



# Global Franchise Regulation Update

Regulatory Developments and Proposals since 2020

By: Carl E. Zwisler and Elizabeth S. Dillon

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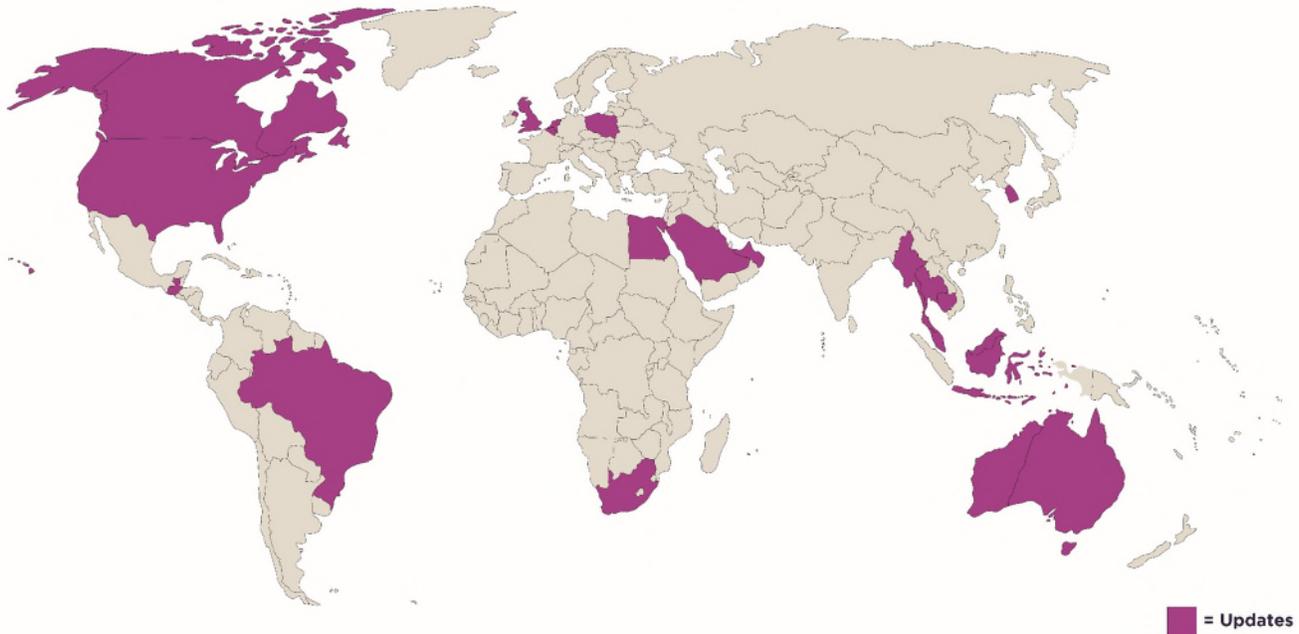
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## 2022 Regulatory Development and Proposals Map\*



\* Does not include pandemic-related regulations.

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*A 30-minute webinar summarizing the most recent regulatory and judicial developments in international franchising was covered in our [Global Franchise Regulation Update Webinar](#) on March 23. Click on the above link to watch a recording of the webinar and access a copy of our PowerPoint.*

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## European Union

### European Commission

#### **New Standard Contract Language for Data Transfers Facilitates Lawful Personal Data Transfers to/from EU and U.S. (Published June 4, 2021)**

In response to the EU Court of Justice Schrems II opinion, which declared that the former EU-US Privacy Shield did not adequately protect personal data, the European Commission has issued Standard Contract Clauses (SCCs) for Data Transfers which may be used to avoid GDPR violations and potential fines of up to 4% of a company's worldwide annual sales. The SCCs must be used, without modification, in agreements relating to sharing personal data of EU residents. Companies have until December 22, 2022, to adopt the SCCs.

- In the Schrems II opinion issued by EU Court of Justice on July 16, 2020, the court ruled that the EU-U.S. Privacy shield does not adequately protect personal data, in part, because any of it is accessible by

the U.S. National Security Agency. EU and U.S. Department of Commerce are attempting to negotiate a resolution.

- Fines and penalties of up to the greater of €20 million or 4% of a company's global annual sales are permitted for violations.
- Class action lawsuits and other judicial relief is also available.

## EU Vertical Block Exemption Regulation (VBER) Evaluation

### EU Vertical Block Exemption Regulation Amendment (Final Version to Be Published May 2022; Effective June 2022)

Following the evaluation of public comments, the European Commission has proposed draft revisions to the VBER.

- Notable for the franchising community, and anyone engaged in online sales in Europe, the proposal liberalizes some of the restrictions on how franchisees may engage in ecommerce. Most of the pre-existing Block Exemption will remain in place, including restrictions on price fixing and noncompete agreements.
- Issues covered by the proposal include territorial restraints, prohibitions on online selling, restrictions on selling via a third-party platforms or marketplaces, prohibitions on the use of price comparison websites, restrictions on online advertising and dual-pricing provisions affecting online selling.
- All franchisors doing business in the EU should review the Proposal to determine how it may affect their online sales programs.
- EU competition law prohibits contracts that restrict competition within the EU under Article 101 of the Treaty on the Functioning of the European Union, and this prohibition applies to franchise agreements. Franchisors can avoid Article 101 by drafting their franchise agreements so that they qualify for the Vertical Agreements Block Exemption (Block Exemption), which is set to expire on May 31, 2022.

## Australia

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### Unfair Contract Terms Law Amendments Would Expand Law to Cover More Franchisees, Establish Severe Penalties for Violations and Make Businesses Subject to Standards Set in Litigation Involving Third Parties with Similar Contract Language. (Bill 2022, Introduced February 9, 2022.)

In 2016 Australia Adopted the Unfair Contract Terms Law which rendered certain terms in form consumer and small business contracts void and unenforceable. The legislation, as amended, would apply to form agreements signed by consumers and franchises with 100 or fewer employees and less than A\$10 million in annual sales.

Bill 2022 allows courts to impose the same penalties for using unfair contract terms that exist for violations of the Franchising Code of Conduct described below.

