

Changing How Products Get from the Manufacturer to the Customer: Common Questions and Risks

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It starts with the best of intentions: A startup medical device company has just sold to a larger enterprise with an established sales team and customer base and no longer needs distributors. A consumer packaged goods company has just bought a brand and needs to transition to a new team of brokers. A growing company is finally ready to take its supply chain captive, including



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the distribution of products to customers, and no longer needs small distributors or sales representatives. Then, surprisingly, rather than joining together to celebrate good fortune and new opportunities, the manufacturer or marketer of products¹ finds itself embroiled in a bitter dispute with departing distributors, brokers, or sales representatives, or subject to demands for payment for goodwill that such parties believe that they have built for the manufacturer's brand. A current example is Kellogg's new supply-chain model—the transition from direct-store delivery to a retail-warehouse model—which eliminates the need for its independent distributors and streamlines distribution to keep up with e-commerce and rising consumer demands.² Kellogg's transition to its modern supply-chain model is currently receiving significant push back from a handful of its independent distributors that have been terminated as a result.³ Kellogg's story will not be the last, and rising consumer expectations on fast, cost-efficient delivery will certainly continue as growing e-commerce platforms set the standard.

1. Manufacturers and marketers of products utilizing distributors, sales representatives, brokers or similar third-party distribution networks are collectively referred to in this article as "manufacturers."

2. See *Kellogg's new supply chain model comes at a high cost*, FOOD DIVE (June 22, 2017), <http://www.fooddive.com/news/kelloggs-job-cuts-layoffs-supply-chain-distribution/445636/>.

3. *Id.*

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As with most business matters, advance planning is crucial to avoiding disputes with distributors, sales representatives, brokers, and similar parties when a company changes its distribution strategy. Where possible, a look at what could be in the future might present a company with an opportunity to develop a strategy that works for both the company and its business partners. When that is not possible, knowledge of the common pitfalls of terminating or refusing to renew distribution agreements, broker agreements, and sales representative or referral agreements helps to inform the manufacturer of whether there is risk, and if there is risk, then what the risk actually is, and eventually, a way to a solution that in many cases may help avoid costly and distracting litigation.

Section I of this article discusses, generally, the legal theories that a manufacturer may encounter in a contested nonrenewal or termination of an agreement. Section II takes a closer look at the potential application of franchise relationship laws and discusses what constitutes “good cause” for nonrenewal or termination. Section III of this article discusses the potential application of Article 2 of the Uniform Commercial Code and what constitutes “reasonable notice.” Finally, Section IV provides an overview of the often-overlooked sales representative laws.

I. Overview of the Nonrenewal or Termination of Product Distribution Agreements

Accidental franchises are often alleged to have arisen from distribution relationships. Therefore, manufacturers should consider the potential impact of state and federal franchise disclosure, registration, and relationship laws at both the beginning and end of their distribution relationships. Careful structuring of an underlying agreement at the onset may help a manufacturer avoid triggering franchise registration and disclosure laws. At the end of the relationship, a manufacturer with a well-structured distribution agreement may be relieved to have grounds for termination and notice periods that align with state franchise relationship laws, so that even if such laws are alleged to apply, the application is a distinction without a practical difference in the treatment of the termination of the agreement.

Often, manufacturers attempt to use a single template for domestic distribution agreements and a single template for international distribution agreements.⁴ A one-size-fits-all approach may not be the most beneficial; nor is such an approach typically feasible given the broad range of applicable

4. The focus of this article is agreements where both parties are doing business in the United States. Practitioners and manufacturers should be aware that there are significant laws, including franchise, dealership, agency, and other laws, governing distribution relationships worldwide and that qualified local counsel should review and advise on the formation, nonrenewal, or termination of an international distribution agreement. The International Distribution Institute provides detailed country reports, model contracts, and resources for local counsel in various jurisdictions. The Institute's general website is <https://www.idiproject.com/>.

laws and regulations. This section identifies the most relevant laws for manufacturers to consider when structuring a distribution network and when making changes to the distribution network, such as the nonrenewal or termination of existing distribution agreements.

Beware: Many available forms of distribution agreement have a provision such as the following: “The Parties to this Agreement are independent contractors and nothing in this Agreement shall be deemed or constructed as creating a joint venture, partnership, agency relationship, franchise, or business opportunity between Seller and Distributor.”⁵ Although such a provision might be helpful to establish the parties’ intent, it is not itself determinative of whether the arrangement may be deemed a franchise and does not preclude the application of franchise registration, disclosure, or relationship laws, or business opportunity laws.

A. Franchise Registration and Disclosure Laws

Most manufacturers do not think of franchising when structuring distribution arrangements because “business format” franchises, such as restaurants or other service based businesses, typically come to mind when one thinks of franchising. In addition, distribution arrangements usually do not include royalties and other fees, another hallmark of a typical franchise. Therefore, manufacturers may overlook the potential application of franchise registration and disclosure laws. A better approach is for a manufacturer to carefully document the availability of exclusions or exemptions from the application of such laws and to consider whether, or to what extent, the distribution or other agreement should be revised to clearly reflect the parties’ intent. For example, the manufacturer may consider including a provision in a distribution agreement that the distributor is not to pay any fees or amounts to the manufacturer except for the purchase of goods for resale and that the manufacturer does not determine the distributor’s method of doing business. Early consideration of the potential application of franchise registration and disclosure laws (as well as business opportunity laws) also permits the manufacturer to avoid common pitfalls, such as required purchases of inventory.

A distributor will typically wait until the manufacturer threatens (or provides notice of) nonrenewal or termination of the underlying agreement to allege that the arrangement was a franchise for which the manufacturer should have provided a Franchise Disclosure Document (FDD) and, if applicable, registered an FDD. The prudent manufacturer will instead address this potential issue at the outset to ensure that if the manufacturer intends to operate within exemptions or exclusions from the application of franchise

5. See Thomson Reuters Practical Law, Distribution Agreement (Pro-Seller), [https://content.next.westlaw.com/Document/Ibb0a3b7fef0511e28578f7ccc38dcbee/View/FullText.html?originationContext=knowHow&transitionType=KnowHowItem&contextData=\(sc.DocLink\)&firstPage=true&bhcp=1](https://content.next.westlaw.com/Document/Ibb0a3b7fef0511e28578f7ccc38dcbee/View/FullText.html?originationContext=knowHow&transitionType=KnowHowItem&contextData=(sc.DocLink)&firstPage=true&bhcp=1).

registration and disclosure laws, the arrangement is structured so that it does not accidentally become a franchise.

A *franchise* occurs when a business (a *franchisor*) licenses its trade name or trademarks and operating methods (i.e., a system of doing business) to a person or entity (the *franchisee*) that agrees to pay certain fees and operate according to the terms of a written agreement for the right to sell the goods or services of the franchisor and benefit from the franchisor's business methods, trademarks, goodwill, professional training, and operating assistance.⁶ A franchise is made up of three elements: (1) use of trademarks, (2) control and/or assistance from the franchisor, and (3) initial and/or ongoing fees.⁷ Franchising in the United States is regulated by the Federal Trade Commission (FTC) and state franchise laws.

The problem: Any business relationship that satisfies all three definitional elements—regardless of the “label” or structure of such relationship—may constitute a *franchise* under the broad federal and state franchise laws. Thus, a distributorship is equally susceptible to franchise regulations and rules despite its lack of resemblance to a “franchisor/franchisee” relationship in the traditional sense.⁸

1. The Franchise Rule

The Federal Trade Commission Disclosure Requirements and Prohibitions Concerning Franchising (Franchise Rule) requires franchisors to provide full presale disclosure to prospective franchise purchasers (FDD).⁹ The Franchise Rule is applicable in all fifty states plus the U.S. territories (such as Puerto Rico and Guam). In relevant part, the FTC defines a “franchise” as follows:

Franchise means any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:

- (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;
- (2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and
- (3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.¹⁰

6. 16 C.F.R. § 436.1(h).

7. *Id.*

8. See *infra* note 13 and accompanying text.

9. 16 C.F.R. § 436.2(a) (“[I]t is an unfair or deceptive act or practice in violation of Section 5 of the [FTC Act] [f]or any franchisor to fail to furnish . . . the franchisor's most recent disclosure document. . . .”).

10. 16 C.F.R. § 436.1(h).

Fifteen states have separate franchise registration and/or disclosure laws generally applicable to most U.S. franchise programs.¹¹ The requirements of these laws vary from mere one-page filings to actual registrations involving a comprehensive application and review process by the state. Completion of the registration process is necessary, in most cases, prior to a franchisor initiating any offering activity in a state.

Unfortunately, state franchise laws lack a uniform definition of what constitutes a franchise. However, many state franchise registration and disclosure statutes categorize a relationship as a franchise whenever a franchisee, in return for a franchise fee, is granted the right to sell goods or services under a marketing plan or system prescribed in substantial part by the franchisor if the operation of the franchisee's business pursuant to that marketing plan or system is substantially associated with the franchisor's trademark, service mark, or other commercial symbol.¹²

If a transaction satisfies the definition of a franchise under the Franchise Rule, and no exemption or exclusion from the Franchise Rule's application applies, it is a violation of Section 5 of the FTC Act for a franchisor to fail to furnish an FDD to a prospective franchisee.¹³ Although there is no private right of action for a franchisee to enforce the Franchise Rule,¹⁴ the FTC may pursue an enforcement action against a party that violated the Franchise Rule (and therefore, the FTC Act).¹⁵ However, as discussed later, although the coverage of the Franchise Rule is, at least on its surface, quite broad, many distribution networks find that such arrangements fall within an exemption or exclusion from its application. If an exemption or exclusion applies, a franchisor need not provide an FDD under federal law.¹⁶

11. These states are California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin. See Appendix A for a chart outlining the corresponding state statutes.

12. A minority of state franchise disclosure laws consider a franchise to exist whenever a franchisee, in return for a franchise fee, is granted the right to sell goods or services using the franchisor's trademark, service mark, or other commercial symbol if the franchisor and franchisee have a "community of interest" in the marketing of such goods or services.

13. See 16 C.F.R. § 436.2(a).

14. Franchise Rule "Statement of Basis and Purpose," 72 Fed. Reg. 15444, 15478, n.350 (Mar. 30, 2007) (citing *Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986 (D.C. Cir. 1973) (no implied private right of action under the FTC Act); *Days Inn of Am. Franchising, Inc. v. Windham*, 699 F. Supp. 1581 (N.D. Ga. 1988) (no private right of action to enforce the Franchise Rule)).

