

The Franchise Memorandum

| By Lathrop GPM

To: Our Franchise and Distribution Clients and Friends

From: Lathrop GPM's Franchise and Distribution Practice Group

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Welcome to *The Franchise Memorandum by Lathrop GPM*, formerly known as *The GPMemorandum*. Periodically, *The Franchise Memorandum* focuses on topics primarily of interest to companies that use distributors and dealers rather than manage a business format franchise system. The distribution-related topics in this issue include arbitration, state franchise laws, and fraud/misrepresentation.

Given the widespread and evolving impact of the COVID-19 pandemic, this issue also includes current developments and resources related to COVID-19 in addition to distribution topics.

COVID-19 Pandemic

Franchise Registration States Make Accommodations to Filing Deadlines Because of the COVID-19 Pandemic

Most franchise registration states (including the exemption notice states of Florida and Utah) have adopted, formally or informally, COVID-19 accommodations relating to franchise and exemption filings, and the offer and sale of franchises. Lathrop GPM's Franchise and Distribution Group has prepared the chart below to summarize the various accommodations. In preparing this chart, our group reached out to the franchise registration states for input and reviewed all of the notices, orders, and releases the states have issued to date. States continue to update and add to their franchise-related accommodations, and our group will monitor these changing accommodations and update our chart accordingly. You can access the most-current version of our chart, which includes additional content, [here](#).

The accommodations described in our chart only relate to the franchise registration states and, at their core, allow franchisors to submit franchise and exemption renewal filings at a later date without penalty. In a few of the franchise registration states, including Illinois, Maryland, and New York, a franchisor is allowed under limited circumstances to offer (but not sell) franchises during the extension period. However, as a general rule, once a franchisor's original expiration date has occurred, the franchisor should cease offering and selling franchises in that state until it obtains an effective registration of its updated FDD in that state. As for the "non-registration states," unless the FTC decides to modify its requirement that franchisors update their FDDs within 120 days of their fiscal year end, franchisors will not be able to offer and sell franchises in those states after the 120-day period without an updated FDD.

(Current as of April 9, 2020)

State	COVID-19 Notice, Order or Release	Filing Type (Electronic or Hard Copy)	Comments
California	Notice to Securities and Franchise Filers (3/22/2020) CA Notice	Electronic or Hard Copy	The state did not extend the deadline for submitting renewals nor grant an extension for existing registrations. However, the state is waiving the additional \$225 filing fee for franchise renewals filed after the renewal deadline but by June 30, 2020, strongly urging franchisors to submit electronic renewal filings, and allowing the use of documents signed electronically using DocuSign, without notarization, if submitted as part of an electronic filing.
Florida	Emergency Order 2020-02 (3/26/2020) FL Order	Electronic (but initial filings must be Hard Copy)	The state tolled renewal deadlines that occur in the months of March or April, 2020 for a period of 45 days from the original renewal deadline, and no late fees will be assessed.
Hawaii	Release: Franchise Filings Deadline Extended (3/29/2020) HI Release	Electronic or Hard Copy	The state extended the deadline for submitting franchise renewal filings to April 30, 2020. Franchisors are encouraged to file online using the state's new portal to facilitate timely review. Based on discussions with the state, it is our understanding that the extended deadline does not alter the requirement that a franchisor must include in its FDD financial statements that are current within 90 days of the date of filing.
Illinois	Notice to Franchisors (4/06/2020) IL Notice	Hard Copy	The state granted to franchisors with franchise or exemption registrations that expire between April 1, 2020 and June 1, 2020, an automatic 60-day extension from their anniversary date to submit their renewal filing without penalty.
Indiana	Administrative Order (4/07/2020) IN Order	Electronic	The state automatically extended to June 30, 2020, the effective period of any existing franchise registration that was set to expire between March 16, 2020, and May 31, 2020. Any renewal must be filed prior to the renewal deadline.
Maryland	Order: Extension of Franchise Registration (3/17/2020) MD Order	Hard Copy	The state granted an automatic extension of the effective dates of franchise registrations and exemptions of effective franchise offerings in the state for a time period equal to 30 days after the date the state's Governor declares the end of the "Coronavirus State of Emergency." During the Coronavirus State of Emergency, a franchisor may offer (but not sell) franchises using an updated FDD under certain limited circumstances.
Michigan	None	Hard Copy	Because renewal filings consist of the submission of an unsigned notice of intent and filing fee and no FDD, there is no need for the state to make an accommodation.
Minnesota	Regulatory Guidance 20-10 (3/30/2020) MN Guidance	Electronic or Hard Copy	The state extended to June 30, 2020, the deadline for franchisors to submit renewal filings that were due by April 30, 2020. Franchisors are strongly encouraged to file online. The renewal fee and a hard copy of the online submission confirmation page must still be mailed to the Minnesota Department of Commerce.

