

## Summer 2014 Franchise Business Network Meeting

July 15, 2014

11:30 a.m. – 1:00 p.m. CDT

12:30 p.m. – 2:00 p.m. EDT

### Agenda

#### **Welcome and Introductions**

**Joel Buckberg, Shareholder**

*Baker Donelson*

#### **How Canada's New Anti-Spam Law Could Impact Franchising**

**Larry Munn, Partner**

*Clark Wilson LLP*

#### **Financial Performance Representations – Making Sense of Your Numbers**

**Michael Seid, Managing Director**

*MSA Worldwide*

#### **Baker Donelson's Franchisor Toolkit: Automating Your Franchise Sales/Compliance Functions**

**Joel Buckberg, Shareholder**

**Jennifer Johnson, Product Development Manager**

*Baker Donelson*



## D. LAWRENCE MUNN

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### Profile

Larry Munn is a partner of the firm and Chair of the Privacy Law Group. He is also a member of the Business Litigation, Higher Learning, Intellectual Property and Insurance Groups. His practice focuses on administrative and regulatory issues and complex litigation.

Larry works with various clients providing advice on legislation and policy development matters. He is counsel to the Insurance Bureau of Canada and appears before the British Columbia Utilities Commission in respect of the ICBC rates and regulation.

His business litigation practice focuses on a variety of commercial matters, with particular emphasis on trade-mark and licensing issues. Recent assignments include a complex trade-mark dispute, numerous opposition proceedings and ongoing advice regarding the development of an extensive trade-mark program. Larry also provides advice on freedom of information, privacy and personal information.

Larry has both a Diploma in Legislative Drafting and an LL.M. from the University of Ottawa. He received his LL.B. from McGill University. Before moving to Vancouver and joining Clark Wilson, he practiced with a large Toronto law firm.

### Memberships & Associations

Law Society of British Columbia (1993)

New York State Bar (1990)

Former Member, Ontario Bar (1989)

American Bar Association, including the Intellectual Property and the Tort and Insurance Law Practice Section

CLARK WILSON LLP

**Canada's New Anti-Spam Law:  
The Basics**

July 15, 2014

Larry Munn – [lm@cwilson.com](mailto:lm@cwilson.com)  
[www.cwilson.com](http://www.cwilson.com)

## Anti-Spam Legislation

- *An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying Out Commercial Activities, and to Amend the Canadian Radio-television and Telecommunications Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, SC 2010, c. 23.*
- The Canadian Anti-Spam Legislation (CASL).

## Key Takeaways

- When to be concerned about CASL
- More onerous than CAN-SPAM
- Two requirements: consent and content
- Some ways to get consent
- Issues with using third parties
- Steps to take to comply with CASL

## Purpose

- The purpose of CASL is to help promote efficiency by regulating electronic communications
- Encompasses messages from all sources impacting electronic communications, including legitimate sources

## Administration

- Oversight by CRTC and Industry Canada
- Administrative Monetary Penalties
  - \$10 Million for an organization
  - \$1 Million for an individual
  - but purpose to promote compliance
- Private Right of Action on July 1, 2017
  - \$200 each contravention to max of \$1 million per day

## Scope

- CASL does not apply to
  - Non-commercial activity
  - Voice, facsimiles, auto-recorded voice calls
  - Broadcast messaging – tweets and posts

## Anti-Spam Prohibition

- Prohibited from sending commercial electronic messages (CEMs) to an electronic address unless satisfy:
  - Consent requirement (express, implied or within an exception)
  - Content requirement (information requirements and required unsubscribe mechanism)

## Commercial Electronic Messages

- “CEM” - an electronic message with one of its purposes to encourage participation in a commercial activity
- “Electronic message” – can be sent by any means of telecommunication, including text, sound, voice or image message
- “Commercial activity” – a transaction, act or conduct of a commercial character, whether or not for profit

## Commercial Electronic Messages

- Deemed to encourage participation in a commercial activity:
  - Offer to purchase, sell, barter, lease product, goods, service, land
  - Offer to provide business, investment or gaming opportunity
  - Advertising or promoting any of the above
  - Promoting a person as being a person who does anything above or intends to do so

## Exceptions

- Prohibition on sending CEMs does not apply if:
  - Family or personal relationship
  - Inquiries or responses about services
  - Within or between businesses concerning activities of recipient
  - Satisfy legal obligation
  - Sent and received on an electronic messaging system
  - You have a reasonable belief CEM sent to a foreign country that has comparable anti-spam law and you comply with that foreign law
- (If within these exceptions, need not satisfy content requirements)

## Consent Not Required

If message:

- provides quote or estimate for supply of product, goods, service, land, if requested by recipient.
- facilitates, completes or confirms a commercial transaction the recipient agreed to enter.
- provides warranty, product recall, safety or security information about a product, goods, or service person uses, has used or has purchased.

