General Contract Clauses: No Business Opportunity

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This Standard Clause memorializes the parties' intent to form a commercial agreement that does not fall within the legal definition of a business opportunity under US federal or state business opportunity laws. Parties (typically, sellers or suppliers) sometimes include this Standard Clause in their licensing, goods or services agreement. This Standard Clause has integrated notes with important explanations and drafting and negotiating tips.

DRAFTING NOTE

Read This Before Using Document

Unless the parties intend to enter into a business opportunity agreement, parties (in most cases, sellers) often seek to avoid the impact of US federal or state business opportunity laws, including state business opportunity statutes. By including these Standard Clauses, the parties demonstrate to each other, courts and other third parties their intent to form a commercial agreement that is excluded from state and federal business opportunity requirements, for example regarding:

- Disclosure and registration.
- Bonding.
- Limitations on termination rights.

Enforceability

Although these Standard Clauses can effectively demonstrate the parties' intent, they do not prevent a court from deeming the agreement to form a business opportunity arrangement.

Business opportunity laws vary by state, so before finalizing their agreement, parties should understand whether and how these laws apply to and classify the agreement. However, despite state law differences, courts typically look beyond the agreement's words to the facts of the transaction to determine whether a business opportunity relationship exists. For example, even if a sale of goods agreement includes these Standard Clauses, a court is more likely to deem the transaction to be a business opportunity if the seller represents that it will buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies or provides.

Business Opportunity Defined

A business opportunity agreement is a type of distribution agreement that does not necessarily create an agency relationship. Under a typical business opportunity arrangement, the buyer obtains the right to offer, sell or distribute goods or services under these conditions:

- The goods or services are supplied by:
  - the seller;
  - seller's affiliate; or
  - a third person with whom the buyer must or is advised by the seller to do business.
- The buyer must pay the seller or seller's affiliate as a condition of obtaining or commencing operation of the business opportunity (either by contract or by practical necessity). This does not include payments for the purchase or reasonable amounts of inventory at bona fide wholesale prices for resale or lease.
- One or more of the following is true:
  - the seller agrees to provide the buyer with outlets or accounts or assistance in establishing outlets or accounts (including internet outlets) for the sale or distribution of the goods or services;
  - the seller agrees to provide the buyer with locations or assistance in finding locations for vending machines, electronic games, rack displays or any other equipment or display for use in the sale or distribution of the goods or services that are owned, leased, controlled or paid for by the purchaser;
  - the seller represents and warrants that there is a market for the goods, services, equipment or supplies and the buyer can earn a profit in excess of the initial payment;
  - the seller represents that it will buy back or is likely to buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies or provides; or
  - the seller represents that it will provide a sales program or marketing program to the buyer.

Work at home opportunities such as envelope stuffing, product assembly and medical billing are often considered business opportunity arrangements. Although franchise and business opportunity agreements have similar attributes, these transactions have different costs and risks. For example:

- State business opportunity laws typically vary more widely than franchise laws. As a result, parties likely can more successfully use contract language to avoid franchise laws in all states than avoid business opportunity laws in all states.
- Business opportunities typically require the parties to make lower set-up and operating investments than franchises.

Most business opportunity laws are written broadly enough to also apply to franchises. Federal business opportunity laws specifically exempt franchises from their scope so long as the franchisor complies with *Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities* (the Franchise Rule) (16 C.F.R. pts 436 and 437). That is not always the case with state business opportunity laws. For more information on the Franchise Rule, see *Practice Note, The Franchise Rule and its Disclosure Requirements (http://us.practicallaw.com/3-524-1564)*.

Business Opportunity Distinguished from Franchise

A franchise is a license under which the seller (franchisor) grants to an individual or entity (franchisee) the right to market and sell the franchisor's goods or services using the franchisor's trademark and other intellectual property in exchange for a franchise fee paid by the franchisee. In granting that license, a franchisor typically exercises substantial control over the franchisee's business. What constitutes a franchise can depend on the definitions under federal or state law.

For more information on franchising, see:

- *Practice Note, The Franchise Rule and its Disclosure Requirements (http://us.practicallaw.com/3-524-1564).*
- *Practice Note, Distributors and Dealers: Federal Law (http://us.practicallaw.com/8-500-4225#a380871).*
- *Article, Franchising country questions: US (http://us.practicallaw.com/2-102-2118).*

Assumptions Used in These Standard Clauses

These Standard Clauses assume that:

- **The agreement does not implicate any state business opportunity laws.** The applicable definition of "business opportunity" may vary depending on the laws applicable to the parties or the transaction.
- **The parties to the agreement are US entities and the goods or services are provided in the US.** If any party is organized or operates in or the goods or services are to be used or delivered in a foreign jurisdiction, these terms may need to be modified to comply with applicable laws in the relevant foreign jurisdiction.
- **These terms are not industry-specific.** These provisions do not account for any industry-specific market practices or federal or state laws, rules or regulations that may apply to the particular transaction.
- **These terms are being used in a business-to-business transaction.** These provisions should not be used for providing goods or services to individual consumers, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.
- **Capitalized terms are defined elsewhere in the agreement.** Certain terms are capitalized but not defined in these Standard Clauses because they are defined elsewhere in the agreement (for example, Agreement, Notice, Parties and Seller).

Bracketed Items

Bracketed items in ALL CAPS, if any, should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added or deleted at the drafting party's discretion.

Since state business opportunity laws vary by state, parties should review and understand applicable state laws before choosing the optional clauses that best fit the agreement.

