

# Marketing, Distribution and Franchising

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*Pillsbury has extensive experience with all forms of marketing and distribution—including dealer and distributor networks, franchise systems, sales agent, direct sales and the Internet—in a variety of industries. That means our lawyers understand the legal issues relevant to clients' businesses and how their businesses work.*

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Our lawyers have a proven ability to help clients achieve their business goals and minimize their legal costs through expert counseling and effective management of complex litigation and transactions. Our range of services in the marketing and distribution areas includes:

- Antitrust and unfair competition counseling
- Marketing, distribution and franchise agreements
- Dealer and distributor programs
- Franchise and counseling compliance
- Advertising, promotional programs and intellectual property counseling
- E-commerce and licensing
- Purchase and sale of businesses engaged in marketing and distribution
- Litigation and dispute resolution

## Our Franchising Practice

Franchise systems can involve all of the above disciplines but they also involve the specific federal and state franchise laws that developed in post-war America and have spread abroad.

We have advised clients on the application of franchise laws to their marketing and distribution agreements. Our work includes helping clients structure their arrangements to avoid triggering franchise laws, as well as preparing franchise registration and disclosure documents for clients when compliance is required. We also draft franchise agreements and provide ongoing advice on how franchise laws regulate relationships between franchisors and franchisees (including the termination and nonrenewal of those relationships).

Our team approach combines business lawyers with litigation attorneys who have extensive experience helping our clients defend claims by franchisees, and prosecute claims against franchisees.

Our franchise law practice reflects Pillsbury's substantial investment in the recruitment of lawyers with distinguished credentials and a strong focus on client service training. Our lawyers pride themselves on adding value to our clients' businesses. To do so, we work closely with in-house counsel to continuously improve our levels of service and reduce costs.

### Representative Franchise Matters

- Primary franchise counsel for a major U.S. oil company, responsible for preparing its franchise agreements and Uniform Franchise Offering Circular for its service station dealers throughout the country, and related state franchise registrations.
- Defended an ice cream manufacturer in cases of alleged fraud in the sale of its retail franchises.
- Handled sale of two oil companies' marketing business in 10 Northeastern states, including over 500 service stations leased to franchise dealers.
- Primary counsel for a U.S. oil company in defending and prosecuting nationwide franchise termination cases under the federal Petroleum Marketing Practices Act.
- Prepared Uniform Franchise Offering Circular for a cell phone company's wireless telecommunications services.
- Represented a garden products retailer in a nationwide distributor reduction program.
- Franchise counseling for several restaurant chain operators.
- Prepared franchise agreements for several take-out restaurant chains.
- Selected by a national burger chain as its outside counsel for franchise matters in the western United States.
- Advice and litigation representation for an automobile association with regard to its network of towing and emergency road service providers.
- Ongoing representation of a U.S. oil company in its alliance with a national burger chain for co-brand retail outlets combining convenience-store service stations and quick-service restaurants.
- Ongoing representation of a U.S. oil company in its alliance with a national convenience store chain for co-brand retail outlets combining the stores with gasoline outlets.
- Prepared and registered Uniform Franchise Offering Circular for a service station dealer, to support its acquisition of a major U.S. oil company's refining and marketing business in California.
- Prepared franchise agreements for several car care outlets.
- Franchise law counseling for high-tech industry clients, including software and hardware manufacturers.
- Provided franchise counseling to several automobile manufacturers.
- Assisted multistate grocery store chain in restructuring its arrangements with store operators to avoid application of franchise laws.
- Represented a major U.S. oil company in litigation challenging the Federal Trade Commission's Franchise Rule, which resulted in the current exemption from the FTC Franchise Rule for branded motor fuel franchises covered by the federal Petroleum Marketing Practices Act.

### Overview of U.S. Franchise Laws

Numerous federal and state franchise laws apply to a wide range of product and service distribution and license arrangements. Most franchise laws define "franchise" broadly, and cast wider nets than are often realized.

There are two broad categories of franchise laws:

- **Franchise Disclosure Laws.** These laws are modeled on securities laws and forbid misrepresentation in selling franchises, require presale disclosure of information to prospective franchisees and, in many cases, also require registration of the franchise offering with state authorities.
- **Franchise Relationship Laws.** These laws regulate certain aspects of the franchise relationship once formed, particularly the franchisor's right to terminate or fail to renew the franchise relationship. They may also prohibit unfair or discriminatory dealings with franchisees, unreasonable restrictions on the transfer of a franchise, interference with the free association of franchisees, and other franchisor conduct thought to be abusive.