## Consent Not Required

If message:

- provides notification of factual information about a subscription, membership, account, loan or similar relationship, or the ongoing use or purchase of a product, goods or service offered under such a relationship.
- provides information related to an employment relationship or related benefit plan in which recipient is currently participating or enrolled.



## Consent Not Required

If message:

- delivers a product, goods or service, including updates or upgrades that recipient is entitled to receive under terms of a transaction previously entered.

## Implied Consent

- If sender has an existing business relationship with recipient, which includes:
  - purchased or leased product, goods, service, involved in an investment or gaming opportunity within last two years,
  - entered into a written contract still in effect or expired within the last two years, or
  - made inquiry or application within the last six months

## Implied Consent

- If person has conspicuously published an electronic address which is not accompanied by a statement that does not wish to receive unsolicited CEMS and the message is relevant to the person's business, role, functions or duties in a business or official capacity.
- If person has disclosed the electronic address without indicating a wish not to receive unsolicited CEMs and the message is relevant to the person's business, role, functions or duties in a business or official capacity.

## Implied Consent - Transitional

- As of July 1, 2014, if have existing business relationship that includes sending of CEMs, consent implied for three years after Act comes in force (i.e. until July 1, 2017).
- Must reassess at July 1, 2017

## Express Consent

- Allows sending of CEMs to all persons who opt-in and without concern whether fall within exception or have implied consent
- Be clear about what the person is consenting to
- Must opt-in to consent
- Provide statement that consent may be withdrawn

## Express Consent

- Set out purpose
- Identity of person requesting (name if consent on behalf of another person)
- Mailing address
- Telephone number with access to voice message or agent, email address or web address
- Statement that may withdraw consent

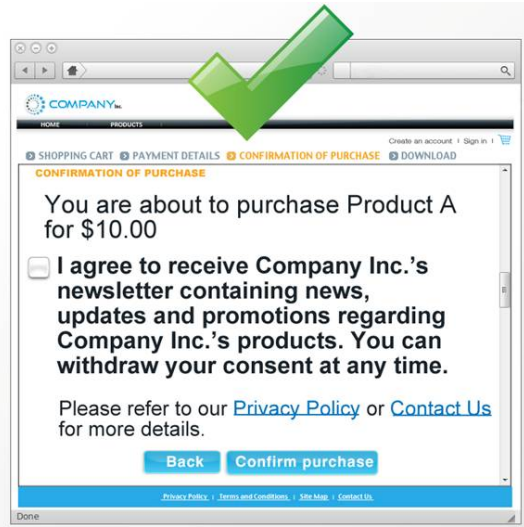
## Express Consent

- Oral or written
- Onus on person who alleges that has consent to prove it
- Oral consent proven by independent third party or audio recording
- “In writing”, includes both paper and electronic

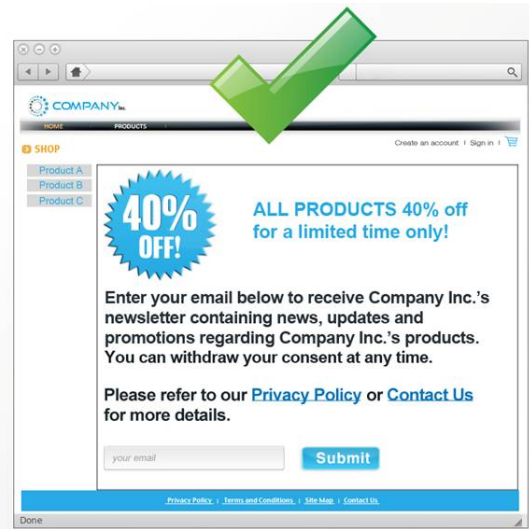
## Express Consent

- Opt-in
- Check a box, type in an email address
- Eg. –  I agree to receive AB Inc.’s newsletter containing news, updates and promotions. Consent may be withdrawn at any time.

