Once at a presentation about the “accidental franchise,” one of the editors of this book was asked by a disappointed audience member when the presenters would get to the part about how to avoid franchise laws. The question was a bit surprising since the setting was the annual conference of the ABA Forum on Franchising. The answer was then and still remains that there are no great tricks to how avoid franchise laws. It is not supposed to be easy. The state and federal franchise laws are consumer protection laws intended to protect from fraud and deceit.1 Thus, the statutory definitions of what constitutes a franchise are often broad, trying to catch many different models and arrangements. States are active in the enforcement of their franchise laws both by requiring registration and by having franchise examiners focused on exposing wrongdoing. And so, just like the presentation referenced above was not about how to avoid franchise laws, neither is this book.

Instead, this book explores a limited facet of franchise laws that may play a small or big role in the franchise program of a franchisor—the type of franchises that legislators have determined do not require the same level of oversight as other franchises may. Just like there seems to be agreement among many state and federal legislators that franchising

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1. According to Keith B. Anderson, Fed. Trade Comm’n, Consumer Fraud in the United States, 2011: The Third FTC Survey (April 2013), available at www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-2011-third-ftc-survey/130419fraudsurvey_0.pdf, in 2011, 25.6 million people in the United States were victims of one or more frauds covered by the FTC survey on which the report was based. The only survey question relating to franchising also covered business opportunities.
should be regulated, there is also agreement that there are certain arrangements that, while they fall into the general franchise definition, are unlikely to be fraudulent or otherwise do not present a significant risk to consumers and do not need to be regulated. Where a franchisor, franchisee, or franchise model falls into one of those low-risk categories, it is an unnecessary burden on the franchisor to require disclosure and state registration.

Unfortunately, just like state and federal legislators apparently cannot agree on one franchise law that applies throughout the United States, neither can they agree on what circumstances warrant an exemption from the regular disclosure and registration requirements. That is where this book comes in.

This book is a review, in a uniform format, of what exemptions are available under federal and state laws. The book is limited to franchise disclosure laws. It does not include a review of general franchise relationship laws and industry-specific franchise laws, and it does not review business opportunity laws. All of those laws may have a significant impact on a franchise system, and the reader is encouraged to look to other sources for more information about such laws.

Why Care About Exemptions

Given the inconsistent and varied nature of franchise exemptions in different statutes, why would a franchisor even bother looking for exemptions? The reasons are likely as varied as the franchisors and franchise programs that take advantage of the exemptions. For some, it can be a general strategy since they want to avoid the rigmarole of preparing and updating an FDD. For others, it may be that they are just starting to franchise and want to see if franchising is the right

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2. Franchisors frequently rely on franchise-centric exemptions from state business opportunity laws. Such exemptions may no longer be available when a franchisor is relying on an exemption from state business laws. For example, in Indiana, a fractional franchise is excluded from the definition of a franchise under the state franchise law. Ind. Code § 23-2-2.5-1(a). Thus, the franchisor relying on that exemption will have to look for another exemption from the Indiana business opportunity statute than the exemption franchisors typically rely on, which specifically refers to an arrangement defined as a franchise under the state’s franchise statute. Id. § 24-5-8-1. In other states, an exemption from a state’s business opportunity statute may depend on the preparation of an FDD, which may not be required if a franchisor relies on state and federal franchise law exemptions.

3. The Business Franchise Guide (CCH) is an excellent resource for statutes and regulations, including industry-specific laws and business opportunity laws. Also, many ABA publications may be helpful, including, for example, Beata Krakus & Alexander G. Tuneski, *Caught in the Web of Federal and State Business Opportunity Laws: Managing and Avoiding the Entanglement of Regulations*, presented at the ABA Annual Forum on Franchising, Orlando 2013; and Dennis R. LaFiura et al., *Comparison of the Trilogy: Common Law Fraud, Franchise Investment Laws and State Little FTC Laws*, presented at the ABA Annual Forum on Franchising, Baltimore 2011.
approach to grow their business before investing time and money in preparing an FDD and spending money and time on registration. In other instances, it may be a way for an established franchisor who hasn’t registered in all states to be able to offer and sell quickly to a prospective franchisee in a state where the franchisor had not already registered. And in other instances, there may be specific aspects of franchise laws, such as financial performance restrictions, that franchisors would like to avoid. Whatever the reason, the franchisor who wants to avail itself of exemptions in connection with any offer or sale of a franchise must carefully review both federal and applicable state laws and regulations. The franchisor must also have the strength to walk away from a deal where an exemption is not available (assuming that it does not want to comply with the regular disclosure and registration requirements).

How to Use This Book

As already heavily hinted to, unfortunately, there is much inconsistency among the available exemptions under the different franchise laws in the United States. While charts are available from different sources that give a general overview of what types of exemptions are available, until now, not one resource is devoted to a more in-depth review of franchise exemptions. This book attempts to remedy this. It consists of separate chapters reviewing federal exemptions and exemptions of each state that has a franchise disclosure statute. The chapters are structured the same way. In the beginning of the chapter, you will find the definition of what constitutes a “franchise” under the applicable statute or regulation. Next, the chapter reviews the availability of a list of common exemptions one by one. It may note that a particular exemption is not available in the state. Or if an exemption is available, the chapter will review in more detail what the criteria for the exemption are, what a franchisor must do to rely on an exemption, and whether it must be renewed. Toward the end of each chapter under the title “Other,” it addresses additional exemptions that are unusual enough not to warrant being commented on in each chapter. Practice tips are interspersed throughout the chapters. Depending on your

4. There are, of course, many articles and presentations that deal with specific types of exemptions or more generally review available exemptions, such as Anne Connelly et al., Go to the Head of the Line: How to Get Registered, Amended, Renewed or Exempted, presented at the ABA Annual Forum on Franchising, Baltimore 2011; Earsa Jackson & Karen B. Satterlee, Navigating the Exemption/Exclusion Maze under the Amended FTC Rule and State Laws, presented at the ABA Annual Forum on Franchising, Austin 2008; and, Robin Day Glenn & Mary Beth Trice, Scenic Tour of Exemptions and Exclusions to Franchise Registration Laws, presented at the ABA Annual Forum on Franchising, San Francisco 2001.
purpose in looking to this book, you may want to compare a particular type of exemption among different states or you may just focus on looking at exemptions available in a particular state. It is our hope that this book will make it easier for franchisors and their counsel to determine whether exemptions are available for their franchise programs.