florida, Georgia, Illinois, Iowa, Minnesota, Oklahoma and South Dakota.

³⁷ See, e.g., *Barter Exchange, Inc. of Chicago v. Barter Exchange, Inc.*, 283 Ill. App. 3d 187, 606 N.E.2d 186, [1992-1993 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 10,164 (1992) (applying Kentucky law); *Martin v. Pilot Industries, Inc.*, 632 F.2d 271, [1980-1983 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 7551 (4th Cir. 1980) (applying North Carolina law); *Cook v. Employers Overload Co.* [1987-1989 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 8936 (S.D. Ohio 1987); *Peltier v. Spaghetti Tree, Inc.*, 451 N.E.2d 1219, [1983-1985 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 8043 (Ohio 1983); *Saydell v. Geppettos's Pizza & Ribs Franchise Systems, Inc.*, 652 N.E.2d 218 (Ohio App. 1994).

offering or offers to refund the purchaser's money if the purchaser is dissatisfied with the business opportunity. In several states it is necessary for a franchisor to file a notice of exemption to avoid application of the business opportunity laws.³⁸ In Connecticut, if the seller's trademark or service mark was federally registered after October 1, 1996, a copy of the trademark or service mark must be filed with the state to claim the exemption.³⁹

See attached **Schedule 5**, a list of the exclusions or exceptions generally available to a franchise seller.

Other Exemptions

There are a variety of other exemptions available to a seller under the business opportunity laws. Under the FTC Rule, a business opportunity seller can use the same exemptions (fractional franchise, department store departments, minimal payments in the first six months, or the absence of a writing) and exclusions (employment relationships, cooperatives, certification programs and single licenses) that are available for other franchise sellers.

The state exemptions are extremely varied by state. In addition to the exemptions discussed above for franchises, some of the more common state exemptions include: (1) the offer or sale of a business opportunity to an ongoing business where the seller will provide products, equipment, supplies or services substantially similar to those already being sold by the purchaser in its ongoing business, (2) the sale in its entirety of an ongoing business, (3) the seller meets certain net worth requirements, (4) the sale of a security, (5) the sale of not-for-profit demonstration equipment for a total price of \$500 or less, and (6) the sale of goods or services to a purchaser who sells other goods or services that are not utilized with the goods or services supplied by the seller.

³⁸ Florida, Kentucky, Nebraska, Texas, and Utah. The need to file an exemption notice in some of these states is fuzzy. In Utah, for example, until amended on April 30, 2001, Section 13-15.2(1)(b) of the statute said the sale of a package or product franchise in compliance with the FTC Rule is not an assisted marketing plan if the seller does not make the type of representations made in the definition provisions. Utah amended its statute as of April 30, 2001 to provide simply that an assisted market plan does not include the sale of a package or product franchise under the FTC Rule. Section 13-15-4.5 of the statute and the Utah Rules contain an Annual Notice of Franchise Exemption to claim this statutory exemption. Utah Business Opportunity Disclosure Act, Utah Code Ann. §13-15-4.5, Bus. Franchise Guide (CCH) ¶¶ 3448.045, 3448.02, 5440.01 to .03. Before the amendment, some franchisor lawyers argued that their clients were not covered by the law and no exemption filing was needed, although other franchisor lawyers felt it was prudent to make the Utah exemption filing.

A bill was introduced in the Florida House of Representatives in 2001 to eliminate the filing requirement for exempt franchisors. H.B.1721. However, the bill died because it was not acted on before the legislature adjourned. It is not clear at this time whether it will be reintroduced.

In Florida, however, franchises are definitely exempt if the exemption notice is filed. If not, one may still rely on the fact that the definitional elements of a business opportunity do not apply.

³⁹ Connecticut Business Opportunity Investment Act §36b-61(6)(D), Bus. Franchise Guide (CCH), ¶ 3078.02.

California amended its Seller Assisted Marketing Plan Law in late 2000 to add an exclusion for a product distributorship where the seller sells products to a purchaser who will resell them at wholesale if the seller has a net worth of \$10,000,000, the seller grants a license of a federally registered trademark, there is no fee for the right to enter into the agreement, the arrangement is not a multi-level distribution program and certain other requirements are met.⁴⁰

The diversity of these laws is a challenge to both sellers and their counsel. The law of each state in which the seller plans to sell a business opportunity needs to be examined in order to determine whether the proposed sales program falls within the definition and whether any exemptions may be available. As will be discussed below, the sellers of many new types of business schemes may be surprised to find that these laws are broad enough to apply to them.

IV. REVIEW OF REPORTED CASES – “THE FLESH”

The most interesting and instructive cases stem from privately litigated claims prosecuted under state law. Although the FTC brings some sweeping actions and achieves laudable results, mainly by preventing future injury, few of the actions have generated interesting legal analysis concerning the scope of the FTC Rule. This is mostly because of the narrowness of the business opportunity ventures portion of the FTC Rule itself. As we learned in the preceding section, FTC business opportunity ventures are confined to “securing accounts for the franchisee, or securing locations or sites for vending machines or rack displays.” With these tight parameters, cases prosecuted under the business opportunity ventures portion of the FTC Rule seldom produce scholarly opinions on the scope of the law. Another stricture is the lack of a private cause of action. Without private actions by disappointed, and often times, desperate buyers who might push the envelope on the coverage of the law, little risk-taking seems to have occurred. Coupling this with the quick bludgeoning the FTC can deliver to most small-scale business opportunity sellers, most of the FTC cases end with an injunction against a relatively defenseless company. The real action is in some of the states.

Connecticut is an excellent example. The Connecticut Business Opportunity Investment Act covers opportunities sold “for the purpose of enabling the purchaser-investor to start a business, and in which the seller represents ... that [it] ... provides a sales program or marketing program to the purchaser-investor.”⁴¹ This type of coverage generates exceedingly more interesting cases.

Eye Associates, P.C. v. IncomRx Systems Limited Partnership,⁴² a case excerpted at the beginning of this paper, is the penultimate example of everything that can go wrong when business opportunity laws are ignored. IncomRx likely realized early in the opinion that its goose

⁴⁰ Calif. Civil Code § 1812.201(b)(10) (effective January 1, 2001), Bus. Franchise Guide (CCH) ¶ 3058.02. See Bus. Franchise Guide (CCH), Report No. 251, p.1 (September 28, 2000).

⁴¹ Connecticut Business Opportunity Investment Act, Connecticut General Statutes, Title 36b, Chapter 672c, Section 36b-61, Bus. Franchise Guide (CCH) ¶ 3078.

⁴² 912 F.2d 23, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9670 (2d Cir. 1990).

was cooked when the Second Circuit began by observing that – “A business opportunity often is nothing more than an occasion for an investor to experience disappointment.”

What started out as a simple agreement to provide medical billing services to a professional corporation offering ophthalmic care services, quickly turned into an exclusive marketing arrangement – and a sale of a business opportunity investment under Connecticut law. Apparently taken with the effectiveness of the billing services, the professional corporation entered into a “Marketing Agreement” to offer the very same services to other medical practices throughout the state. As part of the agreement IncomRx agreed to provide Eye Associates, on request, with marketing, training and sales materials, although Eye Associates acknowledged that marketing was its responsibility. The request was made and a marketing plan was provided.

This was the first time IncomRx entered into such an arrangement and, based on the comments of the court, Eye Associates seemed to play no small part in bringing about the relationship. The district court, apparently recognizing the reality of the deal, granted summary judgment by finding that IncomRx was not a “seller” because “[t]he Marketing Agreement appears to have arisen from a mutually beneficial business arrangement, rather than from solicitation by either party.”⁴³ The Second Circuit, being strict statutory constructionists, disagreed. Rejecting the district court finding, the Court observed, “the district court incorrectly read in a requirement that IncomRx must have *solicited* Eye Associates in order for it to have sold a business opportunity. Quite the contrary, the Act clearly states that sales include every ‘contract to sell . . . a business opportunity for value.’ No requirement of solicitation is included.”

IncomRx further argued that it did not meet the statutory definition of “seller” -- “engaged in the business of selling or offering for sale business opportunity” (§36-504(4)) -- because it sold only one business opportunity. Again, the Second Circuit observed that the Connecticut Act did not exempt single sales from its coverage but was willing to remand the issue to the district court to determine whether a single sale brought IncomRx within the statute’s reach.

The Second Circuit also refused to go along with the lower court’s findings that the agreement did not enable Eye Associates to start a new business nor that IncomRx did not represent that it would supply a marketing plan. As *Eye Associates* shows, business opportunity laws can jump up and snap you when you least expect it. Evidently, IncomRx would have benefited greatly from BusOppRx.

Ohio provides even more fertile ground for liability under its business opportunity law. Proving once again that business opportunity laws are unique statutory creatures, *Cook v. Employers Overload Co.*⁴⁴ involved a dispute over whether the sale of a temporary help service type franchise was covered by Ohio’s Business Opportunity Purchasers Protection Act. Although disclosure documents were provided, the plaintiff complained of certain material

⁴³ *Eye Associates, P.C. v. IncomRx Systems*, No. H-88-126 (PCD), slip op. at 5 (D. Conn. 1989).

⁴⁴ [1987-1989 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 8936 (1987), co-author Jim Meaney served as counsel for the plaintiff, Jess Cook.

misstatements and brought suit under Ohio's Act. Employers Overload argued that the matter should be dismissed because "the franchise agreement does not meet the statutory definition of a 'business opportunity plan.' The Act defines a 'business opportunity plan' as 'an agreement in which the purchaser obtains the right to offer, sell or distribute goods or services [and] *the goods or services are supplied by the seller....*' Ohio Rev. Code §1334.01(D)." (Emphasis Added.)

Employers Overload claimed that it did not supply the service that the plaintiff offered to his customers, *i.e.*, providing temporary employees. Because it only provided the plaintiff with operating methods, and plaintiff's business actually provided the temporary employees, the seller maintained that the agreement did not meet the requirement that the service be supplied by the seller. Employers Overload was not without support and a literal reading of the Ohio Act reveals the ambiguity in the definition.

In an earlier case, another district court in the same judicial district used the same reasoning to find no business opportunity law violation, though it provided no explanation as to why. In *American Nursing Care v. Leisure*,⁴⁵ the court determined that an agreement where a franchisee provided temporary nursing employees was not a business opportunity plan because the franchisee hired the nurses it provided. In essence, the nurses were not provided by the seller of the plan. The *Cook* court did not find itself constrained by the earlier case.

Convincing the court that Ohio's Business Opportunity Purchasers Protection Act should not be read so strictly, Cook argued that "the Ohio legislature did not intend to exclude plaintiff's franchise, which is of the type labeled 'package franchises.' See Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. §436.1-.3 (1987). Plaintiff claimed that such franchises, wherein the purchaser or franchisee is supplied with the tools and method of operation to produce a final product or service which is sold under the franchisor's trademark, were meant to be included in the definition of 'business opportunity plan,' even though the franchisor does not technically supply the product or service sold to the franchisee's customers."

Finding coverage, the court noted: "The legislation was enacted in part in response to a study done by the Ohio Legislative Service Commission entitled *Franchising: Alleged Abuses and Possible State Remedies* (Report No. 111) (1974). This report detailed many of the abuses which were occurring in franchise agreements in general, including package franchises. Furthermore, the consequences of a strict construction of the definition would largely defeat the purposes of the statute." Hence, after considering the legislative purpose and additional favorable case law, the district court concluded that because Employers Overload provided Cook with "the method of operation and many tools to run the business under defendant's trademark," the franchise agreement met the statutory definition of a "business opportunity plan" under Ohio law.

In Ohio, once you are in the soup, you may not be able to get out. Two relatively recent Ohio cases demonstrate that a seller's failure to comply with a business opportunity law -- by failing to provide any disclosures -- could toll the statute of limitations. In *6100 Cleveland*,

⁴⁵ 609 F. Supp. 419, 430 (S.D. Ohio 1984).

Inc., v. Staff Builders International, Inc.,⁴⁶ which was premised on the holding in *RY/EH Inc. v. Arthur Treacher's, Inc.*,⁴⁷ the Court found that Ohio's five year statute of limitations did not begin to run on the date the parties entered into the franchise agreement because the franchisees alleged that the defendant never made the disclosures required under the law. The *RY/EH* Court earlier reasoned "if the seller never makes the disclosures and never gives the notice of cancellation, the violation is a continuing one" Both courts indicated that reading the statute of limitations to commence to run on the date the parties entered into their agreement where the franchisor never made the required disclosures "would allow a franchisor to completely disregard all of the state's disclosure requirements and argue . . . that the franchisee did not timely pursue its remedies even though it didn't have notice of those remedies because the franchisor did not comply with its duty to so inform the franchisee under the Act."⁴⁸ This reasoning defeated the seller's motion to dismiss 6100 Cleveland, Inc.'s claim under Ohio law.

A case brought under the South Carolina Business Opportunity Sales Act reveals that even some of the "big boys" can run into trouble with business opportunity laws. *Tousley v. North American Van Lines, Inc.*⁴⁹ North American Van Lines recruited "owner-operators" to drive tractor-trailers that haul cargo for its customers. "Owner-operators" purchased tractors from North American as part of a program where North American negotiated hauling agreements with cargo customers and assigned runs to the "owner-operators" across the country. As the Court recounted, "North American offered to train Tousley as a truck driver, sell him a truck, finance his purchase of the truck, and dispatch him and his truck to places where he would pick up freight for transportation. The representative stated that Tousley should earn gross income of \$71,000 a year and, after subtracting the payments on his truck and other expenses, should net between \$16,000 and \$19,000 a year."

Tousley signed on for the whole enchilada – he paid a training fee, purchased a tractor on credit extended by North American and commenced the business of hauling cargo for the company. After two years on the road, he earned even less than promised. He tried to end his relationship with North American but wished to keep his tractor by seeking refinancing. Failing to accomplish that, he ultimately consented to a voluntary repossession of the tractor and later sued under South Carolina Business Opportunity Sales Act.⁵⁰

North American conceded it provided no disclosures and wholly failed to comply with the South Carolina Business Opportunity Sales Act but offered some interesting though unsuccessful arguments concerning the purported preemption of state law by the Interstate

⁴⁶ [1998-2000 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 11,666 (N.D. Ohio, 1999).

⁴⁷ 115 Ohio App. 3d 332, 335, 685 N.E.2d 316 (1996), [1997-1998 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 11,509.

⁴⁸ 6100 Cleveland, Inc., supra p. 5 [quoting from *RY/EH Inc. v. Arthur Treacher's, Inc.*, 685 N.E.2d at 319].

⁴⁹ 752 F.2d 96, [1983-1985 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 8284 (4th Cir. 1985).

⁵⁰ S.C. Code Ann. §§39-57-10 to -80 (Law. Co-op. Supp. 2000), Bus. Franchise Guide (CCH) ¶ 3408.

Commerce Act. When that argument failed, North American also contended that the recruitment of Tousley did not result in the sale of a "business opportunity" because none of the triggering representations were made. At trial, the jury found that North American made one or both of the representations quoted from South Carolina law:

(3) That he guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid for the business opportunity; or ...

(4) That upon payment by the purchaser of a fee or sum of money which exceeds fifty dollars to the seller, the seller will provide a sales program or marketing program which will enable the purchaser to derive income from the business opportunity which exceeds the price paid for the business opportunity;

In first discussing the South Carolina Act, the Fourth Circuit noted, "The obvious purpose of the Business Opportunity Sales Act is to alert South Carolina citizens to the possibility that investments in business ventures may be ill-conceived and to provide some protection from unscrupulous promoters." Holding that purpose in mind when disposing of North American's contention, the court simply relied on the jury's finding. North American's "owner-operators" relationship was considered the sale of a business opportunity.⁵¹

A series of cases reported under the Florida Sale of Business Opportunity Act highlight some common exemptions to business opportunity laws. Common to many business opportunity laws, though not all, is an exemption for *the sale of a sales program or marketing program made in conjunction with the licensing of a trademark or service mark that is registered under the laws of any state or of the United States*. Florida's definition of "business opportunity" in the cases that are discussed below had the following exemption:

(1)(a) "Business opportunity" means the sale or lease of any products, equipment, supplies, or services which are sold or leased to a purchaser to enable the purchaser to start a business for which the purchaser is required to pay an initial fee or sum of money which exceeds \$500 to the seller, and in which the seller represents:

* * *

4. That the seller will provide a sales program or marketing program that will enable the purchaser to derive income from the business opportunity, except that this paragraph does not apply to the sale of a sales program or marketing program

⁵¹ North American fared no better under Kentucky's Consumer Protection Act. See *Commonwealth of Kentucky ex. rel. Stephens v. North American Van Lines, Inc.*, 600 S.W.2d 459, [1980-1983 Transfer Binder] Bus. Franchise Guide ¶ 7529 (CCH) (Ky. App. 1979). For a near-identical result under Ohio law, see *Ohio v. Roadmasters of Ohio, Inc.*, [1983 - 1985 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 8059, 1983 WL 197506 (Ohio Ct. Common Pleas 1983); co-author Jim Meaney served as counsel for the State of Ohio.

made in conjunction with the licensing of a registered trademark or service mark that is registered under the laws of any state or of the United States⁵²

In its “own house,” Burger King was able to flesh out the meaning of this exemption to escape coverage of Florida’s Sale of Business Opportunity Act. In *Zuri Barnes v. Burger King Corp.*,⁵³ the district court held that while Burger King fell under the definition of a business opportunity, the exception took it right back out.

Batlemento v. Dove Fountain, Inc.,⁵⁴ illustrates another common exemption -- the sale of an ongoing business. The case involved the purchase of a Casa Mia Restaurant that was part of a chain of primarily family-owned Italian restaurants. Although Casa Mia sold franchises, the restaurant at issue in the matter was an existing location. The seller was a related corporation owned in large part by Casa Mia. The buyers also entered into a Management Contract with Casa Mia to operate the restaurant.

At trial, the jury found a violation of Florida’s Sale of Business Opportunity Act. On appeal, however, the Florida Fifth District Court of Appeals disagreed: “We agree with appellants that the statute simply does not apply to the transaction in this case. The statute defines a ‘business opportunity’ as the sale or lease of products, equipment, supplies or services sold to a purchaser to enable him to start a business under certain defined circumstances; however, the statute expressly *excludes* the sale of an ongoing business. Appellees argue this exclusion for the sale of an ongoing business contemplated by the act does not encompass the situation involved here, where there is a continuing relationship between the parties, but we can find no basis to interpret the plain language of the statute as appellees suggest. It is also undisputed that Buona Fortuna, Inc. was the seller of this ongoing business to the Maniacis. Casa Mia simply contracted to provide management services. The prohibitions of the act apply to the seller of the opportunity, not the shareholders of the seller or individuals who act for the seller.”