15. In addition, many states have so-called "Little FTC Acts" that afford litigants a private right of action against a party that has engaged in deceptive or unfair treatment, which may include a violation of the Franchise Rule. See generally Altresha Q. Burchett-Williams, Robert M. Einhorn & Paula J. Morency, *Claims Under the "Little FTC Acts": The High Stakes of Risk and Reward*, ABA 33rd ANNUAL FORUM ON FRANCHISING (2010). While Little FTC Acts often codify common law concepts, they are often more liberal in permitting causes of action that would fail to satisfy the requirements of a common law claim for fraud or misrepresentation. *Id.*

16. "The provisions of part 436 shall not apply if the franchisor can establish" the applicability of an exemption. 16 C.F.R. § 436.8(a). An exemption from the Franchise Rule does not constitute an exemption under applicable state franchise registration and disclosure laws, and an analysis of the applicability of state exemptions from disclosure and/or registration must be independently undertaken.

2. A Distributorship Is Not a Franchise

Since most distribution arrangements permit the use of the manufacturer's trademark to distribute products, the first prong of the definition of a franchise is typically satisfied.¹⁷ The lack of an express trademark license does not necessarily negate the trademark element—a certain trap for the unsuspecting manufacturer. In fact, only a minority of states technically require the grant of a trademark license to satisfy this element.¹⁸ Even in those “license to use” states, courts have stretched the definition to encompass a de facto trademark license, regardless of explicit contract authority.¹⁹ The majority of state franchise laws, on the other hand, apply the “substantial association” test.²⁰ For example, Michigan law defines this element as follows:

A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services *substantially associated* with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate (emphasis added).²¹

Although states do not uniformly apply “substantial association,” many courts have found the trademark element is met when branded products account for a significant percentage of the independent distributor's overall sales.²² Other states define the element so broadly it would almost always include distributorships or similar business relationships.²³ As a practical matter, the use of typical promotional materials and the promotion of products on websites and otherwise may go a long way to satisfying this element.

As to whether a “significant degree of control” over method of operation or “significant assistance” is present (the second element), the FTC has instructed that significant types of control include, among others, “site ap-

17. The Franchise Rule covers distributorships if all three definitional elements are satisfied. FTC FRANCHISE RULE COMPLIANCE GUIDE 1 (May 2008), <http://www.business.ftc.gov/documents/bus70-franchise-rule-compliance-guide> (hereinafter COMPLIANCE GUIDE). A supplier can avoid Franchise Rule coverage by expressly prohibiting the distributor from using its mark. *Id.* at 2.

18. See, e.g., N.J. STAT. § 56:10-3; MO. REV. STAT. § 407.400.

19. See, e.g., *McPeak v. S-L Distrib. Co.*, No. 12-348 (RBK/KMW), 2014 U.S. Dist. LEXIS 10794, at *12-18 (D.N.J. Jan. 29, 2014) (acknowledging a trademark license may exist where a manufacturer referred to its distributors as “salespeople” and the distributor used the manufacturer's trademarks on clothing and vehicles, despite the contract containing specific language prohibiting the distributor from conducting business under the manufacturer's name, trademarks, or trade names).

20. See, e.g., CAL. BUS. & PROF. CODE § 20001; CONN. GEN. STAT. § 42-133e(b); 815 ILL. COMP. STAT. 705/3; IND. CODE § 23-2-2.5-1; IOWA CODE §§ 523H.1, 537A.1; MICH. COMP. LAWS § 445.1502; VA. CODE § 13.1-559; WASH. REV. CODE § 19.100.010(6).

21. MICH. COMP. LAWS § 445.1502.

22. See *Walker Indus. Prods. v. Intelligent Motion Sys.*, No. DBDCV094010861, 2009 Conn. Super. LEXIS 2586, at *24-25 (Conn. Super. Ct. Oct. 1, 2009).

23. E.g., MINN. STAT. § 80C.1 (trademark element only requires the distribution of goods “using” the franchisor's trade name or trademark); IOWA CODE §§ 523H.1.3, 537A.1.c(iii) (trademark element satisfied where the agreement merely “allows” the business to be substantially associated with the franchisor's trademark). For additional commentary on the application of “substantial association” under state law, see Daniel J. Oates et al., *Substantial Association with a Trademark: A Trap for the Unwary*, 32 FRANCHISE L.J. 130 (Winter 2013).

proval for unestablished businesses, site design or appearance requirements, hours of operation, production techniques, accounting practices, personnel policies and practices, promotional campaigns requiring franchisee participation or financial contribution, restrictions on customers, and location or sales area restrictions.”²⁴ Significant types of assistance include “formal sales, repair or business training programs, establishing accounting systems, furnishing management, marketing or personnel advice, selecting site locations, and furnishing a detailed operating manual.”²⁵ Although control over or assistance provided to distributors is not generally significant enough to meet the threshold of the second prong of the definition of franchise, it is safest to assume that the second prong could be met because definitively disproving this element may time-consuming and expensive. Notably, state laws typically replace the second element—significant control or assistance by the franchisor—with a similar statutory element: marketing plan (e.g., a marketing plan prescribed by the franchisor or advice regarding operations) or community of interest (e.g., continuing financial interest or interdependence among the parties).²⁶ These elements may also be problematic for a manufacturer and, even if the arrangement does not meet the applicable state law’s definition, it may take significant litigation to reach a definitive conclusion.

Finally, the Franchise Rule requires that for an arrangement to be a franchise, the franchisee must make a required payment to the franchisor or its affiliate.²⁷ This is where most distribution relationships fall short of being deemed franchises. Still, because of how a “required payment” is defined, manufacturers should consider whether minimum purchase requirements, sales quotas, or amounts paid for training or the purchase of marketing materials are worth the risk.

The Franchise Rule defines a “required payment” as “all consideration that the franchisee must pay to the franchisor or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the franchise.”²⁸ The FTC has indicated that the definition of payment “is intended to be read broadly, capturing all sources of revenue that a franchisee must pay to a franchisor or its affiliate for the right to associate with the franchisor, market its goods or services, and begin operation of the business.”²⁹ For example, payment may include rent/real estate leases,

24. COMPLIANCE GUIDE, *supra* note 17, at 3.

25. *Id.*

26. *See, e.g.,* Hartford Elec. Supply Co. v. Allen-Bradley Co., 736 A.2d 824, 833–37 (Conn. 1999) (analyzing marketing plan element and noting the manufacturer’s control over pricing, inventory, training, and record keeping); *Beilowitz v. GMC*, 233 F. Supp. 2d 631 (D.N.J. 2002) (discussing economic interdependence); *B & E Juices, Inc. v. Energy Brands, Inc.*, No. 3:07CV1321 (MRK)(WIG), 2007 U.S. Dist. LEXIS 79153, at *13–15 (D. Conn. Oct. 25, 2007) (finding no franchise where, among other factors, the manufacturer controlled only the price paid for their products by the distributor and not the price at which the distributor resold them).

27. 16 C.F.R. § 436.1(h)(3).

28. 16 C.F.R. § 436.1(s).

29. 16 C.F.R. § 436.1(h), COMPLIANCE GUIDE, *supra* note 17, at 5.

advertising assistance, equipment and supplies, training, non-refundable bookkeeping charges, promotional literature, security deposits, or continuing royalties on sales, among other payments, if such amounts are paid to the franchisor or its affiliate.³⁰ Payments to third parties, however, are not included in the FTC's definition of payment in the Franchise Rule.³¹

Most distributorship networks do not satisfy the final definitional prong because of the *bona fide wholesale price exclusion* (i.e., where a new distributor does not pay a distribution fee or make any other required payment to the manufacturer). Specifically, the Franchise Rule states: "A required payment does not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease."³² In order for the bona fide wholesale price exception to apply, the manufacturer must only require the distributor to purchase inventory in amounts that are reasonable for starting inventory or on-going supply. If a manufacturer requires purchases in excess of that amount, those purchases may be deemed to be a required payment or franchise fee. The bona fide wholesale price exemption is applicable only to the purchase of goods that a distributor is authorized to distribute. It does not apply to the purchase of raw materials required to manufacture the goods that are ultimately sold to the consumer. In addition, if a distribution territory is sold by one distributor that is not affiliated with the manufacturer to a new distributor, and the manufacturer does not receive any payment from the new distributor and is not significantly involved in the transaction, the arrangement will not meet the definition of a franchise.³³ In fact, to sweeten the deal for departing (non-renewed or terminated) distributors, manufacturers often suggest a transfer of the distribution rights to a third party that may be willing to compensate the distributor for such rights.

If an exemption or exclusion applies, a franchisor need not provide an FDD under federal law.³⁴ As noted earlier, the exclusion of purchases of inventory at bona fide wholesale prices is often utilized for distribution networks. The analysis, however, does not end there. A manufacturer should also separately evaluate the applicability of the state's franchise law to determine whether it can avail itself of an exemption or exclusion under state law. If there is no distribution fee or other required payment, the evaluation may be very limited, such as confirming that the state's law provides for a whole-

30. 16 C.F.R. § 436.1(h), COMPLIANCE GUIDE, *supra* note 17, at 5–6.

31. 16 C.F.R. § 436.1(h), COMPLIANCE GUIDE, *supra* note 17, at 21.

32. 16 C.F.R. § 436.1(h)

33. *Id.* at § 436.1(t) (The sale of a franchise "does not include the transfer of a franchise by an existing franchisee where the franchisor has had no significant involvement with the prospective franchisee. A franchisor's approval or disapproval of a transfer alone is not deemed to be significant involvement.").

34. "The provisions of part 436 shall not apply if the franchisor can establish" the applicability of an exemption. 16 C.F.R. § 436.8(a). An exemption from the Franchise Rule does not constitute an exemption under applicable state franchise registration and disclosure laws, and an analysis of the applicability of state exemptions from disclosure and/or registration must be independently undertaken.

sale price exclusion. Although state franchise disclosure laws are similar to the Franchise Rule, the definitions utilized, applicable common law, and exclusions and exemptions available under such laws vary.³⁵

B. *Franchise Relationship Laws*

If distributing products worldwide, many manufacturers are aware of the potential application of agency laws that may provide significant protection for distributors and thwart a manufacturer's efforts to replace a distributor in certain territories. Often, however, manufacturers do not realize that the potential application of franchise relationship laws in the United States may jeopardize their efforts to replace, refuse to renew, or terminate distribution arrangements.

Some states govern substantive aspects of a franchise business relationship after an agreement is signed.³⁶ These laws are often designed to protect franchisees from termination without "good cause," termination or nonrenewal of the agreement without advance notice or an opportunity to cure alleged defaults, and discrimination. It is common for a distributor to allege the application of such laws in connection with an effort by its manufacturer to terminate the distributorship or refuse to renew upon expiration of the agreement. Therefore, manufacturers should evaluate the potential application of such laws prior to issuing a notice of default or termination, or undertaking a similar change in a relationship with a distributor. Section II further explores the application of franchise relationship laws in the termination and nonrenewal context.

