Franchise Regulations in the Context of the MSO Model

By Weston Harty

I. In complying with the corporate practice of medicine, MSOs and professional medical practices risk falling within the expansive reach of franchise regulations

Consumer (i.e., patient) protection in part justifies the existence and enforcement of the corporate practice of medicine doctrine (CPOM) in New York.[1] CPOM's compliance requirements, namely the prohibition of nonprofessionals having ownership interests in a professional entity, in turn, has accelerated the proliferation of management service organizations (MSOs) forming MSO-practice affiliations (MSO groups) as a means of opening the New York health care market to private, nonprofessional investment. Depending on the sophistication and size of the MSO and the parameters of the MSO group relationship, however, an MSO group's legitimate efforts to comply with the CPOM may unintentionally increase the liability risk under an unrelated consumer protection framework: franchise regulations.

Beginning in the 1970s, states enacted franchise laws to combat fraud pervading the franchising industry boom in post-World War II America.[2] Most of these initial franchise acts drew inspiration from securities regulations, viewing a franchise offering as an investment opportunity, and sought to establish a uniform baseline of available information to empower investors (i.e., franchisees) to make informed decisions.[3] The first state-level franchise regulations required certain pre-transaction financial and operating disclosures, a model essentially adopted at the federal level in 1979 with the first iteration of the Federal Trade Commission's (FTC) "Franchise Rule."[4] Though borrowing from the securities regulatory framework, the FTC promulgated the Franchise Rule under its general authority to combat unfair and deceptive trade practices under Section 5 of Federal Trade Commission Act of 1914 (FTC Act).[5] Since the adoption of the FTC Act, most states have deferred to the FTC for franchise regulation, though a minority of states including New York, still maintain, or have since enacted, laws and regulations to supplement the Franchise Rule.[6]

As discussed below, the nature of MSO group relationships—especially the delegation of substantial business functions and trademark[7] licensing—can implicate the broadly drafted franchise regulations existing at the federal and state level. For MSO groups falling under the purview of these regulations, MSOs face both the specter of government enforcement and additional causes of action originating with the practice in the event the MSO group affiliation sours. Each MSO, then, must view both the practice and the patient as a consumer when applying existing consumer protection regulations when structuring an MSO group.[8]

II. Franchise regulations generally apply where a party pays a fee and cedes some control over its business for the right to use a trademark, but New York's regulations are substantially broader

The Franchise Rule aims to remedy bargaining imbalances in franchise relationships through pre-transaction disclosures, but, due to its structure and the FTC's enforcement priorities, there are limited mechanisms to ensure these disclosures are actually made. The New York Franchise Act, as defined below, generally expands the scope and enforcement capacity of the Franchise Rule by: (1) covering more relationships, (2) requiring franchisor registration; and (3) permitting private causes of action.

A. The FTC requires franchisors to provide pre-transaction disclosures to franchisees, and the FTC Act empowers only the FTC to enforce this requirement

Under the Franchise Rule, a "franchise" is any relationship where (1) a franchisor grants the franchisee the right to use the franchisor's trademark in exchange for (2) a fee, where (3) the franchisor exerts "significant" control over, or provides "significant" assistance to, the business of the franchisee.[9]

The FTC interprets the trademark and fee elements in the broadest of terms. To the FTC, a "trademark" is shorthand for any kind of commercial symbol associated with a particular good or service, regardless of protection or registration status, essentially any trade or service mark, logo, or trade dress.[10] Fees, meanwhile, extend beyond express licensing fees and include any kind of compensation, be it rent, security deposits, escrows, training fees, equipment leases, continuing royalties, or other arrangement related to the trademark right.[11] In other words, any transfer of value from the purported licensee to the licensor, regardless of the nomenclature, satisfies the fee element if the franchisee's use of the trademark is in any way contingent upon or related to that value transfer.