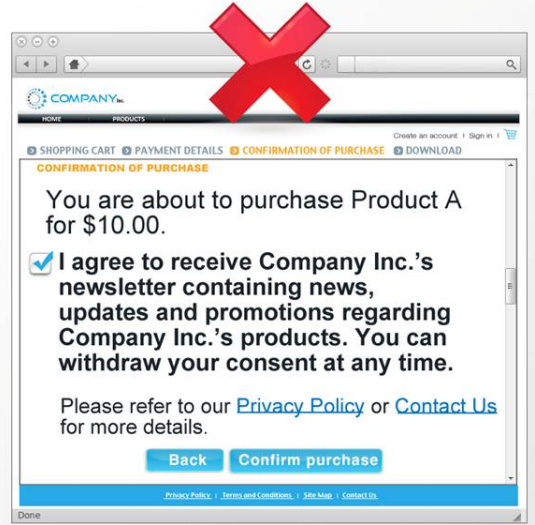
### Express Consent



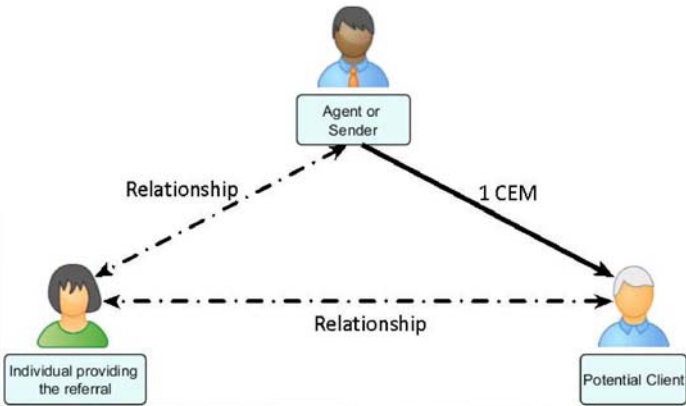
### Express Consent



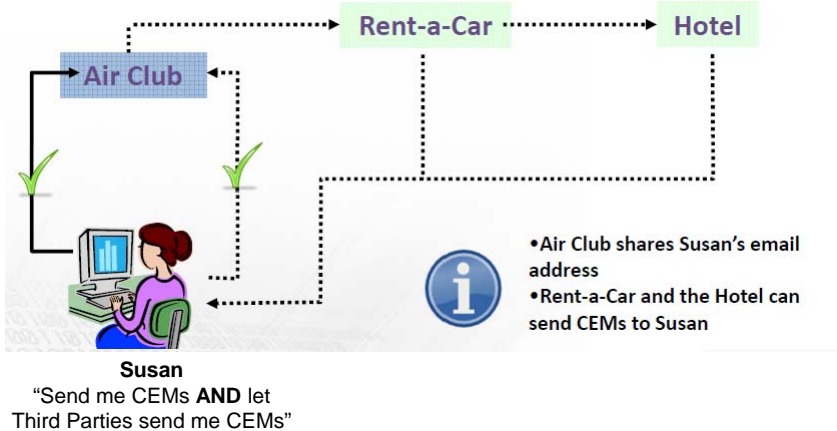
### Express Consent



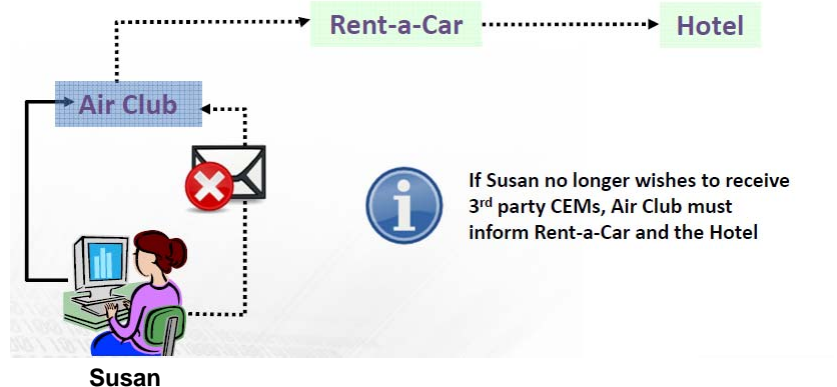
### Third Party Referrals



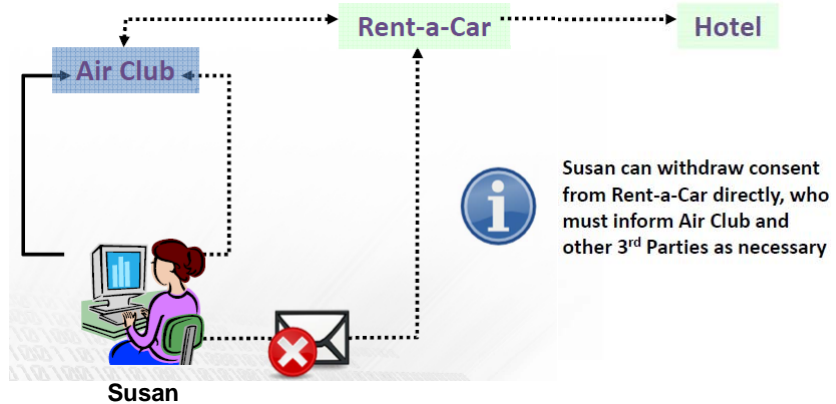
### Third Party Use of Consents



### Third Party Use of Consents



## Third Party Use of Consents



## Third Party Providers

- If relying on a third party to send emails on your behalf, you must exercise reasonable due diligence
- You should have a written contract where the sender agrees to comply with all applicable laws, including CASL
- You should inquire about how they obtained their email list