A similar result was reached in a franchisee-to-franchisee sale of a McDonald’s fast food restaurant in *Schubot v. McDonald’s Corp.*⁵⁵ The district court exonerated McDonald’s of any claims under Florida’s Act because the “statute simply does not apply to the instant matter. The franchise purchases made by Scott Schubot were existing, ongoing businesses *owned by Richard Schubot*. The *owner* of the business sold was *not* the defendants [McDonald’s], but rather the

⁵² Fla. Stat. Ann. §559.801(1)(a), Bus. Franchise Guide (CCH) ¶ 3098.02. This aspect of the law was recently amended (effective October 1, 2001) so that the exclusion only is applicable “if the seller requires use of the trademark or service mark in the sales agreement.” Florida S.B. 784, approved by the Governor on June 13, 2001; Laws of 2001, Chapter No. 2001-214.

⁵³ Bus. Franchise Guide (CCH) ¶ 10,932 (S.D. Fla. 1996).

⁵⁴ 593 So. 2d 234, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9932 (Florida Dist. App. 1991).

⁵⁵ 757 F. Supp. 1351, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9737 (S.D. Fla. 1990), affirmed without opinion, 963 F.2d 385 - table (11th Cir. 1992).

plaintiff's father, Richard Schubot. Section 599.801(1), *et seq.*, simply does not apply to this transaction."

The "flesh" of the business opportunity laws reveals that some courts will read the "bones" quite strictly and literally to achieve broader coverage even when a legislature intended a narrower scope, while other courts may achieve the same result by looking beyond the actual language of a particular statute to focus on a legislature's intended purpose. With either approach a common thread emerges – more often than not, courts will strive to protect business opportunity purchasers. When businesses go awry and life-savings are lost, sympathetic courts usually will find a way to assist the injured purchaser. The Second Circuit's sentiment sums it all up: "A business opportunity often is nothing more than an occasion for an investor to experience disappointment."⁵⁶

Another observation we draw from our review of the case law is that in many instances the line between "business opportunity" and "franchise" is non-existent. All of the cases selected for review demonstrate that a "business opportunity" in one state may very well be a "franchise" in another state or under the FTC Rule. Sometimes the only difference is the registration of a trademark – a razor-thin distinction when you get down to it. Under other business opportunity laws, trademark registration is meaningless. Each law, each definition must be studied in detail.

V. STATE AND FTC ENFORCEMENT ACTIVITY

As the discussion in Sections III and IV show, the various business opportunity laws have a far-reaching sweep and scope. Although most of these laws were adopted before 1985 and were designed to deal with frauds extant at that time, we were curious to see whether the states and FTC were applying these laws to address the scam artists who currently prey on unsuspecting purchasers of new forms of business opportunity, such as those associated with electronic commerce in all of its various manifestations.

State Activity

We conducted an informal survey of the 24 states with laws specifically covering business opportunity. Twenty-three of the 24 states responded. The results of that survey are attached as **Schedule 6**.

We learned that indeed many of the states are applying their laws to new forms of business. For example, Florida reported that business opportunities registered in their state include the old standbys like vending machines and work-at-home programs, but also Internet web building sites. Illinois had pay phone opportunities registered. Oklahoma reported that it had a phone card business opportunity registered, and Washington reported medical billing opportunities. Connecticut's response showed the breadth of coverage of their statute:

⁵⁶ *Eye Associates, P.C. v. IncomRx Systems Limited Partnership*, 912 F.2d 23, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9670 (2d Cir. 1990).

Cellular phones and services; merchandise rentals for consumer and business use; golf tournament services and promotional products; real estate sales/mortgage banking; vending machines; dry-cleaning; cruise travel agency; upscale barber shops for men; first aid training; auto appraisals; after school drama programs for children; commercial flooring contracting; Southwestern-style steakhouse franchise; convenience food store; retail pasta sales; real estate appraisals; bagel shops; pizza franchises; duct cleaning and air quality services; direct mail advertising to wealthy homeowners; displays that dispense long distance phone cards.

In the states that require filing or registration, the number of business opportunities filed or registered ran from a low of two in Iowa to 478 in Texas and 841 in Michigan. It is not clear why there is such a disparity in the filing or registration numbers from state to state.

All of the states say they have taken some type of enforcement action against sellers of business opportunities, usually administrative cease and desist orders or consent orders involving registration and disclosure violations or antifraud violations. But the amount of activity varies considerably. Ohio, which was once very active, reported that it only takes one enforcement action per year and "is not active in enforcement." Oklahoma has instituted civil actions against at least three entities. On the other hand, during the period of January 1, 1996 to June 21, 2001, Connecticut instituted 12 actions against business opportunity sellers.

Many franchise lawyers do not realize that the North American Securities Administrators Association ("NASAA") also has a business opportunity working group.⁵⁷ Dale Cantone of Maryland chairs the committee. Mr. Cantone reports that NASAA runs a training program every year and conducts joint programs with the FTC. In the summer of 2000, for example, the NASAA business opportunity working group met in New Orleans to discuss common issues in enforcement and registration. Also, we know based on conversations with state business opportunity administrators and some responses to our survey that the states regularly exchange information on business opportunity activities with each other and the FTC, and that some states are likely to advise other states that they have taken enforcement action against an identified business opportunity seller. Dale Cantone says there was a huge drop in complaints when Maryland started an education campaign and made a consumer brochure available.⁵⁸

⁵⁷ The group used to be called the Franchise and Business Opportunity Committee, but now apparently is called the Franchise and Business Opportunity Project Group. Most of the Group's activities relate to franchising. Note: many business opportunity administrators are not NASAA members. NASAA also has a Model Business Opportunity Sales Act, which only Illinois appears to have adopted. See *Bus. Franchise Guide* (CCH) ¶ 3650.

⁵⁸ Mr. Cantone also called our attention to a private organization called the National Business Opportunity Bureau, Inc., which records and reports information and complaints on companies in the franchise and business opportunity industry. It is funded through annual registration fees by registered companies. See its web site at <www.nbob.com>.

A number of states have filed criminal complaints against sellers of business opportunity.⁵⁹ However, there are few reported criminal decisions, so it is difficult to determine how concerned the states may be about criminal activity in the business opportunity area.

Some of the states have taken an active or participatory role in the FTC's "Project Billion\$" (discussed in more detail below). However, the FTC, recognizing that the scope of its law is quite narrow, advises consumers on its web site that state law may provide protections that it cannot:

State business opportunity laws typically cover every imaginable type of business opportunity that might be offered. If a business opportunity seller is not required to provide pre-sale disclosures by the Franchise Rule, these disclosures will almost always be required by the laws of the states listed below.

The disclosures required by state business opportunity laws differ, and usually provide more abbreviated information than the Franchise Rule requires. However, most of these laws provide important rights and remedies for business opportunity investors, including required security bonds to cover investor losses.

If you are considering purchasing a work-at-home business opportunity, and reside in a state with a business opportunity law, we encourage you to find out more about the protection provided by your state statute before you invest.⁶⁰

FTC Activity

Despite its limited jurisdictional scope, the FTC has been aggressive in pursuing various types of scam artists. On December 21, 1999, the FTC issued a press release announcing that the FTC and 26 state law enforcers had targeted over 600 Internet pyramid sites for law enforcement action. The state and federal enforcers conducted an Internet pyramid "Surf Day" on March 10-11, 1999, and then filed several actions to halt the illegal operations. One action was against 2Xtreme to halt a pyramid scheme that had disguised itself as a legitimate multi-level marketing plan and used deceptive earnings claims to lure consumers to enroll in the scheme. The FTC press release warned consumers to avoid plans that offer commissions for recruiting additional distributors, that asked new distributors to spend money on high-priced inventory, and plans that claim you'll make money through continued growth of your downline recruits instead of sales.⁶¹

⁵⁹ See, e.g., *People v. Mott*, 140 Cal. App. 3d 394, 189 Cal. Rptr. 589 (1983); *People v. Lee*, [1992-1993 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 10,035 (Cal. 1991); *State of Maryland v. Baum*, [1985-1986 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 8384 (Md. Cir. Ct.).

⁶⁰ <www.ftc.gov/bcp/franchise/netbusop.htm>

⁶¹ FTC Press Release, December 21, 1999 at <www.ftc.gov/opa/1999/9912/cops2.htm>

More significantly, the FTC announced in a press release dated March 6, 2000 that the FTC, the Department of Justice and 29 states were involved in "Project Biz-illion", described as "a multi-pronged attack on traditional business opportunity scams that bilk hundreds of thousands of consumers out of tens of millions of dollars a year."⁶² As of that date, over 68 cases had been filed against fraudulent business opportunity promoters, many of whom were using the classified sections of newspapers and the Internet to peddle pay phone and vending machine routes and work-at-home schemes like medical billing business opportunities.

In a unique approach to ferreting out these scam artists, the FTC and the state enforcement authorities had entered into a "partnership" with more than 105 newspapers that had voluntarily agreed to run a classified ad of their own advising consumers what to look for in a legitimate business opportunity. More than 85 of those newspapers participated in "Project Classified," agreeing to use their best efforts to screen out potentially deceptive ads, including those that make earnings claims without incorporating a disclosure in the ad about the number and percentage of purchasers who have made as much money as the ad claims.

The press release reported that at that time the FTC had filed 13 actions in federal court alleging that false representations about potential earnings had been made, seven of which also alleged a violation of the FTC Rule. The Department of Justice had filed 22 additional cases in federal court seeking civil penalties for business opportunity sellers who failed to provide FTC Rule disclosures, including required substantiation for sales claims. The state partners had filed 33 state court and administrative actions. The state agencies also reported they had filed more than 150 actions in 1999 against business opportunity sellers and pyramid scheme promoters.⁶³

The FTC press release lists the cases filed by the FTC itself, the cases filed on behalf of the FTC by the Department of Justice, and the list of the newspapers involved in the Project Classified partnership. The FTC web site also lists and provides a summary of franchise and business opportunity cases brought from 1995 to 2000.⁶⁴

In June 2001 the FTC issued its "Franchise and Business Opportunity Program Review 1993-2000" ("FTC Review").⁶⁵ The first section provides a statistical analysis of franchise and business opportunities complaints. Of the 4,512 complaints received by the FTC between 1993 and 1999, 75% involved business opportunities. Complaints were lodged against 949 business opportunity sellers, but 74% of the complaints were a single complaint against a company. The majority of complaints involved damages of \$10,000 or less, and more than 92% had injury of

⁶² FTC Press Release, March 6, 2000. <www.ftc.gov/opa/2000/03/biz.htm>

⁶³ In our survey of the state business opportunity administrators, however, we were advised by many states that they had not participated in "Project Biz-illion", or had done so only on a limited basis.

⁶⁴ <www.ftc.gov/bcp/franchise/1999-2000/cases.htm> Also, see the same website for 1997-1998 cases, 1995-1996 cases, and [netadopin.htm](http://www.ftc.gov/bcp/franchise/1999-2000/netadopin.htm).

⁶⁵ The FTC Review can be found on the FTC web site: <www.ftc.gov>. Click on "Consumer Protection", then on "Franchise and Business Opportunity", then on "Reports".

less than \$20,000. However, there has been a steady increase in the number of complaints over time. Vending machine complaints were 12% of the total. The most heavily populated states had the most complaints (Florida, California, Texas and New York), except that Utah had a large number of complaints placing it in the top five.

Surprisingly, offerings advertised via the Internet were less than 10% of the complaints -- most complaints involved mail and print media issues and more than 10% of the complaints involved earnings claims. A relatively small number of consumers indicated they had received no disclosure document and "disclosure complaints were proportionately sparse in the subset of business opportunity claims." *Id.* p. 27. Nearly 25% of the business opportunity complaints indicated a desire to cancel, and more than 20% said they failed to receive a refund or were dissatisfied with the company's refund policies.

The second part of the FTC Review was a statistical analysis of FTC franchise and business opportunity law enforcement activity. During this time period, there were 273 business opportunity investigations leading to 148 cases. In many instances, the FTC brought actions against companies with 100 or more victims. In some instances, the number of victims was 50,000 or higher. Making false or unsubstantial earnings claims was the most frequent violation. In all instances where more than 18 complaints were filed against a business opportunity seller, an investigation was opened. However, the FTC opened 68 investigations where only a single complaint was filed against a business opportunity seller.

The third part of the FTC Review was a discussion of the FTC's education activities pertaining to franchises and business opportunity. In December 2000, the FTC launched "'Top 10 Internet Scams'" designed to educate consumers about the most prevalent scams on the Internet and how to recognize and avoid them. However, business opportunity scams advertised online only ranked 8th out of the top 10.

Detailed charts attached to the FTC Review showed that significant numbers of complaints related to the following types of products: pay telephones, telephone cards, candy, snack foods, computer software and personal hygiene. There were even more complaints with respect to the following kinds of services: medical billing, telecommunications, travel, real estate and ATM machines.

On July 31, 2001, the United States General Accounting Office issued its Report to Congressional Requesters entitled "Federal Trade Commission, Enforcement of the Franchise Rule" ("GAO Report").⁶⁶ The GAO Report covers essentially the same time period as the FTC Review. GAO reports that it reviewed FTC information as well as information from franchise and business regulatory officials in the nine states that have both franchise and business opportunity laws. (See footnote 4 on page 7.)

GAO reports that the FTC has focused most of its Franchise Rule enforcement resources on business opportunity ventures. From January 1993 through June 1999, the FTC had 3,680 complaints, 92% of which involved business opportunities. Of the 162 cases brought to court, 88% involved business opportunities.

⁶⁶ The GAO Report can be found at <<http://www.gao.gov/new.items/d01776.pdf>>.

GAO reported that the FTC uses various means, such as law enforcement summits and conference calls, to communicate and coordinate its franchise and business enforcement activities with the states. Generally the state business opportunity regulatory officials viewed the FTC's communication and coordination activities as being more effective than did the state franchise regulatory officials. Unlike the state franchise officials, many of the state business opportunity officials thought the FTC should perform reviews of business opportunity disclosure documents.

VI. STRATEGIES TO AVOID ENFORCEMENT OR LITIGATION - FRANCHISOR PERSPECTIVE

Because of the FTC's Project Biz-illion\$ and Project Classified, sellers who use the mail, newspapers or the Internet to attract purchasers of business opportunity will be coming under heightened scrutiny. As a lawyer, you should familiarize yourself with the business opportunity laws of every state to make sure your client's program does not unwittingly fall within the scope of those laws.

As a seller, there are strategies to avoid enforcement and litigation. In Sims, the authors suggested six approaches to avoid coverage of many state business opportunity laws if the seller prefers to do so:

1. Register a trademark;
2. Limit the licensees, agents and distributors to established businesses (*i.e.*, not those starting a business);
3. Use the franchisor exemption;
4. Disclaim triggering representation;
5. Seek an interpretive opinion; and
6. Refrain from contracting in selected states.⁶⁷

Some additional strategies might include:

7. Use interstate sales exemptions;
8. Take advantage of state specific exemptions;
9. Negotiate a waiver of disclosure;
10. Use an out of state choice of law clause;
11. Keep the amount of payment outside the state's dollar threshold; and

⁶⁷ Sims, pp. 34-37.

12. Deal with sophisticated purchasers.

We will briefly review some of these strategies and comment on whether they are workable. Keep in mind that even a workable strategy may only be workable in one or a few states.

Many of the business opportunity states exempt the sale of a marketing plan made in conjunction with the licensing of a registered trademark or service mark. In Connecticut, if the trademark or service mark used in connection with marketing plan was federally registered after October 1, 1996, a copy of the trademark or service mark must be filed with the state authorities to claim the exemption. In many states, a federally registered trademark or service mark is required, but in several states a state trademark or service mark registration will suffice to claim the exemption. In many states, getting a state trademark registration can cost as little as \$10. It is a cheap, but effective way, to avoid application of some of the state business opportunity laws. However, to register a mark in a state, the mark has to have been used in that state. Such state registered marks provide little or no protection to the owner. By not having federal registrations, the owner will not have presumptive legal rights that arise from a federal registration.

Most, but not all, of the state business opportunity laws apply to the sale of goods, services or equipment to start or begin a business. Arguably, a sale to a person already in business would not be covered by the laws.⁶⁸ However, one must be careful when making this argument. Unless the purchaser is in the identical business for which the goods, services or equipment is being sold, any divergence into a new or expanded business might be viewed by the states as being the start of a business.⁶⁹

As will be noted from **Schedule 4**, many of the states have some sort of specific exemption available to a franchisor who either provides an appropriate disclosure document to a prospective purchaser or is registered under the state's franchise disclosure law.⁷⁰ In five states, however, the franchisor has to file a notice of exemption.

One of the prudent things a seller can do is to avoid making the kinds of representations that will trigger the applicability of the law. Clearly, the most dangerous representation relates to the purchaser being able to make money in excess of what is invested in the business.⁷¹ It probably would not hurt for the seller to have a specific disclaimer that no income

⁶⁸ See, e.g., *Eclipse Medical, Inc. v. American Hydro-Surgical Instruments, Inc.*, 1999 WL 181412 (S.D. Fla. 1999); *Bunting v. Perdue, Inc.*, 611 F. Supp. 682, [1986-1987 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 8674 (E.D.N.C. 1985); *Eve v. Rutledge*, 597 N.E.2d 194 (Ohio App. 1991); *Morrison v. Chilton Professional Automotive, Inc.*, 984 F. Supp. 1018 (W.D. Tex. 1997).

⁶⁹ See, e.g., *Eye Associates, P.C. v. IncomRx Systems Limited Partnership*, 912 F.2d 23, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9670 (2d Cir. 1990).

⁷⁰ See, e.g., *Barnes v. Burger King Corp.*, 932 F. Supp. 1420, [1996-1997 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 10,932 (S.D. Fla. 1996); *Miller v. All In One*, 1986 WL 6347 (Ohio App. 1986).

⁷¹ See, e.g., *Miksch v. T-Shirts Plus, Inc.*, 1985 WL 4154 (Ohio App. 1985).

representations are being made or guaranteed or can be relied upon.⁷² However, it may be dangerous to rely on such a specific disclaimer as being the only reason the law does not apply to a seller. Interestingly, one court confirmed that financial representations made after the deal was completed are not representations for business opportunity law purposes.⁷³

The seller may wish to seek an interpretive opinion that its program is not covered by the law. However, if the opinion is not what the seller expected, the seller should be prepared to register or not sell in the state.⁷⁴ The same is true at the federal level.⁷⁵

For a seller that is unwilling to modify its program to avoid making any of the triggering representations, the only prudent course of action is to avoid selling in the states that have applicable business opportunity laws. This may become somewhat of a challenge if the Internet is used to make the offers or sales. The web site has to clearly indicate that no offer or sales will be made in certain identified states. At least one business opportunity authority has adopted an interstate sales exemption for Internet offers of business opportunity nearly identical to NASAA's recommended Internet exemption for franchises.⁷⁶

The most effective exemptions are those specifically identified in each state's business opportunity law. While some states have no or few exemptions, other states have numerous exemptions that might be available to a seller. A list of the six most common exemptions is found in Section III of this paper (see page 16). For example, in some states a seller with a substantial net worth will be exempt,⁷⁷ a sale of an ongoing business will not be covered,⁷⁸ or

⁷² See, *Hayden v. Yager*, 2000 WL 306980 (D. Conn. 2000).