The FTC defines the third element less clearly, requiring a more rigorous and nuanced analysis of a given relationship on a case-by-case basis. Levels of control or assistance exist on a continuum without clear demarcation, where "the more

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franchisees reasonably rely upon the franchisor's control or assistance, the more likely the control or assistance will be considered 'significant.'"[12] The FTC also seeks to balance the degree of control against legitimate business interests, like the basic steps all licensors must take to protect and perfect their ownership of a given trademark.[13] Indicia of significant control include customer-facing requirements familiar to anyone who has frequented a fast food restaurant, like standardized site design, product offerings, and production techniques.[14] Significant controls also extend to back office control over things like accounting practices and vendor relationships.[15] Indicia of significant assistance are more amorphous, and can include "furnishing management, marketing, or personnel advice," selecting site locations, and "furnishing system-wide networks and websites."[16] As the fee and trademark element each cast extremely wide nets and involve relatively simple yes or no analyses, whether an arrangement constitutes a franchise for federal purposes almost always hinges on whether the franchisor's control or assistance is significant.

For arrangements satisfying its elements, the Franchise Rule implements a pre-transaction disclosure system to combat unfair or deceptive trade practices through the use of the Franchise Disclosure Document (FDD). The Franchise Rule requires the franchisor to provide the FDD sufficiently ahead of a franchise sale to give the franchisee an opportunity to review and ask questions about its contents. The Franchise Rule also specifies the information the franchisor must include in the FDD. In broad strokes, the FDD must contain information regarding the: (1) nature of the franchise system; (2) franchisor's current and projected financial viability; (3) anticipated costs and expenses associated with operating a franchise in the franchisor's system; (4) franchise agreement; and (5) experience and expertise of the franchisor's key personnel.[17]

As outlined above, noncompliance with the Franchise Rule constitutes an unfair and deceptive trade practice under Section 5 of the FTC Act. As such, the FTC has enforcement authority including levying civil penalties bringing claims in federal court for contract rescission and restitution on behalf of the franchisee.[18] The FTC Act offers no private right of action, giving the FTC plenary enforcement authority that the FTC seldom utilizes.[19] The lack of FTC enforcement likely owes to the fact that the financial rewards available for state-level causes of action (whether for common law fraud or under a state franchise regulation) incentivize franchisees to bring private state-level claims rather than rely on the FTC. To wit, a franchisee in a state like North Carolina can bring a private claim under that state's analog to the FTC Act and seek treble damages in addition to the rescission and restitution the FTC could otherwise secure on its behalf.[20]

B. The New York Franchise Act requires each franchisor to register its FDD with the New York Attorney General and empowers the New York Attorney General and franchisees to enforce its requirements

As mentioned above, while many states simply leave franchise regulation to the federal government, a minority of states maintain supplementary schemes. States with their own franchise acts have taken several approaches, which generally range from broadening the scope of regulated franchise relationships,[21] to providing additional registration or filing requirements with state-level agencies,[22] to regulating some aspect of the franchisor/franchisee relationship other than pre-transaction disclosures,[23] or some combination of the above. In substance, the New York Franchise Sales Act (New York Franchise Act)[24] follows the latter path, and captures a broader range of relationships under its purview than the

Franchise Rule and enhances the pre-transaction compliance requirements.

Under the New York Franchise Act, a "franchise" means any arrangement where (1) the franchisee pays a fee (2) for the right to distribute goods or services either (a) pursuant to a business plan "prescribed in substantial part" by the franchisor or (b) "substantially associated" with the franchisor's trademark.[25] The NY Franchise Act mostly aligns its interpretations of these individual elements with the Franchise Rule. For instance, the New York Attorney General (NYAG), the state authority responsible for enforcing the NY Franchise Act, interprets a "marketing plan" as broadly including "operational, managerial, technical or financial guidelines or assistance."[26] Though technically different from the Franchise Rule's notion of "substantial control" or "substantial assistance", the analysis is roughly analogous: a fact—intensive review to determine the degree of the franchisee's dependence on the franchisor. Similarly, trademarks function as shorthand to reference "any commercial symbol" (whether or not protected) associated with the franchisor.[27] A "franchise fee" likewise generally means any kind of payment associated with the franchise relationship, regardless of form.[28]