## Content Requirement

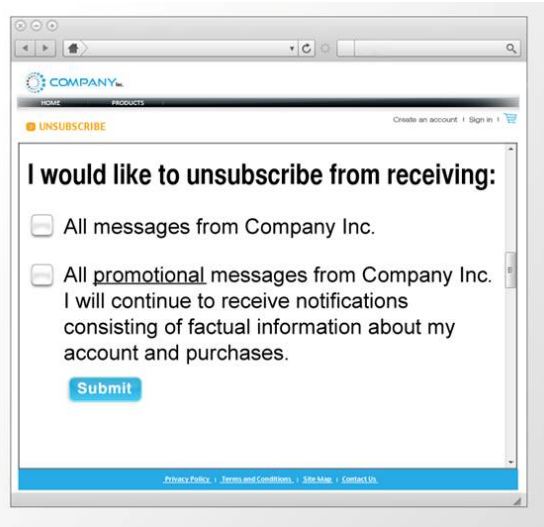
- Information Regarding Sender:
  - Identify sender – or, if different, person on whose behalf sent
  - Provide contact information – mailing address and a telephone number or email

## Content Requirement

- Unsubscribe Mechanism:
  - Be valid for 60 days after CEM sent
  - Give effect without delay and no more than 10 business days
  - Same means unless impractical

## Content Requirement

- Unsubscribe Mechanism:

A screenshot of a web browser window showing an unsubscribe form. The browser's address bar is empty. The website header includes a logo for 'COMPANY', navigation links for 'HOME' and 'PRODUCTS', and links for 'Create an account' and 'Sign in'. A yellow 'UNSUBSCRIBE' button is visible. The main content area contains the heading 'I would like to unsubscribe from receiving:' followed by two radio button options: 'All messages from Company Inc.' and 'All promotional messages from Company Inc. I will continue to receive notifications consisting of factual information about my account and purchases.' A blue 'Submit' button is located below the options. At the bottom of the page, there are links for 'Privacy Policy', 'Terms and Conditions', 'Site Map', and 'Contact Us'.

## JULY 1, 2014

- You should become familiar with the provisions of CASL
- Review existing consents
- Express consents for each new and each existing client are recommended
- Ensure that all CEMs sent to Canadian addresses comply with the content requirements of CASL
- Establish formal policies and procedures

CLARK WILSON<sup>LLP</sup>

**Questions:**

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**THANK YOU**



## MICHAEL H. SEID, MANAGING DIRECTOR

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Michael H. Seid is the founder and Managing Director of **Michael H. Seid & Associates, LLC** (MSA Worldwide), a **domestic and international franchise consulting firm**. For more than 30 years, Michael has served as a Senior Operations and Financial Executive or Consultant for companies within the franchise, retail, restaurant, hospitality healthcare, education and service industries as well as having been a franchisee.

Michael has consulted both domestically and internationally for companies on the appropriateness of franchising, licensing, and other methods of downstream distribution for their products and services; the design and development of franchise and licensing systems; and for established franchisors and other multi-unit franchisees. MSA assists companies in becoming franchisors and provides services in developing retail and operating systems, operations manuals and training programs, franchisor marketing and expansion strategies, real estate selection and site development, franchisee advisory councils, franchisee relations, crisis management, litigation support, mergers and acquisitions, and the strategic restructuring of established franchisors.

Michael is a frequent speaker at programs for the International Franchise Association, universities, law schools, and retail and professional organizations, and has written and lectured for the ABA Franchise Forum and the IFA's Legal Symposium. He has written numerous articles on franchising and is often quoted and interviewed in print and electronic media. Together with the late Dave Thomas, Founder of Wendy's International, Michael is the co-author of **Franchising for Dummies**, published by Wiley Publishing, now in its 2nd edition. He has lectured at several universities and law schools including St. Thomas University, Georgetown Law School, New York University School of Law, Benjamin N. Cardozo **School of Law**, Nova University, the University of Arizona, Johnson & Wales University, MIT Sloan School of Management, Harvard Business School, University of California San Francisco (Berkeley) and Emory University School of Law. He was invited to speak at the Doha Economic Conference in Qatar on the use of franchising to create a middle class in the Middle East focused on dealing with the underlying economic causes of the Arab Spring.