State	COVID-19 Notice, Order or Release	Filing Type (Electronic or Hard Copy)	Comments
New York	Notice of Coronavirus Conditional Relief – Franchise Filings (3/24/2020) NY Notice	Hard Copy	The state granted an extension to existing franchise registrations and exemptions that would have expired between March 1, 2020 and April 30, 2020 (the “Relief Period”). The extension is to a date 90 days from the end of the Relief Period. A franchisor may continue to use its old FDD to offer (but not sell) franchises during the Relief Period. However, once a franchisor submits a renewal or amendment filing the franchisor must cease using its old FDD and may only offer (but not sell) franchises under its updated FDD until the state reviews its renewal or amendment application and notifies the franchisor that its updated FDD has been accepted. A franchisor filing an initial franchise registration application may not offer or sell franchises until the state reviews the application and notifies the franchisor that its FDD has been accepted. All filings are required to be submitted by email in addition to the paper and/or CD filings.
North Dakota	Emergency Notice No. 2020-02 (3/30/2020) ND Notice	Hard Copy	The state granted to franchisors registered with the state an extension of up to 30 days to perform any of their registration filing requirements under the state’s franchise law and related regulations. Franchisors are allowed to submit renewals via email (one per email), with the file number and franchisor name in the subject line of the email. Franchisors must mail the filing fee to the state along with a copy of the filing cover letter.
Rhode Island	None	Electronic	Franchisors should notify state of late filings and consider paying renewal fees as close to the expiration date as possible. Indications are that late fees will not be charged for registrations due in March and April 2020.
South Dakota	None	Hard Copy	The state will not penalize franchisors if renewals are filed late.
Utah	None	Electronic	The state will not penalize franchisors if renewals are filed late.
Virginia	First Order (3/17/2020) VA Order Second Order (4/02/2020) VA Order	Hard Copy	In its first order, the state granted an automatic extension to franchise and exemption registrations that are due to expire while the “Judicial Emergency Declaration” is in effect. The registrations were extended for a period of 21 days or such other time period as may be subsequently ordered. In its follow-up extension orders, the state extended its previous extensions for the pendency of the Judicial Emergency Declaration or such other time period as may be subsequently ordered.
Washington	Notice Concerning Franchise Filing Requirements and Renewal Filing Fees (4/08/2020) WA Notice	Electronic	The state is allowing applicants to pay the \$100 renewal filing fee to complete an application for franchise registration for any offering that was previously registered and that expired, or that will expire, between March 1 and June 30, 2020, and keeping the \$100 exemption filing fee at \$100. Franchisors are reminded that all franchise filings must be submitted electronically, and notary requirements are being temporarily waived. Importantly, franchisors are not permitted to offer or sell franchises during a period in which their franchise registrations have lapsed.
Wisconsin	None	Electronic	Business as usual. It is worth noting that the initial and renewal filing fee in the state are the same.

Federal Trade Commission and Justice Department Issue Expedited Antitrust Procedure and Guidance for Coronavirus Collaborations

The FTC and the DOJ Antitrust Division issued a joint statement that details expedited antitrust procedures and provides guidance for collaborations of businesses working to protect the health and safety of the American people during the COVID-19 pandemic. The full text of the joint statement is available [here](#). The joint statement recognizes that health care facilities may need to work together to provide resources and services to assist patients, consumers, and communities affected by the COVID-19 pandemic, and that other businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies. Under the new procedure, the FTC and the DOJ will respond to COVID-19-related requests, and resolve those requests addressing public health and safety, within seven calendar days of receiving all information necessary to vet such proposals.

