

ADVERTISING/SALES PROMOTION REQUIREMENTS

(Updated June 25, 2009)

This document provides a general overview of the advertising/sales promotion requirements under the state franchise registration laws. As the status of this information is constantly subject to change pursuant to legislative enactment or otherwise, and inasmuch as this data is presented in summary form, you should always consult with experienced counsel to determine if the information has changed or to analyze specific issues.

What Is Considered an Advertisement?

“Advertisement” is any written or printed communication or any communication by means of recorded telephone messages or spoken on radio, television, or similar communications media, published in connection with an offer or sale of a franchise.¹ Advertising must be filed prior to use within the registration states listed below. This requirement does not generally apply to advertisements in a newspaper or other publication of general, regular and paid circulation which has had more than two-thirds of its circulation outside the state during the past twelve months, or to radio or television programs originating outside the state which are received in the state.²

Are there Rules Governing Advertising Content?

In advertising franchise opportunities, franchisors must obviously avoid publishing any advertisement that contains false or misleading information or that omits information which otherwise makes the advertisement not misleading.³ Moreover, an advertisement generally should not contain any statement or inference that a purchase of a franchise is a safe investment, or that failure, loss or default is impossible or unlikely, or that earnings or profits are assured. Franchisors must be extremely careful in making any sort of financial performance representation.⁴ Any financial performance representation—within an advertisement—must be totally consistent with the franchisor’s disclosure document (*i.e.*, Item 19 of the FDD).⁵ Moreover, financial performance representations, if made, must be carefully and extensively substantiated.⁶ For a more detailed description of federal laws pertaining to the use of financial performance representations in promotional materials, please see Appendix A attached to this summary.

In Using the Internet, Can I get Caught in a Web of Legal Noncompliance?

With the establishment and expansive proliferation of the Internet as a promotional tool, franchisors are confronted with the new challenge of determining how traditional advertising rules apply to this invaluable communications medium. For example, a franchisor-web site description of a franchise opportunity may constitute the offer of a franchise. The web content might also be deemed as advertising content subject to various state filing laws. Further, because Internet content can be projected around the globe, a franchisor is faced with the increasing likelihood of having been found to have made an offer, or published an advertisement, in a jurisdiction in which the franchisor has not followed applicable filing requirements.

Internet-based franchise sales advertising is exempt from statutory filing requirements if (1) the advertisement states that the offer is not directed to residents of the state, (2) the advertisement is not actually directed to any resident of the state, and (3) no franchises are sold in the state until the franchisor

¹ See, e.g., Md., Bus. Franchise Guide (CCH) ¶ 3200.01.

² See, e.g., Cal., Bus. Franchise Guide (CCH) ¶ 3050.15.

³ See, e.g., Ind., Bus. Franchise Guide (CCH) ¶ 3140.26; Minn., Bus. Franchise Guide (CCH) ¶ 3230.09.

⁴ Such claims may arise in many different forms.

⁵ See, e.g., Cal., Bus. Franchise Guide (CCH) ¶ 5050.34.

⁶ See, e.g., Wash., Bus. Franchise Guide (CCH) ¶ 5470.25.

obtains state registration.⁷ California, Illinois, New York, and Rhode Island have slight variations in their respective state laws.⁸

Franchisors should ensure that their web sites contain disclaimers that are drafted to take advantage of these Internet exemptions. For example, the franchise sales portion of a franchisor's web site should prominently display words such as the following:

This web site and the franchise sales information on this site do not constitute an offer to sell a franchise. The offer of a franchise can only be made through the delivery of a franchise disclosure document. Certain states require that we register the franchise disclosure document in those states. The communications on this web site are not directed by us to the residents of any of those states. Moreover, we will not offer or sell franchises in those states until we have registered the franchise (or obtained an applicable exemption from registration) and delivered the franchise disclosure document to the prospective franchisee in compliance with applicable law.

Of course, a franchisor must ensure its actual Internet practices are consistent with any disclaimer published by the franchisor on its web site.

Where Must I File Advertising and What are the Mechanics of Filing?

At present, you must file franchise advertising in California, Maryland, Minnesota, New York, North Dakota, Rhode Island and Washington prior to use of advertising in those states. An advertisement is generally deemed approved by a particular state if you do not receive any comments from the examiner within a specified number of days (see below) from the date it is received by the state. You should allow for mailing time.

Submission or filing of advertisements is generally not required outside of the states listed below.⁹ Furthermore, in states where a franchisor is exempt from franchise registration laws, the franchisor is generally also exempt from the requirement to submit or file advertisements with administrative authorities; provided, however, that the franchisor must remain in compliance with any state laws, including franchise laws, pertaining to the content of advertisements. Notwithstanding these exceptions, due to constant modifications of the law, and due to the unique circumstances of your business, you should always consult with experienced counsel in connection with your advertising and promotional activities.