C. *Article 2 of the Uniform Commercial Code*

The Uniform Commercial Code (UCC)—a version of which is codified in most states—applies to contracts for the sale of goods and therefore most distribution agreements. If applicable, the UCC affects how parties may terminate a distribution agreement. Importantly, if a distribution agreement does not address the notice required prior to termination, the UCC will supply the missing term, which often imposes a "reasonable notice" requirement on the parties to the distribution agreement. As discussed further in Section III, many state statutes require "reasonable notice," and the common law provides guidance on such issues.

D. *Common Law Attempts at Achieving Equity*

Courts continue to examine and define the contours of frequently litigated issues, such as termination or nonrenewal in the context of distribution relationships. Manufacturers must be mindful of potential claims arising under state common law as a result of terminating a distributor or dealer. Of course, a party to an agreement can assert a breach of contract claim, whether based on the express terms of the agreement or covenants or duties

35. See 16 C.F.R. § 436.1(h), App. A.

36. See Section II for charts identifying state relationship laws and outlining procedural requirements related to termination and nonrenewal.

implied by law, such as good faith and fair dealing. Good faith and fair dealing claims often accompany “without cause” termination provisions and have been applied in various situations to prevent unjust terminations. However, many jurisdictions do not recognize such claims absent a connection with an express term of the agreement.

Depending on the jurisdiction, terminated distributors may also have other claims under state law, including tortious interference, constructive termination, or recoupment.

E. *Sales Representative Laws*

Manufacturers also may be subject to state legislation governing wholesale representatives and the unlawful termination of their territorial markets.³⁷ State representative laws generally entitle the representative to reasonable compensation upon termination without good cause or upon expiration of the agreement. In fact, some state laws are drafted such that compensation claims at the end of the relationship are likely unavoidable, making it even more important for suppliers to consider this particular risk. Section IV further explains the scope of these often overlooked laws and details important considerations related to termination or nonrenewal when these statutes may apply.

F. *Business Opportunity Laws*

In addition to the Franchise Rule and state franchise disclosure, registration and relationship laws, there is a federal business opportunity rule and many states have business opportunity laws.³⁸ Manufacturers should be aware of and plan for the potential application of these business opportunity laws although the threshold of most distribution arrangements far exceeds their application. Typically, business opportunity laws, like franchise laws, require presale disclosure of enumerated facts about the business opportunity seller.

The federal business opportunity rule contains disclosure requirements that are somewhat similar to, but not the same as the Franchise Rule.³⁹ Similar to the Franchise Rule, a violation of the business opportunity rule, while not affording a private right of action, is a violation of federal law.⁴⁰ A business opportunity is a commercial arrangement which:

- (1) A seller solicits a prospective purchaser to enter into a new business; and
- (2) The prospective purchaser makes a required payment; and
- (3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons⁴¹ will:

37. See Appendix B for a chart outlining the corresponding state sales representative statutes.

38. See Appendix C for a chart outlining state business opportunity laws.

39. 16 C.F.R. § 437.

40. *Id.*

41. “Designated person means any person, other than the seller, whose goods or services the seller suggests, recommends, or requires that the purchaser use in establishing or operating a new business.” 16 C.F.R. § 437.1(d).

- (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices, owned, leased, controlled, or paid for by the purchaser; or
- (ii) Provide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser's goods or services; or
- (iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home.⁴²

Similar to the Franchise Rule, there are several exemptions and exclusions available under the business opportunity rule, including if the seller complies with the disclosure requirements of the Franchise Rule.⁴³

State business opportunity laws can be complex and inconsistent. In Texas, the Business Opportunity Act⁴⁴ is applicable in similar (though not identical) circumstances as the federal business opportunity law. State laws also contain various exemptions and exclusions. For example, under the Texas Business Opportunity Act, a business opportunity does not include a sale of products to a business enterprise that also sells products that are not supplied by the seller.⁴⁵

For the same reasons discussed above,⁴⁶ manufacturers should address this possible issue at the creation of its business model instead of waiting until a distributor raises the application of and disclosure obligations under business opportunity laws, which typically occurs when a dispute arises at the end of a business relationship.

II. Franchise Relationship Laws and “Good Cause”

A. Cases Interpreting Whether Franchise Relationship Laws Apply

The wide array of state relationship laws makes it critical for manufacturers to assess whether a distribution arrangement meets the definition of a “franchise” under a particular state law. This is especially important at the end of the business relationship. Although a distribution agreement may not readily appear to comprise a franchise, some state relationship statutes define a “franchise” so broadly that traditional distributorships may also be covered. In fact, some state relationship laws define “franchise” without reference to any required payment or fee.⁴⁷

42. 16 C.F.R. § 437.1(c).

43. 16 C.F.R. § 437 *et seq.*

44. TEX. BUS. & COMM. CODE § 51.001 *et seq.*

45. TEX. BUS. & COMM. CODE § 51.003(b)(5).

46. *See supra* Section II.A.

47. *See, e.g.*, ARK. CODE ANN. § 4-72-202(1)(A); CONN. GEN. STAT. § 42-133e(b); N.J. STAT. ANN. §§ 56:10-3(a), 4(a); MO. REV. STAT. § 407.400(1).

The following are examples in which courts have applied state franchise laws to distributorships or similar arrangements—sometimes referred to as “accidental” or “hidden” franchises.⁴⁸

- *Appliance manufacturer* was a franchisor and one of its exclusive regional distributors was a franchisee under the New Jersey Franchise Practices Act where the distributor made substantial franchise-specific investments and those investments created franchise-specific goodwill.⁴⁹
- *Software distributor’s* \$125,000 payment for billing program constituted a franchise fee under the Minnesota Franchise Act.⁵⁰
- *Furniture dealer’s* relationship with licensed store owner constituted a franchise under Illinois Franchise Disclosure Act because the dealer charged an indirect franchise fee in the form of a two percent advertising contribution.⁵¹
- *Forklift distributor’s* required payments for service and parts manuals constituted an indirect franchise fee sufficient to invoke protection under the Illinois Franchise Disclosure Act.⁵²
- *Automobile parts dealer* demonstrated a community of interest sufficient to constitute a franchise through evidence of significant franchise-specific investments in the form of inventory, a computer system, and goodwill, as well as the economic interdependence of the two entities.⁵³
- *Office products manufacturer* held to be a franchisor within the meaning of the California Franchise Investment Law where its distributors were required to, among other things, use best efforts to actively solicit orders, install products, provide ongoing serves to customers, and were subject to prices and terms set by the manufacturer.⁵⁴
- *Slot machine distributor* in New Jersey protected from termination under the New Jersey Franchise Practices Act where the distributor made franchise-specific investments demonstrated by purchasing service manuals and sta-

48. For additional cases interpreting the application of franchise laws to distributorships and similar arrangements, see Leonard D. Vines, *The Inadvertent Franchise: When Is a Dealership or Distributorship a “Franchise”?* (2008), http://www.greensfelder.com/media/event/144_Vines_inadvertentfranchise.pdf; Ann Hurwitz & David W. Oppenheim, *You Don’t Want to be a Franchise? Structuring Business Systems Not to Qualify as Franchises*, ABA 34th ANNUAL FORUM ON FRANCHISING (2011). The examples provided indicate the application of the particular state’s franchise law. A similar business relationship in many other states may not yield the same result.

49. *Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262 (3rd Cir. 1995).

50. *Current Tech. Concepts v. Irie Enters.*, 530 N.W.2d 539, 543 (Minn. 1995).

51. *Bly & Sons, Inc. v. Ethan Allen Interiors*, No. CIV. 05-668-GPM, 2006 WL 2547202, at *3 (S.D. Ill. Sept. 1, 2006).

52. *To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am.*, 152 F.3d 658, 664 (7th Cir. 1998); see also *Am. Bus. Interiors Inc. v. Haworth Inc.*, 798 F.2d 1135 (8th Cir. 1986) (an office furniture manufacturer was a franchisor and one of its dealers was a franchisee under the Missouri Franchise Law).

53. *Beilowitz v. GMC*, 233 F. Supp. 2d 631 (D.N.J. 2002).

54. *Gentis v. Safeguard Bus. Sys., Inc.*, 60 Cal. App. 4th 1294 (Cal. Ct. App. 1998), *reh’g denied*, 61 Cal. App. 4th 868A (1998).

tionery, leasing additional warehouse space for the product, and advertising as the manufacturer’s exclusive distributor, and where interdependence was shown through evidence of joint activities, such as promotions, events, demonstrations, training, customer focus groups, and product introductions and servicing.⁵⁵

- *Snack distributorship* constituted a franchise where the distributor paid a fee for training, the supplier and distributor shared fees from a common source, and distributor had the right to use the seller’s trademarks.⁵⁶
- *Baked goods manufacturer* was a franchisor and its route distributors were franchisees under the Connecticut Franchise Act due to the amount of control exerted over the operations of its distributors, including control over prices, promotions and discounts, product placement, and performance standards and procedures.⁵⁷

No state applies the definition of a franchise in exactly the same way, and it is not hard to see why even sophisticated manufacturers may be covered by state franchise legislation. Inevitably, whether a distributorship constitutes a franchise affects how the business grows and changes throughout time.

B. What Is “Good Cause”?

Most state relationship laws require “good cause” for terminating or refusing to renew a franchise. The chart below identifies which U.S. state franchise relationship laws require “good cause” in the context of termination and nonrenewal:

STATE	CITATION	GOOD CAUSE?	
		TERMINATION	NONRENEWAL
Arkansas	ARK. CODE § 4-72-204	✓	✓
California	CAL. BUS. & PROF. CODE §§ 20020, 20025	✓	✓
Connecticut	CONN. GEN. STAT. § 42-133f	✓	✓
Delaware	DEL. CODE. TIT. 6 § 2552	✓	✓
Hawaii	HAW. REV. STAT. § 482E-6	✓	✓
Illinois	815 ILL. COMP. STAT. 705/19	✓	
Indiana	IND. CODE § 23-2-2.7-1	✓	✓
Iowa	IOWA CODE §§ 523H.7, 523H.8	✓	✓
Michigan	MICH. COMP. LAWS § 445.1527	✓	

(Continued)

55. Atl. City Coin & Slot Serv. Co., Inc. v. IGT, 14 F. Supp. 2d 644 (D.N.J. 1998).
 56. Metro All Snax, Inc. v. All Snax, Inc., Bus. Franchise Guide (CCH) ¶ 10,885 (D. Minn. 1996).
 57. Petereit v. S.B. Thomas, Inc., 63 F.3d 1169 (2d Cir. 1995).