1. **No Business Opportunity Agreement.**

(a) No Business Opportunity. Nothing in this Agreement shall be deemed or constructed as creating a business opportunity relationship between [Seller/Supplier] and [Buyer/Customer/Distributor/Reseller]. If any provision of this Agreement is deemed to create a business opportunity relationship between the parties, then [[Seller/Supplier] may [immediately/on [NUMBER] day's written Notice] terminate this Agreement/the parties shall negotiate in good faith to modify this Agreement so as to effect the parties' original intent as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as a [TYPE OF AGREEMENT] agreement and not a business opportunity agreement].

DRAFTING NOTE

No Business Opportunity

These Standard Clauses do not completely prevent a court from deeming the agreement to be a business opportunity agreement. Therefore, the parties should:

- Structure the transaction and draft the operative provisions so that a court is unlikely to deem the transaction a business opportunity agreement.
- Include a mitigation procedure that the parties must follow if the agreement is deemed a business opportunity agreement.

Mitigation Procedure

In the last sentence of this provision, the parties must negotiate whether, if the agreement is deemed to create a business opportunity relationship, either:

- The seller may terminate the agreement. The parties are likely to include this option if the seller:
  - is the party most likely to be negatively impacted if the agreement is deemed a business opportunity agreement; or
  - has the requisite bargaining power.
- The parties must modify the agreement to effect the parties' original intent that the agreement is not a business opportunity agreement. This approach is more balanced, but also more likely to lead to disagreement because the parties may not quickly or easily modify the agreement.

In neither case does termination or contract modification address past or existing liability from the contract having been deemed a business opportunity agreement. Therefore, parties must structure the transaction and draft the operative provisions to reduce the likelihood that a court will deem the transaction a business opportunity agreement.

Including a No Franchise Clause

Parties who use a no business opportunity provision should also consider including a no franchise provision that contains independent contractor language. For a sample no franchise clause with independent contractor language, see *Standard Clauses, General Contract Clauses: No Franchise (http://us.practicallaw.com/4-547-8725)*.

(b) [No Guaranteed Earnings or Refunds. [Seller/Supplier] makes no guarantee of potential earnings that will, or may, be received by [Buyer/Customer/Distributor/Reseller] under this Agreement, and has not provided [Buyer/Customer/Distributor/Reseller] with any statements concerning the possible range of [Buyer/Customer/Distributor/Reseller]'s earnings. Further, [Seller/Supplier] does not promise that [Seller/Supplier] will refund any or all of the amount paid by [Buyer/Customer/Distributor/Reseller] for the right to enter into this Agreement.]

DRAFTING NOTE

No Guaranteed Earnings or Refunds

The seller should use this optional provision where applicable state law defines a business opportunity as including any transaction where the seller represents to the buyer that:

- The buyer will, is likely to or can earn an amount in excess of the initial payment paid by the buyer for the rights under the agreement.
- The seller will refund all or a part of the price paid for the business opportunity if the buyer is unsatisfied with the business opportunity.

The seller's disclaimers in this provision mitigate the risk that the buyer can later successfully claim the seller sold it a business opportunity as defined by applicable state law based on the seller's representation that:

- The buyer would earn a specific income (for example, that the buyer's earnings would exceed the amount it paid for the business opportunity).
- The seller will refund all or part of the price paid by the buyer for the right to enter into the Agreement if the buyer is unsatisfied with the arrangement.

(c) [No Buy-back or Security Agreement. [Buyer/Customer/Distributor/Reseller] acknowledges that [Seller/Supplier] provides no "buy-back", "protection" or "secured investment" arrangement of any nature whatsoever that would serve to protect [Buyer/Customer/Distributor/Reseller] from the loss of any purchases or payments in connection with this business arrangement.]

DRAFTING NOTE

No Buy-back or Security Agreement

A seller should include this optional provision where applicable state law defines a business opportunity to include any transaction where the seller represents that it will buy back product made, produced, fabricated, grown or bred by the buyer using, in whole or in part, the product, supplies, equipment or services that were initially sold or leased, or offered for sale or lease, to the buyer by the seller.

The seller's disclaimers in this optional provision mitigate the risk that the buyer can later successfully claim the seller sold it a business opportunity as defined by applicable state law based on the seller's representation that it would buy product back from the buyer.

(d) [No Sales or Marketing Program. [Seller/Supplier] shall not provide a sales program or a marketing program to [Buyer/Customer/Distributor/Reseller], and has not provided [Buyer/Customer/Distributor/Reseller]'s with any statements or representations about [Seller/Supplier]'s intention to provide a sales program or marketing program.]

DRAFTING NOTE

No Sales or Marketing Program

A seller should include this optional provision where applicable state law defines a business opportunity to include any transaction where the seller represents that it will provide a sales or marketing program to the buyer.

The seller's disclaimers in this provision mitigate the risk that the buyer can later successfully claim the seller sold it a business opportunity as defined by applicable state law because the seller promised that it would provide a sales or marketing program.

(e) [No Location or Site Selection Assistance. [Seller/Supplier] makes no representation to [Buyer/Customer/Distributor/Reseller] that [Seller/Supplier] will provide any locations for [Buyer/Customer/Distributor/Reseller] for the sale of [Buyer/Customer/Distributor/

Reseller]'s [products/services], and has not represented to [Buyer/Customer/Distributor/Reseller] that any assistance will be given directly or indirectly by [Seller/Supplier] in finding locations for the use or operation of [Buyer/Customer/Distributor/Reseller]'s business.]

DRAFTING NOTE

No Location or Site Selection Assistance

A seller should include this optional provision where applicable state law defines a business opportunity to include any transaction where the seller represents that it will provide locations to the buyer, or provide buyer with direct or indirect assistance in finding locations for the buyer's business.

The seller's disclaimers in this provision mitigate the risk that the buyer can later successfully claim the seller sold it a business opportunity as defined by applicable state law because the seller promised that it would provide locations or site selection assistance to the buyer, either directly or indirectly.

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