⁷³ See *Anchor Paper Corp. v. Anchor Converting Co., Inc.*, 338 S.E.2d 821, [1985-1986 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 8535 (N.C. App. 1986).

⁷⁴ Connecticut Advisory Interpretation, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9662 (Conn. 1990); Connecticut Advisory Interpretation, International Factoring Institute.

⁷⁵ The FTC has numerous advisory opinions as to whether a particular program is a business opportunity. See, e.g., FTC Informal Staff Advisory Opinion 00-1, Bus. Franchise Guide (CCH) ¶ 6505 (January 20, 2000); FTC Informal Staff Advisory Opinion 98-1, Bus. Franchise Guide (CCH) ¶ 6490 (January 6, 1998).

⁷⁶ Connecticut has an order exempting certain Internet offers that is similar to NASAA's franchise exemption, although it was adopted before NASAA issued its franchise exemption. Connecticut Administrative Order, Bus. Franchise Guide (CCH) ¶ 5070.011 (Nov. 20, 1996).

In late July, 2001, NASAA published for comment a policy on franchisor Internet advertising. See <www.nasaa.org>.

⁷⁷ See, e.g., Illinois Business Opportunity Sales Law of 1995, §5-10(c), Bus. Franchise Guide (CCH) ¶ 3138.13.

⁷⁸ See, e.g., *Batlemento v. Dove Fountain, Inc.*, 593 So.2d 234, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9932 (Fla. Dist. Ct. App. 1991); *Schubot v. (Continued) (Continued) McDonald's Corp.*, 757 F. Supp. 1351, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9737 (S.D. Fla. 1992); *Mitsubishi Caterpillar Forklift America, Inc. v. Superior Service Assoc., Inc.*, 81 F. Supp. 2d 101, [1998-2000 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 11,772 (D. Maine

there will be no coverage if the initial payment is less than the state's minimum dollar threshold or exceeds the state's maximum dollar threshold.⁷⁹

At least one court suggested recently that it would permit a negotiated waiver of the statute's disclosure obligation.⁸⁰ This flies in the face of the common perception that these laws reflect the public policy of the state and cannot be waived, but note that less than half of the business opportunity laws have an anti-waiver provision in the law.

On a similar vein, at least one court allowed the choice of another state's law to avoid application of the local law.⁸¹ However, this also seems to fly in the face of public policy considerations and at least one court has rejected that approach.⁸²

Another strategy is to keep the amount of the payments below a state's minimums or above its maximum dollar thresholds.⁸³ However, a seller who tries to bifurcate the initial payments may be surprised to learn that the cumulative total triggers the applicability of the law even though individual payments may be below the dollar threshold.⁸⁴ Under the FTC Rule and many state laws, coverage can be avoided if no consideration is paid for the first six months.⁸⁵

Finally, one court said that under the Ohio Business Opportunity Purchasers Protection Act, which explicitly requires reasonable reliance on misstatements, there was no reasonable reliance by sophisticated purchasers on earnings representations made by a franchisor.⁸⁶ While this is an attractive argument for many sellers, most states would likely have little sympathy for this approach.

Strategies to allow sellers to avoid enforcement or litigation are available, but the real challenge for the lawyer is in being able to implement these strategies in some cohesive manner.

1999).

⁷⁹ *GJ Food Service One, Inc. v. Shepherd*, 1998 WL 195698 (Ohio App. 1998).

⁸⁰ *S.J. Business Enterprises, Inc. v. Colorall Technologies, Inc.*, 755 So. 2d 769, Bus. Franchise Guide (CCH) ¶ 11,828 (Fla. Dist. Ct. App. 2000).

⁸¹ *Tele-Save Merchandising Co. v. Consumers Distributing Co., Ltd.*, 814 F.2d 1120, [1986-1987 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 8819 (6th Cir. 1987) (applying Ohio law).

⁸² *Keller v. Woods*, 1995 WL 1055817 (Va. Cir. Ct. 1995).

⁸³ See, e.g., *GJ Food Service One, Inc. v. Shephard*, 1998 WL 195698 (Ohio App. 1998).

⁸⁴ See *State ex rel. McLeod v. VIP Enterprises, Inc.*, 335 S.E.2d 243, [1985-1986 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 8436 (S.C. Ct. App. 1985).

⁸⁵ 16 C.F.R. §§436.2(2), 436.2(a)(3)(iii), Bus. Franchise Guide (CCH) ¶¶ 6163, 6164. See **Schedule 2**.

⁸⁶ *Lang, Lang & Suhor Investors, L.L.C. v. The American Bagel Co.*, [1997-1998 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 11,447 (D. Md. 1998).

A strategy that works in one state may not necessarily work or be available in another state. There is no substitute for an analysis of each business opportunity law in the states where the seller wants to sell. For many business opportunity sellers, there is a reluctance to register as a franchise or business opportunity. If the seller attempts to avoid compliance at all costs, the lawyer should beware and should reconsider the client relationship.

The challenge may be even greater for a different reason with respect to sellers of electronic commerce opportunities. The persons involved in the e-commerce field tend to be younger and may have little patience for the time it takes to comply with the various state and federal franchise and business opportunity laws. The following comment made in the context of franchising is similarly applicable to sellers of business opportunities:

Faced with the choice of establishing or expanding a business using the low cost Internet model, new companies may choose not to use franchising as their distribution vehicle for the future. [As] anyone who has represented a young technology or Internet company knows, the management typically has a limited appreciation of legal formalities and a low tolerance level for governmental regulation and may avoid franchising as a mode of distribution as a result. Additionally, in this increasingly digital, wired business world, many companies simply cannot afford to endure the delays occasioned by compliance with franchise regulations.⁸⁷

For a legitimate seller of business opportunities, however, filing or registering with the state can be a helpful and protective process. While many business opportunity sellers use a disclosure document in the FTC Rule format or the UFOC format, a more simplified form of disclosure is available under most state business opportunity laws. If the client decides to register, the lawyer should review the law and the state's suggested form of disclosure to determine which format makes the most sense from the client's standpoint. Because the required disclosures are often fairly simple, it may make more sense simply to comply with the state's business opportunity law than to try to avoid it.

VII. LITIGATION STRATEGIES FOR "FRANCHISEES" AND BUSINESS OPPORTUNITY BUYERS

The first arrow pulled from "franchisee" counsel's quiver is a private cause of action. A private cause of action, that is, that arises under a specialized law covering the sale of franchises or business opportunity. Without it franchisees must proceed on generalized theories of law unsuited to franchise and business opportunity disputes – ones where pre-sale representations, often the crux of the case, are quickly crushed under myriad common law principles. Finding a private cause of action is an essential key to success. In a pinch, even a private cause of action under a business opportunity law may do the trick. As we will review in detail, virtually all of the state business opportunity laws contain private causes of action ... and more.

⁸⁷ John R. F. Baer, Mary Beth Trice and Hal A. Rose, "*Franchising: Distribution Model for the Millennium?*", p. 21, ABA Forum on Franchising (October 13-15, 1999).

State business opportunity laws offer a variety of available statutory remedies – cancellation, rescission, actual damages and, in some instances, treble damages or punitive damages. And, music to any plaintiff’s attorney’s ears, most states allow recovery of attorney fees. For an example of the types of damages that can be awarded under a state business opportunity law, see *Smith v. Strickland*,⁸⁸ (although the award was reduced on appeal, the trial court awarded \$675,762.43 in compensatory damages, \$700,000 in punitive damages, \$2,027,287.02 in treble damages and \$250,000 in attorney fees -- all in a bench trial involving the sale of a basement waterproofing system franchise!).

Also, due to certain quirky provisions contained in some state laws, the private cause of action may come with an unlimited statute of limitations. Ohio is a prime example. Section 1334.06 of the Ohio Revised Code lists all of the items that the *agreement* must contain. In addition to the obvious, Ohio requires that the agreement contain a clause notifying the purchasers of their right to cancel the agreement within five days of the purchase and that a Notice of Cancellation form be attached to the agreement itself.

The consequence of failing to comply with these requirements is startling. Section 1334.06(D) of the Ohio Revised Code drives the point home: “*Until the seller has complied with this section, the purchaser may cancel the agreement by notifying the seller by mailing, delivering, or telegraphing written notice to the seller of the purchaser’s intention to cancel. The five-day period within which the purchaser may cancel the agreement prescribed by this section begins to run from the time the seller complies with divisions (A), (B), and (C) of this section.*” (Emphasis Added.) Divisions (A) and (B) carry the notice provisions discussed above. Recognizing that Ohio’s five year statute of limitations must be read in *pari material* with Section 1334.06(D) of the Ohio Revised Code, the Ohio Court of Appeals reversed and remanded a trial court’s dismissal of an aggrieved buyer’s action that was based on the expiration of the statute of limitation. *RY/EH Inc. v. Arthur Treacher’s, Inc.*⁸⁹ So, be alert to the possible arguments that abound from the “cancellation” provisions of state business opportunity laws.

Naturally, to determine if a particular state law will be of assistance, a review must be undertaken of the possible applicable laws. As a general rule, the laws of the state where the franchisee resides, where the franchisor’s principal place of business is located and where the business is located, all must be considered. Although we have reviewed business opportunity laws in general in earlier sections of this paper, here we will concentrate on the remedies offered under each law. As we review the available remedies keep in mind, however, that litigation under business opportunity laws is not immune to the common roadblocks franchisors place in the way of any litigation matter, such as arbitration, choice of law provisions and venue selection. See *Bakhsh v. JACRRC Enterprises, Inc.*,⁹⁰ (choice of law); *Tele-Save Merchandising*

⁸⁸ 314 S.C. 192, 442 S.E.2d 207 (1994), *cert. denied*.

⁸⁹ 115 Ohio App. 3d 332, 685 N.E. 2d 316, [1997-1998 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 11,509 (Ohio App. 1996).

⁹⁰ 895 P.2d 746 (Okla. App. 1995).

Co. v. Consumers Distributing Co., Ltd.,⁹¹ (choice of law); *Knepper v. Ramm Foods, Inc.*,⁹² (arbitration). And, if franchisee counsel is planning to embark on the journey of creatively applying a business opportunity law to a questionable situation, counsel must be thoroughly prepared with legislative history, sharp statutory analysis, case law research and persuasive argument. Perhaps because the first and last hurdle you will face is the legal challenge to the applicability of the law, be ready.

Ferretting out the existence of an available private cause of action is no different than finding one under any franchise law – look! For those who want a jump-start, however, we provide the private, civil remedies available under most of the state business opportunity laws in **Schedule 7**.

Is there any strategic value to enlisting the assistance of state and federal governmental agencies when you are considering filing suit against a business opportunity seller? Certainly the various business opportunity laws and the FTC Rule provide state and federal agencies with a variety of enforcement tools, *i.e.*, injunctive relief, appointment of a referee or a receiver, sequestration of assets, consumer redress, civil and criminal penalties.⁹³ But will the state and federal agencies use them to assist your client?

A review of significant case law in the business opportunity area indicates that there is very little enforcement activity undertaken by state government agencies. Indeed, enforcement by state agencies is downright somnolent. This was confirmed in the informal survey we conducted of the 24 business opportunity states. *See Schedule 6*. Most states issued administrative slaps-on-the-hands only, while even the most aggressive state (Connecticut) on average brought only two actions a year. Ohio conceded that it “is not active in enforcement.” Thus, do not expect effective assistance from a state agency.

On the other hand, with their “Project Biz-illion\$”, the FTC and the Department of Justice seemingly are aggressive and relentless. And our review of the FTC’s “Franchise and Business Opportunity Program Review 1993-2000” confirms greater enforcement activity at the federal level. Keep in mind, however, that the narrower scope of the FTC Rule may not be of assistance to a client unless the business involves “retail outlets or accounts for the goods, commodities or services, or locations or sites for vending machines, rack displays or other product sales displays.”

But, assuming your client’s matter falls under the FTC definition, what can you expect by way of assistance from the FTC or the Department of Justice? The practical answer is probably not a great deal. Most of the actions taken by federal, and for that matter, state agencies, are complaint-driven. That is, when large numbers of “consumers” file complaints, the agencies take notice. Seldom do they react to isolated, individualized claims. As we reported earlier, the FTC brought most of their actions against companies with 100 victims or more. In some instances,

⁹¹ 814 F.2d 1120 (6th Cir. 1987).

⁹² 28 Va. Cir. 241, 1982 WL 884727 (Va. Cir. 1992).

⁹³ *See, e.g.*, Section 1334.08 of the Ohio Revised Code; Fla. Stats. Ann. (2001) §559.813.

the number of victims was 50,000 or higher. Interestingly, in all instances where more than 18 complaints were filed against a business opportunity seller, the FTC opened an investigation. However, the FTC also opened 68 investigations where only a single complaint was filed against a business opportunity seller – so some hope may exist for individual injured purchasers. See FTC Review pp. 30-31.

Thus, while you should usually recommend to a client that they lodge a complaint with the FTC and the appropriate state agency,⁹⁴ and you should follow-up with the agencies on those complaints, we do not suggest you “bet the farm” on their assistance or intervention. It is the rare case when state or federal agencies will react quickly and positively enough to effect a result that can be achieved through private action. So it may be best to file first and complain later.

VIII. WHAT’S NEW ON THE BUSINESS OPPORTUNITY HORIZON – FTC RULE AND STATE CHANGES

In the Notice of Proposed Rulemaking to amend the FTC Rule, the FTC said that it agreed with the overwhelming view of commenters during the rulemaking process that “franchise and business opportunity are distinct business arrangements that require separate disclosure approaches.”⁹⁵ The FTC admitted that many of the FTC Rule’s pre-sale disclosures do not apply to the sale of most business opportunity, which “typically involve fairly simple contracts or purchase agreements.”⁹⁶ The FTC said the detailed disclosure obligations may also “create barriers to entry for legitimate business opportunity sellers.”⁹⁷ Accordingly, the FTC intends to conduct a separate rule-making proceeding for business opportunity sellers.

In the Notice of Proposed Rulemaking, the FTC said it calculated that there may be 5,000 franchise systems, consisting of 2,500 business format and product franchisors and 2,500 business opportunity sellers.⁹⁸

The FTC gave no indication in the Notice of Proposed Rulemaking as to what it intended to do with respect to business opportunities, except to hint that some type of disclosure would still be required. A review of FTC and state enforcement activity in recent years confirms that the FTC and states are targeting sellers engaged in fraud and deceptive business practices and are using the detailed registration and disclosure requirements only as a vehicle to find violations of the law.

⁹⁴ Sometimes it might be difficult to settle once the government is involved.

⁹⁵ Notice of Proposed Rulemaking, §C.1, 64 Fed. Reg. 57293, 57296 (Oct. 22, 1999).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at §G, 64 Fed. Reg. at 57326.

The Business Franchise Guide reported recently that the FTC intends to issue a staff report in September 2001 on its proposed franchise disclosure rule revisions according to a timetable released in the Federal Register on May 14, 2001.⁹⁹

Steven Toporoff of the FTC advises that the FTC decided to put the development of a separate FTC business opportunity rule on the back burner because the FTC does not want to address the same issues (*e.g.*, on-line disclosure) in two different rule-making proceedings. He anticipates that many substantive issues addressed in the FTC Franchise Rule revisions can be carried over to the business opportunity rule.

While it is too early to determine what a new FTC business opportunity rule will look like, Mr. Toporoff indicates that there will likely be a simplified form of disclosure. The FTC will be looking at balancing the need for disclosures against prohibitions that will prevent fraud from occurring. Unless the two new rules are made effective at the same time, it appears that the current FTC Rule will continue to apply to business opportunity until a separate FTC business opportunity rule is promulgated; there will be no gap.

As part of our survey of the state business opportunity examiners, we inquired whether the states foresaw any amendments to their laws in the future. Although most states responded that no statutory amendments were planned for the near future, the State of Washington indicated that it expects to review its business opportunity law following final changes to the FTC Rule on franchising and business opportunity. The State of Ohio indicated that several attempts have been made in the past to revise and narrow some of the definitions and exemptions. Utah amended its laws as of April 30, 2001 to clarify its franchise exemption. North Carolina says it is considering increasing its filing fee. Earlier this year an unsuccessful effort was made to amend the Florida statute to eliminate the filing requirement for exempt franchisors. However, the Florida law was amended later in a variety of ways to change some of the definitional elements, the type of required disclosures and the financial assurances provisions (to be effective October 1, 2001).

One of the authors believes that the FTC and the states might consider whether they can just as effectively regulate business opportunity sellers with a simple fraud statute, perhaps with a simplified one or two page disclosure document, rather than by using an unnecessarily burdensome and elaborate disclosure or a registration scheme. Such a simplified statute could provide for registration or filing of the disclosure document, civil and criminal penalties for violation, and private remedies including treble damages and attorney's fees.

IX. CONCLUSION

We hope we have answered the questions posed at the outset -- Why should a "franchise lawyer" have any interest in business opportunity laws? Why should "franchisors" concern themselves with laws designed to apply to business opportunity? Is there any value to "franchisees" or their lawyers being aware of remedies provided in business opportunity laws? Also, we hope we have raised the collective awareness of Forum members to the importance of

⁹⁹ Bus. Franchise Guide (CCH), Report No. 259, p. 3 (May 30, 2001). 66 Fed. Reg. 26582 (May 14, 2001).

business opportunity laws in daily practice. At a minimum, we hope we have reduced *“the fear of the unknown.”*

As new businesses emerge, and the methods to deliver goods and services expand beyond our wildest imaginations, new relationships are spawned. “Franchise lawyers” are often consulted about the implications of these new relationships – sometimes in advance of their formation and, at other times, only when they are dysfunctional. To bring the full complement of your “franchise” training to the table, one cannot overlook the potential application of the business opportunity laws to these emerging relationships.