STATE	CITATION	GOOD CAUSE?	
		TERMINATION	NONRENEWAL
Minnesota	MINN. STAT. § 80C.14	✓	✓
Mississippi	MISS. CODE § 75-24-53		
Missouri	MO. REV. STAT. § 407.405		
Nebraska	NEB. REV. STAT. § 87-404	✓	✓
New Jersey	N.J. STAT. § 56.10-5	✓	✓
Rhode Island	R.I. GEN. LAWS §§ 6-50-1, 6-50-4	✓	✓
Virginia	VA. CODE § 13.1-564	✓*	
Washington	WASH. REV. CODE § 19.100.180	✓	
Wisconsin	WIS. STAT. § 135.03	✓	✓

* Virginia's Retail Franchising Act requires reasonable cause. VA. CODE § 13.1-564.

There is no uniform definition of “good cause” although many state relationship statutes attempt to define or limit the parameters of the term. A handful of states define “good cause” as “failure by the franchisee to substantially comply with the material and reasonable requirements imposed by the franchisor. . . .”⁵⁸ Others contain unique requirements or examples of good cause. Below is a non-exhaustive list of specific statutory examples of good cause for termination:⁵⁹

- Failure to cure a breach or repeated noncompliance of the agreement
- Voluntary abandonment of the franchise
- Criminal conviction related to the franchise business
- Insolvency or bankruptcy
- Failure to pay sums due
- Loss of either party's right to occupy the franchise premises
- Material misrepresentation made by franchisee related to the franchise
- Franchisee conduct that materially impairs the goodwill of the franchise business or impairs the franchisor's trademark or trade name
- Public health and safety issues
- Failure to act in good faith
- Failure to comply with other laws applicable to the operation of the franchise

58. MINN. STAT. § 80C.14(b); *see also, e.g.*, NEB. REV. STAT. § 87-402(8); N.J. STAT. § 56.10-5; R.I. GEN. LAWS § 6-50-2(4); WIS. STAT. § 135.02(4).

59. This list was adapted from FUNDAMENTALS OF FRANCHISING 389 (Rupert M. Barkoff et al. eds., 4th ed. 2015). The list comprises examples from various state laws and should not substitute a state-specific analysis of the applicable state statute governing the relationship.

Likewise, a subset of state relationship statutes also require good cause for nonrenewal by the franchisor.⁶⁰ Of the states that require good cause for nonrenewal, several specifically permit nonrenewal in certain circumstances.⁶¹ Nebraska, for example, permits nonrenewal where the agreement provides that the franchise is not renewable or that the franchise is renewable only if the franchisor or franchisee meets certain reasonable conditions.⁶² Illinois, Michigan, and Washington do not require good cause for nonrenewal, but specify the circumstances in which renewal is required or prohibited—e.g., the application of post-term non-competition provisions or fair compensation upon nonrenewal.⁶³

Because courts continue to examine the “good cause” requirement, evaluating the individual state’s case law is just as important as examining the applicable statute. Each case is fact intensive; however, courts regularly address good cause in the context of a franchisee’s failure to pay amounts owed or meet performance requirements or a franchisor’s (supplier’s) withdrawal from or reorganization in a particular geographic area.⁶⁴

C. Other Procedural Requirements for Termination and Nonrenewal

State relationship laws—with or without a “good cause” requirement—may also impose procedural requirements on those who are deemed to be franchisors under such laws that are electing not to renew or terminate a franchise. Consequently, a franchisor may need to provide its franchisee with advance written notice or the opportunity to cure a default depending on the applicable state law. The chart below provides a general summary of the procedural requirements for termination and nonrenewal under state franchise relationship laws:

STATE	GENERAL CITATION	PROCEDURAL REQUIREMENTS
Arkansas	ARK. CODE §§ 4-72-201 <i>et seq.</i>	Termination and nonrenewal require <i>90 days’ written notice</i> setting forth the reasons for such action, and <i>30-day cure period</i> . <i>10-day cure period</i> required for repeated deficiencies within a 12-month period. Exceptions for notice and cure under certain circumstances.

(Continued)

60. See chart at Section III.B.

61. See, e.g., ARK. CODE § 4-72-204(a)(2); CONN. GEN. STAT. § 42-133f(e); IND. CODE § 23-2-2.7-1(8).

62. NEB. REV. STAT. § 87-404(1).

63. MICH. COMP. LAWS § 445.1527(d); WASH. REV. CODE § 19.100.180(2)(i); 815 ILL. COMP. STAT. 705/20.

64. See, e.g., *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373 (7th Cir. 1998) (discussing “good cause” requirement for termination under Wisconsin Fair Dealership Law where consumer electronics distributor terminated due to the manufacturer changing from independent distribution to one-step distribution in the geographic area).

STATE	GENERAL CITATION	PROCEDURAL REQUIREMENTS
California	CAL. BUS. & PROF. CODE §§ 20000 <i>et seq.</i>	Termination requires <i>60 days' notice</i> and <i>60-day cure period</i> . The cure period shall not exceed 75 days, unless otherwise specified by the franchise agreement. Franchisor must give at least <i>180 days' notice of nonrenewal</i> and meet at least one of the other statutory requirements for nonrenewal. Franchisor may extend the expiration of the current franchise term for a limited period in order to satisfy the time of notice of nonrenewal requirement. Immediate termination and nonrenewal under certain circumstances.
Connecticut	CONN. GEN. STAT. §§ 42-133e <i>et seq.</i>	Termination and nonrenewal require <i>60 days' notice</i> , which must state the reasons for such action. <i>Six months' notice</i> if nonrenewal based on sale or lease of franchise premises, conversion of property, or expiration of lease. <i>30 days' notice</i> if termination or nonrenewal based on voluntary abandonment by franchisee. Immediate termination or nonrenewal upon notice under certain circumstances. <i>No cure period</i> required.
Delaware	DEL. CODE. TIT. 6 §§ 2551 <i>et seq.</i>	Notwithstanding any provision in a franchise agreement which provides otherwise, termination and nonrenewal require at least 90 days' notice . <i>No cure period</i> required.
Hawaii	HAW. REV. STAT. §§ 482E-1 <i>et seq.</i>	Termination requires <i>written notice and a reasonable opportunity to cure</i> . Upon termination or expiration of franchise after the refusal to renew, the franchisor may owe the franchisee fair compensation under certain circumstances.
Illinois	815 ILL. COMP. STAT. 705/1 <i>et seq.</i>	Termination requires <i>notice and a reasonable opportunity to cure</i> . No specified period to cure, but need not be more than 30 days. Nonrenewal requires <i>6 months' notice</i> . Failure to provide adequate notice may require the franchisor to provide fair compensation to the franchisee.

STATE	GENERAL CITATION	PROCEDURAL REQUIREMENTS
Indiana	IND. CODE §§ 23-2-2.7-1 <i>et seq.</i>	Termination and nonrenewal require <i>90 days' notice</i> . The statute does not prevent a franchise agreement from providing that the agreement is not renewable upon expiration or that the agreement is only eligible for renewal under certain conditions. <i>No cure period</i> required.
Iowa	IOWA CODE §§ 523H.1 <i>et seq.</i>	Termination requires <i>written notice</i> setting forth reasons for such action, and a <i>30-90 day cure period</i> . The cure period need not exceed 30 days for non-payment. Immediate termination upon notice and without opportunity to cure under certain circumstances. Nonrenewal requires <i>6 months' notice</i> and meets one of the additional statutory requirements for nonrenewal.
Michigan	MICH. COMP. LAWS §§ 445.1501 <i>et seq.</i>	Termination requires <i>notice and a reasonable opportunity to cure</i> . No specified period to cure, but need not be more than 30 days. Nonrenewal under certain conditions may require the franchisor to provide <i>6 months' notice</i> or provide fair compensation at the time of expiration.
Minnesota	MINN. STAT. §§ 80C.01 <i>et seq.</i>	Termination requires <i>90 days' notice</i> , which sets forth the reasons for such action, and <i>60-day cure period</i> . Immediate termination upon notice under certain circumstances. Nonrenewal requires <i>180 days' notice</i> and <i>60-day cure period</i> . The franchisor must also give the franchisee an opportunity to operate the franchise for a sufficient period of time to enable the franchisee to recover the fair market value of the franchise as a going concern.
Mississippi	MISS. CODE §§ 75-24-51 <i>et seq.</i>	Termination and nonrenewal require <i>90 days' notice</i> . Immediate termination upon notice under certain circumstances. <i>No cure period</i> required.

(Continued)

STATE	GENERAL CITATION	PROCEDURAL REQUIREMENTS
Missouri	MO. REV. STAT. §§ 407.400 <i>et seq.</i>	Termination and nonrenewal require <i>90 days' notice</i> . Immediate termination upon notice under certain circumstances. <i>No cure period</i> required.
Nebraska	NEB. REV. STAT. §§ 87-401 <i>et seq.</i>	Termination and nonrenewal require <i>60 days' notice</i> . The statute does not prevent a franchisor from providing that the franchise is not renewable or that the franchise is only renewable if the franchisor or franchisee meets certain reasonable conditions. Termination for voluntary abandonment requires 15 days' notice. Immediate termination upon notice under certain circumstances. <i>No cure period</i> required.
New Jersey	N.J. STAT. §§ 56.10-1 <i>et seq.</i>	Termination and nonrenewal require <i>60 days' notice</i> setting forth the reasons for such action. Termination for voluntary abandonment requires 15 days' notice. Immediate termination upon notice under certain circumstances. <i>No cure period</i> required.
Rhode Island	R.I. GEN. LAWS §§ 6-50-1 <i>et seq.</i>	Termination and nonrenewal require <i>60 days' notice</i> , which sets forth the reasons for such action, and a <i>30-day cure period</i> ; provided that a dealer has a right to cure 3 times in any 12-month period during the term of the agreement. Immediate termination upon notice under certain circumstances. Termination or nonrenewal for non-payment requires <i>10-day cure period</i> ; provided that a dealer has a right to cure 3 times in any 12-month period during the term of the agreement. If the reason for termination or nonrenewal is for violation of any law, regulation, or standard concerning public health or safety, the dealer is entitled to immediate, written notice, and a <i>24-hour cure period</i> .