Where the NY Franchise Act increases its scope relative to the Franchise Rule, then, is not in the definitions of the elements themselves,[29] but by condensing the three element Franchise Rule definition into two.[30] Instead of requiring the presence of *both* the franchisor's substantial control over *and* licensing of its trademark to, the franchisee, the NY Franchise Act requires merely that *either* the franchisor provide a "marketing plan" *or* license its trademark to the franchisee. As a result, business relationships can constitute a franchise in New York even without trademark licensing if the assistance or advice provided by the purported franchisor otherwise constitutes a "marketing plan," or vice versa. The massive increase of scope cannot be understated; except for the specifically enumerated exceptions to the NY Franchise Act, many trademark licensing relationships are technically franchises for the purposes of New York law. Consequently, the NY Franchise Act facially applies to a number of business relationships that are outside the scope of the Franchise Rule, most other state franchise acts, and a common sense, layperson understanding of franchises in general.

In addition, New York requires the franchisor to put the state on notice of the terms of the franchise sale. While the Franchise Rule only requires that the franchisor provide a compliant FDD to the franchisee, New York essentially requires the franchisor to maintain a current copy of its FDD (with a few additional disclosures) on file with the New York attorney general.[31] During the registration process, the New York attorney general has the opportunity to review and comment on the FDD and additional materials prior to approving the franchisor to make franchise offerings in New York. After the initial approval, the franchisor must continue to regularly update its disclosures to maintain a current registration and authorization to continue franchise sales within the state.[32]

The NY Franchise Act, like the Franchise Rule, authorizes government enforcement of its requirements. Similar to the FTC, the New York attorney general can levy civil penalties and seek restitution on behalf of the franchisee.[33] The New York attorney general can also seek to enjoin future franchise sales by the offender and initiate criminal proceedings against a willing and knowing violator.[34] Unlike the Franchise Rule, however, there is also a private cause of action enabling franchisees to seek damages and rescisson of the franchise agreement,[35] though actions under the New York Franchise Act are generally restorative and not punitive in nature (unlike the treble damages that may be available in other states like North Carolina).[36] Where additional malfeasance, like intentional misrepresentations, accompany noncompliance with the NY Franchise Act, a franchisee may have grounds fraud or other causes of action.

III. Though policy leans against government enforcement of franchise regulations against MSOs, private causes of action remain a potential source of liability

As shown below, given the vast breadth of these regulations, an MSO group could constitute a franchise, at least nominally, in both a federal and New York-specific context. MSOs should therefore remain cognizant of the available exceptions and exclusions to the Franchise Rule and New York Franchise Act and, regardless of whether any exceptions or exclusions apply, carefully structure the MSO group relationship to avoid potential liabilities under these statutes and regulations.

A. MSO groups facially meet the definition of a franchise (i) in New York when they involve the payment of a fee in exchange for considerable support services, and (ii) for federal purposes, with the addition of a right to use a trademark

In a typical MSO group relationship, the MSO provides a variety of back-office support services to the practice, as provided in a management, support, administrative, or other non-clinical services contract (ASA) in exchange for a fee. These services optimally encompass all business functions other than the actual practice of medicine[37] (which, due to the CPOM, the MSO legally cannot perform). Typically, the practice will delegate all or some degree of authority to the MSO for: supply and equipment purchasing or leasing; vendor contracting; IT systems (including the electronic medical record (EMR)) licensing and management; office space procurement; developing and implementing marketing strategies

for the practice; recruiting new physician candidates; maintaining the practice's books and records, handling payroll, and processing patient billing and collections; and procuring insurance for the practice and its professional employees. In essence, the practice stands to experience a substantial interruption of its business and perhaps might not profitably operate without the MSO. While the reservation of authority over clinical matters means the MSO does not control the practice for franchise Rule purposes, this degree of assistance is at least arguably "significant" within the FTC's interpretation of the phrase.