From the franchisor side, there may be a simple means of sidestepping future legal entanglements and confusion down the road. In the meantime, there is no substitute for an individual state by state analysis of the applicable business opportunity laws. There is no uniformity and none can be expected in the foreseeable future. For the franchisee lawyer, you may discover a means of salvaging an otherwise disastrous business venture. One thing is certain, when you practice in the franchise area you do not want to enter the ballgame with “your eyes wide shut” to the existence and impact of the business opportunity laws. The results could be devastating to you ... and your clients.

Schedule 1

FEDERAL AND STATE BUSINESS OPPORTUNITY AUTHORITIES

August 1, 2001

Jurisdiction/Address	Administrator/Contact Person
California (filing required) Department of Justice Attorney General's Office 110 West A Street Suite 1100 San Diego, CA 92101 (619) 645-2088 (619) 645-2062 (fax)	Gayle S. Weller, Esq. San Diego Office
Connecticut (registration required) Department of Banking Securities Division 44 Capitol Avenue Hartford, CT 06106 (860) 240-8233 (860) 240-8295 (fax)	Cynthia Antanaitis, Esq.
Florida (filing required) Department of Agriculture & Consumer Services 227 N. Bronough Street City Centre Building Suite 7200 Tallahassee, FL 32301 (850) 410-3754 (850) 921-8201 (fax)	Robert James
Georgia (no filing required) Governor's Office of Consumer Affairs No. 2 - Martin Luther King, Jr. Drive Plaza Level, East Tower Atlanta, GA 30334 (404) 656-3790 (404) 463-8212 (fax)	Barry W. Reid (Administrator) Jon Poss, Esq. (Contact Person)

Jurisdiction/Address**Administrator/Contact Person**

Illinois (registration required)
Illinois Securities Department
Office of the Secretary of State
Lincoln Tower
520 S. Second Street
Suite 200
Springfield, IL 62701
(217) 785-4947
(217) 782-8876 (fax)

Tanya Solov (Administrator)
David Finnigan, Esq. (Contact Person)

Indiana (filing required)
Consumer Protection Division
Attorney General's Office
402 West Washington Street
Indianapolis, IN 46204-2770
(317) 232-6201
(317) 233-4393 (fax)

Eric Jackson (Administrator)
Roger Smith (Contact Person)

Iowa (registration required)
Securities Bureau of the Iowa Insurance
Division
340 Maple Street
Des Moines, IA 50319-0066
(515) 281-4441
(515) 281-3059 (fax)

Dennis N. Britson

Kentucky (registration required)
Attorney General's Office
Consumer Protection Division
209 St. Clair
Frankfort, KY 40601
(502) 696-5389
(502) 573-8317 (fax)

(Administrator position vacant)
Wanda Delaplane, Esq.

Louisiana (bond filing and consent to service
required)
Louisiana Secretary of State
3851 Essen Lane
Baton Rouge, LA 70809
(225) 922-0415
(225) 342-7011 (fax)

Helen J. Cumbo (Administrator)
Ms. Diane M. Griscom (Contact Person)

Jurisdiction/Address**Administrator/Contact Person**

Maine (registration required)
Banking Bureau
Securities Division
State House - Station 121
Augusta, ME 04333
(207) 624-8551
(207) 624-8590 (fax)

Ms. Christine Bruenn (Administrator)
Ms. Bonnie Russell (Contact Person)

Maryland (registration required)
Attorney General's Office
Securities Division
200 St. Paul Place - 20th Floor
Baltimore, MD 21202
(410) 576-6368
(410) 576-6532 (fax)

Dale E. Cantone, Esq.

Michigan (filing required)
Consumer Protection Division
Department of the Attorney General
670 Law Building
Lansing, MI 48913
(517) 373-7117
(517) 335-1935 (fax)

Kathryn Barron, Esq.

Minnesota (registration required)
Department of Commerce
Registration Division
133 East 7th Street
St. Paul, MN 55101
(651) 296-6328
(651) 284-4106 (fax)

Ann Hagestad

Nebraska (filing required)
Department of Banking & Finance
P.O. Box 95006
Lincoln, NE 68509
(402) 471-2171 or 3445
e-mail: Karenr@bkg.state.ne.us

Karen Reynolds

Jurisdiction/Address**Administrator/Contact Person**

New Hampshire (registration required)
Attorney General's Office
Consumer Protection Division
State House Annex
Concord, NH 03301
(603) 271-3641
(603) 271-2110 (fax)

Kristin Spath, Esq.
Senior Assistant Attorney General

North Carolina (filing required)
Business Opportunity Registration
Department of the Secretary of State
P.O. Box 29622
Raleigh, NC 27626-0622
(919) 733-4161
(919) 821-0818 (fax)

Mary E. Kelly

Ohio (no filing required)
Attorney General's Office
Consumer Fraud & Crime Section
25th Floor, State Office Tower
30 East Broad Street
Columbus, OH 43266-0410
(614) 466-8831
(614) 466-8898 (fax)

David Dembinski

Oklahoma (registration required)
Oklahoma Department of Securities
Suite 860
First National Center
120 N. Robinson
Oklahoma City, OK 73102
(405) 280-7700
(405) 280-7742 (fax)

Irving L. Faught (Administrator)
Faye Morton (Contact Person)

South Carolina (registration required)
Secretary of State's Office
P.O. Box 11350
Columbia, SC 29211
(803) 734-1728
(803) 734-1604 (fax)

Carolyn Hatcher (Administrator)
Douglas Renew (Contact Person)

Jurisdiction/Address**Administrator/Contact Person**

South Dakota (registration required)
Division of Securities
910 E. Sioux Avenue
Pierre, SD 57501
(605) 773-4013
(605) 773-5953 (fax)

Leonore Triez (Administrator)
Katie Hofer (Contact Person)

Texas (registration required)
Secretary of State's Office
Statutory Documents Section
P.O. Box 13563
Austin, TX 78711
(512) 475-1769
(512) 475-2815 (fax)

Dorothy Wilson

Utah (filing required)
Department of Commerce
Consumer Protection Division
160 East 300 South
Salt Lake City, UT 84145
(801) 530-6601
(801) 530-6001 (fax)

Christy Daskalakis

Virginia (no filing required)
Department of Agriculture and Consumer
Services
Consumer Affairs Office
1100 Bank Street, Suite 1100
Richmond, VA 23219
(804) 786-2043
(804) 786-5112 (fax)

**Frank McCormick

Washington (registration required)
Department of Financial Institutions
Securities Division
P.O. Box 9033
Olympia, WA 98507-9033
(360) 902-8760
(360) 586-5068 (fax)

Deborah Bortner (Administrator)
Martin Cordell (Contact Person)
Brad Ferber (Contact Person)

** Frank McCormick agreed to be the contact person at the Consumer Affairs Office in Virginia. However, it appears there is no appointment for this function in Virginia.

Jurisdiction/Address**Administrator/Contact Person**

Federal Trade Commission
(no filing required)
Division of Marketing Practices
Bureau of Consumer Protection
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3128

Steven Toporoff

Schedule 2

BUSINESS OPPORTUNITY LAWS DEFINITIONAL ELEMENTS OF REPRESENTATIONS

August 1, 2001

Jurisdiction	Location for Vending Machines, etc.⁽¹⁾	Outlets or Accounts⁽²⁾	Buy Back Products⁽³⁾	Guarantee of Income⁽⁴⁾	Refund Purchase Price⁽⁵⁾	Marketing Plan⁽⁶⁾	Market for the Products⁽⁷⁾	Advice on Training⁽⁸⁾	Provide Services of a Person⁽⁹⁾	Seller will sell the Goods⁽¹⁰⁾	Seller pays difference between investment and Earnings⁽¹¹⁾	Payment Threshold⁽¹²⁾
FTC	x		x						x			\$500 within 6 months
Alabama						x						Any Consideration
California			x	x			x					\$500+ to -\$50,000 within 6 months
Connecticut	x		x	x	x	x						\$200 if no income guarantee
District of Columbia												Any purchase, lease or receipt
Florida	x		x	x	x	x						\$500+
Georgia	x		x			x						\$500+ for a marketing plan within 6 months
Illinois	x	x	x	x	x	x						\$500+

Jurisdiction	Location for Vending Machines, etc.⁽¹⁾	Outlets or Accounts⁽²⁾	Buy Back Products⁽³⁾	Guarantee of Income⁽⁴⁾	Refund Purchase Price⁽⁵⁾	Marketing Plan⁽⁶⁾	Market for the Products⁽⁷⁾	Advice on Training⁽⁸⁾	Provide Services of a Person⁽⁹⁾	Seller will sell the Goods⁽¹⁰⁾	Seller pays difference between investment and Earnings⁽¹¹⁾	Payment Threshold⁽¹²⁾
Indiana			x	x			x			x	x	\$500+ to -\$50,000 within 6 months
Iowa	x	x	x	x	x	x						\$500+ within 6 months
Kentucky	x		x	x			x					\$500
Louisiana	X		x	x	x	x						\$300+ within 180 days
Maine	x		x	x	x	x						\$250+ within 6 months
Maryland	x	x	x	x	x	x						\$300 within 6 months
Michigan	x		x	x	x	x						\$500 within 6 months
Minnesota	x		x	x								\$500+
Nebraska	x	x	x	x	x		x	x				\$500+ within 6 months
New Hampshire	x											Any fee or charge

Jurisdiction	Location for Vending Machines, etc.⁽¹⁾	Outlets or Accounts⁽²⁾	Buy Back Products⁽³⁾	Guarantee of Income⁽⁴⁾	Refund Purchase Price⁽⁵⁾	Marketing Plan⁽⁶⁾	Market for the Products⁽⁷⁾	Advice on Training⁽⁸⁾	Provide Services of a Person⁽⁹⁾	Seller will sell the Goods⁽¹⁰⁾	Seller pays difference between investment and Earnings⁽¹¹⁾	Payment Threshold⁽¹²⁾
North Carolina	x		x	x	x	x						\$200+ if there is an income guarantee, refund or marketing plan
Ohio	x	x	x	x			x					\$500+ to - \$50,000 within 6 months
Oklahoma	x	x	x	x	x	x						\$500 within 1 year
South Carolina	x		x	x	x	x						\$250
South Dakota	x	x	x	x	x	x						\$250+ within 6 months
Tennessee												Any purchase lease, rent or assignment
Texas	x		x	x		x						\$500+ within 6 months
Utah	x		x	x		x						\$300 (or \$300+ for a marketing plan) within 6 months
Virginia	x		x	x	x	x						\$500+

Jurisdiction	Location for Vending Machines, etc.⁽¹⁾	Outlets or Accounts⁽²⁾	Buy Back Products⁽³⁾	Guarantee of Income⁽⁴⁾	Refund Purchase Price⁽⁵⁾	Marketing Plan⁽⁶⁾	Market for the Products⁽⁷⁾	Advice on Training⁽⁸⁾	Provide Services of a Person⁽⁹⁾	Seller will sell the Goods⁽¹⁰⁾	Seller pays difference between investment and Earnings⁽¹¹⁾	Payment Threshold⁽¹²⁾
Washington	x		x	x		x						\$300+ for a marketing plan

Notes:

The descriptions below are a general summary of how these representational elements are often presented in the business opportunity laws. The specific language may vary by state, and each state's law should be consulted for the exact language used. There may be other triggering representations not covered by this chart.

- (1) This representation usually covers locations for vending machines, racks, display cases and similar devices, and currency-operated amusement machines, on the premises of a third party.
- (2) The seller represents that it will provide or assist the purchaser in finding outlets or accounts for the purchaser's services.
- (3) The seller will purchase any or all products made, produced, fabricated, grown, bred or modified by the purchaser.
- (4) The seller guarantees that the purchaser will derive income from the business which exceeds the price paid to the seller.
- (5) The seller will refund all or part of the purchase price paid to seller, or repurchase products, equipment or supplies if the purchaser is dissatisfied.
- (6) The seller will provide a marketing plan.
- (7) The seller represents that there is a market for the products, equipment, supplies or services sold to the purchaser.

- (8) The seller will provide advice or training pertaining to the sale of any products, equipment, supplies or services.
- (9) The seller will provide the services of a person able to secure retail outlets, accounts, site or location for the goods, services or commodities, vending machines, rack displays or other product sales displays.
- (10) The seller will sell, lease or distribute the goods or services rendered by the investors.
- (11) The seller will pay the investor the difference between the initial payment and the investor's earnings from the investment.
- (12) The payment thresholds vary by state and some do not have any minimum or maximum amounts. Where there is a plus symbol (*e.g.*, \$500+), that means the payment threshold amount is in excess of the stated amount (*e.g.*, in excess of \$500). Where there is a minus symbol (*e.g.*, -\$50,000), that means the payment threshold is less than the stated amount (*e.g.*, less than \$50,000).

Schedule 3

BUSINESS OPPORTUNITY LAWS DISCLOSURE/REGULATIONS REQUIREMENTS

August 1, 2001

Jurisdiction	Title of Law	Disclosure ⁽¹⁾	Filing or Registration ⁽²⁾	Bonding, Escrow, Trust or other ⁽³⁾	Unfair Practice ⁽⁴⁾	Private Remedy ⁽⁵⁾
Federal Trade Commission	Franchise and Business Opportunity Ventures	x				
Alabama	Deceptive Trade Practices Act				x	x
California	Seller Assisted Marketing Plans	x	F	B,E,T		x
Connecticut	Business Opportunity Investment Act	x	R	B,T, LC		x
District of Columbia	Consumer Protection Procedures Law				x	x
Florida	Sale of Business Opportunities Act	x	F	B,CD, LC		x
Georgia	Business Opportunity Sales Law	x	⁽⁶⁾	B,E,T	x	x
Illinois	Business Opportunity Sales Law of 1995	x	R	B ⁽⁷⁾	x	x
Indiana	Business Opportunity Transactions Law	x	F	B, LC		x
Iowa	Business Opportunity Promotions Law	x	R	B	x	x
Kentucky	Sale of Business Opportunities Law		R	B, CD		x
Louisiana	Business Opportunity Sellers and Agents Law	⁽⁸⁾	⁽⁹⁾	B	x	x

Jurisdiction	Title of Law	Disclosure⁽¹⁾	Filing or Registration⁽²⁾	Bonding, Escrow, Trust or other⁽³⁾	Unfair Practice⁽⁴⁾	Private Remedy⁽⁵⁾
Maine	Sale of Business Opportunities Law	x	R	B, E		x
Maryland	Business Opportunity Sales Act	x	R	B, T		x
Michigan	Michigan Consumer Protection Act		F		x	x
Minnesota	Franchise Act	x	R	E	x	x
Nebraska	Seller-Assisted Marketing Plan Act	x	F	B, T,	x	x
New Hampshire	Distributorship Disclosure Act	x	R	B, E	x	x
North Carolina	Business Opportunity Sales Law	x	F	B, T	x	x
Ohio	Business Opportunity Purchasers Protection Act	x		B, T		x
Oklahoma	Business Opportunity Sales Act	x	R	⁽¹⁰⁾		x
South Carolina	Business Opportunity Sales Act	x	R	B, T	x	x
South Dakota	Business Opportunities	x	R	B ⁽⁷⁾		x
Tennessee	Consumer Practice Act of 1977				x	x
Texas	Business Opportunity Act	x	R	B, T, LC	x	x
Utah	Business Opportunity Disclosure Act	x	F			x
Virginia	Business Opportunity Sales Act	x		B, E		x

Jurisdiction	Title of Law	Disclosure⁽¹⁾	Filing or Registration⁽²⁾	Bonding, Escrow, Trust or other⁽³⁾	Unfair Practice⁽⁴⁾	Private Remedy⁽⁵⁾
Washington	Business Opportunity Fraud Act	x	R	B, T	x	x

Notes:

- (1) Each state's disclosure requirements are unique. Check the statute for the exact disclosure procedure and requirements and forms to use. Note: The Florida statute was amended as of October 1, 2001 to require disclosure of the total number of purchasers in the last 3 years and names, addresses and phone numbers of the 10 closest purchasers.
- (2) Check the statute for the registration and filing requirements.
- (3) Some states require bonding, an escrow account or a trust if certain representations are made. Some states allow a letter of credit to be posted instead.
- (4) These states specifically describe misrepresentations as an unfair practice.
- (5) These states specifically provide for a private remedy.
- (6) Any seller irrevocably appoints the Secretary of State as its agent for service of process.
- (7) This state has an alternative minimum net worth requirement.
- (8) This state requires that a specific disclosure be made with respect to any written reference to a specific range or level of income or earnings potential.
- (9) This state requires that a bond be filed with the state and that the Secretary of State be appointed as agent for service of process.
- (10) This state has a minimum net worth requirement instead of a bonding or escrow requirement.
- (11) This chart shows Florida law as amended October 1, 2001. Prior to that date, instead of a certificate of deposit, the current law provides for a trust account.