STATE	GENERAL CITATION	PROCEDURAL REQUIREMENTS
Virginia	VA. CODE §§ 13.1-557 <i>et seq.</i>	No statutory notice or cure period. Reasonable cause required.
Washington	WASH. REV. CODE §§ 19.100.180 <i>et seq.</i>	Termination requires <i>notice and a reasonable opportunity to cure</i> . No specified period to cure, but need not be more than 30 days. If the default cannot reasonably be cured in the 30-day cure period, the franchisee must initiate substantial or continuing action to cure within 30 days. Immediate termination without notice or opportunity to cure available under certain circumstances. Nonrenewal requires <i>1 year's notice</i> .
Wisconsin	WIS. STAT. §§ 135.01 <i>et seq.</i>	Termination and nonrenewal require <i>90 days' notice</i> , which sets forth all reasons for such action, and a <i>60-day cure period</i> . No notice is required under certain circumstances. Termination or nonrenewal for non-payment requires a <i>10-day cure period</i> .

D. Beware: Termination for Convenience Clauses

The “good cause” quandary may not raise a red flag for those who have carefully crafted agreements allowing the franchisor to terminate or not renew the agreement for any reason or without cause—otherwise known as “no-cause” or “termination for convenience” provisions.

Beware. In many states, this type of provision will not protect the franchisor from a state relationship law requiring good cause for termination or nonrenewal.⁶⁵ *Heating & Air Specialists, Inc. v. Jones* illustrates such this trap. There, the Eighth Circuit found that a provision in an air conditioner dealer’s contract allowing either party to terminate the agreement without cause was invalid under the Arkansas Franchise Practices Act, which requires good cause for termination.⁶⁶

65. See, e.g., *Gen. Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 319 (3d Cir. 2001) (“Even if the terms of a private franchise agreement permit termination at will, [New Jersey’s Franchise Practices Act’s] good cause requirement will supersede that arrangement and impose a good cause requirement on the franchisor’s decision.”); *To-Am Equip.*, 953 F. Supp. 987, 991 (N.D. Ill 1997), *aff’d*, 152 F.3d 658 (7th Cir. 1998) (discussing Mitsubishi forklift distributorship agreement, which provided that either party could terminate without cause on 60 days’ notice, and noting that “[t]ermination of a franchisee under Illinois Franchise Disclosure Act must be supported by good cause, and contracts at odds with statutory scheme are ineffectual”).

66. *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923, 931 (8th Cir. 1999). The court ultimately held, however, that good cause existed to terminate the franchise. *Id.*

In a few states, such as Nebraska or Indiana, a franchisor *may* be able to avoid the “good cause” scrutiny in the context of nonrenewal if the agreement provides that it is not renewable upon expiration, but, even in those states, the good cause requirement will prevail if the right to renew is otherwise unaddressed within the agreement.⁶⁷

III. UCC and Reasonable Notice

A. *Determining Whether Article 2 of the UCC Applies*

Article 2 of the UCC, a version of which has been adopted in almost every state, governs the performance and termination of contracts for the sale of goods. Because different variations of the UCC exist across state lines and state courts interpret the provisions of the UCC differently, it is important to focus on the applicable state statute and case law.

In most states, the UCC will apply to distribution agreements where the agreement is predominately for the sale of goods.⁶⁸ The term “goods” is broadly defined as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.”⁶⁹ Distribution contracts that contain both a goods and services aspect are subject to the applicable state court’s interpretation of whether such a “hybrid” model is primarily driven by the sale of goods and therefore governed by the statute. Whether Article 2 applies affects the procedural aspects of termination in a distribution relationship.

B. *What Is Reasonable Notice?*

Section 2-309(3) of the UCC states: “Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.”⁷⁰ What constitutes reasonable notification is state-law specific; thus, practitioners *must* consult the relevant state statute and case law. Although ultimately a fact-specific determination, courts frequently consider what would be a reasonable length of time for the other party to seek a substitute agreement when assessing what constitutes “reasonable notice.”⁷¹ Courts have inter-

67. NEB. REV. STAT. § 87-404(1) (“This subsection shall not prohibit a franchise from providing that the franchise is not renewable. . . .”); IND. CODE § 23-2-2.7-1(8) (same).

68. See *e.g.*, *Artman v. Int’l Harvester Co.*, 355 F. Supp. 482, 486 (W.D. Pa. 1973) (Pennsylvania recognizes distributorship/franchise agreements as falling within sales section of U.C.C.).

69. U.C.C. § 2-105.

70. U.C.C. § 2-309(3).

71. See, *e.g.*, *Coburn Supply Co. v. Kohler Co.*, 342 F.3d 372, 376 (5th Cir. 2003) (analyzing reasonable notice for non-exclusive distributor relationship and holding 105 days’ notice was reasonable); *Matheus v. Tombstone Pizza*, 303 N.W.2d 855 (Wis. Ct. App. 1981); *Serpa Corp. v. McWane Inc.*, 199 F.3d 6, 8-9 (1st Cir. 1999) (reasonableness of notice is measured in terms of the ability of the party affected by the termination to obtain a substitute arrange-

puted reasonable notice to be anywhere from thirty days to nine months.⁷² Best practice mandates a close look at local case law dealing with similar circumstances or industries, identifying the average reasonable-notice period and assessing the best strategy in light of the client's goals and preferences.

IV. State Sales Representative Laws

A. *What Are Sales Representative Laws?*

A majority of states regulate a manufacturer's relationship with sales representatives who promote the manufacturer's products.⁷³ The primary focus of these laws is to ensure proper compensation of the sales representatives. A sales representative is generally defined as "a person who engages in the business of soliciting, on behalf of a principal, orders for purchase at wholesale of the product or products of the principal" and who is compensated, in whole or in part, by commission.⁷⁴ A "principal" is defined broadly under state laws and typically applies to any person who engages in manufacturing, producing, importing, or distributing a product or products for sale to customers who purchase the product or products for resale; utilizes sales representatives to solicit orders; and compensates the sales representatives, in whole or in part, by commission.⁷⁵ Some states have exclusions from their statutes, including: (1) sales representatives who place orders for their own account,⁷⁶ (2) employees,⁷⁷ and (3) door-to-door salespeople.⁷⁸

B. *How to Address Sales Representative Laws*

If applicable, these laws regulate compensation from the outset (terms of the written contract) to the termination of the business relationship. Of particular importance is the time period during which the manufacturer must pay post-termination commissions to the sales representative; state laws can vary from a few days to forty-five days.⁷⁹ Manufacturers that overlook

ment); *Teitelbaum v. Hallmark Cards, Inc.*, 520 N.E.2d 1333, 1335 (Mass. App. Ct. 1988) (60-day notice of termination for exclusive distributor was reasonable where the card shop obtained another supplier before it reopened).

72. *E.g.*, *Coburn Supply Co.*, 342 F.3d at 376 (105 days' notice); *Cal. Wine Ass'n v. Wis. Liquor Co.*, 121 N.W.2d 308, 317-18 (Wis. 1963) (60 days' notice would have been reasonable); *Monarch Beverage Co. v. Tyfield Imps., Inc.*, 823 F.2d 1187, 1190-91 (7th Cir. 1987) (upholding 30 days' notice as reasonable notice); *Sierra Wine & Liquor Co. v. Heublein, Inc.*, 626 F.2d 129, 131 (9th Cir. 1980) (noting six months' notice required under the circumstances).

73. *See App. B.*

74. ALA. CODE § 8-24-1 (defining "Commission," "Principal," and "Sales Representative" under Alabama law).

75. *See id.*

76. 820 ILL. COMP. STAT. ANN. 120/1(4); KY. REV. STAT. § 371.370; OHIO REV. CODE ANN. § 1335.11(A)(3); 43 PA. STAT. ANN. § 1471; S.C. CODE ANN. § 39-65-10(4).

77. 820 ILL. COMP. STAT. ANN. 120/1(4); KAN. STAT. ANN. § 44-341; MD. CODE ANN., LAB. & EMPL. § 3-601; MINN. STAT. ANN. § 181.145; N.Y. LAB. LAW § 191-a(d); OHIO REV. CODE ANN. § 1335.11(A)(3); 43 PA. STAT. ANN. § 1471.

78. KAN. STAT. ANN. § 44-341; MISS. CODE ANN. § 75-87-1(c).

79. *See App. B.*

these nuanced state regulations risk liability for treble damages as well as attorney fees and court costs for such violations, thus underscoring the significance of considering whether a state sales representative law applies and determining the applicable procedural requirements upon termination.⁸⁰

V. Conclusion

The message is clear: changing how products get to a manufacturer's end customer necessitates careful planning and detailed consideration. Although many arrangements are in fact *not franchises*, a manufacturer is best served if the manufacturer documents the parties' specific intentions in the underlying agreement and confirms the application of exemptions or exclusions in advance. In doing so, manufacturers and their counsel must (1) identify applicable federal and state registration, disclosure, and relationship laws; (2) consider whether the UCC affects the logistics of nonrenewal or termination; (3) analyze and protect against risks associated with state common law claims; and (4) address any post-termination obligations related to the manufacturer's state sales representatives. On a final note, even if such steps are not taken at the outset, creativity and ingenuity may help craft a solution that enables the manufacturer to conduct its business as necessary and dissuades departing distributors from bringing claims that may become a significant distraction from future plans for the distribution network.