MSA Worldwide is a member of the International Franchise Association's Supplier Forum, and Michael serves on the Supplier Forum's Board of Directors as a Past Chairman. As Supplier Forum Chairman he served on the Board of Directors of the **International Franchise Association** (1997 and 1998) and was the first professional service provider to serve on the International Franchise Association's Executive Committee. He was a member of the Board of Directors of the **International Franchise Association** for two terms (2002 through 2008) and was the first professional services provider ever directly elected to the IFA's board in the association's history. He was reelected to the

Board of Directors of the IFA during the associations board meeting held on 15 September 2011 in Washington DC and will assume his board responsibilities on 14 February 2012 at the conclusion of the IFA's 52nd Annual Convention in Orlando.

Michael is chairman of the IFA's Social Sector Franchising Task Force and is past chairman of the IFA's VetFran Committee. He serves on several committees at the IFA, including FranPAC, VetFran, The President's Advisory Council, the Finance and Budget Committee, the Research Committee, was a trustee of the IFA's Education Foundation. He has also served on several other IFA committees and task forces.

He has completed the requirements and has been awarded the designation of CFE (Certified Franchise Executive) by the International Franchise Association and is a "very non-practicing" CPA licensed in the State of New York. He is a member of the American Institute of Certified Public Accountants ("AICPA"), New York State Society of CPAs ("NYSSCPA") and is an associate member of the American Bar Association ("ABA"). Michael was honorably discharged from the U.S. Army with the rank of Staff Sergeant.

Michael has been qualified as an expert in Federal and State courts and has testified in several cases involving franchising, restaurants, retailing, manufacturing, and service companies in Federal and State Court and in Arbitration Proceedings.

Michael is the Chief Concept Officer and a member of the Board of Directors and Executive Committee of **CFWshops**, a Social Sector Franchisor established to provide clinical services and essential medicines in the peri-urban areas of Sub-Saharan Africa. He also serves on the board and executive committee of the **HealthStore Foundation** and **One Family Health** as part of his commitment to the use of business format franchising as a method to improving the human condition and have a world changing impact on poverty, diseases and economic development. CFWSHops is a franchisor member of the IFA, and Michael is the representative of CFWSHops at the International Franchise Association. Michael speaks frequently internationally on Social Sector Franchising, the use of Business Format Franchising technology applied to societal needs, in the emerging world.

Michael is a member of the **Goldman Sachs Special Situations Group's Chambers Street Executive Network**. The Special Situation Group (SSG) is a global investing platform that invests across the corporate capital structure. The Chambers Street Executive Network is comprised of senior industry experts appointed from diverse industries to advise SSG and its portfolio companies. Members also serve Goldman Sachs portfolio companies as board members, interim executives, consultants, and mentors to high potential portfolio company executives. Michael is on the board of advisors of **Nourish Capital**, an early-stage growth equity investment firm focused exclusively on the restaurant industry.

Michael is on the Board of Directors of the **William Rosenberg International Center of Franchising** at the University of New Hampshire and serves on several other boards, including public corporations.



Strategic Advice & Guidance Based on Real World Experience

## ***Financial Performance Representations – Making Sense of Your Numbers***

Baker Donelson – Nashville, TN  
15 July 2014

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## **We have reached a tipping point**

- It may still be voluntary

but

- The majority of franchisors, with franchisees, today provide a Financial Performance Representation

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## According to the FTC

“Any representation, including any oral, written, or visual representation, to a prospective franchisee, including a representation in the 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”

## Who is governed?

- Any “person that offers for sale, sells, or arranges for the sale of a franchise”.
  - Franchisor, its employees, representatives and agents
  - Sub-franchisors
  - Sales Brokers
  - Possibly franchisees
- Does not include:
  - Franchisees or franchisors selling their existing businesses
  - Others not engaged in franchise sales

## Basis of Disclosure

- Must be disclosed in Franchise Disclosure Document
- Must have a reasonable basis
- Franchisor must be able to substantiate claim, and be able to support any assumptions on which it is based

## Acceptable Disclosures

- Franchisor's financial statements
- Item 19 – FPR
- During discovery day – consistent with FPR
- Operating costs not linked to sales
- Existing franchisees to prospective franchisees - mostly
- Information on owed locations available for sale



## Acceptable Disclosures

- Reference to industry statistics or relevant articles – with limitations
- Provided to franchisee's lender
- Supplemental information – when FPR provided – on particular locations or circumstances