The Amendments explain that the fact that a party can negotiate "minor or insubstantial" changes to a contract does not detract from it being considered a "form contract," and therefore, subject to the law.

If a court finds a term in a form contract to be unfair, the term or those substantially like it will be presumptively unfair "if used by anyone in the same industry."

## Australia ACCC Requires Franchisors to Disclose “Key Facts Sheet” (Effective July 1, 2021)

After expanding disclosures, prohibitions, and remedies available under the Franchising Code of Conduct, Australia has become the first country to also require franchisors to summarize certain portions of Australian FDDs in a “Key Facts Sheet.” (Similar concepts have been proposed for inclusion in a revised U.S. FTC Franchise Disclosure Rule.)

The Key Facts Sheet must be provided to a prospective franchise purchaser at least 14 days before signing a binding agreement relating to a franchise or before making a nonrefundable payment to a franchisor.

The Key Facts Sheet is a “fill in the blanks” form prescribed by the ACCC which includes many “Yes-No” questions, allowing no opportunity for explanation or clarification of answers. This can make the answers misleading. <https://treasury.gov.au/sites/default/files/2021-08/Small-Business-Key-Fact-Sheet-Aug2021.pdf>

## Franchise Regulations Adopted (Effective July 1, 2021)

Following several years of hearings, comments and the evaluation of scores of proposed changes to the Australian Franchising Code of Conduct, the Australian Parliament has adopted far-reaching, and, in some cases, novel changes to the Franchising Code, which create unique challenges for franchisors.

### Cancellation rights

#### ○ Franchise Sales

- Unlike most franchise disclosure laws which give franchisees a 14-day (or longer) presale cooling-off period before a franchise agreement may be signed or money collected by the franchisor, in addition to its 14-day pre-sale cooling off period, the Code gives franchisees a 7-day post-signing cancellation right.

#### ○ Lease of Franchised Premises if Franchisor is Lessor

- If the franchisor or its affiliate will lease or sublease a location to the franchisee, if the lease terms were not disclosed before the franchise agreement was signed, the franchisee may cancel the lease and the franchise agreement until 14 days after receiving the final lease terms.

#### ○ Franchisees’ Transferees

- If a franchisee transfers its franchise to a third party, the transferee may cancel the transfer for up to 14 days after becoming a franchisee.

Exception: Not applicable after transferee assumes control of the seller’s franchised business.

#### ○ New Alternative Dispute Resolution (ADR) process.

- Either party may invoke mediation or conciliation under the Code’s procedures.
- Regardless of restrictions in franchise agreements, multiple franchisees may join in ADR.
- The Code’s new arbitration procedure may be selected by either party.
- The Code does not cut off right to litigate after the process has been followed.

#### ○ Franchisees may request the right to terminate agreements by sending a notice with reasons to their franchisors.

- Franchisors must reply with their position and reasons for disapproving a request.

- If a franchisee is unsatisfied with the franchisor's response, the Franchisee may send a follow up request with additional justifications.
- If a franchisor disagrees with the franchisee's proposal and explains its reasons, a franchisee may invoke the Code's ADR process.

### Significant Capital Expenditures

- o A franchisor may not require a franchisee to make a "significant capital expenditure" in a franchised business during the term of the franchise agreement unless the franchisor:
  - satisfies very challenging FDD disclosure requirements; or
  - gets consent of a majority of affected franchisees.

#### Exceptions:

- Expenditures required to comply with applicable law.
- Franchisees may agree to changes, even though not required to do so.

The only way to avoid the requirement to obtain consent of a majority of franchisees is to satisfy disclosure requirements and discuss the expenditure before signing, renewing or extending the franchise agreement with each affected franchisee.

- o Required FDD disclosures of expenditures must include:
  - the rationale, amount, timing and nature of the expenditure;
  - the anticipated outcomes and benefits of the expenditure; and
  - the expected risks associated with the expenditure.
- o The only "definition" of "significant capital expenditure" is this example:
  - Example: The information could include the type of any upgrades to facilities or premises, any planned changes to the corporate identity of the franchisor's brand and indicative costs for any building materials.
- o Franchisors must notify prospective franchisees to obtain advice from a lawyer, accountant or business consultant.
  - Franchisees must certify that they received the advice, or that they received the notice from the Franchisor and elected not to obtain the advice.

### Penalties

- o Penalties for Code violations are increased for franchisors and for individuals involved in violations:
  - Franchisor penalties may be the greater of:
    - A\$10 million,
    - 3 X the franchisor's benefit derived from the breach, or
    - 10% of the franchisor's turnover for the 12 months before the breach.
  - Individual penalties of up to A\$500,000.

## Belgium

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### Unfair Contract Terms and Abuse of Economic Power Acts (Effective June 1, and December 1, 2020)

- Abuse of power over the economic dependence of a company is a part of the B2B Relationships Act adopted by the Belgian Parliament in March 2019. Economic dependence can be created through distributorship or franchise agreements. For an abuse to be actionable, it must affect a significant part of the relevant Belgian market. It became effective June 1, 2020.
- Unfair contract terms in B2B agreements are now void and unenforceable, while the remainder of the agreements remain enforceable, if that is practical. Focused on the balance of rights and obligations of the parties, the law prescribes a “blacklist” and a “gray list” of “unfair terms.” Whereas the unfairness of terms on the gray list may be rebutted, terms on the blacklist are automatically null and void.
- Included on the blacklist is language granting a franchisor the unilateral right to interpret any clause of the agreement and a requirement that a franchisee waive any remedy it may otherwise have against a franchisor. The Unfair Contract Terms Law became effective December 1, 2020.

## Brazil

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### New Franchise Law (Published December 27, 2019; Effective March 26, 2020)

Amends existing franchise law:

- Clearly states that the franchisee/franchisor relationship is not a consumer relationship and is not an employment or joint employment relationship.
- Creates eight new categories of information that must be included in Franchise Offering Circulars (COF).
- Changes the waiting period, in most instances, between delivering the COF and when the franchisee may sign the franchise agreement or payment of fees to 10 days.
- Allows franchisors to lease or sublease the commercial space to franchisees and to charge rent that exceeds the amount paid by the franchisor to the landlord, if the parties agree to this in the COF and franchise agreement, and the rent does not impose an excessive burden on the franchisee.
- Requires franchise agreements that affect only Brazilian territory to be written in Portuguese. International agreements must either be drafted in or translated into Portuguese at the franchisor’s expense.
- Requires franchise agreements that affect only Brazilian territory to be governed by Brazilian law. The governing law of international agreements may be negotiated by the parties.
- Permits the use of arbitration as an alternative dispute resolution mechanism.
- Removes the requirement that franchise agreements be signed in the presence of two witnesses.