80. See App. B.

APPENDIX A:
General Summary of U.S. State Disclosure and Registration Laws

State	State Disclosure/ Registration Laws	Citation	Bona Fide Wholesale Exclusion?
California	Franchise Investment Law	CAL. CORP. CODE § 31000 <i>et seq.</i>	Yes [§ 31011]
Hawaii	Franchise Investment Law	HAW. REV. STAT. § 482E-1 <i>et seq.</i>	Yes [§ 482E-2]
Illinois	Franchise Disclosure Act	815 ILL. COMP. STAT. 705/1 <i>et seq.</i>	Yes [§ 705/3(14)(c)]
Indiana	Franchises Law	IND. CODE § 23-2-2.5-1 <i>et seq.</i>	Yes [§ 23-2-2.5-1(i)(3)]
Maryland	Franchise Registration and Disclosure Law	MD. CODE ANN., BUS. REG. § 14-201 <i>et seq.</i>	Yes [§ 14-201(f)(3)(i)]
Michigan	Franchise Investment Law	MICH. COMP. LAWS § 445.1501 <i>et seq.</i>	Yes [§ 445.1503(1)(a)]
Minnesota	Franchises Law	MINN. STAT. § 80C.01 <i>et seq.</i>	Yes [§ 80C.01(9)(a)]
New York	Franchises Law	N.Y. GEN. BUS. LAW § 680 <i>et seq.</i>	Yes [§ 681(7)(a)]
North Dakota	Franchise Investment Law	N.D. CENT. CODE § 51-19-01 <i>et seq.</i>	Yes [§ 51-19-02(6)(a)]
Rhode Island	Franchise Investment Act	R.I. GEN. LAWS § 19-28.1-1 <i>et seq.</i>	Yes [§ 19-28.1-3(h)(3)]
South Dakota	Franchises for Brand-Name Goods and Services Law	S.D. CODIFIED LAWS § 37-5B-1 <i>et seq.</i>	Yes [§ 37-5B-1(26)]
Virginia	Retail Franchising Act	VA. CODE ANN. § 13.1-557 <i>et seq.</i>	Yes [§ 13.1-559(A)]
Washington	Franchise Investment Protection Act	WASH. REV. CODE § 19.100.010 <i>et seq.</i>	Yes [§ 19-100.010(8)(a)]
Wisconsin	Franchise Investment Law	WIS. STAT. § 553.01 <i>et seq.</i>	Yes [§ 553.03(5m)(a)]

APPENDIX B: General Summary of U.S. State Sales Representative Laws Termination and Nonrenewal

<i>State</i>	<i>Citation</i>	<i>Applies to Wholesale Orders Only?</i>	<i>Applies Only to the Sales of Products, Not Services?</i>	<i>Applies to Any Principal or Only Out-of-State Principals?</i>	<i>Time Required for Last Payment After Termination of Contract?</i>	<i>Damage Remedy?</i>	<i>Recovery of Attorneys' Fees & Court Costs?</i>	<i>Waiver Allowed?</i>
Alabama	Ala. Code § 8-24-1 through § 8-24-5, ¶ 7010	Yes (8-24-1)	Products only (8-24-1)	Any (8-24-1)	Within 30 days of termination for commissions due at time of termination. For commissions due <i>after</i> termination, within 30 days after date commissions become due. (8-24-2)	3 times the damages sustained (8-24-3)	Yes (8-24-3)	No (8-24-5)
Alaska	No applicable provision	N/A	N/A	N/A	As specified by agreement and governed by common law	Damages awarded as if the contract had been fully performed. Lost profits may be recovered. Punitive damages not allowed unless tort committed independently. (Common Law)	Yes (Alaska R. Civ. Proc. 82)	Not specified by statute; no applicable case law
Arizona	Ariz. Rev. Stat. Ann. § 44-1798 through § 44-1798.04 ¶ 7030	Yes (44-1798)	Products and Services (44-1798)	Any (44-1798.04)	Not to exceed 30 days for commissions due at time of termination. For	3 times the commissions due (44-1798.02)	Prevailing Party (44-1798.02)	No (44-1798.04)

Arkansas	Ark. Code Ann. § 4-70-301 through § 4-70-306, ¶ 7040	Yes (4-70-301)	Products only (4-70-301)	Out-of-state only (4-70-301)	commissions due <i>after</i> termination, within 14 days after date commissions become due. (44-1798.02)	As specified in written contract, or within 30 working days of termination if contract is not in writing (4-70-303)	3 times the damages sustained (4-70-306)	Yes (4-70-306)	No (4-70-305)				
California	Cal. Lab. Code § 2751; Cal. Civil Code § 1738.10 through § 1738.17, ¶ 7050 (§ 1238.10 through § 1238.17 applies to any principal, but applies only to wholesale orders of products; § 2751 applies to <i>all</i> commission contracts, regardless of whether they involve the solicitation of wholesale or retail orders of products <i>and</i> services)	Yes (1738.12)	Products and Services (1738.12)	Any (1738.14)	As specified in written contract (1738.13)	3 times the damages sustained (1738.15)	Prevailing Party (1738.16)	No (1738.13)					

(Continued)

State	Citation	Applies to Wholesale Orders Only?	Applies Only to the Sales of Products, Not Services?	Applies to Any Principal or Only Out-of-State Principals?	Time Required for Last Payment After Termination of Contract?	Damage Remedy?	Recovery of Attorneys' Fees & Court Costs?	Waiver Allowed?
Colorado	Colo. Rev. Stat. § 12-66-101 through § 12-66-104, ¶ 7060	Yes (12-66-101)	Products only (12-66-101)	Any (12-66-102)	As specified in written contract (not an independent cause of action) <i>Fuhrdt v. Relo, Inc.</i> , 71 F. App'x 615, 616 (9th Cir. 2003)	3 times the damages sustained (12-66-103)	Prevailing Party (12-66-103)	Not specified by statute; no applicable case law
Connecticut	Conn. Gen. Stat. § 42-481 through § 42-484	Yes (42-481)	Products and Services (42-481)	Any (42-482)	For commissions due <i>on or before</i> termination, as specified in contract, or 30 days after termination, whichever occurs later. For commissions due <i>after</i> termination, as specified in contract, but not later than 30 days after contractual due date. (42-482)	2 times the commissions due (42-482)	Prevailing Party (42-482)	No (42-484)

Delaware	No applicable provision	N/A	N/A	N/A	As specified by agreement and governed by common law	Actual damages only; no special damages. Damages awarded as if the promisor had performed the contract. Punitive damages only available when tort committed independently. (Common Law)	Attorneys' fees available if party brought litigation in bad faith or party acted in bad faith during litigation (<i>Reserves Dev. LLC v. Severn Sav. Bank</i> , FSB, No. 2502-VCP, 2007 Del. Ch. LEXIS 185 (Ch. Dec. 31, 2007))	Not specified by statute; no applicable case law
Florida	Fla. Stat. § 686.201, ¶ 7090 (REPEALED) (statute held unconstitutional because it discriminated against interstate commerce by only imposing requirements on out-of-state principal. <i>See D.G.D. Inc. vs. Jason Berkowitz</i> , 605 So. 2d 496 (Fla. Ct. App. 3d Dist. 1992))	No	Products only	Any	As specified in written contract or within 30 days of termination if contract is not in writing	3 times the commissions due	Yes	N/A

(Continued)

State	Citation	Applies to Wholesale Orders Only?	Applies Only to the Sales of Products, Not Services?	Applies to Any Principal or Only Out-of-State Principals?	Time Required for Last Payment After Termination of Contract?	Damage Remedy?	Recovery of Attorneys' Fees & Court Costs?	Waiver Allowed?
Georgia	Ca. Code Ann. § 10-1-700 through § 10-1-704, ¶ 7100	Yes (10-1-700)	Products only (10-1-700)	Any (10-1-704)	All commissions due within 30 days of termination (10-1-702)	All amounts due, plus exemplary damages up to 2 times the commissions due (10-1-702)	Statute permits recovery of reasonable attorney's fees <i>only</i> and omits court costs. Sales Rep also liable for attorneys' fees if court determines suit was frivolous. (10-1-702)	No (10-1-703)
Hawaii	No applicable provision	Governed by common law	Governed by common law	Governed by common law	As specified by agreement and governed by common law	Actual damages: just compensation commensurate with loss. Extent of loss must be shown with reasonable certainty; otherwise, plaintiff is only entitled to nominal damages. Punitive damages for "willful, wanton, and reckless" breach causing tortious injury.	Attorneys' fees only available when provided by statute, stipulation, or agreement (<i>Uyemura v. Wick</i> , 57 Haw. 102, 551 P.2d 171 (1976); Haw. Rev. Stat. Ann. § 607-14)	Not specified by statute; no applicable case law

Idaho	No applicable provision	N/A	N/A	N/A	N/A	As specified by agreement and governed by common law	Damages must be reasonable foreseeable. Consequential damages and lost profits only allowed if specifically contemplated by parties. Punitive damages not available absent fraud, malice, or oppression. (Common Law)	Yes (I.C. § 12-120)	Not specified by statute; no applicable case law
Illinois	820 ILCS 120/0.01 through 120/3, ¶ 7130	Yes (820 ILCS 120/1)	Products only (820 ILCS 120/1)	Any (820 ILCS 120/1)	Within 13 days of termination for commissions due at time of termination. For commissions due <i>after</i> termination, within 13 days of becoming due (820 ILCS 120/1)	Exemplary damages up to 3 times the commissions owed (820 ILCS 120/3)	Yes (820 ILCS 120/3)	No (820 ILCS 120/2)	
Indiana	Ind. Code § 24-4-7-1 through § 24-4-7-8, ¶ 7140	Yes (24-4-7-3)	Products only (24-4-7-3)	Any (24-4-7-6)	Within 14 days after commissions would have been due had the contract not been terminated (24-4-7-5)	Exemplary damages up to 3 times the commissions owed (if bad faith noncompliance) (24-4-7-5)	Principal liable if exemplary damages awarded. Sales Rep liable if court determines suit was frivolous. (24-4-7-5)	No (24-4-7-8)	

(Continued)

State	Citation	Applies to Wholesale Orders Only?	Applies Only to the Sales of Products, Not Services?	Applies to Any Principal or Only Out-of-State Principals?	Time Required for Last Payment After Termination of Contract?	Damage Remedy?	Recovery of Attorneys' Fees & Court Costs?	Waiver Allowed?
Iowa	Iowa Code § 91A.1 through § 91A.13, ¶ 7160	Yes (See 91A.2)	Products and Services (91A.2)	Any (91A.2)	By the next regular payday; or if payment owed is difference between credit against the commission and the commission, no later than 30 days after termination (91A.3; 91A.4)	Unpaid wages; but if intentional failure to pay, also liquidated damages—5% of the unpaid commissions per day (91A.2; 91A.8) Also potentially liable to civil penalties of \$500/day (91A.8)	Yes (91A.8)	Not specified by statute; no applicable case law
Kansas	Kansas Stat. Ann. § 44-341 through § 44-347, ¶ 7160	Yes (44-341)	Products only (44-341)	Any (44-341)	All commissions due no later than 30 days after termination (44-342)	Commissions due, plus the lesser of either: 1% of the unpaid commissions per day, or an amount equal to the unpaid earned commissions (effectively, a maximum of double the commission due) (44-342)	Not specified by statute; no applicable case law	Yes, if fairly and knowingly agreed to. <i>(See LDCircuit, LLC v. Sprint Comm'ns Co., L.P., 364 F. Supp. 2d 1246 (D. Kan. 2005))</i>