## Direct Verbal Triggers

- Last year our average franchisee grossed over \$500,000
- Last year our franchisees had a range of gross sales of between \$350,000 and \$600,000
- Or when a unit manager during a visit proudly says "My location did \$550,000 last year"

## Indirect Verbal Triggers

- Your franchise will do \$2,000 per week
- Time Magazine determined our average unit sales are approximately \$2,000 a week
- Figure a 10% return on your investment
- Tell me what you think you can make and I'll let you know if it's realistic
- 1/3 of your sales will be gross profit
- Break even will be achieved in six months
- Let me see your projection and I will let you know if they look realistic

## Other FPR Triggers

- Statements of gross sales, gross margins, gross profits, net income, break even, average ticket, number of daily, weekly, monthly, per person transactions.
- You can tell the media just don't hand the article to the prospect.
- Plaques or articles posted in public areas of franchisor's office

## Its not an FPR

- If you give the prospect unit operating cost information

unless

- You tie that information to a percentage of stated sales

## Its not an FPR

- If you brag – puffery is allowed
  - You are going to make a lot of money
  - This business will be very profitable.
  - This is the opportunity of a lifetime.
  - This is going to be the next McDonald's

## Its not an FPR

- If your existing franchisees provide the prospect with the information

unless

- You compensate the franchisee for participating in the sales process – may depend on franchisee's involvement and compensation

## Its not an FPR

- If you give the prospective franchisee information or pro forma to build a business plan

unless

- You add formulas and other data to the information provided

## Its not an FPR

- If you give existing franchisees any financial information in training or during the relationship required to operate their business

but

- Where franchisee is both a franchisee and a prospective franchisee the information can't be for the purpose of encouraging additional franchise sales

## Its not an FPR

- If you give financial information to a bank or lender and not to the prospective franchisee

unless

- You know or don't protect that information from going through the banker to the prospective franchisee

## Why should I provide an FPR

- It gets the “How much will I make” question off the table
- It protects franchisors from possible “off the books” claims made by franchise sellers
- It is required by most franchise brokers
- It is required by most sophisticated or multi-unit developers
- Most franchisors are providing one today

## Why should I provide an FPR

- It protects the franchisee from misunderstanding outside industry data
- It facilitates the franchise sales process by enabling prospect to compare information and conduct their evaluation
- It provides a basis for providing supplemental information to prospect
- It's the right thing to do – when the information is not misleading

## Why not provide an FPR

- The information may be misleading if basis for information does not line up with franchise offered
- Information accumulated from franchisees may be inaccurate or reliable
- May be costly to accumulate meaningful information
- May be costly to construct properly – consultants, lawyers, auditors

## Why not provide an FPR

- Loss of competitive edge because the disclosure is public
- Existing unit and system information reveals the weaknesses in the system – if your financial performance is not good, maybe you should not be franchising

## If FPR not provided you must state

“We do not make any representations about a franchisee’s future financial performance or the past financial performance of company-owned or franchised outlets. We also do not authorize our employees or representatives to make any such representations either orally or in writing. If you are purchasing an existing outlet, however, we may provide you with the actual records of that outlet. If you receive any other financial performance information or projections of your future income, you should report it to the franchisor’s management by contacting [name, address, and telephone number], the Federal Trade Commission, and the appropriate state regulatory agencies.”

## Can you provide projected FPRs

- Yes – but with care
  
- Needs to disclose “significant factors upon which a franchisee’s future results are expected to depend”



## Reasonable Basis

- Reasonable basis is not defined under the rule
- Is it reasonable when:
  - Basis is in NYC but franchises will be in Ft. Smith type markets
  - Basis is 5,000 square foot locations but franchise offered is for 1,500 square foot
  - Basis is fast casual but franchise offered is for kiosk or QSR
  - Basis includes three day-parts but franchise offered is for only two
- Basis must be supportable when documentation requested

## Historic Basis

- Define Groups measured – type, time, geography, etc.
- Time period – relevant period
- Number of units – in system, in group, how many provided information, how many achieved level of performance, distinguishing characteristics

## Historic Basis – Gross Sales

For example:

- For defined types
- For defined periods of operation
- For different levels of sales
- Average and median sales in each level
- Number of Company owned achieving each ach level
- Number of franchisees in each level

## Excluded information

- Should exclude data that franchisor deems unreliable or not representative of offering
- Details of information excluded should be disclosed

## Supplemental information

- May be provided only when an FPR is provided
- Does not need to be registered
- Appropriate when circumstances dictate
- Beneficial and under utilized
- In writing and prepared with the care and formality of the original FPR
- Explain departure from FPR
- Franchisee should sign a receipt for supplemental information

## Actual unit information

- May be provided for existing locations offered for sale
- Not to “end run” FPR
- No FPR required in FDD
- Information provided is unlimited

## In the media – advertising for franchisees

- If in electronic or printed advertising information must be supported by FPR in FDD – updated as required in FDD
- If advertising discontinued FPR must still be provided to prospect for at least an additional six months
- Additional information regarding basis must be included in advertisement

## In the media – press releases and stories

“Company statements in speeches, press releases and the like will not be considered ‘general media representations’ unless they are specifically directed at members of the public interested in purchasing a franchise.”