⁷ See, e.g., Minn., Bus. Franchise Guide (CCH) ¶ 5230.81.

⁸ See, e.g., Cal., Bus. Franchise Guide (CCH) ¶ 5050.355, Ill., Bus. Franchise Guide (CCH) ¶ 5130.231, N.Y., Bus. Franchise Guide (CCH) ¶ 5320.12, R.I., Bus. Franchise Guide (CCH) ¶ 5390.01.

⁹ Although § 445.1524 of the Mich. Franchise Inv. Law authorizes state administrators to require the filing of any promotional materials directed at prospective franchisees, no such requirement has been imposed by the state. See Bus. Franchise Guide (CCH) ¶ 3220.24.

Summary of State Requirements

State	File # Days Prior to Use	# Copies To Be Filed	Special Requirements—General	Special Requirements—Financial Performance Representations	Internet Exemption	Publication of Requirements
CA	3 bus.	1 <i>(but unpublished requirement of 2 copies for review purposes)</i>	Advertisement must: (1) include name and address of franchisor; (2) if referring to registration of a franchise, must include disclaimer of state endorsement in capital letters of no less than 10-point type: “THESE FRANCHISES HAVE BEEN REGISTERED UNDER THE FRANCHISE INVESTMENT LAW OF THE STATE OF CALIFORNIA. SUCH REGISTRATION DOES NOT CONSTITUTE APPROVAL, RECOMMENDATION OR ENDORSEMENT BY THE COMMISSIONER OF CORPORATIONS NOR A FINDING BY THE COMMISSIONER THAT THE INFORMATION PROVIDED HEREIN IS TRUE, COMPLETE AND NOT MISLEADING.”; (3) if including an endorsement of a public figure, disclose any compensation or benefit to that individual; and (4) if containing a claim of an exemption from or reduction in tax liability, such claim must be based on the opinion of counsel, which counsel must be named in the advertisement.	Advertisement should not contain any statement or inference that purchase of franchise is a safe investment or that failure, loss or default is impossible or unlikely, or that earnings or profits are assured and any actual earnings claims made must conform with Item 19 of the disclosure document. ¹⁰	Internet offer exempt if: (1) franchisor files with the Commissioner a written notice, executed by franchisor’s officer or general partner that includes (a) URL address, (b) statement that the franchisor agrees to comply with CFIL when posting any Internet advertisement, and (c) franchisor’s name, address, telephone number, and contact person; (2) advertisement is not directed to any state resident; and (3) preface, exhibit or appendix of the franchisor’s disclosure document includes URL address and the following statement of not less than 12-point type: “Our website has not been reviewed or approved by the California Department of Business Oversight, any complaints concerning the content of this website may be directed to the California Department of Business Oversight at www.dbo.ca.gov. Cal., ¶ 5050.355.	Generally: Cal., Bus. Franchise Guide (CCH) ¶ 5050.33-.355
IL	No submission required¹¹		Advertisement must: (1) if referring to registration of a franchise, cannot suggest that the state endorses the franchise, and (2) include name and address of counsel if opinion of counsel is provided in advertisement.	No advertising in connection with offer or sale of franchise shall contain statement that purchase of franchise is a safe investment, is free from risk of loss or failure, or assures earnings or profit. Use of words such as “success,” “profits,” or “profit potential” may be used if reasonably qualified.	Internet offer exempt if the franchisor limits contact with prospective Illinois franchises to keeping a prospect list and notifying such prospects that until the franchisor registers the franchise in the state, no further discussion about the franchise opportunity can take place. Ill., ¶ 5130.231.	Ill., Bus. Franchise Guide (CCH) ¶ 5130.18-.231

¹⁰ While “earnings claims” are now referred to as “financial performance representations,” some states still have not changed their statutes to reflect the change.

¹¹ Ill. previously had advertising provision, but it has been repealed.