The new procedure allows any firm, individual, or group of firms or individuals to submit a proposal and receive a statement advising whether the proposed activity would be challenged by the FTC and the DOJ under antitrust laws. The applicant must submit a written description of the proposal, which includes the parties that would be involved in the effort or activity, and the contact information of a person from whom the agencies could obtain additional information. The expedited procedure is only for use for COVID-19 related public health efforts and may be invoked at the option of the requestor instead of using standard procedures for handling requests for advice. The joint statement lists several types of collaborative activities designed to improve the health and safety response to the pandemic that would likely be consistent with antitrust laws. The joint statement notes, however, that the FTC and DOJ will not hesitate to hold accountable businesses and individuals who try to use the COVID-19 pandemic to engage in antitrust violations or take advantage of the pandemic through other fraudulent or illegal schemes.

Other COVID-19 Resources for Franchisors and Distributors

Franchisors and distributors across the country are confronting a myriad of challenges and pressures related to the spread of COVID-19. Lathrop GPM has established a cross-disciplinary team to provide alerts, articles, and other resources to help clients navigate these uncertain times. Some of the following may be of particular interest to franchisors and distribution-based businesses:

Webinars:

- [Insurance Recovery 101 for Franchisors: Maximizing Your Coverage \(Including COVID-19 Related Losses\)](#) by Insurance Recovery Practice Group Leader Kim Winter, Insurance Recovery Partner Rick Kubler, and Franchise Partner Craig Miller
- [COVID-19 Webinar: The Employer's Perspective](#) by Megan Anderson, Neil Goldsmith, Mark Mathison, and Brian Woolley
- [What You Need to Know About the CARES Act](#) by Jeff Peterson, Andrew Hogenson, Daryn McBeth, and Sarah Duniway

COVID-19 Legal Updates:

- Employment Alert: [Employer Documentation Required to Support New Paid Leaves, and Related Tax Credits, Detailed by DOL and IRS](#) by Brian Woolley, Megan Anderson and Garrett Pratt
- Insurance Recovery Alert: [Will Business Interruption Losses From COVID-19 Be Covered By My Insurance?](#) by Kim Winter and Noah Nash
- E-Business Alert: [Using E-Commerce to Survive COVID-19](#) by Michael Cohen
- Litigation Alert: [COVID 19 – Restrictive Covenants and Trade Secret Protection During the “New Normal”](#) by Kate O’Hara Gasper and Jennifer Hannah
- Litigation Alert: [The Invisible Customer – What Owners Should Consider If a Customer Later Tests Positive for COVID-19](#) by Danielle Twait and Patricia Lehtinen Silva
- Food Alert: [FDA Eases Enforcement of Nutrition Labeling Rules for the Restaurant Industry](#) by Julia Dayton Klein
- CARES Act Update: [COVID-19 Federal Loan Assistance Programs](#) by Andrew Hogenson
- CARES Act Reference: [Overview of SBA Loan Programs Under the 2020 CARES Act](#)
- Insurance Recovery Blog Post: [Coverage for Coronavirus Claims](#) by Alexandra Roje in [The Road to Insurance Recovery](#)
- Franchise Update: [Franchisor’s Response to the Coronavirus Threat](#) by Michael Gray
- Essential Business Update: [Executive Orders Requiring Stay-At-Home/Shelter-In-Place With Exceptions for ‘Essential Businesses’](#) by Nicholas Anderson and David Morehouse
- Essential Business Reference: [State by State Table for Determining ‘Essential Businesses’ During Shelter-In-Place](#) by Nicholas Anderson and David Morehouse
- Technology Update: [Cybersecurity for a Remote Workforce](#) by Tedrick Housh and Michael Cohen

Lathrop GPM’s COVID-19 Response Team in the News:

- ["Franchise System Responses to the Coronavirus,"](#) International Franchise Association (IFA) article by Franchise Partner Michael Sturm
- ["Revisiting Franchise Agreements In Light Of COVID-19,"](#) Law360 article by Franchise Partner Michael Gray
- ["10 Suggestions for Franchise Systems on How They Can Respond to the Coronavirus Crisis,"](#) Global Franchise article by Franchise Partner Michael Sturm
- ["Restaurant Expert Q&A: COVID-19 Bigger than Great Recession,"](#) Food on Demand article featuring Franchise Partner Ryan Palmer