- Not to be provided to prospects in sales or other information
- Not to send prospects to sources of articles
- Same rules apply to SEC filings for public franchisors

## New or Emerging Franchisors

- May not have any franchisees
- May not have franchisees with history
- May use company owned information only
- If bottom line performance provided include royalties and other fees
- Impact of unavailable critical mass, territory restrictions, other sources of revenue, geographic differences, debt service, start up costs, etc.

## Types of FPRs

- Sources - Reports Provided, Survey Data
- Supported by appropriate notes and explanations
- The information and format is determined solely by franchisor
  - Gross Sales
  - Gross Profits – clearly defined
  - Unit Financial Statements

## Industry specific information

- May be more a more accurate or useful basis for information
  - Reservation rates
  - Room occupancy percentages
  - Number of vehicles employed
  - Number of jobs per day per vehicle
  - Gross profit per job

## Industry specific information

- Percent of costs - labor, cost of goods, rent
- Number of employees
- Number of completed jobs per day – per hour per employee
- Average daily sales
- Sales calls to closed sales ratio
- National accounts
- Repeat business
- Average ticket price
- Number of customers per day

## Should you provide

- Today you need a good reason not to provide an FPR – Not doing so
  - Puts you outside the norm today
  - Likely reduce or delay your franchise sales
  - Limit your franchisee's financing ability
  - Limit multi-unit or sophisticated franchisees
  - Limit the availability of brokers
  - Increase claims of improper claims

## Questions



*Strategic Advice & Guidance  
Based on Real World Experience*

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Joel Buckberg is a shareholder in Baker Donelson's Nashville office, where he is a member of the Corporate/Mergers & Acquisitions Group. Mr. Buckberg counsels clients on business transactions and operations, particularly in hospitality, franchises and distribution, including strategic planning, development, disclosure, equity and debt financing, mergers and acquisitions, system policy and practice development, regulatory compliance and commercial contracts. Prior to joining Baker Donelson, Mr. Buckberg was Executive Vice President and Deputy General Counsel of Cendant Corporation.

### Publications & Speaking Engagements

- Author – "[Were The GM, Chrysler Dealer Terminations Constitutional?](#)" *Law360* (May 2014)
- Author – "[Terminated Auto Dealers Revenge - Were the GM/Chrysler Dealer Terminations Unconstitutional?](#)" *Hospitalitas* newsletter (Spring 2014)
- Co-speaker – "Product Distribution Agreements," webinar, Strafford, December 2013
- Co-author – "[SEC Takes First Significant Steps Toward Crowdfunding](#)," *Franchising Business & Law Alert*, October 2013
- Speaker – "Understanding Financial Statements," ABA Forum on Franchising annual meeting, Orlando, Florida, October 2013
- Co-speaker – "[Perhaps You Are Your Brothers' & Sisters' Keeper](#)," Tennessee Hospitality Association's Annual Hospitality Law Symposium, July 2013
- Author – "[KFC Franchise Guarantors Not Subject to Mint Julep Jurisdiction](#)," *Hospitalitas* newsletter Issue 3, November 2012
- Co-author – "Delivery and Updating" chapter, *American Bar Association Forum on Franchising FTC Franchise Rule*, 2012
- Co-speaker – "Product Distribution Agreements," webinar, Strafford, September 2012
- Author – "[FTC Modifies Franchise Rule](#)," *Hospitalitas* newsletter Issue 2, August 2012
- Co-author – "[Join the Crowd – Is Franchising Uniquely Suited for Crowdfunding?](#)" *Hospitalitas* newsletter Issue 2, August 2012
- Co-author – "[Franchisee's Disregard of LLC Formalities Creates Exposure for LLC Debts](#)," *Hospitalitas* newsletter Issue 2, August 2012