State	File # Days Prior to Use	# Copies To Be Filed	Special Requirements—General	Special Requirements—Financial Performance Representations	Internet Exemption	Publication of Requirements
IN	No registration required. ¹²	None	Former IND. CODE § 23-2-2.5-25 required advertisement registration, but was repealed by Laws of 2002, Senate Bill 423, approved March 14, 2002, effective July 1, 2002.	None.	Internet offer exempt from statutory filing requirements if (1) the advertisement states that the offer is not directed to residents of the state, (2) the advertisement is not actually directed to any resident of the state, and (3) no sale of such franchises are made in the state as a result of the offer. Ind., ¶ 5140.011.	Ind., Bus. Franchise Guide (CCH) ¶ 3140.25-.26, ¶ 5140.011.
MD	5 days Md., (CCH) ¶ 5200.09. <i>but</i> 7 bus. Md., (CCH) ¶ 3200.25.	1	Advertisement must: (1) include name and address of franchisor in promotional materials; (2) submit written transcript for video/audio promotional materials and description of the contents; and (3) include name and address of counsel if opinion of counsel is provided in advertisement.	Advertisement for franchise offering may not refer to: (1) the purchase or sale of franchise as safe investment, as free from risk of loss or default, or as guarantee or assurance of earnings or profits; and (2) an earnings claim, unless otherwise permitted by Commissioner.	Internet offer exempt from statutory filing requirements if (1) the advertisement states that the offer is not directed to residents of the state, (2) the advertisement is not actually directed to any resident of the state, and (3) no franchises are sold in the state until the franchisor obtains state registration. Md., ¶ 5200.18.	Md., Bus. Franchise Guide (CCH) ¶¶ 3200.25 & .28, ¶¶ 5200.09 & .18.
MN	5 bus. <i>(may publish advertisement if examiner does not issue a comment letter within 3 bus. days after filing.)</i>	1	Advertisement must include: (1) name and address of franchisor, including primary commercial symbol of the franchisor; (2) state registration number assigned to the offering; and (3) name and address of counsel if opinion of counsel is provided in advertisement.	No advertisement shall make reference to: (1) acquiring of franchise as an assurance of earnings or profits, as safe investment, or as free from loss, default, or failure or that such is impossible or unlikely; and (2) projections or statements of operations or income from operation of any franchise.	Internet offer exempt from statutory filing requirements if (1) the advertisement states that the offer is not directed to residents of the state, (2) the advertisement is not actually directed to any resident of the state, and (3) no franchises are sold in the state until the franchisor obtains state registration. Minn., ¶ 5230.81-.82	Minn., Bus. Franchise Guide (CCH) ¶ 3230.09, ¶¶ 5230.24, .28-.29, & .81-.82.

¹² Like Ill., Ind. previously had advertising provision, but it has been repealed.

State	File # Days Prior to Use	# Copies To Be Filed	Special Requirements—General	Special Requirements—Financial Performance Representations	Internet Exemption	Publication of Requirements
NY	7	1 (2 copies must be submitted with the prospectus or disclosure document). N.Y., ¶ 5320.03.	Advertisement must: (1) be verified in writing that the advertisement is not inconsistent with filed prospectus; (2) cover letter must state: “we verify that the enclosed advertisement is consistent with the filed Franchise Disclosure Document” (in addition to separate verification); and, (3) sales literature must state in easily readable print: “This advertisement is not an offering. An offering can only be made by a prospectus filed first with the Department of Law of the State of New York. Such filing does not constitute approval by the Department of Law.” Or, the following: ¹³ “This offering is made by prospectus only.”	No sales literature shall include any representation or statement inconsistent with prospectus on file with Department.	Internet offer exempt if: (1) franchisor’s URL address is stated (a) on the cover page of a franchise disclosure document included with an application for state registration, (b) on the cover page of a franchise disclosure document included with an application for exemption from registration that is on file with the New York State Department of Law, or (c) on a notice filed with the New York State Department of Law, (2) the Internet advertising is not directed at any person in the state, (3) the advertisement states that the offer is not directed to residents of the state, (4) the advertisement is not actually directed to any resident of the state, and (5) no franchises are sold in the state until the franchisor obtains state registration. N.Y., ¶ 5320.12-.13.	N.Y., Bus. Franchise Guide (CCH) ¶ 3320.04, ¶¶ 5320.03, .09, & .12-13.
ND	5 bus.	1	None.	None.	Internet offer exempt from statutory filing requirements if (1) the advertisement states that the offer is not directed to residents of the state, (2) the advertisement is not actually directed to any resident of the state, and (3) no franchises are sold in the state until the franchisor obtains state registration. N.D., ¶ 5340.02.	N.D., Bus. Franchise Guide (CCH) ¶ 3340.10, ¶ 5340.02.

¹³ This second notice is to be used with print advertisements no more than 5” long/1 column wide and broadcast advertisements of 30 seconds or less.