The Federal Trade Commission's Trade Regulation Rule on Franchising (16 CFR Part 436) is a franchise disclosure law applicable in all 50 states. It does not require registration. Numerous states also have franchise disclosure laws, most of which require registration. The FTC Franchise Rule does not preempt these state laws; however, compliance with them generally will also satisfy the FTC Franchise Rule's requirements. Some of the state franchise disclosure laws also contain franchise relationship provisions and a number of other state laws deal separately with such issues.

Generally speaking, three basic elements must be present for an agreement to qualify as a franchise under these laws:

- **Trademark.** The franchisee's business must be substantially associated with the franchisor's trademark, advertising, or other commercial symbol.
- **Required Payment (Franchise Fee).** The franchisee must be required to make some payment to the franchisor other than for resale merchandise sold at a bona fide wholesale price. The required payment or franchise fee element may be satisfied by payments other than the sort of upfront or recurring royalties typically considered a franchise fee. Thus, for example, required payments for advertising assistance, promotional materials or training will usually satisfy this element.
- **Significant Assistance or Control—Marketing Plan or System—Community of Interest.** The franchisor must exert "significant control" or provide "significant assistance" in regard to the franchisee's "method of operation" (FTC Franchise Rule), or the franchisee must do business under a marketing plan or system prescribed in substantial part by the franchisor (e.g., California Franchise Investment Law), or there must be a "community of interest" between the franchisor and franchisee in the franchise business (e.g., Hawaii Franchise Investment Law).

These franchise elements are imprecise and have not always been interpreted the same way under the various laws that use them. They tend to be liberally construed by franchise enforcement agencies and courts. For example, any of the following may be sufficient to satisfy the FTC Franchise Rule's significant assistance or control requirement: furnishing management, marketing or personnel advice; formal sales, repair or business training programs; restrictions on customers; location or sales area restrictions; site design or appearance requirements and promotional campaigns requiring franchisee participation or financial contributions.

The franchise laws recognize exemptions for certain types of arrangements which would otherwise qualify as franchises. For example, the FTC Franchise Rule and a number of state laws exempt "fractional franchises," where the sales arising from a franchise relationship represent no more than 20 percent of the sales of the franchisee's total business.

Violation of the FTC Franchise Rule can subject franchisors to civil penalties of \$10,000 per day. State franchise disclosure laws typically make willful violations a crime punishable by fines and imprisonment and some also provide for civil penalties. The state laws also authorize private enforcement actions in which rescission, damages (sometimes trebled) and attorneys' fees are usually available to prevailing franchisees.

There are also a number of industry-specific franchise laws at both the federal and state level. These laws particularly cover the following groups: automobile dealers, motor fuel dealers and distributors, farm machinery dealers and alcoholic beverage distributors.

Finally, many states have enacted business opportunity and seller-assisted marketing plan laws, which essentially are a species of franchise law. Although the typical purpose of these laws is to regulate the sale of small-scale business opportunities (such as vending machine routes and work-at-home programs) to unsophisticated individuals with limited business experience, the laws are loosely written and may cover a wide variety of distribution and license arrangements. However, state business opportunity and seller-assisted marketing plan laws generally exempt franchises if the franchisor has complied with applicable federal or state franchise laws.

### Litigation and Dispute Resolution

Our attorneys have many years of experience successfully handling marketing and distribution cases for clients in virtually every economic sector. Our litigation expertise in this area covers a wide range of matters, including:

- Franchise termination
- Price discrimination
- Price-fixing, conspiracy and monopolization
- Exclusive dealing and tying arrangements
- Below cost sales/predatory pricing
- Unfair competition and trade practices
- Misrepresentation/false advertising
- Trademark and trade dress infringement
- Domain name disputes

Our lawyers appear regularly in federal and state trial and appellate courts, arbitration and mediation proceedings, and matters before the Federal Trade Commission, the U.S. Patent and Trademark Office, International Trade Commission and other government agencies. We also have extensive experience prosecuting and defending challenges to advertising before the National Advertising Division of the Council of Better Business Bureaus.

Our attorneys have handled class actions of all kinds, as well as numerous cases involving large groups of dealers and distributors, franchisees, and their trade associations. We follow a multidisciplinary approach in which litigation attorneys work in teams with business lawyers who have in-depth knowledge of the client's business and the legal framework in which the client operates.

### About Pillsbury

Pillsbury Winthrop Shaw Pittman LLP is a leading international law firm with offices around the world and a particular focus on the energy & natural resources, financial services, real estate & construction, and technology sectors. Recognized by *Financial Times* as one of the most innovative law firms, Pillsbury and its lawyers are highly regarded for their forward-thinking approach, their enthusiasm for collaborating across disciplines and their unsurpassed commercial awareness.

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