The MSO (or an affiliate) may also hold a trademark that it makes available to or requires the practice to use as part of a broader branding strategy. For instance, the MSO may permit, or require, that the practice migrate to web addresses, post signage, and use letterhead bearing or incorporating the MSO's trademark. Where trademark licensing occurs, the fee under the ASA will also be sufficient to constitute a fee for franchise analysis purposes. In sum, many MSO group relationships where the MSO licenses a trademark to the practice could constitute a franchise under the Franchise Rule.[38]

A New York-specific analysis of the MSO group model is even more clear-cut. In New York, remember that franchises form any time one party exchanges a fee for a trademark license or access to a marketing plan. Accordingly, *every time* the MSO couples a trademark license with its services, a franchise will exist, regardless of the nature and degree of its support services. Even where the MSO does not license a trademark, New York's broad view of what constitutes a "marketing plan" (that is, operational, managerial, technical or financial guidelines or assistance), leads to the same conclusion given the extent of support services describe above. And that is before even considering that many MSOs expressly assume control of marketing and advertising as part of the MSO group affiliation.[39] As the MSO's services at least arguably constitute a marketing plan, then, the MSO group relationship could constitute a franchise under the NY Franchise Law as well even absent a trademark license.

B. MSO groups generally do not meet the statutory exclusions to the Franchise Rule and NY Franchise Act

The FTC has promulgated a number of exceptions to the Franchise Rule, and also recognizes a number of exclusions outside the context of its regulations.[40] New York, meanwhile, largely tracks these exceptions and exclusions as codified in the New York Franchise Act.[41] Notably, these exclusions and exemptions do not nullify the general prohibitions on unfair or misleading trade practices, but instead merely exempt the franchisor from pre-transaction disclosure and, in the case of New York, registration with the New York attorney general. In relevant part, this means that fitting under an exclusion or exemption does not insulate the franchisor from liability for fraud or other, similar causes of action.

Although these exemptions and exclusions exist, most are not applicable in the MSO group context,[42] and the limited options that are available are not necessarily practical to rely upon. For example, the Franchise Rule exempts offerings to franchisees having at least a five-year operating history and a net worth in excess of $6,165,000 (subject to adjustments for inflation).[43] While some practices may well fall into this category, practice assets are largely intangibles like goodwill, presenting accurate valuation challenges.

Of more use is the single franchise exemption to the Franchise Rule.[44] This arrangement, as its name implies, refers to situations where the franchisor grants a single license in its trademark.[45] New York's exemption is slightly different, in that it refers to offers directed "to not more than two persons" and also requires the franchisor to be qualified in New York, among other requirements.[46] The upshot, however, is largely the same—a limited offering of franchises. That can be a viable path in some cases, but is not particularly helpful for a larger MSO group because it requires rolling all of the affiliated physicians and practices into one (potentially multistate) professional entity. Qualifying one professional entity in more than one jurisdiction quickly becomes cumbersome if not entirely infeasible while an MSO group may prefer to spread its affiliations over multiple practices to limit risk.

The overall impact is that MSO groups can arguably form franchises under federal and New York law, and these relationships do not neatly fall into existing exclusions or exemptions, potentially exposing MSOs to franchisor liability.

C. The dynamics between practice and MSO in an MSO group does not align with the policy justifications supporting government regulation of franchises

In assessing the risk of franchisor liability, however, we must also consider the MSO group model practically through a prosecutorial lens. As outlined above, franchise regulations generally aim to protect franchisees that are generally placed at a bargaining disadvantage, whether due to their inexperience in the franchise's line of business or the relative fungible nature of the capital they provide. In practice, consider that, to a prospective franchisee, a franchise presents a turnkey business opportunity: the franchisor determines how the franchise will look, where it will be located, what goods or services it will provide, the vendors it will purchase from, and a myriad of other operational know-how that is essential to running the business, as well as the value of the goodwill associated with an established brand. To the franchisor, meanwhile, the franchisees are essentially interchangeable—in a good franchise system, franchisees do not need training, experience, or any-

thing else other than the up-front capital necessary to open the location because of all of the assistance the franchisor is providing.