For additional updates and resources, visit the [Lathrop GPM COVID-19 Client Resource website](#)

Legislation and Rulemaking

Indiana Legislature Adopts Franchise Registration Amendment Requirements

On March 21, 2020, Indiana's governor signed into law HB 1049, which amends Indiana's franchise disclosure law to define changes requiring an amendment to franchise registrations and FDDs. Effective July 1, 2020, franchisors must file amendments to their FDD no later than 30 days after the occurrence of a material change in the information contained in the FDD. The statute enumerates various events that constitute a material change, including: (i) the termination, closing, failure to renew, or reacquisition of 10% of all franchises in a franchisor's system, or 10% of the franchisor's franchises located in Indiana; (ii) a change in control or other legal changes to the franchisor's entity; (iii) the introduction or discontinuance of a product or service that exceeds a specific threshold; (iv) a change in fees charged by the franchisor, or a significant change in the parties' obligations or rights; or (v) any other change designated as material by the State's commissioner. The statute does not specify whether franchisors must pay a fee to file a post-effective amendment.

The statute fails to sufficiently define or clarify various terms and phrases that it uses to describe a material change. For example, it does not explain what constitutes a "change in control," and how a franchisor should amend its FDD if there is no disclosure regarding control of the franchisor entity in the first place. Additionally, it is not clear if a franchisor needs to amend its FDD if the introduction or discontinuance of certain products or services only applies systemwide, or even if the changes impacts a limited number of franchisees. These are just a few of the many questions that will arise out of this statute, and without additional guidance, franchisors may unknowingly violate Indiana's franchise disclosure law. Regardless, in light of COVID-19 and the significant number of franchises that are required to close by government orders or the economic downturn, starting in July franchisors should be mindful of whether they have experienced a certain number of terminations or closures inside and outside of Indiana, which would trigger the franchisor's obligations under this statute.

Arbitration

Sixth Circuit Refuses to Compel Arbitration of Antitrust Class Action, Finding No Agreement to Arbitrate

A putative antitrust class action against a shock absorber manufacturer may proceed in federal court, the Sixth Circuit Court of Appeals recently held, affirming denial of the manufacturer's motion to compel arbitration. *In re: Auto. Parts Antitrust Litig.*, 951 F.3d 377 (6th Cir. 2020). This dispute arose after retailers of automotive parts brought antitrust claims against KYB Corporation and KYB Americas Corporation. KYB manufactures car parts and distributes them through its subsidiary KYB Americas, which contracts with a network of retailers who then resell the parts to individual consumers. After the retailers filed suit in federal court in Michigan, the defendants moved to compel arbitration. The district court denied the motion, concluding the parties did not form an agreement to arbitrate, and defendants appealed.

The agreements between the retailers and KYB Americas did not contain an arbitration provision. Nonetheless, the defendants argued that the retailers were required under their agreements to honor the terms and conditions of KYB's limited warranty, and the warranty required the arbitration of disputes with "original retail purchasers." However, the court held that the "original retail purchasers" referenced in the

warranty were the buyers of the parts from the retailers, not the retail sellers themselves. Thus, neither the retailer plaintiffs nor the manufacturer and distributor defendants had agreed to arbitrate any dispute between the retailers and the defendants, and the district court's decision was affirmed.

State Dealer Laws

Federal Court Allows to Proceed Dealer's Claims Against GM Under the Minnesota Vehicle Sale and Distribution Act

A federal court in Minnesota recently denied General Motors' motion to dismiss a lawsuit brought by one of its dealers, Lupient Chevrolet. *Lupient Chevrolet, Inc. v. General Motors LLC*, 2020 WL 335996 (D. Minn. Jan. 21, 2020). Lupient operates a Chevrolet motor vehicle dealership. Under the parties' dealership agreement, Lupient is required to maintain a certain level of sales performance, which is measured by comparing Lupient's sales to the sales opportunities within the geographical areas assigned to Lupient. The agreement also prohibits GM from unreasonably refusing to approve any change to Lupient's executive management team. In 2018, GM notified Lupient that its sales performance was unsatisfactory. Lupient sued, alleging GM violated the Minnesota Vehicle Sale and Distribution Act (MVSDA) and breached its implied covenant of good faith and fair dealing by improperly assigning geographical areas to Lupient that artificially depressed Lupient's measured sales performance, and by unreasonably denying Lupient's request to change its executive management team. In response, GM filed a motion to dismiss.