Schedule 4

BUSINESS OPPORTUNITY LAWS OTHER ELEMENTS

August 1, 2001

Jurisdiction	Begin (B), start (S), maintain (N) or operate (O) a business	Minimum Dollar Threshold ⁽⁸⁾	Maximum Dollar Threshold ⁽⁹⁾	Contract in Writing and Mandatory Contract Provisions	Cooling Off/Cancellation Rights	Prohibited Acts	Governmental Civil Actions	Criminal Actions	Private Remedies (R), Treble Damages (T), Punitive Damages (P), Interest (I), Attorney's Fees (A)	Non-waiver provision	Directors, officers, controlling persons liability	Rescission and time period
FTC		\$500 ⁽¹⁾				x	x	x			x	
Alabama		Any consideration				x	x	x	R, T, A			
California	B, M, O	\$500+ ⁽¹⁾	-\$50,000 ⁽¹⁾	X	x	x	x	x	R, P, A	x		1 Year
Connecticut	S	\$200 ⁽⁴⁾		X		x	x	x	R	x		1 Year
District of Columbia	S	Any purchase, lease or receipt				x	x		R, T, P, A			
Florida	S	\$500+		X		x	x	x	R, A		x	1 Year
Georgia	S	\$500+ for marketing program ⁽¹⁾		X		x		x	R		x	1 Year
Illinois	S	\$500+		X		x	x	x	R, T, I, A	x	x	3 Years
Indiana	B, O	\$500+ ⁽¹⁾	-\$50,000 ⁽¹⁾	X	x	x	x	x	R, A.			1 year
Iowa	S	\$500+ ⁽¹⁾		X	x	x	x	x	R, A	x	x	3 years or 1 year after discovery
Kentucky	S	\$500		X	x	x	x	x	R, A	x		

Jurisdiction	Begin (B), start (S), maintain (N) or operate (O) a business	Minimum Dollar Threshold⁽⁸⁾	Maximum Dollar Threshold⁽⁹⁾	Contract in Writing and Mandatory Contract Provisions	Cooling Off/Cancellation Rights	Prohibited Acts	Governmental Civil Actions	Criminal Actions	Private Remedies (R), Treble Damages (T), Punitive Damages (P), Interest (I), Attorney's Fees (A)	Non-waiver provision	Directors, officers, controlling persons liability	Rescission and time period
Louisiana	S	\$300 ⁽²⁾		In writing only		x		x				
Maine	S	\$250+ ⁽¹⁾			X	x	x	x	R, A			No time period
Maryland	S	\$300 ⁽¹⁾		X				x	R, A			No time period
Michigan	S	\$500 ⁽¹⁾				x	x		R, A			
Minnesota	S	\$500+				x	x	x	R, A	x	x	3 years
Nebraska	B, M	\$500+ ⁽¹⁾		X	X	x	x		R, A	x		1 year
New Hampshire		Any fee or charge				x			R			90 days after knowledge
North Carolina	S	\$200+ ⁽⁵⁾		X		x			R, A			1 year
Ohio	B, M	\$500+ ⁽¹⁾	-\$50,000 ⁽¹⁾	X	X	x	x	x	R, T, A	x		5 years
Oklahoma	S	\$500 ⁽³⁾		X		x	x	x	R, A		x	3 or 2 years
South Carolina	S	\$250+		X		x			R, A			1 year
South Dakota	S	\$250+ ⁽¹⁾		X		x	x	x	R, A	x	x	3 years
Tennessee		Any purchase, lease, rent or assignment				x	x	x	R, T	x		
Texas	S	\$500+ ⁽¹⁾		X		x	x		R	x		

Jurisdiction	Begin (B), start (S), maintain (N) or operate (O) a business	Minimum Dollar Threshold⁽⁶⁾	Maximum Dollar Threshold⁽⁹⁾	Contract in Writing and Mandatory Contract Provisions	Cooling Off/Cancellation Rights	Prohibited Acts	Governmental Civil Actions	Criminal Actions	Private Remedies (R), Treble Damages (T), Punitive Damages (P), Interest (I), Attorney's Fees (A)	Non-waiver provision	Directors, officers, controlling persons liability	Rescission and time period
Texas	S	\$500+ ⁽¹⁾		X		x	x		R	x		
Utah	S	\$300+ ⁽⁶⁾					x		R, A			No time period
Virginia	S	\$500+		X		x		x	R, A			1 year
Washington	S	\$300+ ⁽⁷⁾		X		x	x	x	R, T, A			No time period

Notes:

- (1) Initial payment must be made within 6 months.
- (2) Initial payment must be made within 180 days.
- (3) Initial payment must be made within 1 year.
- (4) If no income guarantee.
- (5) If there is an income guarantee, refund or marketing plan.
- (6) \$300 within 6 months, or \$300+ for a marketing plan within 6 months.
- (7) \$300 for a marketing plan.
- (8) Where there is a plus symbol (e.g., \$500+), that means the payment threshold amount is in excess of the stated amount (e.g., in excess of \$500).
- (9) Where there is a minus symbol (e.g., -\$50,000), that means the payment threshold is less than the stated amount (e.g., less than \$50,000).

Schedule 5

BUSINESS OPPORTUNITY LAWS AVAILABLE EXCLUSIONS OR EXEMPTIONS FOR FRANCHISORS

August 1, 2001

Jurisdiction	Title of Law	Available Exclusion or Exemption for Franchisors	Exemption Filing Requirement
Federal Trade Commission	Franchise and Business Opportunity Ventures	None - Part of Franchise Trade Regulation Rule	
Alabama	Deceptive Trade Practices Act	None	
California	Seller Assisted Marketing Plans	Registered or exempt franchises under CA Franchise Investment Law	
Connecticut	Business Opportunity Investment Act	Sale of marketing plan made in conjunction with license of federally registered trademark or service mark	Yes (only for post 10-1-96 federally registered trademarks or service marks)
District of Columbia	Consumer Protection Procedures Law	None	
Florida	Sale of Business Opportunities Act	Meets FTC Rule definition and files notice	Yes
Georgia	Business Opportunity Sales Law	Sale of marketing plan made in conjunction with license of registered trademark or service mark	
Illinois	Business Opportunity Sales Law of 1995	Franchise under IL Franchise Disclosure Act and purchaser gets UFOC or FTC disclosure document	
Indiana	Business Opportunity Transactions Law	Sale of franchise as defined by Franchises Act	

Jurisdiction	Title of Law	Available Exclusion or Exemption for Franchisors	Exemption Filing Requirement
Iowa	Business Opportunity Promotions Law	Sale of franchise as defined in law, if purchaser is given UFOC or FTC disclosure document	
Kentucky	Sale of Business Opportunities Law	Meets FTC Rule definition and files notice	Yes
Louisiana	Business Opportunity Sellers and Agents Law	Sale or lease of sales plan or marketing program made in conjunction with license of registered trademark or service mark	
Maine	Sale of Business Opportunities Law	Sale of marketing program in conjunction with license of federally registered trademark or service mark	
Maryland	Business Opportunity Sales Act	Sale of registered or exempt franchise under MD Franchise Registration and Disclosure Law	
Michigan	Michigan Consumer Protection Act	Sale of franchise defined by MI Franchise Investment Law	
Minnesota	Franchise Act	None - Part of Franchises Act	
Nebraska	Seller-Assisted Marketing Plan Act	Compliance with FTC Rule, seller uses FTC disclosure document or UFOC, and files notice	Yes
New Hampshire	Distributorship Disclosure Act	None, but has coverage with limited FTC-type definition	
North Carolina	Business Opportunity Sales Law	Sale of marketing program in conjunction with license of federally registered trademark or service mark	

Jurisdiction	Title of Law	Available Exclusion or Exemption for Franchisors	Exemption Filing Requirement
Ohio	Business Opportunity Purchasers Protection Act	Fully complying with FTC Rule, or where purchaser gets UFOC	
Oklahoma	Business Opportunity Sales Act	Sale of franchise as defined in Act, if seller gives purchaser a UFOC or FTC disclosure document	
South Carolina	Business Opportunity Sales Act	Sale of marketing program made in conjunction with license of registered trademark or service mark	
South Dakota	Business Opportunities	Sale of franchise as defined in SD Franchises law, if seller delivers UFOC	
Tennessee	Consumer Protection Act of 1977	None	
Texas	Business Opportunity Act	Sale of franchise as defined by FTC Rule if franchisor complies in all material respects with FTC Rule and files notice	Yes
Utah	Business Opportunity Disclosure Act	Sale of franchise as defined by FTC Rule and files notice	Yes
Virginia	Business Opportunity Sales Act	Franchise defined by VA Retail Franchising Act	
Washington	Business Opportunity Fraud Act	Franchise subject to WA Franchise Investment Protection Act	

Note: This chart chooses the most readily available exemption or exclusion for a franchisor. In some states, other exemptions or exclusions may be available. For example, in Florida franchises are definitely exempt if the exemption notice is filed. If not, one may still rely on the fact that the definitional elements of a business opportunity do not apply.

Schedule 6

SURVEY OF STATE BUSINESS OPPORTUNITY EXAMINERS As of June 19, 2001

1. Name of Administrator.
2. How many business opportunities are registered in your state?
3. What are some of the types of business opportunities that are registered in your state?
4. What type of enforcement action, if any, has your office taken in the last 5 years?
5. Is your office involved in the FTC Project Biz-illion\$? If so, please describe the nature of the involvement.
6. Is your office involved with the North American Securities Administrators Association ("NASAA")? If so, please describe the nature of the involvement.
7. Does your office have a registration kit or explanatory brochure available for registrants? If so, please send one; name and address are listed below.
8. Do you see any amendments to your law in the future? If so, please describe.
9. For FL, KY, NB, TX and UT: how many franchisors have filed franchise exemptions?
10. For CT: Since your marketing plan exemption involving federally registered trademarks became effective in 1996, how many franchisors have filed trademark notices?

John R. F. Baer, Esq.
SONNENSCHN NATH & ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-2604 Phone
(312) 876-7934 Fax
jbaer@sonnenschein.com e-mail

STATE SURVEY
As of August 1, 2001

State	Number of Registered or Filed Business Opportunities	Types of Business Opportunities	Enforcement Actions in Last 5 Years
California	73	Vending machines, medical billing, gold plating, mini-blind cleaning, screen printing, phone cards, web malls and many one of a kind businesses	Numerous actions under false and deceptive advertising laws. Actions under Seller Assisted Marketing Plan law for failure to file, or where the party filed but did not comply with filing requirement.
Connecticut	31	Cellular phones and services; merchandise rentals for consumer and business use; golf tournament services and promotional products; real estate sales/mortgage banking; vending machines; drycleaning; cruise travel agency; upscale barber shops for men; first aid training; auto appraisals; after school drama program for children; commercial flooring contracting; Southwestern-style steakhouse franchise; convenience food store; retail pasta sales; real estate appraisals; bagel shops; pizza franchises; duct cleaning and air quality services; direct mail advertising to wealthy homeowners; displays that dispense long distance phone cards.	11 enforcement actions were taken.
Florida	approximately 250	Vending machines, work at home programs, internet web building sites, distributorships.	Administrative fines and cease and desist orders.
Georgia	No filings	Only must file a consent for service with Secretary of State.	Civil penalty orders with cease and desist language.

State	Number of Registered or Filed Business Opportunities	Types of Business Opportunities	Enforcement Actions in Last 5 Years
Illinois	51	Display stands for the sale of specialty cigars, medical billing and processing of claims, lease and operation of payphones, display stands for the sale of greeting cards, sale of products through vending machines, auto paint touch up services, travel services, and auto glass repair.	Cease and desist orders. Some fines. Consent orders requiring offers of rescission.
Indiana	3	Vending machine company, a company that sells a car painting business, and check processing business opportunity.	Suits filed against unregistered opportunities. Issuance of Assurances of Voluntary Compliance and Civil Investigative Demands.
Iowa	2 (usually 5 to 15 per year)	Family Tree Music Video Corp. and Paint Bull Int'l, Inc.	Withdrawal requests, registration denials, cease and desist orders.
Kentucky	4 registered, 1,305 exempt	Vending machines, pay phones, prepaid long distance cards.	1 criminal, 2 civil enforcement, 2 AVC's.
Louisiana	140	N/A	N/A
Maine	11	Many different types.	Unregistered. Fraud.
Maryland	8	3 vending machines, 2 medical billings, 2 business packages, 1 auto repair.	Cease and desist orders. Consent orders.
Michigan	841	Varies greatly. Vending, foods, recreation, general business, etc.	Too numerous to indicate. Generally failure to file notice of intent and unfair and deceptive acts and practices.
Minnesota	2 registered 1 pending	Phone cards, pay phones, vending machines.	Difficult to tell because part of the Franchises Act.
Nebraska	7	Vending machines, medical billing and traditional business opportunities.	Cease and desist orders.

State	Number of Registered or Filed Business Opportunities	Types of Business Opportunities	Enforcement Actions in Last 5 Years
New Hampshire	No response		
North Carolina	264	Restaurants, greeting cards, phonecards, car repairs, ice cream shops	Enforcement is handled through the Dept. of Justice – Consumer Affairs Division.
Ohio	No filings	N/A	Approximately one per year.
Oklahoma	7	Mostly billing systems, vending machines, phone cards, and food service.	Administrative actions and civil suits against 3 sellers.
South Carolina	238	Various vending, coffee machines, cigar distributors, greeting cards, uniform distributors, medical billing.	None.
South Dakota	17	Medical billing, vending machines.	Cease and desist orders. Actions against fraudulent activities.
Texas	478	No response.	Handled by the Attorney General.
Utah	53	Vending machines, medical billing, carpet cleaning.	Administrative actions.
Virginia	No filings	Not available.	No referrals to the state enforcement agency in last 5 years.
Washington	38	Over 90% are vending machines.	Administrative cease and desist orders, or consent order. Usually registration and disclosure, or antifraud, violations.

Schedule 7

PRIVATE, CIVIL REMEDIES AVAILABLE UNDER MOST OF THE STATE BUSINESS OPPORTUNITY LAWS

August 1, 2001

CALIFORNIA

Purchaser's Right to Cancel; Seller's Right to Cure

Sec. 1812.215. (a) If a seller uses any untrue or misleading statements to sell or lease a seller assisted marketing plan, or fails to comply with Section 1812.203, or fails to give the disclosure documents or disclose any of the information required by Sections 1812.205 and 1812.206, or the contract does not comply with the requirements of this title, then within one year of the date of the contract at the election of the purchaser upon written notice to the seller, the contract shall be voidable by the purchaser and unenforceable by the seller or his assignee as contrary to public policy and the purchaser shall be entitled to receive from the seller all sums paid to the seller when the purchaser is able to return all equipment, supplies or products delivered by the seller; when such complete return cannot be made, the purchaser shall be entitled to receive from the seller all sums paid to the seller less the fair market value at the time of delivery of the equipment, supplies or products not returned by the purchaser, but delivered by the seller. Upon the receipt of such sums, the purchaser shall make available to the seller at the purchaser's address or at the places at which they are located at the time the purchaser gives notice pursuant to this section, the products, equipment or supplies received by the purchaser from the seller. Provided, however, if the seller inadvertently has failed to make any of the disclosures required by Section 1812.205 or 1812.206 or the contract inadvertently fails to comply with the requirements of this title, the seller may cure such inadvertent defect by providing the purchaser with the correct disclosure statements or contract if at the time of providing such correct disclosures or contract the seller also informs the purchaser in writing that because of the seller's error, the purchaser has an additional 15-day period after receipt of the correct disclosures or contract within which to cancel the contract and receive a full return of all moneys paid in exchange for return of whatever equipment, supplies or products the purchaser has. If the purchaser does not cancel the contract within 15 days after receipt of the correct disclosures or contract, he may not in the future exercise his right to void the contract under this section due to such noncompliance with the disclosure or contract requirements of this title.

(b) If a seller fails to deliver the equipment, supplies or product within 30 days of the delivery date stated in the contract, unless such delivery delay is beyond the control of the seller, then at any time prior to delivery or within 30 days after delivery, at the election of the purchaser upon written notice to the seller, the contract shall be voidable by the purchaser and unenforceable by the seller or his assignee as contrary to public policy.

The rights of the purchaser set forth in this section shall be cumulative to all other rights under this title or otherwise.

[Purchaser's Action for Damages]

Sec. 1812.218. Any purchaser injured by a violation of this title or by the seller's breach of a contract subject to this title or of any obligation arising from the sale or lease of the seller assisted marketing plan may bring any action for recovery of damages. Judgment shall be entered for actual damages, plus reasonable attorney's fees and costs, but in no case shall the award of damages be less than the amount of the initial payment provided the purchaser is able to return all the equipment, supplies or products delivered by the seller; when such complete return cannot be made, the minimum award shall be no less than the amount of the initial payment less the fair market value at the time of delivery of the equipment, supplies or products that cannot be returned but were actually delivered by the seller. An award, if the trial court deems it proper, may be entered for punitive damages.

CONNECTICUT

Contracts Voidable, When. Purchaser-Investor's Remedies

Sec. 36b-74. (Formerly Sec. 36-517). (a) If a business opportunity seller uses any untrue or misleading statement in the sale of a business opportunity, or fails to give the proper disclosures in the manner required by section 36b-63, or fails to deliver the equipment, supplies or products, or render the services necessary to begin substantial operation of the business opportunity within forty-five days of the delivery date stated in the business opportunity contract, or if the contract does not comply with the requirements of section 36b-66, then within one year of the date of the contract, upon written notice to such business opportunity seller, the purchaser-investor may void the contract and shall be entitled to receive from such business opportunity seller all sums paid to such business opportunity seller. Upon receipt of such sums, such purchaser-investor shall make available to such business opportunity seller at such purchaser-investor's address or at the places at which they are located at the time notice is given, all products, equipment or supplies received by such purchaser-investor. Purchaser-investors shall not be entitled to unjust enrichment by exercising the remedies provided in this subsection.

(b) Any purchaser-investor injured by a violation of sections 36b-60 to 36b-80, inclusive, or by a business opportunity seller's breach of contract subject to said sections or any obligation arising therefrom may bring an action for recovery of damages, including reasonable attorney's fees.

(c) Upon complaint of any person that a business opportunity seller has violated the provisions of sections 36b-60 to 36b-80, inclusive, the superior court for the judicial district in which either the seller or purchaser-investor is located or the superior court for the judicial district of Hartford-New Britain [On and after September 1, 1998, the phrase "judicial district of Hartford" shall be substituted for "judicial district of Hartford-New Britain".] shall have jurisdiction to enjoin the defendant or defendants from further violations.

(d) Any purchaser-investor who is damaged by any violation of sections 36b-60 to 36b-80, inclusive, or by a seller's breach of the contract for the business opportunity sale or of any obligation arising therefrom may bring an action against the bond or trust account provided for in section 36b-64 to recover damages suffered.

(e) The rights and remedies provided by sections 36b-60 to 36b-80, inclusive, shall be in addition to any other rights or remedies provided by law or equity.

(f) Every cause of action under sections 36b-60 to 36b-80, inclusive, shall survive the death of any person who might have been a plaintiff or defendant.

FLORIDA

Sec. 559.813. (1) If a business opportunity seller uses untrue or misleading statements in the sale of a business opportunity, fails to give the proper disclosures in the manner required by this part, or fails to deliver the equipment, supplies, or products necessary to begin substantial operation of the business within 45 days of the delivery date stated in the business opportunity contract, or if the contract does not comply with the requirements of this part, the purchaser may, within 1 year of the date of execution of the contract and upon written notice to the seller, rescind the contract and shall be entitled to receive from the business opportunity seller all sums paid to the business opportunity seller. Upon receipt of such sums, the purchaser shall make available to the seller at the purchaser's address, or at the places at which they are located at the time notice is given, all products, equipment, or supplies received by the purchaser. The purchaser shall not be entitled to unjust enrichment by exercising the remedies provided in this subsection.