## Cambodia

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### Franchise Agreements Must be Registered with the Cambodian Ministry of Commerce (January 13, 2020)

- Beginning January 2020, franchise agreements must be recorded with the Cambodian Ministry of Commerce in order for the agreement to be enforceable against a franchisee or licensee.

- The parties must submit a notarized, fully-executed franchise or license agreement that includes the following finalized terms: (a) information about the parties, including the names, addresses and country of incorporation, (b) details about the marks, including the registration or application numbers, classification or marks, and any specifications about the marks, (c) whether the agreement is exclusive or non-exclusive and whether the license is a sublicense, (d) the term of the agreement, and (e) conditions on control of effectiveness and quality of goods or services. Additionally, a copy of the trademark registration or renewal must be filed with the franchise agreement and a copy of the business registration information.

## Canada

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### Quebec — Government Proposes Law Requiring Franchise and Other Form Contracts to Be Prepared in French (Proposed May 13, 2021; Referred for Study October 21, 2021)

- Amended Languages Law would require franchise agreements and renewal agreements to be written in French to be enforceable.
- It would no longer be sufficient for a franchisee to consent to the agreement being written in English.
- Following public hearings during September-October 2021, the bill was referred to the Committee on Culture and Education for study.

### Ontario Disclosure Laws Revised for Less Rigid Disclosure Requirements (Effective September 1, 2020)

- Ontario has amended the Arthur Wishart Act, Ontario's franchise disclosure law. The most notable changes include the following:
  - Permits franchisors to sign an agreement with a prospective franchisee before providing the prospective franchisee with an FDD if that agreement either (a) requires the prospect to keep the information confidential, (b) prohibits the prospect from using the franchisor's confidential information, or (c) designated a territory or specific location for the prospect.
  - Permits franchisors to accept a deposit from a prospective franchisee before providing the prospect with an FDD so long as the amount is fully refundable, does not exceed 20% of the initial franchise fee and does not exceed \$100,000, and is committed under an agreement that does not require the prospect sign a franchise agreement.
  - Requires franchisors to provide a statement of material change to prospective franchisees if a material change happens between providing the prospect with an FDD and signing a franchise agreement. The statement of material change must include two receipt pages that are signed by at least two officers or directors of the franchisor, where one of the receipt pages is for the franchisee to keep and one for the franchisor to receive once it's been signed.
  - Revises the fractional franchise exemption, large franchisor exemption, small investment exemption, and exemption of pre-sale disclosure to franchisor's officers and directors.
  - Expands the types of financial statements can be included in the FDD, including financial statements that were prepared in accordance with U.S. GAAP or IFRS standards, as well as standards set out in the CPA Canada Handbook – Accounting.

## Egypt

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### Proposed Franchise Regulation Is Being Redrafted (November 14, 2021)

- Following a hearing by a Congressional committee, a redrafted version of previously released franchise regulations, has been placed on hold while various stakeholders are consulted. As of January 30, 2020, the consultations had not yet been scheduled.
- The consensus of the Trade and Industry Committee at the hearing was that Egypt needs a franchise law.

### Revised Proposed Egyptian Franchise Law (Proposed January 2019)

- Introduced as part of a Regulatory Reform and Development activity initiative. Involves a unique comprehensive Regulatory Impact Assessment.
- Designed to “enhance the business environment through a better regulatory framework.”
- All franchises must be registered with the Minister of Trade and Industry (MOTI). Franchisors must submit essential data, but there is no standard for reviewing documents or data submitted for registration.
- Franchisors must notify both prospective franchisees and existing franchisees of possible changes in conditions that could adversely affect the franchisee’s business.
- Legislation is so ambiguous that knowing how to comply would be impossible.
- Post-term non-compete covenants may prohibit franchisees from “competing with the franchise,” but what that means is unclear.
- All disputes must be resolved through arbitration. Franchisors and franchisees could not pursue injunctions or other remedies in courts — anywhere.
- Despite concern about facilitating access to financing for franchised businesses, the proposal fails to address actual barriers to franchise financing or actions that could be adopted to motivate lenders to finance franchises.
- Comments were solicited on the proposal until March 2019, but as of the date of this update, no further information has been shared.

## Guatemala

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### Discussions in the Works for Guatemala Franchise Act (March 2020)

- Government officials in Guatemala are in discussions to craft a franchise law to regulate franchising in the country. No legislation has been drafted.

## Malaysia

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### Amendment of Malaysian Franchise Act (March 2020; Awaiting Effective Date as of March 4, 2022)

- On March 6, 2020, the Franchise (Amendment) Bill was published in the Gazette after receiving its royal assent on February 20, 2020. The Ministry has yet to set an effective date for Amendment. The Amendment provides that a foreign franchisor that has already obtained approval under section 54 of the Act before the effective date of the Amendment is deemed to have registered its franchise under section 6(1) of the Act. However, if a section 54 application is still pending on the effective date of the amended Act, the foreign franchisor must comply with the new registration requirement and subsequently register its franchise under § 6(1) of the Act. The registrations are essentially the same.
- The Amendment makes it a criminal offense for a franchisor to grant a franchise without first registering the franchise with the proper authorities, or for a franchisee of a foreign franchisor to fail to register the franchise agreement within 14 days of signing.
- Creates a period of effectiveness for franchise disclosure documents once it has been registered.
- Requires franchisors and franchisees to display their franchise registration information conspicuously.
- Creates a new requirement that franchise agreements must include language regarding renewing or extending the term of the agreement.
- States that search warrants which are issued under the Franchise Act will be valid and enforceable, and the information obtained pursuant to the search warrants will be admissible as evidence under the Franchise Act.
- This amendment to the Malaysian Franchise Act was passed to create clarity after the High Court's decision in the Brainbuilder case, which held that both the franchisor and franchisee were responsible for registering a franchise agreement in accordance with the 1998 Franchise Act, and that since the foreign franchisor had failed to register the franchise under section 6 of the Act and the franchisee had failed to register the franchise agreement with the Minister of Commerce, the agreement was void and unenforceable. Malaysia – Dr. H K Fong Brainbuilder Pte Ltd v Sg-Maths Sdn Bhd & Ors [2018] MLJU 682. The Malaysian Appeals Court has affirmed the High Court's decision. Malaysia – Dr. H K Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors [2021] 1 CLJ 155.