For MSO groups, the inverse is, to a degree, true. The services that an MSO provides, for example, are by definition ancillary to the nature of the business itself and are not otherwise unique between MSOs. Though necessary for the practice to operate as a business, it is the MSO's services, and not the franchisees, that are more or less fungible. Moreover, while the MSO may possess an established brand identity, it is the practice that often offers the more valuable goodwill through its relationships with its patients. And the practice, of course, could only develop its own patient base if it successfully operated as a business prior to affiliating with the MSO, meaning that the practice theoretically can operate without the MSO's involvement. The relative bargaining positions of the MSO and practice, then, more closely balance each other as opposed to a textbook franchisor-franchisee relationship.[47] This relative balance in bargaining position, in turn, misaligns with the policy justifications for government intervention in the formation of putative franchise relationships, as the practice is less likely to be taken advantage of than an inexperienced investor.

The greater utility of other consumer protection frameworks available to governmental authorities also affects the likelihood of government enforcement. Specifically, the CPOM, in theory, protects a greater number of consumers than franchise regulations with regard to MSO groups, as patients (the consumer for CPOM purposes) greatly outnumber practices (the consumer for franchise regulation purposes), and the patient is, in any event, the ultimate consumer of health care services. The patient, furthermore, generally lacks expertise in, or sophisticated knowledge of, medicine and relies on the professional judgment of the clinician. Given that CPOM and franchise issues can substantially overlap, the enforcement authority, for instance, the New York attorney general, should favor enforcing the CPOM over franchise regulations given the greater utilitarian benefit. Reality has already borne this out, best exemplified in the New York attorney general's enforcement activity around Aspen Dental. The arrangement, involving individual practice entities separately operating under Aspen Dental's trade dress, plainly constitutes a franchise under the New York Franchise Act.[48] Yet the AG's final Assurance of Discontinuance entirely omits any discussion of franchise law and rests solely on the CPOM and patient protection.[49]

In sum, even though many MSO groups might otherwise meet the definition of a franchise, the policy justifications underlying franchise regulations and greater utility of CPOM enforcement should advise against the FTC or New York attorney general invoking its authority to enforce these regulations against MSO groups.

D. Because private causes of action still exist under the New York Franchise Act, MSOs could face liability as a putative franchisor even absent government enforcement

So, as we've seen, although many MSO group relationships arguably constitute franchises under both federal and New York law, the enforcing agencies lack strong policy justifications to pursue enforcement, especially in light of other enforcement mechanisms that apply to many of the same relationships. That, in total, means MSO groups likely need not lose sleep over government (whether federal or state) enforcement of franchise regulations, but that does not address private causes of action.

Accordingly, MSOs should carefully structure the MSO group to minimize the risk of inadvertently forming an actionable franchise in the event an affiliation with a practice sours. Recall that states and the federal government regulate franchises primarily to combat unfair and deceptive trade practices against the franchisee—things like hidden costs; arbitrarily prescriptive or restrictive operational requirements; or over-promised and under-delivered support. Structuring the MSO group arrangement around these principles, then, can minimize inferences of an actionable franchise.

Due to the aforementioned overlap between CPOM and franchise issues, MSO group arrangements should mitigate this risk already as a natural byproduct of structuring around the CPOM. The practice, for instance, should always retain absolute discretion over clinical decisions or any other act that constitutes the practice of medicine. However, an MSO's services can eat into the autonomy of the practice without violating the CPOM by limiting the autonomy of the practice in a practical sense. For instance, the MSO may receive a delegation to negotiate and bind the practice to payor contracts or secure broader than necessary power of attorney to sign negotiable instruments on behalf of practice. Other fairly common practices like assigning real property leases from the practice to the MSO (to serve as sublandlord to the practice) or having the MSO sublicense the EMR to the practice can also weigh in the favor of finding a franchise relationship by limiting the practice's options if a dispute were to arise. Consider whether the practice has a real option to terminate the ASA in the event of a breach if the MSO has the right to deny the practice's employees entry to the practice's offices or access to the practice's EMR in the event the ASA terminates. The MSO could still, of course, negotiate these kinds of agreements and recommend locations, but the practice should be the signing party.