(2) (a) The department may enter an order imposing one or more of the penalties set forth in paragraph (b) if the department finds that a seller or any of the seller's principal officers or agents:

1. Violated or is operating in violation of any of the provisions of this part or of the rules adopted or orders issued thereunder;

2. Made a material false statement in any application document, or record required to be submitted or retained under this part;

3. Refused or failed, after notice, to produce any document or record or disclose any information required to be produced or disclosed under this part or the rules of the department;

4. Made a material false statement in response to any request or investigation by the department, the Department of Legal Affairs, or the state attorney; or

5. Has intentionally defrauded the public through dishonest or deceptive means.

(b) Upon a finding as set forth in paragraph (a), the department may enter an order doing one or more of the following:

1. Issuing a notice of noncompliance pursuant to section 120.695.
 2. Imposing an administrative fine not to exceed \$5,000 per violation for each act which constitutes a violation of this part or a rule or order.
 3. Directing that the seller or its principal officers or agents cease and desist specified activities.
 4. Refusing to issue or revoking or suspending an advertisement identification number.
 5. Placing the registrant on probation for a period of time, subject to such conditions as the department may specify.
- (c) The administrative proceedings which could result in the entry of an order imposing any of the penalties specified in paragraph (b) shall be conducted in accordance with chapter 120.
- (3) Any purchaser injured by a violation of this part, or by the business opportunity seller's breach of a contract subject to this part or any obligation arising therefrom, may bring an action for recovery of damages, including reasonable attorney's fees.
- (4) Upon complaint of any person that a business opportunity seller has violated the provisions of this part, the circuit court shall have jurisdiction to enjoin the defendant from further such violations.
- (5) The Department of Legal Affairs, the Department of Agriculture and Consumer Services, or the state attorney, if a violation of this part occurs in her or his judicial circuit, are the enforcing authorities for purposes of this part, and they may bring civil actions in circuit court for temporary or permanent injunctive relief and may seek other appropriate civil relief, including, but not limited to, a civil penalty not to exceed \$5,000 for each violation, restitution and damages for injured purchasers of business opportunities, and court costs and reasonable attorney's fees.
- (6) Any remedy provided in this section may be recovered in an appropriate action, or the enforcing authority may terminate any investigation or action upon agreement by the offender to pay as stipulated civil penalty, to make restitution or pay damages to purchasers, or to satisfy any other relief authorized in this section and requested by the enforcing authority.
- (7) The remedies provided herein shall be in addition to any other remedies provided by law or in equity.
- (8) The department has the authority to adopt rules pursuant to chapter 120 to implement this part.

GEORGIA

Sec. 10-1-417. (a) If a business opportunity seller or multilevel distribution company uses any untrue or misleading statements; or fails to comply with Code Section 10-1-411; or fails to

deliver the equipment, supplies, or products necessary to begin substantial operation within 45 days of the delivery date stated in the contract; or if the business opportunity seller or multilevel distribution company does not comply with the requirements of Code Sections 10-1-410 through 10-1-416, then, within one year of the date of the contract, upon written notice to the seller, the purchaser or participant may void the contract and shall be entitled to receive from the seller all sums paid to the seller. Upon receipt of such sums, the purchaser or participant shall make available to the seller at the purchaser's or participant's address or at the places at which they are located at the time notice is given, all products, equipment, or supplies received by the purchaser or participant. However, the purchaser or participant shall not be entitled to unjust enrichment by exercising the remedies provided for in this subsection.

(b) The violation of any provision of this part shall constitute an unfair or deceptive act or practice in the conduct of a consumer act or practice or consumer transactions under Part 2 of this article, the "Fair Business Practices Act of 1975," and shall authorize an affected participant or purchaser to seek the remedies provided for in Code Section 10-1-399 and in subsection (a) of Code Section 10-1-417.

(c) Nothing contained in this part shall be construed to limit, modify, or repeal any provisions of Chapter 5 of this title, the "Georgia Securities Act of 1973," including, but not limited to, the definition of the term "security" as contained in paragraph (26) of subsection (a) of Code Section 10-5-2.

(d) Any person who fails to comply with this part shall be guilty of a misdemeanor of a high and aggravated nature. In addition thereto, if the violator is a corporation, each of its officers and directors may be subjected to a like penalty; and, if the violator is a sole proprietorship, the owner thereof may be subjected to a like penalty; and, if the violator is a partnership, each of the partners may be subjected to a like penalty, provided that no person shall be subjected to a like penalty if the person did not have actual knowledge of the acts violating this part.

ILLINOIS

Sec. 5-120. (a) Any person who violates Section 5-25, 5-50, subsection (a) of Section 5-35, or subsection (a) of Section 5-40 of this Law, is liable to the purchaser who may sue either at law or in equity for rescission, for recovery of all money or other valuable consideration paid for the business opportunity and for actual damages, together with interest at 10% per annum from the date of sale, reasonable attorney's fees and court costs.

(b) Any person who violates Section 5-95, 5-105, or 5-110 of this Law is liable to the purchaser who may sue either at law or in equity for rescission, for recovery of all money or other valuable consideration paid for the business opportunity and for treble the actual damages, together with interest at 10% per annum from the date of sale, reasonable attorney's fees and court costs.

(c) Any person who violates Section 5-95, 5-105, 5-110, or subsection (a) of Section 5-35 of this Law, or who breaches any business opportunity contract or agreement or any obligation arising under the contract or agreement is liable to the purchaser who may sue the surety of the bond, either at law or in equity to recover all money or other valuable consideration paid for the

business opportunity and actual damages, together with interest at 10% per annum from the date of sale, reasonable attorney's fees and court costs. The liability of the surety shall not exceed the amount of the bond.

Sec. 5-125. Every person who directly or indirectly controls a person liable under Section 5-120 or 5-125 of this Law, every partner in a partnership so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions and every employee of a person so liable who materially aids in the act or transaction constituting the violation is also liable jointly or severally with and to the same extent as such person, unless the person liable under this Section proves that he or she did not know, and in the exercise of reasonable care could not have known of the existence of the facts constituting the alleged liability. There is contribution, as in cases of contract, among the several persons held liable.

INDIANA

Sec. 15. If a seller fails to comply with section 2 of this chapter, the investor may cancel any contract by notifying the seller in any manner.

Sec. 16. (a) If a seller:

- (1) uses any untrue, misleading, or deceptive statements in a business opportunity transaction;
- (2) fails to deliver the goods or services necessary to begin substantial operation of the business within forty-five (45) days of the delivery date stated in the contract; or
- (3) fails to comply with section 6 of this chapter;

the investor may void the contract within one (1) year of the date of the contract by giving written notice to the seller and is entitled to a return from the seller of all consideration paid to the seller.

(b) Upon receipt by the investor of the consideration paid to the seller, the investor shall make available to the seller, at a reasonable time and place, the goods received by the investor. However, the investor is not entitled to unjust enrichment by exercising the rights provided by this section.

Sec. 17. Notwithstanding any other section of this chapter, a person who is damaged by a seller's failure to comply with this chapter or by a seller's breach of a contract may:

- (1) bring an action for recovery of his actual damage including attorney fees; and
- (2) bring an action against the bond required by section 3 of this chapter;

to recover an amount equal to his actual damages. However, the liability of the seller under this section may not exceed the amount of the bond.

IOWA

Cancellation of Contract

Sec. 523B.6. The purchaser has the right to cancel a contract with a seller for a business opportunity for any reason at any time within three business days of the date the purchaser signs the contract or the date the contract is accepted by the seller whichever is later. The notice of the right to cancel, the seller's obligation to provide the purchaser with cancellation forms, and the procedures to be followed when a contract is canceled shall be the same as the procedures in chapter 555A for door-to-door sales.

a) Liability—Remedies

Sec. 523B.7. 1. a. A person who violates section 523B.2, subsection 1, 8, or 9, is liable to the purchaser in an action for rescission of the agreement, or for recovery of all money or other valuable consideration paid for the business opportunity, and for actual damages together with interest as determined pursuant to section 668.13 from the date of sale, reasonable attorney's fees, and court costs.

b. A person who violates section 523B.12, subsection 2 or 3, is liable to the purchaser who may sue either at law or in equity for rescission, or for recovery of all money or other valuable consideration paid for the business opportunity, and for the recovery of treble damages together with interest as determined pursuant to section 668.13 from the date of sale, reasonable attorney's fees, and court costs.

c. A person who violates section 523B.2, subsection 8, or section 523B.12, subsection 2 or 3, or who breaches a business opportunity contract or agreement or an obligation arising under the contract or agreement, is liable to the purchaser who may sue the surety of the seller's bond, either at law or in equity, to recover all money or other valuable consideration paid for the business opportunity and actual damages, together with interest as determined pursuant to section 668.13 from the date of sale, reasonable attorney's fees, and court costs. The liability of the surety shall not exceed the amount of the bond.

2. Every person who directly or indirectly controls a party liable under this section, every partner in a partnership so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status in, or performing similar functions for, and every employee of, a party so liable who materially aids in the act or transaction constituting the violation is also liable jointly and severally with and to the same extent as the party, unless the person liable as a result of the person's relationship with the liable party as defined under this section proves that the person did not know, and in the exercise of reasonable care could not have known of the existence of the facts giving rise to the alleged liability. Among the persons held liable, a party paying more than the party's percentage share of damages may recover judgment for contribution upon motion to the court or in a separate action.

3. An action shall not be maintained under this section unless commenced within three years after the act or transaction constituting the violation, or within one year after the discovery of the facts constituting the violation, whichever period later expires.

4. The rights and remedies available pursuant to this chapter are in addition to any other rights or remedies that may exist at law or in equity.

KENTUCKY

Cancellation by Purchaser

Sec. 367.819. (1) The purchaser of a business opportunity has the right to cancel as set forth in KRS Chapter 367 as well as the right to cancel such purchase for any reason at any time prior to midnight of the thirtieth calendar day after signing a contract for purchasing the business opportunity. In addition, the purchaser may cancel such purchase at any time for the following violations:

(a) Not providing locations as represented;

(b) Failing to deliver goods or merchandising materials as represented; or

(c) Failing to comply with KRS 367.809(2).

(2) Cancellation occurs when the consumer/investor gives written notice to the offeror at the address given in the purchase agreement or otherwise provided by the offeror and the notice and statement of the buyer's right to cancel provided for in subsection (1) of this section.

(3) Notice of cancellation, if given by mail, is given when it is deposited in the mail properly addressed and postage prepaid.

(4) Notice of cancellation given by the purchasers need not take a particular form and is sufficient if it indicates by form of written expression the intention of the buyer not to be bound by any contract to purchase the business opportunity.

(5) Within fifteen (15) days after the date of notice of cancellation by the consumer/investor, the seller must tender to the consumer/investor any payments as well as shipping costs made by him and terminate all financial obligations created in connection with the purchase of the business opportunity. Within five (5) days of refund, the consumer/investor shall make available to the offeror the items delivered by the offeror.

(6) Any waiver by the consumer/investor of a business opportunity of the right provided in this section is null and void, and will not operate to relieve the seller of any obligation placed upon him by this section.

Liability for False or Misleading Representations

Sec. 367.815. (1) Any person who offers a business opportunity and makes representations that are false, misleading or deceptive shall be liable to the consumer/investor of such business opportunity in an amount equal to the sum of his actual damages or fifteen hundred dollars

(\$1,500), whichever is greater, as well as the cost of the action together with reasonable attorney's fees, as determined by the court.

(2)(a) All persons registering pursuant to KRS 367.805 shall either furnish a bond by a surety company authorized to do business in the Commonwealth or establish a full cash certificate of deposit with a licensed and insured bank or savings institution located in the Commonwealth to insure the veracity of all statements contained in the registration. The amount of the bond or certificate of deposit shall be in an amount equal to the total amount of the initial payments under all business opportunity agreements the offeror has entered into in the Commonwealth during the previous year but in no case shall the amount be less than seventy five thousand dollars (\$75,000). The bond or certificate of deposit shall be in the favor of the Attorney General of Kentucky.

(b) Any person who is damaged by any violation of KRS 367.801 to 367.819, or by the offeror's breach of contract for the business opportunity sale, or of any obligation arising therefrom may bring an action against the bond or certificate of deposit to recover damages suffered, provided that the aggregate liability of the surety or trustee shall be only for the actual damages and shall not exceed the amount of the bond or trust account.

(3) A person who has furnished a bond described in subsection (2) of this section may petition the division for release of the bond by submitting a verified statement that such person has not offered business opportunities in the state for the last five (5) years.

(4) Any offeror of a business opportunity who has offered or sold in this state shall maintain a complete set of books, records, and accounts of its business opportunity sales. The sale documents shall be maintained on each transaction for a period of four (4) years after the date of agreement. The offeror shall make the books and records available to the division upon demand at a location within the state.

LOUISIANA

Sec. 1824. A violation of any of the provisions of this Chapter shall constitute an unfair practice under the provisions of R.S. 51:1401 through R.S. 51:1418.

[The foregoing was Sec. 1 of the enacting measure; Secs. 2 and 3 of the measure provide for severability and for repeal of conflicting laws.--CCH]

MAINE

Right of Avoidance

Sec. 4698. A purchaser may avoid a contract for the purchase of a business opportunity by giving written notice of avoidance to the seller, by ordinary mail postage prepaid within 3 full business days following the day on which the contract was made. The notice shall be sufficient if addressed to the seller at the address given either in the disclosure statement or on the contract. Notice of avoidance shall be effective upon deposit in the United States mail. The notice of

avoidance need not take a particular form and is sufficient if it expresses the intention of the purchaser not to be bound by the contract.

1. Return of goods. Within 20 days after a notice of avoidance is effective, the purchaser shall tender to the seller any goods or commodities delivered to the purchaser pursuant to the contract. Tender is sufficient if the purchaser makes the goods or commodities available to the seller at the purchaser's residence or business. If the seller fails to take possession of the goods or commodities within 20 days after the notice of avoidance is effective, the goods or commodities become the property of the purchaser without obligation to pay for them.

2. Return of funds. Within 20 days after a notice of avoidance is effective, the seller shall return to the purchaser the full amount of any fees or deposits which were given by the purchaser to the seller or an affiliated person under the contract, unless the purchaser refuses to tender goods or commodities pursuant to subsection 1.

b) Remedies

Sec. 4700. 1. Violation. Any violation of this chapter shall constitute a violation of Unfair Trade Practices, Title 5, chapter 10.

* * *

6. Rescission; surety bond. Any person who violates this chapter or any rule or order under this chapter, is liable to the purchaser who may sue either at law or in equity for rescission, for recovery of all money or other valuable consideration paid for the business opportunity and for actual damages, together with interest at the legal rate from the date of sale, reasonable attorney's fees and court costs.

The purchaser may sue the surety of the bond, either at law or in equity to recover all money or other valuable consideration paid for the business opportunity and actual damages, together with interest at the legal rate from the date of sale, reasonable attorney's fees and court costs for any violation of this chapter, of any rule or order under this chapter committed by a seller or for any breaches of any business opportunity contract or for any fraudulent practices or unlawful representation, whether or not by way of advertising, perpetrated by a seller in connection with the offer or sale of any business opportunity. The liability of the surety shall not exceed the amount of the bond.

MARYLAND

Sec. 114-126. (a) (1) If a seller violates a provision of §§14-120 through 14-125 of this subtitle, the buyer, within 1 year after the date of a contract for the sale of a business opportunity:

(i) May void the contract; and

(ii) Is entitled to receive from the seller a refund of any money paid to the seller.

(2) On receipt of the refund, the buyer shall make available to the seller any products, equipment, or supplies received from the seller at:

(i) The buyer's address; or

(ii) The place where the products, equipment, or supplies were located when notice to void the contract was given.

(3) However, the buyer may not be unjustly enriched by exercising a remedy under this subsection.

(b) A buyer may sue for damages, including reasonable attorney's fees, if the buyer is injured by:

(1) A violation of this subtitle; or

(2) The seller's breach of a contract for the sale of a business opportunity.

(c) On complaint that a seller has violated this subtitle, the circuit court may enjoin the seller from further violation.

(d) The remedies in this section are in addition to any other remedy provided by law or in equity.

MICHIGAN

The Michigan business opportunity law has been incorporated in the Michigan Consumer Protection Act (Michigan Compiled Laws, 1979, Sections 445.901 through 445.922). See that provision for available remedies.

MINNESOTA

Sec. 80C.17. Subdivision 1. A person who violates any provision of this chapter or any rule or order thereunder shall be liable to the franchisee or subfranchisor who may sue for damages caused thereby, for rescission, or other relief as the court may deem appropriate.

Subd. 2. Every person who directly or indirectly controls a person liable under subdivision 1, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions and every employee of a person so liable who materially aids in the act or transaction constituting the violation is also liable jointly and severally with and to the same extent as such person, unless the person who would otherwise be liable hereunder had no knowledge of or reasonable grounds to know of the existence of the facts by reason of which the liability is alleged to exist.

Subd. 3. Any suit authorized under this section may be brought to recover the actual damages sustained by the plaintiff together with costs and disbursements plus reasonable attorney's fees.

Subd. 4. Except as explicitly provided in this section, no civil liability in favor of any private party shall arise against any person by implication from or as a result of the violation of any provision of sections 80C.01 to 80C.22 or any rule or order thereunder. Nothing herein shall limit any liability which may exist by virtue of any other statute or under common law if sections 80C.01 to 80C.22 were not in effect.

Subd. 5. No action may be commenced pursuant to this section more than three years after the cause of action accrues.

NEBRASKA

Marketing Plan Contract; Purchaser; Right to Cancel; When

Sec. 59-1743. The purchaser shall have the right to cancel a seller-assisted marketing plan contract for any reason at any time within three business days of the date the purchaser and the seller sign the contract pursuant to section 59-1744. The notice of the right to cancel and the procedures to be followed when a contract is canceled shall comply with sections 59-1743 and 59-1744.

Seller; Noncompliance with Act; Contract; Voidable; Purchaser; Remedies

Sec. 59-1752. If (1) a seller uses any untrue or misleading statements relating to a seller-assisted marketing plan, (2) a seller fails to provide the disclosure documents or disclose any of the information required by sections 59-1732 to 59-1740, or (3) the contract does not comply with the requirements of the Seller-Assisted Marketing Plan Act, then within one year of the date of the contract at the election of the purchaser upon written notice to the seller, the contract shall be voidable by the purchaser and unenforceable by the seller or his or her assignee as contrary to public policy and the purchaser shall be entitled to receive from the seller all sums paid to the seller when the purchaser is able to return all equipment, supplies, or products delivered by the seller. When such complete return cannot be made, the purchaser shall be entitled to receive from the seller all sums paid to the seller less the fair market value at the time of delivery of the equipment, supplies, or products not returned by the purchaser, but delivered by the seller. Upon the receipt of such sums, the purchaser shall make available to the seller, at the purchaser's address or at the places at which they are located at the time the purchaser gives notice pursuant to this section, the products, equipment, or supplies received by the purchaser from the seller.

c) Violation; Action for Recovery of Damages; Award; Statute of Limitations

Sec. 59-1758. (1) Any purchaser injured by a violation of the Seller-Assisted Marketing Plan Act or by the seller's breach of a contract subject to the act or of any obligation arising from the sale or lease of the seller-assisted marketing plan may bring an action for recovery of damages. Judgment shall be entered for actual damages suffered by the purchaser, plus reasonable attorney's fees and costs. When the purchaser is able to return all the equipment, supplies, or products delivered by the seller, the actual damages awarded shall not be less than the amount of the initial payment. When such complete return cannot be made, the actual damages awarded shall not be less than the amount of the initial payment less the fair market value at the time of

delivery of the equipment, supplies, or products that cannot be returned but were actually delivered by the seller.