### Ministry of Domestic Trade and Consumer Affairs Considers Further Amendments to the Malaysian Franchise Act (September 2020)

- The Malaysian Ministry of Domestic Trade and Consumer Affairs has been reported to be considering a proposal that would limit the start-up capital needed to “start a new franchise business” to RM 50,000 (\$12,038 USD). The goal is to facilitate “micro-entrepreneurship” by lowering the capital needed by franchisees to start a franchised business and to spur entrepreneurship.

## Myanmar

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### Trademark Registration (Passed January 30, 2019; Effective 2020)

- Myanmar has adopted a trademark registration law where, once a trademark is registered, the trademark will be valid for a period of 10 years from the filing date and renewable every 10 years. Registration is a first-to-file.
- The law introduces criminal penalties for trademark infringement and counterfeiting, with penalties as much as three years' imprisonment and a fine of up to MMK 5 million (USD 3,250). The new law also gives the judiciary the power to establish specific intellectual property courts; there is no word whether the Myanmar courts will establish such courts.
- Regulations are now being prepared and are expected to be published sometime in 2020.

## Netherlands

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### Dutch Parliament Passes Comprehensive Franchise Legislation (Effective January 1, 2021)

The new Dutch Franchise Law requires:

- Franchisors to deliver a disclosure document to prospects at least 4 weeks before a sale may be concluded, prohibits any amendments to the franchise agreement during the cooling off period, except those which benefit the prospective franchisee.
- Franchisors to refrain from inducing a prospect to make payments or investments associated with the franchise agreement until the 4 weeks after an FDD has been delivered.
- FDDs to include many customary discrete disclosures, plus “all other information that he/it knows, or can reasonably assume, to be relevant for conclusion of the franchise agreement.”
- “Within the bounds of reasonableness and fairness, the prospective franchisee will take measures that are necessary to prevent him/it from concluding the franchise agreement under the influence of incorrect assumptions.”
- After 4 weeks from date of delivery of FDD, franchisors must disclose:
  - any proposed amendments to the draft agreement;
  - an explanation the investment that the change would require of the prospective franchisee; and
  - other information that the franchisor knows or can reasonably assume, to be relevant to the performance of the franchise by the franchisee.
- Franchisors to provide franchisees with assistance and support that may be reasonably be expected. If a franchisee notifies its franchisor that it is not receiving expected assistance, the franchisor and franchisee must consult about the franchisee's expectations.
- Franchisors to make annual disclosures to franchisees about the extent to any surcharges or other financial contributions made by franchisees during the preceding fiscal year covered the costs or investments that the franchisor intends or intended to cover with the payments.
- Franchisors to consult with their franchisees at least once yearly.

- Franchisors to set a maximum investment cap or minimum loss cap that a franchisee will incur as a result of new programs, new fees, surcharges or other investments franchisees can be required to make without amending the franchise agreement.
- If the fees or costs exceeds the caps, the changes may not be enforced against franchisees established in Netherlands unless a majority of them consents to the changes. If no caps are established, each franchisee established in the Netherlands must give its prior consent to the new requirement. This provision applies 2 years after the effective date of the law even to franchise agreements in existence before the effective date (January 1, 2023).
- Franchisors to disclose financial information regarding the intended location of each franchisee's business. If the franchisor lacks such information, it must disclose financial data of one or more businesses it considers to be comparable to the proposed franchisee's location, accompanied by an explanation of why the franchisor considers the locations comparable.
- Franchisors and franchisees to behave towards one another "as befits a good franchisor and a good franchisee."
- Franchise agreements to state how much goodwill be attributable to the franchisee and reimbursed by the franchisor at termination or expiration of the franchise agreement.

## Poland

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### Draft Polish Franchise Law Proposed to Justice Ministry Working Group (June 17, 2021)

- In response to complaints by franchisees to Members of Parliament, the Ministry of Justice has appointed a working group to prepare a draft franchise law. The professor who has been appointed to prepare a draft has submitted it to the working group for review and comment. The original draft would impose pre-sale disclosure obligations on franchisors and prohibit certain unfair practices.

## Saudi Arabia

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### Saudi Arabia Franchise Regulations Promulgated (Effective June 2020)

In June 2020, the Saudi government published the regulations that clarify and implement the new franchise law. The regulations include the following terms:

- At least 14 days before a franchise agreement is signed or the prospect pays any monetary consideration regarding the franchise, franchisors must provide an FDD, written in Arabic, to the prospect.
- Franchisors must file the FDD with the Ministry of Commerce and Investment (Ministry) before filing the franchise agreement with the Ministry.
- Franchise agreements must be written in Arabic and be filed with the Ministry within 90 days of signing.
- Requires franchisors to provide information about any material changes that occur between date the prospect receives the FDD and signing a franchise agreement.
- Defines "material change" as "any change in information or circumstance that would be materially effective on the value of a franchise or a decision by a prospective franchisee to enter into a franchise agreement."

- Requires franchisors to file disclosure documents with the Ministry every year, within 6 months of the franchisor's fiscal year end. Sets the filing fees as (500) SR for an initial filing and (100) SR for a renewal filing.
- Filings are effective for the full term of an agreement but may be cancelled if the franchise agreement terminates or expires and both franchisor and franchisee submit a cancellation request.
- FDDs need not be updated if a franchisor does not intend to grant more franchises in the Kingdom during the next year but must be updated before being provided to a prospective franchisee.
- In the absence of any terms in the franchise agreement, sets rules about the how an advertising fund must be administered.
- Restricts how franchisors can limit a franchisee's transfer of the agreement or control of the franchisee entity.
- States what information must be included in the disclosure document. Financial Performance Representations are optional but must comply with restrictions similar to the U.S. FTC Franchise Rule's FDD Item 19 requirements.