GM asserted a handful of arguments but none were successful. First, GM argued Lupient's claims were not ripe because Lupient had not yet suffered any damages. The court disagreed, holding damages need not be pled with specificity. Second, GM argued against the retroactive application of the MVSDA, but the MVSDA expressly provides that it applies retroactively. Third, GM argued Lupient failed to allege GM was not applying its performance standards uniformly, but the court held Lupient pled facts supporting the position that GM's application of its performance standard was not fair, reasonable, equitable, or based on accurate information in violation of the MVSDA. Fourth, GM argued Lupient's good faith and fair dealing claim was duplicative of its MVSDA claims, but the court noted such duplicative claims are permitted. Finally, GM argued Lupient's claim regarding the change in its executive team failed on the facts, but the court rejected GM's reliance on evidence outside of the pleadings at the motion to dismiss stage to demonstrate Lupient's allegations were false.

Fraud/Misrepresentation

California Federal Court Dismisses Dealer's Robinson-Patman Act and Unfair Competition Claims, Among Others, but Grants Leave to Amend Those Claims

After Ralph Lauren Corporation terminated a dealer of 14 years, Victoria Card, Card sued Ralph Lauren in California state court for, among other things, breach of contract, breach of the implied covenant of good faith and fair dealing, misrepresentation, intentional interference with economic advantage, unfair competition under California law, violation of the Robinson-Patman Act, and a RICO Act violation. The case was removed to federal court in California, and that court recently ruled on Ralph Lauren's motion to dismiss Card's third amended complaint. *Card v. Ralph Lauren Corp.*, 2020 WL 353464 (N.D. Cal. Jan. 21, 2020). Only Card's contract claims survived.

The court dismissed Card's Robinson-Patman Act claim because Card had failed to plead facts sufficient to support a plausible inference that Ralph Lauren had sold the same or similar products to her competitors at lower prices than she was charged. Although Card identified a competitor that she claimed was allowed to sell product at greater discounted rates than she was allowed to sell, the Court noted that the complaint failed to identify any specific products that Ralph Lauren actually sold to that competitor that was also sold to Card. However, because Card plausibly alleged both an injury and a harm to competition from the alleged price discrimination, the court noted it would permit Card to amend her complaint to plead specific facts related to the products that were allegedly sold to Card and the other dealer at different prices. The court dismissed Card's unfair competition claim under Cal. Bus. and Prof. Code Section 17200 because it was premised on claims the court had already dismissed, including the misrepresentation and Robinson-Patman Act claims, but again allowed Card to re-plead that claim to the extent it was premised on the Robinson-Patman Act. All of Card's other claims were dismissed without leave to amend in light of the multiple opportunities the court gave Card to cure her pleading deficiencies.

International

Global Franchise Regulations Update

The Global Franchise Regulation Update (GFRU) is a Lathrop GPM publication designed to highlight recent changes and proposed developments in franchise laws around the world. The GFRU is published three times a year based upon press reports and correspondence with franchise lawyers and other professionals. Recent updates include: International Franchisors Confront Changing Franchise Regulatory Environment in Belgium, the Netherlands, Thailand, and Saudi Arabia; Malaysian Court Ruling Places International Franchisors at Risk.

The most recent issue is available [here](#), and on our website: <https://www.lathropgpm.com/services-practices-International-Development.html>. If you would like to receive the GFRU as soon as it is issued, please contact Kimberly.Bradshaw@lathropgpm.com to be added to our distribution list.

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For more information on our Franchise and Distribution practice and for recent back issues of this publication, visit the Franchise and Distribution Practice Group at <https://www.lathropgpm.com/services-practices-Franchise-Distribution.html>.

On January 1, 2020, Gray Plant Mooty and Lathrop Gage combined to become Lathrop GPM LLP.

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