(2) Any action brought pursuant to this section shall be commenced within five years of the date of the sale of the seller-assisted marketing plan.

NEW HAMPSHIRE

Sec. 358-E: 6. I. Any violation of the provisions of this chapter is an unfair or deceptive act or practice within the meaning of RSA 358-A: 2. Any right or remedy set forth in RSA 358-A may be used to enforce the provisions of this chapter.

II. Any distributor may bring an action under RSA 358-A for violation of this chapter to recover damages sustained by reason of such violation against the grantor or any other person who has materially participated or aided in making such sale. Said distributor may proceed against any escrowed or impounded funds or surety bond to recover damages.

III. (a) If the grantor has failed to register the distributorship or has failed to provide to a distributor a disclosure statement as required by this chapter, the distributor may elect to void the distributorship agreement. Notice of any such election shall be given by the distributor within 90 days after the distributor has knowledge of the failure of the grantor to comply with the requirements of this chapter to each person from whom recovery will be sought, by United States mail, return receipt requested, or by personal service.

(b) Upon receipt of such notice, the grantor or any other person who has materially participated or aided in making such sale may offer to return any consideration paid or to repurchase the distributorship for a price equal to the full amount paid, together with 6 percent interest on said amount from the date of payment, less any income received from the distributorship. Every offer shall be in writing, shall be delivered to the distributor or sent by United States mail, return receipt requested, addressed to the distributor, shall offer to return any consideration paid or to repurchase the distributorship for a price equal to the full amount paid together with 6 percent interest on said amount from the date of payment, less any income received by the distributor and may require the distributor to return to the person making such offer all unsold goods, equipment, fixtures, leases and similar items received. Such offer shall continue in force for 15 days from the date on which it was received by the distributor, shall advise the distributor of such rights and the period of time limited for acceptance thereof, and shall contain such further information, if any, as the division may prescribe. If the offer is accepted, the grantor must pay all sums due within 10 days of its receipt of the acceptance.

(c) A distributor shall waive any right to proceed against the grantor for its failure to register or provide a disclosure statement if said distributor fails to accept an offer tendered pursuant to the provisions of paragraph III(a) and (b).

N. CAROLINA

Sec. 66-100. (a) If a business opportunity seller uses any untrue or misleading statements in the sale of a business opportunity, or fails to give the proper disclosures in the manner required

by G.S. 66-95, or fails to deliver the equipment, supplies or product(s) necessary to begin substantial operation of the business within 45 days of the delivery date stated in the business opportunity contract, or if the contract does not comply with the requirements of G.S. 66-99, then, within one year of the date of the contract, upon written notice to seller, the purchaser may void the contract and shall be entitled to receive from the business opportunity seller all sums paid to the business opportunity seller. Upon receipt of such sums, the purchaser shall make available to the seller at purchaser's address or at the places at which they are located at the time notice is given, all product(s), equipment or supplies received by the purchaser. Provided, that purchase shall not be entitled to unjust enrichment by exercising the remedies provided in this subsection.

(b) Any purchaser injured by a violation of this Article or by the business opportunity seller's breach of a contract subject to this Article or any obligation arising therefrom may bring an action for recovery of damages, including reasonable attorneys' fees.

(c) Upon complaint of any person that a business opportunity seller has violated the provisions of this Article, the superior court shall have jurisdiction to enjoin the defendant from further such violations.

(d) The remedies provided herein shall be in addition to any other remedies provided for by law or in equity.

(e) The violation of any provisions of this Article shall constitute an unfair practice under G.S. 75-1.1.

OHIO

[Cancellation]

Sec. 1334.05. In addition to any right otherwise to revoke an offer, a purchaser has the right to cancel an agreement selling or leasing to him a business opportunity plan until midnight of the fifth business day after the day on which the purchaser signs the agreement. Cancellation is evidenced by the purchaser giving written notice of cancellation to the seller at the address stated in the agreement. The purchaser may deliver the notice by mail, telegram, manual delivery, or other personal delivery. Notice of cancellation given by a purchaser need not take a particular form and is sufficient if it indicates in writing the intent of the purchaser not to be bound. Written notice of cancellation shall be effective upon the date of postmark. Telegram delivery is effective when the telegram is ordered. Manual delivery or other personal delivery is effective when delivered to the seller or to the seller's address, whichever is first.

Sec. 1334.06(D) Until the seller has complied with this section, the purchaser may cancel the agreement by notifying the seller by mailing, delivering, or telegraphing written notice to the seller of the purchaser's intention to cancel. The five-day period within which the purchaser may cancel the agreement prescribed by this section begins to run from the time the seller complies with divisions (A), (B), and (C) of this section.

[Private Remedies]

Sec. 1334.09. (A) For a violation of sections 1334.01 to 1334.15 of the Revised Code, a purchaser has a cause of action and may in an individual action, rescind the transaction and recover, if he is found to have been damaged, three times the amount of actual damages or ten thousand dollars, whichever is greater, or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

(B) The court may award to the prevailing party a reasonable attorney fee limited to the work reasonably performed, if either of the following apply:

(1) The purchaser complaining of the act or practice that violated sections 1334.01 to 1334.15 of the Revised Code has brought or maintained an action that is groundless and the purchaser brought or maintained the action in bad faith;

(2) The seller or broker committed an act or practice that violates sections 1334.01 to 1334.15 of the Revised Code.

OKLAHOMA

Sec. 824. A. Any person who violates Section 6, subsection A of Section 8, subsection A of Section 9 or Section 11 of the Oklahoma Business Opportunity Sales Act, is liable to the purchaser who may sue either at law or in equity for rescission, for recovery of all money and other valuable consideration paid for the business opportunity and for actual damages, together with interest at the legal rate from the date of sale, reasonable attorney's fees and court costs.

B. Any person who violates Sections 19, 21 or 22 of the Oklahoma Business Opportunity Sales Act is liable to the purchaser who may sue either at law or in equity for rescission, for recovery of all money or other valuable consideration paid for the business opportunity and for actual damages, together with interest at the legal rate from the date of sale, reasonable attorney's fees and court costs.

Sec. 825. Any person who controls or materially aids a person liable under Sections 22 or 23 of this act shall be liable jointly and severally with and to the same extent as the person committing the violation.

S. CAROLINA

Sec. 39-57-80. (a) If a business opportunity seller uses any untrue or misleading statements in the sale of a business opportunity, or fails to give the disclosures required by §39-57-30, or fails to deliver the equipment, supplies or products necessary to begin substantial operation of the business within forty-five days of the delivery date stated in the business opportunity contract, or if the contract does not comply with the requirements of §39-57-70, then, within one year of the date of the contract, upon written notice to seller, the purchaser may void the contract and shall be entitled to receive from the business opportunity seller all sums paid to the business opportunity seller. Upon receipt of such sums, the purchaser shall make available to the seller at purchaser's address or at the places at which they are located at the time notice is given, all

products, equipment or supplies received by the purchaser. The purchaser, however, shall not be entitled to unjust enrichment by exercising the remedies provided in this subsection.

(b) Any purchaser injured by a violation of this chapter or by the business opportunity seller's breach of a contract or any obligation arising therefrom may bring an action for recovery of damages, including reasonable attorneys' fees.

(c) Upon complaint of any person that a business opportunity seller has violated this chapter, the court of common pleas shall have jurisdiction to enjoin the defendant from further violations.

(d) The remedies provided herein shall be in addition to any other remedies provided for by law or in equity.

(e) The violation of any provisions of this chapter shall constitute an unfair trade practice under §39-5-20 of the 1976 Code.

S. DAKOTA

Sec. 37-25A-49. Any person who violates §§37-25A-43, 37-25A-45, and 37-25A-46 is liable to the purchaser who may sue either at law or in equity for rescission, for recovery of all money or other valuable consideration paid for the business opportunity and for actual damages, together with interest at the legal rate from the date of sale, reasonable attorney's fees and court costs.

TEXAS

Sec. 41.302. A violation of this chapter is a false, misleading, or deceptive act or practice under Section 17.46, Business & Commerce Code. A public or private right or remedy prescribed by Chapter 17, Business & Commerce Code, may be used to enforce this chapter. (V.A.C.S. Art. 5069-16.15(b).)

UTAH

Sec. 13-15-6. (1) If a seller fails to file the disclosures required under Section 13-15-4, or fails after demand by the division to file the disclosure within 15 days, the division, consistent with Section 13-2-5, shall begin adjudicative proceedings and shall issue a cease and desist order.

(2) Any purchaser of a business opportunity from a seller who does not comply with this chapter is entitled, in an appropriate court of competent jurisdiction, to rescission of the contract, to an award of a reasonable attorney's fee and costs of court in an action to enforce the right of rescission, and to the amount of actual damages or \$2,000, whichever is greater.

(3) In the event the division is granted judgment or injunctive relief in an appropriate court of competent jurisdiction, the division, in addition to any other relief, is entitled to an award of reasonable attorney's fees, costs of court, and investigative fees.

(4)(a) In addition to other penalties under this chapter, and to its other enforcement powers under Title 13, Chapter 2, Division of Consumer Protection, the division director may impose an administrative fine of up to \$1,000 for each violation of this chapter.

(b) All money received through administrative fines imposed under this section shall be deposited in the Consumer Protection Education and Training Fund created by Section 13-2-8.

VIRGINIA

Sec. 59.1-268. If a business opportunity seller (i) uses any untrue or misleading statements in the sale of a business opportunity, (ii) fails to give the proper disclosures in the manner required by §59.1-264, or (iii) fails to deliver the equipment, supplies, product or products necessary to begin substantial operation of the business within forty-five days of the delivery date stated in the business opportunity contract, or if the contract does not comply with the requirements of §59.1-267, then, within one year of the date of the contract, upon written notice to seller, the purchaser may void the contract and shall be entitled to receive from the business opportunity seller all sums paid to the business opportunity seller. Upon receipt of such sums, the purchaser shall make available to the seller at the purchaser's address or at the places at which they are located at the time such notice is given, all product, products, equipment and supplies received by the purchaser. No purchaser shall be entitled to any unjust enrichment by exercise of the remedies provided in this subsection.

Any purchaser injured by (i) a violation of this chapter, (ii) the business opportunity seller's breach of a contract subject to this chapter, or (iii) by any obligation arising therefrom may bring a civil action for recovery of damages, including reasonable attorney's fees.

Upon complaint of any person that a business opportunity seller has violated the provisions of this chapter, the circuit court wherein the violation is alleged to have occurred shall have jurisdiction to enjoin such seller from further violations of this chapter.

The remedies provided herein shall be in addition to any other remedies provided for by law or in equity.

WASHINGTON

Business Opportunity Contract--Content--Cancellation Period

Sec. 19.110.110. (1) Every business opportunity contract shall be in writing and shall be dated and signed by the purchaser.

* * *

(4) The contract shall include the following notifications, in ten point type, immediately above the space for the purchaser's signature:

(a) "Do not sign this contract if any of the spaces for agreed terms are blank."

(b) "Do not sign this contract unless you received a written disclosure document from the seller at least forty-eight hours before signing."

(c) “You are entitled to a copy of this contract at the time you sign it.”

(d) “You have seven days exclusive of Saturday, Sunday, and holidays to cancel this contract for any reason by sending written notice to the seller by certified mail, return receipt requested. Notice of cancellation should be mailed to:

(seller’s name and business street address)

“The notice must be postmarked before midnight of the seventh day exclusive of Saturday, Sunday, and holidays after you sign the contract.

“The seller shall return all deposits and payments within ten days after receipt of your cancellation notice.

“You must make available to the seller all equipment, products, and supplies provided by the seller within ten days after receipt of all refunded deposits and payments.”

(1) Liability of Seller for Violation of Chapter--Remedies--
Damages

Sec. 19.110.130. Any seller who violates any provision of this chapter is liable to the purchaser. The purchaser may sue for actual damages, or an injunction, or rescission, or other relief.

In addition, the purchaser may sue for costs of suit, including a reasonable attorney’s fee. The court may increase the amount of damages awarded up to three times the amount of actual damages.

DISTRICT OF COLUMBIA (SUMMARY ONLY)

The District of Columbia Consumer Protection Procedures Law expressly covers franchises and business opportunities. Included in the definition of “goods and services” are “franchises, business opportunities, and consumer services of all types.” The statute prohibits, among other acts, passing off goods or services; misrepresenting the source, sponsorship, or affiliation of another; falsely claiming the quality, grade, or style of goods or services; and making or enforcing unconscionable terms of sales or leases. A “consumer” suffering damages as a result of a violation may bring an action for actual damages, treble damages, reasonable attorneys’ fees, punitive damages, and any other relief deemed proper. District of Columbia Code, 1981, Title 28, Chapter 39, Sections 28-3901 through 28-3908.

Schedule 8

**BUSINESS OPPORTUNITY LAW
DEFINITIONAL ELEMENTS¹**

Appendix 3A

from

Martin D. Fern, Richard M. Asbill,
Kenneth Costello & W. Andrew Scott,
Franchising Law & Practice
(STP Specialty Technical Publishers, 1997)*

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APPENDIX 3A

Definitional Elements of State Business Opportunity Statutes

Alabama: Ala. Code § 8-19-5, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3018.

Definition: “‘seller-assisted marketing plan’ includes any plan, scheme or system in which for a consideration a buyer acquires goods and/or services together with a plan, scheme or system for the resale of said goods and/or services.”

Elements:

- (1) Acquisition by buyer of goods and/or services for a consideration;
- (2) Plan, scheme or system for resale of said goods and/or services;
- (3) (a) Misrepresentation as to any of the following:
 - (i) The amount or extent of earnings to result,
 - (ii) The extent or nature of the market for the goods and/or services, or
 - (iii) The seller's repurchase of all or part of the goods and/or services; or
- (b) Failure to deliver the goods and/or services within the time represented.

California: Cal. Civ. Code § 1812.201, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3058.02.

Elements:

- (1) Offer to sell or lease goods or services,
- (2) Initial required payment over \$500 but less than \$50,000,
- (3) Incident to starting or operating a business,
- (4) Seller has advertised or solicited sale or lease,
- (5) One of following representations:
 - (a) Guarantee or likelihood of success,
 - (b) There is an established market for goods or services sold, or
 - (c) Guarantee or likelihood of repurchase.

Connecticut: Conn. Gen. Stat. § 36b-60, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3078.02.

Elements:

- (1) Sale or lease or offer to sell or lease goods or services,
- (2) To enable investor to start a business,
- (3) Seller represents either:
 - (a) seller will provide or assist in providing locations for vending machines, racks, display cases, currently operated amusement devices, or devices designated by regulations, or
 - (b) seller will purchase some or all of the output, or
 - (c) seller guarantees (even if conditionally) success or will refund all or part of purchase price from dissatisfied investor, or
 - (d) seller will provide marketing program.

Florida: Fla. Stat. § 559.801 (applies to business opportunities), reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3098.02.

Elements:

- (1) Sale or lease of goods or services,
- (2) Enabling purchaser to start a business,
- (3) Initial required fee of over \$500, and
- (4) One of following representations:
 - (a) Seller will provide or assist in finding locations for vending machines, racks, display cases, currency or card operated equipment or currency operated amusement machines or other devices,
 - (b) seller will purchase some or all of the output,
 - (c) written guarantee of success or refund (even if only in part) or repurchase (even if only in part),
 - (d) seller will provide a marketing program.

Georgia: Ga. Code Ann. § 10-1-410, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3108.01.

Elements:

- (1) Sale or lease, or offer to sell or lease, goods or services,
- (2) Enabling purchaser to start a business,
- (3) One of following representations:
 - (a) seller will provide or assist in finding locations for vending machines, racks, currency operated amusement machines, or other devices,
 - (b) seller will purchase some or all of the output,
 - (c) if an initial payment of over \$500 is required, seller will make a refund (even if only in part) or repurchase (even if only in part),
 - (d) seller will furnish a marketing program where initial payment is over \$500.

Illinois: Ill. Bus. Opp. Sales Law of 1995, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3138.

Elements:

- (1) Contract, express or implied, oral or in writing, where the seller or a recommended person will provide goods or services;
- (2) Enabling purchaser to start a business;
- (3) Initial payment over \$500;
- (4) One of following representations:
 - (a) Seller will provide or assist in finding locations for use or operation of vending machines, racks or display cases on premises not owned or leased by purchaser or seller;
 - (b) Seller or a person he recommends will provide or assist in finding outlets or accounts;
 - (c) Seller or a person he specifies will purchase purchaser's output;
 - (d) Seller guarantees purchaser will derive income in excess of purchase price;
 - (e) Seller will refund all or part of the price paid or repurchase products or supplies if purchaser is dissatisfied; or
 - (f) Seller will provide a marketing plan (other than one made in conjunction with the licensing of a registered trademark or service mark);

Indiana: Ind. Code Title 24, Art. 5, CH. 8, § 1, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3148.01.

Elements:

- (1) Sale or lease or offer to sell or lease goods or services,
- (2) Enabling investor to begin or operate a business,
- (3) Initial payment of over \$500 but less than \$50,000,
- (4) One of following representations:
 - (a) possibility of profit,
 - (b) a market exists for goods made or services rendered,
 - (c) seller may purchase some of the output,
 - (d) seller or a person referred by seller may or will sell, lease or distribute goods made or services rendered by investor,
 - (e) seller may or will cover a loss.

Iowa: Iowa Code Title XX, § 523B.1.1, reproduced at 1 Bus. Franchise Guide ¶ 3158.01.

Elements:

- (1) Agreement (oral or written, express or implied) that seller or person recommended by seller will provide goods or services,
- (2) Enabling investor to start a business,
- (3) Initial investment of over \$500,
- (4) One of following representations:
 - (a) seller or person recommended by seller will provide or assist in finding locations for racks, vending machines, or similar devices,
 - (b) seller or person recommended by seller will provide or assist in finding outlets or accounts,
 - (c) seller or person recommended by seller will purchase some or all of the output,
 - (d) investor will make profit,
 - (e) seller will make refund (even if only in part) or repurchase goods (even if only in part),
 - (f) seller will provide a marketing plan,

Kentucky: Ky. Rev. Stat. § 367.801, reproduced at 1 Bus Franchise Guide (CCH) ¶ 3178.01.