Kentucky	Ky. Rev. Stat. Ann. § 371.370 through § 371.385, ¶ 7170 (statute held unconstitutional because statute discriminated against interstate commerce by only imposing requirements on out-of-state principal. <i>Cecil v. Duck Head Apparel Co.</i> , 895 Supp.155 (W.D. Ky. 1995))	Yes	Products only	Out-of-state only	All commissions due no later than 30 days after termination	All amounts due plus exemplary damages up to 2 times the commissions due	Yes	N/A
Louisiana	La. Rev. Stat. Ann. § 51:441 through § 51:445, ¶ 7180	Yes (51:441)	Products only (51:441)	Any (51:441)	As specified in the agreement, or if not specified, no later than 30 working days after termination (51:443)	3 times the damages (51:444)	Statute permits recovery of reasonable attorney's fees <i>only</i> and omits court costs. (51:444)	Not specified by statute; no applicable case law
Maine	Me. Rev. Stat. Ann. 10 § 1341 through § 1344, ¶ 7190	Yes (51:441)	Products only (51:441)	Out-of-state only (51:441)	All commissions accrued due no later than 30 days after termination (51:443)	Exemplary damages up to 3 times the commissions due (51:444)	Yes. Sales Rep liable for attorneys' fees if court determines suit was frivolous. (51:444)	No (51:443)

(Continued)

<i>State</i>	<i>Citation</i>	<i>Applies to Wholesale Orders Only?</i>	<i>Applies Only to the Sales of Products, Not Services?</i>	<i>Applies to Any Principal or Only Out-of-State Principals?</i>	<i>Time Required for Last Payment After Termination of Contract?</i>	<i>Damage Remedy?</i>	<i>Recovery of Attorneys' Fees & Court Costs?</i>	<i>Waiver Allowed?</i>
Maryland	Md. Lab. and Empl. Code § 3-601 through § 3-607, ¶ 7200	Yes (3-601)	Products only (3-601)	Any (3-606)	Within 45 days after payment would have been due had the contract not been terminated (3-604)	Up to 3 times the commissions owed (3-605)	Yes (3-605)	No (3-603)
Mass.	Mass. Gen. I, ch. 104, § 7 through § 9, ¶ 7210	Yes (§ 7)	Products only (§ 7)	Any (§ 9)	Within 14 days of termination for commissions due at time of termination. For commissions due <i>after</i> termination, within 14 days of date that commissions are due. (§ 8)	Principal amount, plus up to 3 times the commissions owed (§ 9)	Yes (§ 9)	No (§ 9)
Michigan	Mich. Comp. Laws Ann. § 600.2961, ¶ 7220	Yes (600.2961)	Products only (600.2961)	Any (600.2961)	Within 45 days of termination for commissions due at time of termination. For commissions due after termination, within 45 days after	Actual damages, plus if intentional violation, then the lesser of either: 2 times the commissions due, or \$100,000 (effectively, a maximum of double the	Yes (600.2961)	No (600.2961)

Minnesota	Minn. Stat. Ann. § 181.145 and § 325E.37, ¶ 7230 (§ 181.145 establishes when commission payments are due upon contract termination; § 325E.37 protects sales representatives from termination of the agreement absent just cause)	Yes (325E.37)	Products and Services (§ 181.145; 325E.37)	Any (§ 181.145)	date commission due. (600.2961) No more than 3 working days if terminated by employer or if salesperson resigns giving at least 5 days written notice; no more than 6 working days if salesperson resigns without giving 5 days written notice; 10 working days if salesperson was entrusted with disbursement, or handling money and/or property (§ 181.145)	commission due) (600.2961) Commissions due, plus 1/15 the commissions due for each day the commissions go unpaid-not to exceed 15 days (effectively, a maximum of double the commission due) (§ 181.145)	Statute permits recovery of reasonable attorney's fees <i>only</i> and omits court costs. (§ 181.145) Yes through arbitration (325E.37)	No (325E.37)
Mississippi	Miss. Code Ann. § 75-87-1 through § 75-87-7, ¶ 7240	Yes (75-87-1)	Products only (75-87-1)	Out-of-state only (75-87-1)	All commissions due within 21 days of termination (75-87-5)	3 times the commissions due (75-87-7)	Yes (75-87-7)	Not specified by statute; no applicable case law

(Continued)

<i>State</i>	<i>Citation</i>	<i>Applies to Wholesale Orders Only?</i>	<i>Applies Only to the Sales of Products, Not Services?</i>	<i>Applies to Any Principal or Only Out-of-State Principals?</i>	<i>Time Required for Last Payment After Termination of Contract?</i>	<i>Damage Remedy?</i>	<i>Recovery of Attorneys' Fees & Court Costs?</i>	<i>Waiver Allowed?</i>
Missouri	Mo. Rev. Stat. § 407.911 through § 407.915, ¶ 7250	Yes (407.911)	Products and Services (407.911)	Any (407.911)	Within 30 days of termination for commissions due at time of termination. For commissions due after termination, within 30 days of becoming due. (407.912)	Commissions due, plus an annualized, pro-rata amount as if sales representative was still earning commissions (407.913)	Prevailing Party (407.913)	No (407.915)
Montana	No applicable provision	N/A	N/A	N/A	As specified by agreement and governed by common law	Natural damages are direct result of the contract breach (compensatory). Contemplated damages available if parties were aware damages would result from a breach. Punitive damages only available where conduct is independently tortious. (Common Law)	Attorneys' fees not awarded absent relevant statute or agreement between parties (Mont. Code Ann. § 27-1-311)	Not specified by statute; no applicable case law

Nebraska	Neb. Rev. Stat. § 48-1228 through § 48-1232, ¶ 7270	No (48-1229)	Products and Services (48-1229)	Any (48-1229)	Payment due on next regular payday following employer's receipt of payment; claim arises 30 days after regular payday. (48-1230.01; 48-1231)	Unpaid commissions, and if nonpayment was willful, 2 times the commissions due—placed in state's common school fund, meaning representative may only recover the unpaid wages (48-1231; 48-1232)	Yes. Attorneys' fees shall not be less than 25 percent of the unpaid wages, unless the employee fails to recover more than he or she would have recovered on their payday. (48-1231)	Not specified by statute; no applicable case law
Nevada	No applicable provision	N/A	N/A	N/A	As specified by agreement and governed by common law	Compensatory damages include lost profits and expectancy damages. Punitive damages not available when based solely on contract. (Common Law)	No common law or statutory recovery of attorneys' fees for breach of contract claims	
New Hampshire	N.H. Rev. Stat. Ann. § 339-E:1 through § 339-E:6, ¶ 7290	Yes (339-E:1)	Products only (339-E:1)	Any (339-E:1)	As specified in the agreement, subject to cap of 45 calendar days (339-E:2)	Damages sustained, plus exemplary damages up to 3 times commission owed (339-E:3)	Yes (339-E:3)	No (339-E:6)

(Continued)

<i>State</i>	<i>Citation</i>	<i>Applies to Wholesale Orders Only?</i>	<i>Applies Only to the Sales of Products, Not Services?</i>	<i>Applies to Any Principal or Only Out-of-State Principals?</i>	<i>Time Required for Last Payment After Termination of Contract?</i>	<i>Damage Remedy?</i>	<i>Recovery of Attorneys' Fees & Court Costs?</i>	<i>Waiver Allowed?</i>
New Jersey	N.J. Stat. Ann. § 2A:61A-1 through § 2A:61A-7, ¶ 7300788	Yes (2A:61A-1)	Products and Services (2A:61A-1)	Any (2A:61A-1)	Within 30 days of termination date or 30 days of the date commissions are due, whichever is later (2A:61A-2)	Commissions due, plus exemplary damages 3 times the amount of commission owed (2A:61A-3)	Statute permits recovery of reasonable attorney's fees <i>only</i> and omits court costs. (2A:61A-3)	No (2A:61A-6)
New Mexico	No applicable provision	N/A	N/A	N/A	As specified by agreement and governed by common law	General damages arise naturally as the result of the breach. Consequential damages if harm was foreseeable result of breach. Punitive damages when defendant acted with reckless disregard for victim. (Common Law)	No common law or statutory recovery of attorneys' fees for breach of contract claims	Not specified by statute; no applicable case law
New York	N.Y. Labor Law § 191-a through § 191-c, ¶ 7320	Yes (§ 191-a)	Products [and Services] (§ 191-a)	Any (§ 191-a)	Within 5 business days of termination for commissions due when contract terminated. For earned commissions	2 times the damages sustained (§ 191-c)	Prevailing Party (§ 191-c)	Not specified by statute; no applicable case law

					<p><i>not</i> due when contract terminated, within 5 business days after those commissions become due. (§ 191-b)</p>	<p>Commissions due, plus exemplary damages not to exceed 2 times the amount of commissions due (66-192)</p>	<p>Yes (66-192)</p>	<p>No (66-193)</p>
North Carolina	<p>N.C. Gen. Stat. § 66-190 through § 66-193, ¶ 7330</p>	<p>No (Language limiting statute to wholesalers was repealed in 2003). (66-190)</p>	<p>Products and Services (66-190)</p>	<p>Any (66-190)</p>	<p>Within 30 days of termination for commissions due at time of termination. Within 15 days of the due date for commissions due after termination. (66-191)</p>	<p>Commissions due, plus exemplary damages not to exceed 2 times the amount of commissions due (66-192)</p>	<p>Yes (66-192)</p>	<p>No (66-193)</p>
North Dakota	<p>No applicable provision</p>	<p>N/A</p>	<p>N/A</p>	<p>N/A</p>	<p>As specified by agreement and governed by common law</p>	<p>Damages must flow directly and naturally from breach. Special damages (including lost profits) recoverable if contemplated by the parties. No punitive damages unless independently tortious conduct involved. (Common Law)</p>	<p>No common law or statutory recovery of attorneys' fees for breach of contract claims</p>	<p>Yes (See <i>Rosenberger v. Son, Inc.</i>, 491 N.W.2d 71, 76 (N.D. 1992))</p>

(Continued)

<i>State</i>	<i>Citation</i>	<i>Applies to Wholesale Orders Only?</i>	<i>Applies Only to the Sales of Products, Not Services?</i>	<i>Applies to Any Principal or Only Out-of-State Principals?</i>	<i>Time Required for Last Payment After Termination of Contract?</i>	<i>Damage Remedy?</i>	<i>Recovery of Attorneys' Fees & Court Costs?</i>	<i>Waiver Allowed?</i>
Ohio	Ohio Rev. Code Ann. § 1335.11, ¶ 7350	Yes (1335.11)	Products and Services (1335.11)	Any (1335.11)	Within 30 days of termination for commissions due at time of termination. 13 days of date commissions become due for commissions due after termination. (1335.11)	Exemplary damages not to exceed 3 times the commissions due (1335.11)	Prevailing Party (1335.11)	No (1335.11)
Oklahoma	Okla. Stat. Tit. 15 § 675 through § 679, ¶ 7360	Yes (§ 676)	Products only (§ 676)	Out-of-state only (§ 676)	Within 14 days for commissions due at time of termination. For commissions due after termination, within 14 days of date commissions become due. (§ 678)	Commissions due (§ 678)	Prevailing Party (§ 678)	No (§ 679)
Oregon	Or. Rev. Stat. § 646A.097, ¶ 7370	Yes (646A.097)	Products only (646A.097)	Out-of-state only (646A.097)	Within 14 of termination days for all commissions accrued (646A.097)	Commissions due, and 9% interest on amount per annum until paid, plus 3 times the damages if willful failure to comply (646A.097)	Prevailing Party (646A.097)	No (646A.097)