### **Saudi Franchise Law (Approved October 8, 2019)**

Applies to all franchises to be performed in Saudi Arabia.

- A franchise may not be granted unless the franchise has been operated on the basis of the same franchise operation manual by at least two entities and for at least one year.
- A master franchisee of a foreign franchisor may not grant subfranchises unless the master franchisee has operated in KSA for at least one year.
- Franchisor must provide franchisees with comprehensive FDDs.
- Franchisors must train, transfer know-how, provide franchise operations manuals and not compete with the franchisee in the same geographical areas, unless they agree otherwise in franchise agreements.
- Franchisor must accept a change of control over the franchisee and the assignment of the franchise agreements unless the refusal is based upon conditions specified in the law or in the regulations.
- Unless a franchise agreement provides otherwise, or a basis outlined in the Act exists, a franchisee may renew the franchise agreement on the same terms as the expiring agreement.
- Franchisors may not terminate a fixed-term agreement except for causes specified in the Act.
- Upon the termination or non-renewal of a franchise agreement, franchisees may require franchisors to purchase physical assets purchased from sources designated by the franchisor for losses suffered by the franchisee.

## South Africa

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### Franchise Industry Ombud Proposal Released for Comment (Updated August 2021)

- In cooperation with the South Africa Department of Industry and Trade, a task force is drafting a proposal, advocated by the Franchise Association of South Africa to codify the association's code of ethics so that it applies to all franchisors. It would establish a regulator of franchising.
- The "Franchise Industry Ombud" regulation would establish a detailed mechanism (30 pages) for resolving franchise disputes, with rules of procedure.
- The law would establish a self-funding organization, financed by levies on franchisors and franchisees. It would not preclude parties from seeking relief in court or in arbitration.
- Parties involved in the process are precluded from disclosing information about the dispute to the media.
- The proposal would establish new standards of performance on franchisors and franchisees.
- The draft code has been submitted to the Consumer Protection Commission for consideration.

## South Korea

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### Franchise Law Amendments Require Minimum Experience for Franchisors, Apply Standards to Smaller Franchisors, Increase Disclosures Re Online Product Sales. (Effective November 19, 2021)

- Only franchisors with experience operating one or more directly managed units for at least one year can franchise in South Korea. There is a narrow exception for franchisors that operate the franchise with a license under other laws or regulations.
- The South Korean Fair Trade Commission (KFTC) believes that the increase of franchisors selling products online or through directly managed units may lead to a decrease in sales for franchisees. As a result, franchisors now must disclose information related to products sales online or through directly managed stores.
- Under the previous regulations, small-sized franchisors were subject only to the obligation to prohibit providing false or misleading information and the obligation to refund required payments. The amended regulations now require small-sized franchisors also to register their disclosure document.
- The new enforcement decree expands local government's authority to impose fines.

### South Korea Fair Trade Commission Provides Relief to Franchisor's that Provide Relief to Their Franchisees (September 2020)

- The KFTC makes franchisors which implement at least one of the following cooperative measures for franchisees eligible to apply for a reduction of interest rates and / or guarantee fees to ease the impact of COVID-19: (i) reduction / exemption from royalties; (ii) reduction of the price of products that franchisees are required to purchase for the franchise business; (iii) provision of support for marketing and advertising costs; (iv) provision of compensation for losses suffered by franchisees; and (v) provision of cash support to franchisees.

## Thailand

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### Unfair Franchise Practices Guidelines Amended to Avoid Conflicts with Exclusivity Grants in Area Development Agreements (Effective August 20, 2021)

- The regulations adopted September 23, 2020, required franchisors planning to open, or to authorize another franchisee to open a franchised business, to first give the closest franchisee to the proposed location the right to acquire the franchise.
- Amendment excludes locations contractually committed to an area developer or other franchisee from the law's "first offer" requirement.

### Guidelines on Unfair Trade Practices in the Franchise Business (Effective February 4, 2020)

- Under the Guidelines, issued by the Office of the Trade Competition Commission, prior to entering into a franchise agreement, franchisors must disclose information to prospective franchisees, such as details on (1) the royalty fee and other mandatory payments relating to the operation of the franchise business, (2) the franchise business model, (3) the intellectual property rights, and (4) the renewal and termination of the franchise agreement.

#### **Franchisors are prohibited from engaging in the following trade practices that may cause damage to franchisees:**

- Setting restrictive conditions for the franchisee without justifiable reasons, such as forcing the franchisee to exclusively buy products or services that are irrelevant to the operation of the franchise business from a designated business operator.
- Setting additional conditions for the franchisee to comply with, after the franchise agreement has already been executed. Exceptions may apply if franchisors can justify their reasons, or if new conditions are agreed in writing.
- Restricting the franchisee, without justifiable reasons, from purchasing products from other business operators that offer products with comparable quality, but at a lower price.
- Restricting franchisees, without justifiable business reasons, from offering discounts on perishable goods or products close to their expiration.
- Setting discriminatory conditions among franchisees, without justifiable reasons.
- Setting any conditions for a purpose other than to maintain the reputation, quality, and standards of the franchise brand, in accordance with the franchise agreement.
- Besides allowing franchisees to sue for damages, administrative fines of up to 10% of the franchisors annual revenue may be imposed.
- A draft Franchise Business Act is also said to be under consideration.

## United Arab Emirates

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### Changes to Commercial Agency Law Said to Be Under Consideration (February 2022)

According to newspaper articles — but no official sources — the UAE is considering several amendments to its Commercial Agency Law (CAL).

- The proposal would apply to franchisees, commercial agents and distributors that are partly owned (but not controlled) by foreigners. The current CAL only creates rights for companies wholly-owned by Emiratis.
- The proposal would apply the CAL to all franchises. The current CAL does not necessarily apply to all franchises.
- The CAL protects commercial agents, distributors and franchisees from termination or nonrenewal absent good cause or mutual consent of the parties.