To be clear, these are policy arguments, and the MSO could still perform the tasks referenced above without guaranteeing franchisor liability in the event the practice ever filed a claim. However, the MSO can distance itself from the type of relationship that the New York Franchise Act seeks to govern if the ASA reserves some degree of authority over non-clinical affairs for the practice. In those cases, borrowing from the federal interpretation, the degree of influence is lessened and more comfortably reflects an administrative service provider than that of a franchisor.

IV. State and federal franchise regulations present a manageable but oft-ignored risk in MSO-practice affiliations

The federal government and several states, especially New York, take an over-inclusive view of franchise relationships and consequently nominally regulate many business relationships that are not commonly understood as, or intended to be, franchises. Looking purely at these regulatory frameworks, some MSO groups could fall also constitute unintentional or inadvertent franchises. Though an MSO group might technically be a franchise, the realities of the MSO-practice dynamic in the MSO group do not squarely align with the policy justifications favoring regulations of franchises in most cases, which minimizes the risk of government enforcement. However, New York's private cause of action under the New York Franchise Act advises structuring the MSO's delegation of authority from the practice around both franchise regulations as well as the CPOM.

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Endnotes

1. *See, generally*, *Carothers, M.D., P.C. v. Progressive Ins. Co.*, 128 N.E.3d 153, 162 (N.Y. 2019).
2. *About the Franchise Investment Law*, California Department of Financial Investment and Protection, https://dfpi.ca.gov/about-the-franchise-investment-law/ (last updated Feb. 7, 2020).
3. *The Accidental Franchise and the New York Restaurateur*, Hospitality Law Committee of the Association of the Bar of the City of New York, https://s3.amazonaws.com/documents.nycbar.org/files/2019516-Franchise_Laws.pdf (April, 2019); *See also* N.Y. Gen. Bus. L. § 680 ("The legislature hereby finds and declares that . . . New York residents have suffered substantial losses where the franchisor . . . has not provided full and complete information regarding the franchisor-franchisee relationship.").
4. *Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities*; Final Rule, 72 Fed. Reg. 15445 (March 30, 2007).
5. *Id.*
6. *See, generally*, State Pre-Sale Franchise Registration and Disclosure Laws Charts: Overview, Practical Law Commercial Transactions, with P. Loh, B. Smith, and M. Mitcham, Westlaw (November 30, 2021).
7. I use the term "trademark" here, and throughout this article, as a general stand-in for any commercial symbol, design, logo, phrase, or dress associated with a good or service, regardless of registration status.
8. This article will focus on the application of the federal and New York state franchise regulations to the MSO group model. Though, as discussed in this article, New York's franchise regulations are among the broadest in the United States, separate state-level analyses are necessary for each state relevant to a given MSO group.
9. 16 C.F.R. § 436.1(h).
10. *Compliance Guide: Franchise Rule 16 C.F.R. Part 436*, Federal Trade Commission, p. 2 (May 2008), https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf.
11. *Id.* at p. 5.
12. *Id.* at p. 2.
13. *Id.* at p. 3.
14. *Id.*
15. *Id.*
16. *Id.*
17. 16 C.F.R. § 436.5.
18. 15 U.S.C. § 57b(b).
19. https://www.foley.com/en/insights/publications/2022/02/ftc-initiates-rare-enforcement-action-burgerim.
20. North Carolina's analog to the FTC Act includes a private cause of action, and prevailing plaintiffs can be awarded treble damages. N.C.G.S. § 75-16. While North Carolina does not independently regulate franchises in most contexts, it does import the federal understanding of unfair and deceptive trade practices from federal jurisprudence.
21. California, for instance, separately incorporates certain petroleum and gasoline production and distribution relationships into the definition of "franchise" in addition to essentially incorporating the Franchise Rule's three-element test. See Cal. Corp. Code § 31005(b).
22. "Registration" and "filing" jurisdictions are industry terms relating to the level of state review. A registration jurisdiction requires state review and approval of the FDD, whereas a filing jurisdiction merely requires filing of the FDD. *Compare* Calif. Corp. Code §§ 31114—16 with Va. Code § 13.1-560.
23. For example, N.J. Stat. § 56:10-4 governs the termination of the franchise relationship, as opposed to the formation of one.
24. N.Y. Gen. Bus. L. §§ 680, *et seq*.
25. N.Y. Gen. Bus. L. § 681(3).
26. 13 N.Y.C.R.R. § 200.1(b).
27. N.Y. Gen. Bus. L. § 681(3)(b).
28. N.Y. Gen. Bus. L. § 681(7); *see also* 13 N.Y.C.R.R. § 200.1(a).
29. Though it could be argued that a "marketing plan" is broader than substantial control or substantial assistance, the difference is functionally negligible in comparison to the merging of elements.