State	File # Days Prior to Use	# Copies To Be Filed	Special Requirements—General	Special Requirements—Financial Performance Representations	Internet Exemption	Publication of Requirements
RI	5 bus.	1	\$10 payable to General Treasurer of Rhode Island as “examination fee” per item.	None.	Internet offer exempt from statutory filing requirements if (1) the advertisement states that the offer is not directed to residents of the state, (2) the advertisement is not actually directed to any resident of the state, (3) no franchises are sold in the state until the franchisor obtains state registration and (4) procedures are implemented to control timing of subsequent communications with prospective franchisees. R.I., ¶ 5390.01.	R.I., Bus. Franchise Guide (CCH) ¶¶ 3390.12 & .29, ¶ 5390.01.
SD	No submission required ¹⁴		None.	None.	Internet offer exempt from statutory filing requirements if (1) the advertisement states that the offer is not directed to residents of the state, (2) the advertisement is not actually directed to any resident of the state, and (3) no franchises are sold in the state until the franchisor obtains state registration. S.D., ¶ 5410.20.	S.D., Bus. Franchise Guide (CCH) ¶ 3411.23, ¶ 3418.13 & .46, ¶ 5410.20.
WA	7	1 (2 copies must be submitted with the prospectus or disclosure document). Wash., ¶ 5470.03.	Advertisement must: (1) include name and address of franchisor in promotional materials, (2) if relying on endorsement of public figure, advertisement, disclose any compensation or benefit to that individual; and (3) if advertisement contains a claim of an exemption from or reduction in tax liability, such claim must be based on the opinion of counsel, which counsel must be named in the advertisement.	Advertisement should: (1) not contain any statement or inference that purchase of franchise is safe investment or that failure, loss or default is impossible or unlikely, or that earnings or profits are assured; and (2) not normally contain projection of future franchisee earnings unless projection is (a) based on past earnings records of all franchisees operating under conditions, including location, substantially similar to conditions affecting franchises being offered (b) for a reasonable period only and (c) is substantiated by data which clearly supports projections	Internet offer exempt from statutory filing requirements if (1) the advertisement states that the offer is not directed to residents of the state, (2) the advertisement is not actually directed to any resident of the state, and (3) no franchises are sold in the state until the franchisor obtains state registration. Wash., ¶ 5470.90.	Wash., Bus. Franchise Guide (CCH) ¶¶ 3470.10-.11, ¶ 5470.03, .25, & .90.

¹⁴ Like Ill. and Ind., S.D. previously had advertising provision, but it has been repealed.

Appendix A: Financial Performance Representation Requirements

“Financial performance representation” means “any representation, including oral, written, or visual representation, to a prospective franchisee, including a representation in general media, that states, expressly or by implication, a specific level or range of actual or potential sales, income, gross profits, or net profits. The term includes a chart, table, or mathematical calculation that shows possible results based on a combination of variables.”¹⁵ Mere disclosure of cost information does not constitute a financial performance representation and thus does not require disclosure.¹⁶ Additionally, financial performance representation does not include all financial performance information posted online or appearing in press releases or speeches, unless the franchisor directs the speeches or news releases to prospective franchisees or uses copies of speeches or news releases in marketing materials aimed at prospective franchisees, then such materials will be considered financial performance representations.¹⁷

A franchisor does not need to make financial performance representations; however, if a franchisor does make financial performance representations, the franchisor must have a reasonable basis and written substantiation for the representation at the time it is made and the representation must be stated in the Item 19 disclosure.¹⁸

If a financial performance representation is made, the franchisor must disclose whether the representation is based on historical financial performance of the franchise system’s existing outlets, or a subset of those outlets, or is a forecast of the prospective franchisee’s future financial performance.¹⁹

When including a financial performance representation in an advertisement based on historical representations, a franchisor must clearly state:” Some [outlets] have [sold] [earned] this amount. Your individual results may differ. There is no assurance that you’ll [sell] [earn] as much.”²⁰

When including a financial performance representation in an advertisement based on future projections, a franchisor must clearly state: “These figures are only estimates of what we think you may [sell] [earn]. Your individual results may differ. There is no assurance that you’ll [sell] [earn] as much.”²¹

Regardless of the type of financial performance representation, franchisors may not have additional language that disclaims the financial performance representation they have made or state that a franchisee may not rely on the information presented.²²

And finally, franchisors choosing to make financial performance representations in advertisements or elsewhere must insure that such financial performance representations conform with corresponding disclosures contained in the franchise disclosure document.²³

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¹⁵ FTC Rule, Bus. Franchise Guide (CCH) ¶ 5705. In 2008, “financial performance representation” replaced “earnings claim”.

¹⁶ FTC Rule § 436.1(e).

¹⁷ *Id.* Under the original Rule §436.1(e), “financial performance representation” broadly included financial performance information via the Internet and franchisors’ speeches and news releases.

¹⁸ See FDD Guidelines, Item 19 Instructions.

¹⁹ See FDD Guidelines, Item 19 Instructions.

²⁰ FTC Rule, Bus. Franchise Guide (CCH) ¶ 5706.

²¹ *Id.*

²² *Id.*

²³ See FDD Guidelines, Item 19 Instructions.