## United Kingdom

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### UK Competition and Markets Authority (CMA) Recommends Adopting a UK Vertical Restraints Block Exemption Similar to EU (Expected Effective Date June 2022)

- Dual pricing and different criteria for online sales will likely cease to be hardcore restrictions.
- Exemptions expected to allow for exclusive and selective territories.
- Will define active v. passive selling.
- Generally, aligns with EU proposed VBER amendments, but key differences exist and will likely be more favorable than the UK Block Exemption.

### New Regulations of Advertising and Merchandizing High Fat, Sugar and Salt Products (HFSS) Apply to Businesses with 50 or More Employees. Employees of Franchise Chains Are Aggregated. (Effective October 1, 2022)

- Franchisees' businesses are treated as part of their franchisor's businesses, and not as separate businesses.

## United States

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### FTC Franchise Rule Review (December 2020)

- As a part of its ten-year review of the entire franchise disclosure rule the FTC requested comments on the Franchise during 2019.
- The FTC hosted a public workshop in November 2020 to discuss the potential issues with the current Franchise Rule, which was last amended in 2007. The FTC also re-opened public comments regarding potential changes to the FTC Franchise Rule until December 2020.

### Cortez Masto Study of Franchising Practices (Published April 2021)

Senator Catherine Cortez Masto has published a study showing alleged deficiencies in franchise regulations and has sponsored legislation requiring FDD disclosures of defaults under US Small Business Administration-backed loans to prospective franchisees of franchisors which use SBA financing programs. SBA financing accounts for as much as ½ of all financing for new U.S. franchisees.

## Federal Trade Commission Priorities Set (Issued September 22, 2021)

- FTC Chair Lina Khan released a statement outlining her strategic priorities and operational objectives for the Federal Trade Commission. One of her focuses will be on restrictive provisions in franchise agreements. Another would restrict the enforceability of noncompetition agreements in employment agreements.
- In January 2022 the FTC issued Civil Investigative Demands to several franchisors in the cleaning industry demanding that they produce copies of all agreements that they and their franchisees use with employees that contain noncompete restrictions.
- In February 2022 the FTC published a new complaint form, suggesting a focus on issues beyond those the FTC regulates under the FTC Franchise Disclosure Rule: Describe what happened, including any unfair or unreasonable contract terms, misleading statements during the sales process, or other problems. The FTC has not regulated “unfair or unreasonable contract terms” before.

## FTC Draft Strategic Plan Targets Unfair Practice and Non-Compete Clauses (Released November 12, 2021)

The FTC has released for public comment its draft strategic plan for fiscal years 2022-2026. Included in the strategic plan are goals such as “restricting the use of non-compete provisions,” “bring[ing] enforcement actions to stop unfair and deceptive practice,” and “promot[ing] an open and competitive marketplace” to benefit the public. The FTC’s objectives signal their intent to act on President Biden’s July 9, 2021, Executive Order that directed the FTC to “to exercise the [its] statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”

## Illinois Representative Schakowsky Introduces Bill to Create Private Right of Action Under FTC Franchise Rule (February 1, 2022)

Because the U.S. Federal Trade Commission’s Franchising Trade Regulation Rule may only be enforced by the FTC, and not by franchisees affected by violations of the Rule, franchise lawyers have typically brought claims for Rule violations by asserting that Rule violations violate state unfair and deceptive practices or tort laws. H.R. 6551. would allow franchisees to sue franchisors in Federal Courts or Franchise Rule Violations.

## **Joint Employer**

### Federal Action

- Since the inception of the Biden administration, Joint Employer Rules adopted during the Trump administration (which overturned decisions issued during the Obama administration) have been challenged by Democratic leaders of Department of Labor and National Labor Relations Board. They are also being challenged in the courts in actions brought by Democratic state attorneys general and the SEIU.

## Federal Court Overturns Department of Labor’s Rescission of Trump Joint Employer Rule: *Coalition for Workforce Innovation v. Walsh, ED Texas* (March 14, 2022)

- On July 29, 2021, the U.S. Department of Labor announced a final rule to rescind the “Joint Employer Status Rule Interpreting the Fair Labor Standards Act,” that took effect in March 2020. However, a U.S. District Court has reinstated the Rule enacted during the Trump Administration because the DOL failed to provide a meaningful opportunity for comments on the delay of the Rule’s implementation. The court also found that DOL’s subsequent withdrawal of the Rule was arbitrary and capricious.

- On January 12, 2020, the Trump Labor Department (DOL) published its final rule to revise and update its regulations interpreting joint employer status under the Fair Labor Standards Act (FLSA).
- In the final Trump-era rule, DOL:
  - specified that when an employee performs work for the employer that simultaneously benefits another person, that person will be considered a joint employer when that person is acting directly or indirectly in the interest of the employer in relation to the employee;
  - provided a four-factor balancing test to determine when a person is acting directly or indirectly in the interest of an employer in relation to the employee;
  - clarified that an employee's "economic dependence" on a potential joint employer does not determine whether it is a joint employer under the FLSA;
  - specified that an employer's franchisor, brand and supply, or similar business model and certain contractual agreements or business practices do not make joint employer status under the FLSA more or less likely; and
  - provided several examples applying the Department's guidance for determining FLSA joint employer status in a variety of different factual situations.
- The day before President Trump left office, his Justice Department filed a brief with the U.S. Second Circuit Court of Appeals, seeking to reinstate portions of the Labor Department's Joint Employer Rule which a District Court had vacated on September 8, 2020. The District Court opinion had vacated the application of the Rule to franchise relationships, and other vertical employment relationships, in a challenge to the Rule brought by the Democrat attorneys general of sixteen states and the District of Columbia.
- The International Franchise Association and a coalition of business groups intervened in the case and filed their own appeal. *State of New York et al v. Scalia*, No. 1:2020cv01689 - Document 74 (S.D.N.Y. 2020). On September 8, 2020, the U.S. District Court for the Southern District of New York struck down the DOL's joint employer rule insofar as it related to vertical joint employer relationships.