Pennsylvania	Pa. Stat. Ann. § 1471 through § 1478, ¶ 7380	Yes (§ 1471)	Products only (§ 1471)	Any (§ 1471)	Within 14 days of termination for commissions due at time of termination, and within 14 days of contractual due date for commissions becoming due after termination (§ 1473)	Commissions due plus exemplary damages not to exceed 2 times the commission due (§ 1475)	Yes Principal to recover fees if suit was frivolous (§ 1475)	No (§ 1476)
Rhode Island		N/A	N/A	N/A	As specified by agreement and governed by the common law	Compensatory damages, including lost profits, available. No punitive damages available for breach of contract. (Common Law)	Attorneys' fees awarded when court finds that losing party raised no genuine issue of material fact or law, or if court renders default judgment (R.I. Gen. Laws 1956 § 9-1-45)	Not specified by statute; no applicable case law
South Carolina	S.C. Code Ann. § 39-65-10 through § 39-65-80, ¶ 7400	Yes (39-65-10)	Products only (39-65-10)	Any (39-65-50)	As specified in the contract (39-65-20)	All amounts due, plus punitive damages not to exceed 3 times the commissions due (39-65-30)	Statute permits recovery of reasonable attorney's fees <i>only</i> and omits court costs. (39-65-30)	No (39-65-70)

(Continued)

<i>State</i>	<i>Citation</i>	<i>Applies to Wholesale Orders Only?</i>	<i>Applies Only to the Sales of Products, Not Services?</i>	<i>Applies to Any Principal or Only Out-of-State Principals?</i>	<i>Time Required for Last Payment After Termination of Contract?</i>	<i>Damage Remedy?</i>	<i>Recovery of Attorneys' Fees & Court Costs?</i>	<i>Waiver Allowed?</i>
South Dakota		N/A	N/A	N/A	As specified by agreement and governed by the common law	Damages must be reasonable certain. Punitive damages only available when independent tort is committed. (Common Law)	No common law or statutory recovery of attorneys' fees for breach of contract claims	Not specified by statute; no applicable case law
Tennessee	Tenn. Code Ann. § 47-50-114, ¶ 7420	Yes (47-50-114)	Products only (47-50-114)	Any (47-50-114)	Within 14 days of termination for commissions due at time of termination. For commissions becoming due after termination, within 14 days after they become due. If no written contract, all commissions are due within 14 days. (47-50-114)	Commissions due. If bad faith, exemplary damages up to 3 times the amount of commissions due (47-50-114)	Yes Attorneys' fees and court costs are only allowed if the principal's non-payment was in bad faith. Sales Rep liable for attorneys' fees if court determines suit was frivolous. (47-50-114)	No (47-50-114)
Texas	Tex. Bus. & Com. Code Ann. § 54-001 through § 54-006, ¶ 7430	Yes (54-001)	Products only (54-001)	Any (54-005)	As specified in written contract. All commissions due within 30 "working"	3 times the commissions due (54-004)	Yes (54-004)	No (54-006)

Utah	Utah Code Ann. § 34-44-101 through Utah Code Ann. § 34-44-302	Yes (34-44-102)	Products and Services (34-44-102)	Any (34-44-103)	days of termination if contract is not in writing (54.003) Within 30 days of termination for commissions due at time of termination, and within 14 days of contractual due date for commissions becoming due after termination (34-44-202)	3 times the commission due (34-44-301)	Yes (34-44-301)	No (34-44-104)
Vermont	No applicable statute	N/A	N/A	N/A	As specified by agreement and governed by the common law	Direct damages flow naturally from the breach itself. Special/ consequential damages must be foreseeable. Punitive damages only available when breach has character of willful tort. (Common Law)	No common law or statutory recovery of attorneys' fees for breach of contract claims	Not specified by statute; no applicable case law

(Continued)

<i>State</i>	<i>Citation</i>	<i>Applies to Wholesale Orders Only?</i>	<i>Applies Only to the Sales of Products, Not Services?</i>	<i>Applies to Any Principal or Only Out-of-State Principals?</i>	<i>Time Required for Last Payment After Termination of Contract?</i>	<i>Damage Remedy?</i>	<i>Recovery of Attorneys' Fees & Court Costs?</i>	<i>Waiver Allowed?</i>
Virginia	Va. Code Ann. § 59.1-455 through § 59.1-459, ¶ 7460	Yes (59.1-455)	Products only (59.1-455)	Any (59.1-455)	As specified in contract, but not to exceed 30 days after termination, or for orders processed after termination, 30 days from shipment (59.1-457)	Earned commission and other earned/payable compensation (59.1-457)	Not specified by statute; no applicable case law	No (59.1-458)
Washington	Wash. Rev. Code § 49.48.150 through 49.48.190, ¶ 7470	Yes (49.48.150)	Products only (49.48.150)	Any (49.48.180)	Within 30 days after receipt of payment by the principal for products/goods sold by sales representative (or earlier, if by contract) (49.48.160)	Not specified by statute; no applicable case law	Not specified by statute; no applicable case law	No (49.48.190)
West Virginia	No applicable statute	N/A	N/A	N/A	As specified by agreement and governed by the common law	Compensatory damages recoverable when naturally arising from breach, or when damages were contemplated by parties during agreement. Lost profits are recoverable.	No common law or statutory recovery of attorneys' fees for breach of contract claims	Not specified by statute; no applicable case law

Wisconsin	Wis. Stats. § 134.93, ¶ 7490	Yes (134.93)	Products only (134.93)	Any (134.93)	All commissions due at time of termination, cancellation, or nonrenewal of the contract (134.93)	Commissions due plus exemplary damages of not more than 2 times the amount of commissions due (134.93)	Yes (134.93)	Not specified by statute; no applicable case law			
Wyoming	No applicable statute	N/A	N/A	N/A	As specified by agreement and governed by the common law	Compensatory damages, as well as incidental damages, are available when foreseeable. Punitive damages are not available for breach of contract. (Common Law)	No common law or statutory recovery of attorneys' fees for breach of contract claims	Not specified by statute; no applicable case law			

(Continued)

<i>State</i>	<i>Citation</i>	<i>Applies to Wholesale Orders Only?</i>	<i>Applies Only to the Sales of Products, Not Services?</i>	<i>Applies to Any Principal or Only Out-of-State Principals?</i>	<i>Time Required for Last Payment After Termination of Contract?</i>	<i>Damage Remedy?</i>	<i>Recovery of Attorneys' Fees & Court Costs?</i>	<i>Waiver Allowed?</i>
Puerto Rico	P.R. Laws Ann. Tit. 10, § 279 through § 279g, ¶ 7520	No (§ 279)	Products and Services (§ 279)	Any (§ 279)	Not specified by statute; no applicable case law	Not specified If terminating without "just cause", sales representative shall be compensated for either (A) the extent of damages, to be determined by (i) actual value of investments and expenses, (ii) good will attributable to sales rep, (iii) amount of benefit obtained from sales during previous 5 years; or (B) 5% of total sales. (§ 279c)	Not specified by statute; no applicable case law	No (§ 279g)

APPENDIX C:
General Summary of U.S. State Business Opportunity Laws

State	State Business Opportunity Law	Citation
Alaska	Sale of Business Opportunities Law	AK. STAT. § 45.66.010 <i>et seq.</i>
California	California's Seller Assisted Marketing Plan Act	CAL. CIV. CODE § 1812.200 <i>et seq.</i>
Connecticut	Business Opportunity Investment Act	CONN. GEN. STAT. § 36B-60 <i>et seq.</i>
Florida	Sale of Business Opportunities Act	Fla. Stat. § 559.80 <i>et seq.</i>
Georgia	Sale of Business Opportunities Act	O.C.G.A. § 10-1-410 <i>et seq.</i>
Illinois	Business Opportunity Sales Law	815 ILCS 602/5-1 <i>et seq.</i>
Indiana	Business Opportunity Transactions	IND. CODE § 24-5-8-1 <i>et seq.</i>
Iowa	Business Opportunity Promotions	IOWA CODE § 551A.1 <i>et seq.</i>
Kentucky	Sale of Business Opportunities	KY. REV. STAT. § 367.801 <i>et seq.</i>
Louisiana	Business Opportunity Sellers and Agents	LA. REV. STAT. § 51:1821 <i>et seq.</i>
Maine	Regulations of the Sale of Business Opportunities	ME. REV. STAT. tit. 32 § 4691 <i>et seq.</i>
Maryland	Business Opportunity Sales Act	MD. CODE ANN., BUS. REG. § 14-101 <i>et seq.</i>
Michigan	Michigan Consumer Protection Act	MICH. COMP. LAWS § 445.902 <i>et seq.</i>
Minnesota	Treated as a "franchise" under the Franchise Law	MINN. STAT. § 80C.01 <i>et seq.</i>
Nebraska	Seller Assisted-Marketing Plan Act	NEB. REV. STAT. § 59-1701.01 <i>et seq.</i>
New Hampshire	Distributorship Disclosure Act	N.H. REV. STAT. § 358-E:1 <i>et seq.</i>
North Carolina	Business Opportunity Sales Law	N.C. GEN. STAT. § 66-94 <i>et seq.</i>
Ohio	Business Opportunity Plans	OHIO REV. CODE § 1334.01 <i>et seq.</i>
Oklahoma	Business Opportunity Sales Act	OKLA. STAT., tit. 71, § 801 <i>et seq.</i>
South Carolina	Business Opportunity Sales Act	S.C. CODE § 39-57-10 <i>et seq.</i>
South Dakota	Business Opportunities Act	S.D. CODIFIED LAWS § 37-25A-1 <i>et seq.</i>
Texas	Business Opportunity Act	TEX. BUS. & COM. CODE § 51.001 <i>et seq.</i>
Utah	Business Opportunity Disclosure Act	UTAH CODE § 13-15-1 <i>et seq.</i>
Virginia	Business Opportunity Sales Act	VA. CODE ANN. § 59.1-262 <i>et seq.</i>
Washington	Business Opportunity Fraud Act	WASH. REV. CODE § 19.110.010 <i>et seq.</i>