30. It also bears noting that the NY Franchise Act does not apply only to franchises physically located in the state. For instance, if the franchisor is located in New York and extends an offer to an out-of-state person for an out-of-state franchise, the NY Franchise Act would apply. *See A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, 70 F. Supp. 3d 376, 393–94 (D.D.C. Sept. 30, 2014).
31. N.Y. Gen. Bus. L. § 683.
32. *Id.*
33. N.Y. Gen. Bus. L. § 689.
34. N.Y. Gen. Bus. L. §§ 690; 692.
35. N.Y. Gen. Bus. L. § 691.
36. N.Y. Gen. Bus. L. § 691(2) (preventing franchisees from brining a claim under the NY Franchise Act if, prior to the franchisee's filing of a claim, the franchisor offered to repay the franchise fee with interest).
37. For instance, all practice standards; patient care decisions; and the hiring, firing, and disciplining of the practice's physician employees.
38. It bears reiterating that without a trademark, a franchise relationship cannot form under the Franchise Rule. As such, not licensing a trademark is seemingly a foolproof work around franchise regulation. However, larger MSOs (i.e., MSOs with a presence in multiple states and which otherwise fall outside of the exclusions and exemptions to follow) typically possess an established trademark with associated goodwill value. Those MSOs presumably, then, would not find avoiding trademark licensing altogether particularly helpful advice. For that reason, I generally assume the presence of a licensed trademark for the purposes of the federal analysis. And, regardless, while a trademark license is necessary for the Franchise Rule, recall that a franchises can exist without a trademark license under the NY Franchise Law.
39. Control over marketing does not, per se, constitute a marketing plan. However, if a MSO is affiliated with multiple practices and utilizes a similar marketing strategy for each practice, or operates a centralized marketing plan for all of the practices, then there is an inference of a cohesive plan. This isn't necessarily the type of cooperative marketing offered in franchise systems (that is, where each franchisee pays a designated fee into a central advertising fund, which the franchisor spends on behalf of all of the franchisees), but the statute does not make a distinction.
40. *See Compliance Guide*, *supra* note 10.
41. N.Y. Gen. Bus. L. § 684.
42. *See, e.g.,* 16 C.F.R. § 436.8(a)(1) (relating to arrangements with fees totaling less than $615); 16 C.F.R. § 436.8(a)(7) (exempting relationships that lack written documents governing the relationship).
43. 16 C.F.R. § 436.8(a)(5)(ii). *See also* N.Y. Gen. Bus. L. § 684(2)(a) (notably, in this case the AG still has the discretion to grant or deny an exemption on a case-by-case basis).
44. This exception is not expressly stated in the FTC's regulations, but is listed in the compliance guide published by the FTC. *See Compliance Guide*, *supra* note 10.
45. *Id.* at p. 16.
46. N.Y. Gen. Bus. L. § 684(3)(c).
47. This is not to say that bargaining power is necessarily equal between an MSO and a practice.
48. *See In re Aspen Dental Management, Inc.*, Assurance of Discontinuance No.: 15-103 (June 15, 2015).
49. *Id.*

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