### National Labor Relations Board Issues Joint Employer Rule (Issued February 26, 2020)

- The NLRB's final rule governing joint-employer status under the National Labor Relations Act restores the joint-employer standard that the NLRB applied for several decades prior to the 2015 decision in *Browning-Ferris*, but with the greater precision, clarity, and detail that rulemaking allows. It was challenged as unlawful in a lawsuit filed by the Service Employees International Union on September 17, 2021.
- The NLRB announced that it plans to reopen rulemaking on the standard for determining whether two employers are joint employers. The likely effect, now that Democrat/pro-labor members are in the majority on the Board is that the rule adopted during the Trump administration will be repealed, and the approach adopted during the Obama administration will be reinstated.

### ***Independent Contractor or Employee?***

#### Federal Action

- The PRO Act (Protecting the Right to Organize Act) has been introduced independently and as a part of the Biden Infrastructure Bill. It would make major changes in the way that workers can organize and

would adopt the “ABC Test” for determining whether a worker is an employee or an independent contractor.

- Because workers who are involved in the same business as their payors are considered to be employees, Franchisors are concerned that they could be held liable for their franchisees’ employment law violations.
- Although efforts to pass the bill have been stalled so far in this Congress, the legislation remains a priority for the Biden administration. (March 4, 2022)

## California

- California AB-5 (Effective January 1, 2020) characterizes all workers as “employees,” rather than as “independent contractors,” unless each factor in its “ABC Test” is met. The law is of special concern to franchisors which collect fees from customers and pay proceeds to franchisees. Many fear that franchisees could claim that they are “workers,” who have been misclassified by their franchisors. In November 2020, the citizens of California voted to except the “gig workers” of Uber, Lyft and other similar companies from the application of AB-5.
- The International Franchise Association’s (IFA’s) efforts to obtain an exclusion from the law for franchisors was unsuccessful during the most recent session of the California legislature.
- The California Supreme Court unanimously ruled on January 14, 2021, that the independent contractor standard set out in *Vasquez v. Jan-Pro Franchising, Inc.*, 2021 WL 127201 (Cal.), (Jan 14, 2021) is retroactive. *Vasquez* is the case that articulated the employee/independent contractor standard which was adopted by AB-5. Thus, questions about the enforceability of the retroactive application of AB-5 to relationships which pre-dated the enactment of the law appear to be resolved.
- The California Supreme Court’s opinion did not address whether either *Vasquez* or AB-5 apply generally to franchise relationships.

## Employee Anti-Poaching Provisions Under Attack

### State Attorneys General Investigations (June 16, 2020)

- “No Poach” provisions prohibit franchisees franchising employees of other franchisees of the same brand; and sometimes apply to the franchisor’s employees.
- Beginning in early 2018, 15 state attorneys general announced that they were investigating anti-poaching language in franchise agreements. Since then, the investigation has been extended too many other industries.
- The Washington State Attorney General has announced that at least 237 franchisors have entered into an “assurance of discontinuance” whereby they have agreed to no longer enforce no-poach agreements and to delete anti-poaching language from their future franchise agreements throughout the U.S. (June 2020).

### FTC Commissioner Slaughter Advocates Trade Regulation Rule to Address Competition in Labor Markets (January 9, 2020)

- It would regulate non-compete covenants in employment agreements, prohibit anti-poaching and arbitration agreements in franchise agreements.

## U.S. Department of Justice (December 7, 2020)

- The Department of Justice filed an amicus curiae brief with the Eleventh U.S. Circuit Court of Appeals in *Arrington v. Burger King Worldwide, Inc.*, challenging the U.S. District Court's ruling that Burger King was incapable of conspiring with its franchisees in a case challenging anti-poaching language in Burger King's franchise agreements. DOJ argued that the District Court had applied the wrong standard in dismissing anti-poaching claims under the Sherman Antitrust Act.

## California Assembly Passes Bill to Create "Fast Food Sector Council"

### FAST Recovery Act Awaits Consideration in California Senate (February 17, 2022)

The Fast Recovery Act (AB 257) passed the California Assembly on February 17, 2022 and is now under consideration in the California Senate. The legislation would create a Fast Food Sector Council to establish minimum standards on wages, working hours, and working conditions. It would make franchisors jointly and severally liable for violations of the law and the Council's decisions with their franchisees. The Council would be structured in a way that labor union representatives would always hold a majority of the votes.

## Franchise Disclosure Standards

### NASAA Policy Statement Would Ban Franchisor Use of Acknowledgments and Questionnaires in Connection with Franchise Sales. (December 6, 2021)

State regulators of franchise registration and disclosure laws are members of the North American Securities Administrators Association (NASAA) and its Franchise Project Group. On December 6, 2021, the Group released a proposed Policy Statement, requesting comments by January 5, 2022. The proposal would dramatically alter the franchise sales process used by most U.S. Franchisors.

U.S. franchise sales laws severely restrict statements that franchisors can make about a prospective franchisee's possible sales, profits or earnings ("Franchise Performance Representations" or FPRs) — prohibiting them if they are not included in franchise disclosure documents (FDDs). FPRs must meet the detailed "reasonable basis" and "substantiation" standards prescribed by the FTC, as interpreted by state franchise law administrators and NASAA.

Franchisors are concerned about alleged noncompliant oral FPRs made by their representatives during the franchise sales process. They want to identify and prevent them, and they want to avoid liability for claims that differ from what they have vetted and placed in their FDDs.

To make sure that prospective franchisees realize that they may only rely upon the FPRs in their FDDs, and to avoid liability for alleged verbal FPRs, for 30 years franchisors have included in their franchise agreements acknowledgments that franchisees are only relying on the information disclosed in FDDs and not on any other information. Additionally, many franchisors use questionnaires, including questions such as, "Has any representative of the franchisor told you any information about our historical sales, profits or earnings, or told you the level of sales, profits or earnings that you might expect to make as a franchisee?"

If a prospective franchisee answers "yes," to the question, the franchisor either declines to proceed with the sale, or takes steps to document that the franchisee will not be relying on the oral FPR if the sale proceeds.

The Project Group claims that franchisees are forced to answer "no" to the questions, and to sign agreements including the acknowledgments, or they are told that they won't be granted a franchise. The Group also claims

that the acknowledgments and questionnaires allow franchisors to escape liability for state franchise sales law violations by using questionnaires and acknowledgment — which they claim violate “anti-waiver prohibitions” in state franchise laws.

Initial comments from franchisee organizations and lawyers who typically represent franchisees favored the proposal and supported the Project Group’s rationale.