Elements:

- (1) Opportunity to offer, sell, or distribute through a distribution device goods or services supplied in whole or in part by offeror,
- (2) Initial payment of at least \$500,
- (3) *All* of following representations:
 - (a) investor will earn, can earn, or is likely to earn gross or net profit over initial required investment, and
 - (b) offeror has knowledge of relevant market and that demand exists to enable investor to earn a profit, or locations will be provided or assistance in finding locations will be furnished, *or* there is a guaranteed market or offeror will or is likely to purchase some of the output.

Louisiana: La. Rev. Stat. § 51:1821, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3188.01.

Elements:

- (1) Sale or lease, or offer to sell or lease, goods or services,
- (2) Initial consideration of over \$300,
- (3) Enabling investor to start a business,
- (4) One of following representations,
 - (a) that seller or entity referred by seller will provide or assist in finding locations for vending machines, racks, amusement machines, or similar devices,
 - (b) seller or entity referred by seller will purchase some or all of the output,
 - (c) guarantee of success or that seller will make refund of (even if only in part) or repurchase (even if only in part),
 - (d) representation that for fee of over \$300, seller will provide marketing program that will enable investor to earn profits,

Maine: Me. Rev. Stat. Ann., Tit. 32, Ch. 69-B, § 4691, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3198.01.

Elements:

- (1) Sale, lease or distribution of goods or services,
- (2) Enabling investor to start a business,
- (3) Fee aggregating in excess of \$250 during any consecutive six month period,
- (4) One of following representations:
 - (a) offeror or affiliate provides locations for vending machines, racks, amusement machines, or other devices,
 - (b) offeror or affiliate will purchase investor's output,
 - (c) guarantee of success,
 - (d) offeror will make refund (even if only in part) or repurchase goods (even if only in part),
 - (e) offeror or affiliate will provide a marketing program.

Maryland: Md. Code Ann. Art. 56, § 401, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3200.01.

Elements:

- (1) Sale or lease of products or services,
- (2) Initial required payment of \$200 or more,
- (3) Enabling investor to start a business,
- (4) One of following representations:
 - (a) offeror will provide or assist in obtaining accounts or retail outlets for use or of operation racks, vending machines, amusement machines or other devices,
 - (b) offeror will purchase some or all of the output,
 - (c) offeror guarantees profit or refund (even if only in part) or repurchase (even if only in part),
 - (d) upon payment of \$200 offeror will provide a marketing program enabling investor to make profit.

Michigan: Mich. Comp. Laws, § 445.902, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3228.01.

Elements:

- (1) Sale or lease of products or services,
- (2) Enabling investor to start a business,
- (3) One of following representations:
 - (a) offeror to provide or assist in finding locations for vending machines, racks, amusement machines or other devices,
 - (b) offeror may in the ordinary course of business purchase some or all of the output,
 - (c) offeror assures investor of profit or refund (even if only in part) or repurchase (even if only in part),
 - (d) if the investor pays an aggregate of \$500 or more for the business opportunity from any time before buying it until 6 months after the date of sale, offeror will provide a marketing program enabling investor to make profit.

Minnesota: Minn. Stat. § 80C.01, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3230.01.

[Note Minn. Law covers both franchises and business opportunity ventures in same statute.]

Elements:

- (1) Sale or lease of goods or services,
- (2) Total price of \$500 or more,
- (3) Enabling investor to start a business,
- (4) Offeror makes any of the following representations:
 - (a) offeror or affiliate will provide or assist in finding locations for vending machines, racks, amusement machines or other devices,
 - (b) offeror will purchase some or all of the output,
 - (c) guarantee of success.

Nebraska: Neb. Rev. Stat. § 59-1702, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3278.02.

Elements:

- (1) Sale or lease, or offer to sell or lease, goods or services,
- (2) Initial payment of over \$500,
- (3) Enabling investor to begin or operate a business,
- (4) Advertisement or other solicitation of purchase or lease by offeror,
- (5) One of the following representations:
 - (a) investor will, is likely to, or can make profit,
 - (b) a market exists for the goods or services,
 - (c) offeror will or is likely to purchase some or all of the output.

New Hampshire: N.H. Rev. Stat. Ann., Tit. XXXI, § 358-E:1, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3298.01.

Elements:

- (1) Contract or agreement (express or implied, oral or written), in exchange for a fee,
- (2) Grant of right to do any of the following:
 - (a) Offer, sell or distribute through vending machines, racks or similar devices goods manufactured or supplied by offeror,
 - (b) Purchase from offeror or affiliate inventory for sale or distribution via such devices,
 - (c) Purchase or lease from offeror or affiliate such devices to be used for the sale or distribution of merchandise,
- (3) Representation that offeror will provide or assist in finding locations for such devices.

North Carolina: N.C. Gen. Stat. § 66-94, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3338.01.

Elements:

- (1) Sale or lease of goods or services,
- (2) Enabling investor to begin a business,
- (3) Any of the following representations:
 - (a) Offeror will provide or assist in finding locations for vending machines, racks, amusement machines, or other devices,
 - (b) Offeror may in the ordinary course of business purchase some or all of the output,
 - (c) guarantee of profit, or (if the investor makes an initial required payment of more than \$200) the offeror will make a refund (even if only in part) or repurchase (even if only in part),
 - (d) (if the investor pays \$200 or more) offeror will provide a marketing program enabling the investor to make a profit.

Ohio: Ohio Rev. Code § 1334.01, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3358.01.

Elements:

- (1) Investor obtains right to offer, sell or distribute goods or services,
- (2) The goods or services are supplied by offeror, a third party with whom the offeror requires or advises the investor to do business, or an affiliate,
- (3) Initial required payment over \$100 and less than \$50,000,
- (4) One of the following representations:
 - (a) retail outlets or accounts for sale or distribution of the goods or services, or assistance in establishing same, will be provided,
 - (b) locations for vending machines, rack displays, electronic games, or other devices for use in sale or distribution, or assistance in finding same, will be provided,
 - (c) profit can be earned,
 - (d) a market exists for the goods or services,
 - (e) there is a buy-back arrangement.

Oklahoma: Okla. Stat. Tit. 71, Ch. 4, § 802, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3368.02.

Elements:

- (1) Agreement (express or implied, oral or written), for the sale or lease of goods or services,
- (2) Enabling investor to start a business,
- (3) One of following representations (direct or indirect, oral or written):
 - (a) offeror or a person recommended by offeror will provide, or assist in finding, locations for vending machines, racks, or other similar devices,
 - (b) offeror or a person recommended by offeror will provide, or assist in finding, outlets or accounts,
 - (c) offeror or offeror's designee will purchase some or all of the output,
 - (d) guarantee of success,
 - (e) offeror will make refund (even if only in part) or repurchase (even if only in part),
 - (f) offeror will provide a marketing plan.

South Carolina: S.C. Code § 39-57-20, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3408.02.

Elements:

- (1) Sale or lease of goods or services,
- (2) Enabling investor to start a business,
- (3) Initial required payment of more than \$250,
- (4) One of following representations:
 - (a) offeror will provide or assist in finding locations for vending machines, racks, amusement machines, or other devices,
 - (b) offeror will purchase some or all of the output,
 - (c) guarantee of success, or offeror will make refund (even if only in part) or repurchase (even if only in part),
 - (d) offeror will provide marketing program enabling investor to succeed.

South Dakota: S.D. Codified Laws Ann. § 37-25A-1, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3418.01.

Elements:

- (1) Agreement (express or implied, oral or written), for the sale or lease of goods or services,
- (2) Enabling investor to start a business,
- (3) One of following representations:
 - (a) offeror will provide or assist in finding locations for vending machines, racks, or other similar devices,
 - (b) offeror will provide or assist in finding outlets or accounts,
 - (c) offeror will purchase some or all of the output,
 - (d) offeror guarantees success,
 - (e) offeror will make refund (even if only in part) or repurchase (even if only in part),
 - (f) offeror will provide a marketing plan.

Texas: Tex. Rev. Civ. Stats. Tit. 79., Art. 16.05, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3438.05.

Elements:

- (1) Sale or lease of goods or services,
- (2) Enabling investor to begin a business,
- (3) Initial required payment of more than \$500,
- (4) Offeror represents that investor will or is likely to earn a profit,
- (5) One of the following representations:
 - (a) offeror will provide or assist in finding locations for use or operation of the goods or services,
 - (b) offeror will provide production or marketing program,
 - (c) offeror will or is likely to repurchase (even if only in part) goods sold to investor or purchase some or all of the output.

Utah: Utah Code Ann. § 13-15-2, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3448.02.

Elements:

- (1) Sale or lease of goods or services,
- (2) Enabling investor to start a business,

- (3) Initial required payment of \$500 or more,
- (4) One of the following representations:
 - (a) offeror will provide or assist in finding locations for vending machines, racks, or amusement machines or other devices,
 - (b) offeror or referral will purchase some or all of the output,
 - (c) offeror will provide guarantee of success or repurchase of goods even if only in part,
 - (d) upon payment of more than \$500, offeror will provide marketing program which will enable investor or earn profit.

Virginia: Va. Code § 59.1-263, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3468.01.

Elements:

- (1) Sale of goods or services,
- (2) Enabling investor to start a business,
- (3) Initial required price of more than \$500,
- (4) One of the following representations:
 - (a) offeror will provide or assist in finding locations for vending machines, racks, amusement machines, or other devices,
 - (b) offeror will purchase some or all of the output,
 - (c) guarantee of success, or refund (even if only in part) or repurchase (even if only in part),
 - (d) offeror will provide marketing program which will enable investor to make profit.

Washington: Wash. Rev. Code § 19.110.020, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3478.02.

Elements:

- (1) Sale or lease of goods or services,
- (2) Enabling investor to start a business,
- (3) One of the following representations:
 - (a) offeror will provide or assist in finding locations for vending machines, racks, amusement machines, or other devices,
 - (b) offeror will purchase some or all of the output,
 - (c) guarantee of success,
 - (d) if investor directly or indirectly pays a fee exceeding \$300 therefor, offeror will provide a marketing program which will enable investor to make a profit.

Schedule 9

BUSINESS OPPORTUNITY LAW OBLIGATIONS²

Appendix 3B

from

Martin D. Fern, Richard M. Asbill,
Kenneth Costello & W. Andrew Scott,

Franchising Law & Practice

(STP Specialty Technical Publishers, 1997)*

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APPENDIX 3B

Compliance Requirements Imposed by State Business Opportunity Statutes

Alabama: Ala. Code § 8-19-5, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3018.

- (1) Prohibits misrepresentations.

California: Cal. Civ. Code §§ 1812.203205, 1812.2081812.211, 1812.214, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3058.0406, 3058.0912, 3058.15.

- (1) Filing,
- (2) Prohibited acts,
- (3) Disclosure,
- (4) Cancellation rights,
- (5) Required contract provisions,
- (6) Escrow account (under certain circumstances),
- (7) Maximum down payment,
- (8) Preservation of claims and defenses,
- (9) Bonds, trust accounts (under certain circumstances).

Connecticut: Conn. Gen. Stat. §§ 36-505508, 36-510, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3078.0306, 36.508.

- (1) Registration,
- (2) Disclosure,
- (3) Surety bond or trust account (under certain circumstances),
- (4) Prohibited acts.

Florida: Fla. Stat. §§ 559.803-805, 559.807, 559.809, 559.811, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3098.0304, 3098.05, 3098.06, 3098.07.

- (1) Disclosure,
- (2) Filing,

- (3) Bond or trust account (under certain circumstances),
- (4) Prohibited acts,
- (5) Required contract provisions.

Georgia: Ga. Code Ann. §§ 10-1-411415, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3108.0206.

- (1) Disclosure,
- (2) Bond, trust account, escrow,
- (3) Filing,
- (4) Prohibited acts,
- (5) Required contract provisions.

Illinois: Bus. Opp. Sales Law of 1995, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3138.

- (1) Registration,
- (2) Disclosure,
- (3) Minimum Net Worth or Bond Requirement if guarantee of success or refund promises are made.

Indiana: Ind. Code § Tit. 24, Art. 5, Ch. 8, §§ 26, 1112, 15, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3148.0206, 3148.1112.

- (1) Disclosure,
- (2) Bond or letter of credit,
- (3) Filing,
- (4) Required contract provisions,
- (5) Escrow,
- (6) Cancellation rights,
- (7) Prohibited acts.

Iowa: Iowa Code Tit. XX. §§ 523B.2, 5235.4, 523B.12, reproduced at 1 Bus. Franchise Guide ¶¶ 3158.02, 3158.04, 3158.12.

- (1) Registration,
- (2) Disclosure,
- (3) Required contract provisions,
- (4) Bond (under certain circumstances),
- (5) Cancellation rights,
- (6) Prohibited acts.

Kentucky: Ky. Rev. Stat. Tit. XXIX, §§ 367.805, 367.809, 367.819, reproduced at 1 Bus Franchise Guide (CCH) ¶¶ 3178.03, 3178.05, 3178.010.

- (1) Registration,
- (2) Prohibited acts,
- (3) Cancellation rights.

Louisiana: La. Rev. Stat. §§ 51.1821, 51.1823, at 1 Bus. Franchise Guide (CCH) ¶¶ 3188.01, 3188.03.

- (1) Bond,
- (2) Prohibited acts.

Maine: Me. Rev. Stat. Ann., Tit., Ch. 690B, §§ 4693, 4695, 4699, § 4691, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3198.03, 3198.0509.

- (1) Disclosure,
- (2) Bond or escrow account,
- (3) Registration,
- (4) Cancellation rights,
- (5) Prohibited acts.

Maryland: Md. Code Ann. Art. 56, §§ 408-412, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3200.0812.

- (1) Disclosure,
- (2) Bond or trust account (under certain circumstances),
- (3) Filing,
- (4) Required contract provisions,
- (5) Prohibited acts.

Michigan: Mich. Comp. Laws, 1979 § 445.903b, reproduced at 1 Bus. Franchise Guide (CCH) ¶ 3228.01.

- (1) Filing.

Minnesota: Minn. Stat. §§ 80C.02, 80C-0506, 80C.13, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3230.02, 3230.0506, 3230.13.

- (1) Registration,
- (2) Disclosure,

- (4) Cancellation rights,
- (5) Required contract provisions.

Oklahoma: Okla. Stat. Tit. 71, Ch. 4, §§ 806, 808.09, 811, 819.20, 822, § 802, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 368.06, 3368.0809, 3368.11, 3368.1920, 3368.22.

- (1) Registration,
- (2) Disclosure,
- (3) Required contract provisions,
- (4) Prohibited acts.

South Carolina: S.C. Code §§ 39-57-3039-57-70, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3408.0307.

- (1) Disclosure document,
- (2) Bond or trust account (under certain circumstances),
- (3) Registration,
- (4) Prohibited acts,
- (5) Required contract provisions.

South Dakota: S.D. Laws §§ 37-25A-7, 37-25A-14, 37-25A-23, 37-25A-4344, 37-25A-46, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3418.07, 3418.14, 3418.23, 3418.4344, 3418.46.

- (1) Registration,
- (2) Disclosure,
- (3) Required contract provisions,
- (4) Bond (under certain circumstances),
- (5) Prohibited acts.

Texas: Tex. Rev. Civ. Tit. 79, Stats. Arts. 16.0809, 18.11, 16.1415, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3438.0809, 3438.11, 16.1415.

- (1) Registration,
- (2) Disclosure,
- (3) Required contract provisions,
- (4) Bond, trust account or letter of credit (under certain circumstances),
- (5) Prohibited acts.

Utah: Utah Code Ann. §§ 13-15-45, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3448.0405.

- (1) Registration,
- (2) Disclosure,
- (3) Prohibited acts.

Virginia: Va. Code §§ 59.1-264267, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3468.0306.

- (1) Disclosure,
- (2) Bond or escrow account,
- (3) Prohibited acts,
- (4) Required contract provisions.

Washington: Wash. Rev. Code §§ 19.110.050, 19.110.070, 19.110.100, 19.110.110, 19.110.120, reproduced at 1 Bus. Franchise Guide (CCH) ¶¶ 3478.05, 3478.07, 3478.10, 3478.11, 3478.12.

- (1) Registration,
- (2) Disclosure,
- (3) Surety bond or trust account (under certain circumstances),
- (4) Cancellation rights,
- (5) Prohibited acts.

JOHN R. F. BAER

John R. F. Baer is a partner in the Chicago office of Sonnenschein Nath & Rosenthal. Mr. Baer has a broad transactions practice with extensive experience representing companies engaged in franchising and distribution, including the use of sales representatives, both domestically and internationally. His practice covers a wide range of other related areas, including sales, warranties, product safety and regulatory. Mr. Baer has spoken and written extensively on both domestic and international franchise issues.

Mr. Baer is Chair of the Illinois Attorney General's Franchise Advisory Board and a member of the Legal/Legislative Committee of the International Franchise Association. He is the Editor of the *CCH Sales Representative Law Guide*, the Editor-in-Chief of the ABA Forum on Franchising's *The Franchise Lawyer* and on the Board of Editors of *Leader's Franchising Business & Law Alert*. Mr. Baer formerly was an Associate Editor of *ABA Franchise Law Journal*, co-author of a quarterly column on international franchise developments for the *World Franchise & Business Report*, and Vice President of the Franchising Committee of Union Internationale des Avocats. He is also a member of the Illinois State Bar Association's Special Committee on Ethics 2000.

JAMES A. MEANEY

James A. Meaney is an attorney with Alkon, Meaney & Hart in St. Croix, United States Virgin Islands. Mr. Meaney is licensed to practice law in Ohio (1977) and United States Virgin Islands (1997). Before relocating to the Virgin Islands, he was a partner at Thompson, Hine & Flory in Columbus, Ohio. In 1997, he received Martindale-Hubbell's AV® rating and since 1994, has been named in *The Best Lawyers in America* (Franchising). Mr. Meaney is a member of the American Bar Association's Forum Committee on Franchising and served as the first Chairperson of the Columbus Bar Association's Franchise and Distribution Law Committee from 1992 to 1994. Mr. Meaney served on the Columbus Bar Association's Board of Governors from 1995 to 1997. In April of 1997, he relocated his practice to Christiansted, St. Croix in the U.S. Virgin Islands. He was Section Chief of the Ohio Consumer Frauds and Crimes Division, Ohio Attorney General's Office from 1982 through 1984, where he first became involved in franchise regulation and litigation.

Included among his writings in the franchise and business opportunity area are:

How To Buy A Franchise, Pilot Books (1999).

"Ohio, The Unknown Franchise Law," 11 *Franchise Law Journal*, No. 3 (Fall 1991).

"Ohio's Business Opportunity Law: A Practical Guide," 11 *Ohio Northern Law Review* 651 (1984), republished 1 *Franchise Law Review* 169 (1986).

Ohio Consumer Law Handbook, Chapter 8, "Business Opportunity Purchasers Protection Act" (1988); (1997).