Franchisors and their lawyers opposed it, arguing that other remedies exist for forcing prospects to lie to receive a franchise. They also pointed out that courts rarely dismiss claims of franchise law violations, merely because of the existence of answers to a questionnaire or an acknowledgment in a franchise agreement.

NASAA has not announced whether it will revise its proposal or when it proposes to make the Policy Statement Effective. If it is effective, state franchise examiners are expected to prohibit franchisors from using questionnaires and acknowledgements in the documents that they register.

## ***Other State Actions***

### California

Amendments to the California Franchise Relations Act (AB 676) passed the California Assembly on January 27, 2022 and are now under consideration in the California Senate. This legislation would require prospective franchisees to provide certain information to a franchisor when applying for a franchise and would require a franchisor to notify the prospective franchisee within 15 days if further information is required to complete the application. A franchisor must notify a prospective franchisee of approval or disapproval within 60 days and provide a prospective franchisee with certain information if it disproves an application. The bill also authorizes state franchise examiners to prohibit the use of acknowledgements and questionnaires. (See discussion of NASAA Project Committee Proposal in link below.)

[https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220AB676](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB676)

### Oregon

#### **Franchise Relationship Bill (H.B. 4152) Fails to Receive Vote Following Hearing February 7, 2022)**

The proposal would impose contractual requirements and limitations on franchisors, including restricting franchisors’ rights to terminate or refuse the renewal of franchise agreements, requiring franchisors to permit franchisees to sell, assign, or transfer to another certain assets and interests in the franchise, and permitting franchisees to bring damages and equitable relief actions for violation of the Act. Because the bill was not voted out of committee by the House deadline, the bill will not be considered in this legislative session.

## ***Privacy***

#### **California Voters Adopt California Privacy Rights Act (CPRA) in Referendum (Adopted November 3, 2020, Effective January 1, 2021 (in part) and January 1, 2023 (for most provisions)**

- The CPRA applies to companies which “alone or in combination” with gross annual revenues exceeding \$25 million, buys, sells or shares information of 100,000 or more consumers or households which earn more than half of their revenue from selling or sharing consumers’ personal information. Whether franchisors and their franchisees criteria will be shared for purposes of determining whether they are acting “alone or in combination” has not been clarified.

- Many requirements are similar to GDPR.
- Regulated companies suffering data breaches resulting from unreasonable data security are subject to class action claims for damages ranging between \$100-\$750 per California consumer, or actual damages, if higher.

### **The California Consumer Privacy Act (CCPA) Covers Many Franchisors and Franchisees Operating in the U.S. (Effective January 1, 2020)**

- The CCPA applies to any for profit entity “doing business in California” with \$25 million in annual gross revenues, or that processes the personal information of 50,000 or more California devices.
- The CCPA covers any entity that shares “common branding” with another business and controls or is controlled by that business. Under the law consumers may sue a company if its ‘non-encrypted or non-redacted personal information is subject to unauthorized access and exfiltration, theft or disclosure as a result of the company’s failure to implement and maintain reasonable security procedures and practices.
- Statutory damages ranging between \$100-\$750 may be recovered by each customer or franchisee, as well as their actual damages.
- Initial regulations do not clarify how the law applies to franchising.

### **Virginia enacts the Consumer Data Protection Act (“VCDPA”) (Effective January 1, 2023)**

Different than the CCPA in key areas: (1) broader affirmative consent or opt-in requirement to process sensitive data; (2) broader opt-out rights including targeted advertising, sale of personal data and profiling that may have legal impacts (such as an impact on financing or insurance); and (3) mandatory data protection assessments.

- Employee data and business-to-business data is not covered in the VCPDA.
- No private right of action but Virginia attorney general can seek fines for failure to cure a violation of up to \$7,500 per violation.

### **Colorado Enacts Colorado Privacy Act (the “CPA”) (Effective July 1, 2023)**

- The CPA borrows from the CPCPA and CPRA, and the VCDPA.
- Similar to the VCDPA, consumers may opt out of the processing of their personal data for targeted advertising, sale of personal data and profiling that may have legal impacts.
- Data controllers have 45 days to fulfill consumer requests.
- Privacy notice requirements are similar to VCDPA, requiring that data controllers provide an accessible privacy notice that includes the categories of data processed and the categories of data shared with third parties, and the purpose for processing personal data.
- Breach of the CPA is considered a deceptive trade practice under the Colorado Consumer Protection Act. There is no private right of action, but the attorney general’s office may take action.

For more information on data privacy in the United States, you may refer to Lathrop GPM's 2022 [Legal Guide to Privacy and Data Security](#).

## About the Global Franchise Regulatory Update

The Global Franchise Regulatory Update is compiled from publications and correspondence with franchise counsel from throughout the world. Often the information we report is based upon the analysis of regulations or proposals which have been prepared by others (who are identified on the following pages), based upon their interpretation of the regulations and proposals as published in their original language. We are indebted to them for their assistance.

The Update is designed as an alert to regulatory developments, but it is not intended to be a comprehensive overview or analysis of the regulations discussed. The Update should not be considered legal analysis or advice. Despite our best efforts, we do not claim that the Update includes all franchising regulatory developments throughout the world. If you are aware of anything that we have missed or may have misinterpreted, please bring the information to our attention.

## About the Lathrop GPM Franchise and Distribution Law Practice Group

International franchisors and franchising professionals need to know how legal and regulatory developments may affect business plans, negotiations and the execution of concluded agreements. In our efforts to offer value-added services to our clients, we monitor global franchise regulatory developments to provide them with the competitive edge this information may offer.

The Lathrop GPM Franchise and Distribution Law Practice Group consists of over 30 franchise lawyers and paralegals, operating from offices throughout the United States.

The reputation of our international franchise team is recognized by our clients and colleagues, as represented through elite rankings in Chambers Global, the International Who's Who of Franchise Lawyers, Best Lawyers in America, Super Lawyers, Chambers U.S., and Franchise Times Legal Eagles, among other legal ranking organizations.

If you have any questions, corrections, would like to contribute information regarding franchising regulatory developments in your country, or would like to discuss expanding your franchise system internationally, please contact us:

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