- Author – "[Franchisor's Addendum Enhances Franchisee's Right to Assign Store Lease](#)," *Hospitalitas* newsletter Issue 1, February 2012
- Author – "[Are Shuttle Drivers Franchisees or Employees? Ninth Circuit Wants Lower Court to Decide](#)," *Hospitalitas* newsletter Issue 5, December 2011
- Featured – "[The Rights Guard: What Floats Franchise Attorney Joel Buckberg's Boat After Hours](#)," *Franchise Times*, June/July 2011
- Speaker – "[The Franchise System Post-Private Equity Investment](#)," IFA 2011 Legal Symposium, Washington, D.C., May 16-17, 2011
- Speaker – "Fran-Guard: Sales Management and Compliance," 2011 International Franchise Association's 51st Annual Convention, Las Vegas, February 2011
- Author – "[Oregon Affirms Commitment to Franchisee as Employee Ruling](#)," *Hospitalitas* newsletter Issue 1, January 2011
- Featured – "[A Must-Read Q&A With Attorney Joel Buckberg](#)," *Franchise Times SuperBook*, October 2010
- Co-author – "[Healthcare and Franchising—Compatible or Contraindicated?](#)" *Business Law and Governance*, AHLA, October 2010
- Author – "[Tough Locations Produce Complex Litigation](#)," *Hospitalitas* newsletter 2010, Issue 3, September 2010
- Co-author – "Does Your Point of Sale System Comply with PCI and New State Statutes?" *The Business Lawyer*, January 2010
- Co-author – "Annual Franchise and Distribution Law Developments 2009," American Bar Association Forum on Franchising, October 2009
- Author – "[Franchisee Tips for Troubled Times](#)," *HotelWorld Network*, March 18, 2009
- Co-author – "Disclosure Law Violations: Understanding the Penalties," *Franchising World*, August 2008
- Author – "Franchise Compliance Sets the Tone," *Franchising World*, November 2007
- Author – "When Private Equity Knocks, Will You Be Ready to Answer?" about private equity in LJN's *Franchising Business & Law Alert*, August 2007
- Co-author – "Legal Issues Arising from the Ownership of Competing Franchise Systems," American Bar Association Forum on Franchising (October 1999)
- Author – "Dealing with Franchisees in the Workout Process," in *The Real Estate Workout Deskbook* (H. Zuckerman, ed., Probus Publishing, Chicago 1992)
- Frequent Contributor to *Franchise Times* magazine and *Lodging Business*, the magazine of the Asian American Hotel Owners' Association.
- Lectured on the subject of condominium hotels at the Annual Meeting of the International Bar Association
- Frequent lecturer on domestic and international franchising and hospitality at programs sponsored by International Franchise Association, American Bar

Association Forum on Franchising, The Lodging Conference, and Cardozo Law School.

### **Professional Honors & Activities**

- President and founder – National Franchise Council, 1998 – 2000; Chairman, 2000 – 2003
- Chairman – International Franchise Association Legal Legislative Committee and Corporate Counsel Committee, 1997 – 98
- Administrator – International Franchise Association Franchise Compliance Training Program, 2007 – 2011
- Trainer – FRAN-GUARD franchise compliance training program, 2010 – present
- Member – American Hotel & Lodging Association General Counsel Committee
- AV® Preeminent™ Peer Review Rated by Martindale-Hubbell
- Listed in *Best Lawyers in America*® in the area of Franchise Law since 2008
- Named the *Best Lawyers'* 2014 Nashville Franchise Law "Lawyer of the Year"
- Named to *Who's Who Legal: The International Who's Who of Business Lawyers* since 2009
- Named to *The International Who's Who of Franchise Lawyers*, 2008, 2011, 2012
- Named to "Legal Eagles" by *Franchise Times*, 2007 – 2014
- Named to "20 People to Watch in Franchising" by *Franchise Times*, November 2001
- Named to "New Jersey's Top Rated Lawyers" by *ALM*, 2012
- Member – Board of Trustees, Immune Deficiency Foundation
- Member – United States Coast Guard Auxiliary

### **Admissions**

- Texas, 1980
- Georgia, 1981
- New Jersey, 1994
- Tennessee, 2006

### **Education**

- Vanderbilt University School of Law, J.D. 1980; M.B.A., 1980
- Union College, 1976

**Jennifer H. Johnson**

Knowledge Management Manager  
Birmingham  
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jhjohnson@bakerdonelson.com

Jennifer Johnson is a Knowledge Management Manager in the Birmingham office of Baker Donelson.

**Publications & Speaking Engagements**

- Comment – "Deafening Silence: The Quest for a Remedy in Internet Defamation," 39 *Cumberland Law Review* 475 (2009)

**Professional Honors & Activities**

- Designated Chartered Property Casualty Underwriter (CPCU)

**Admissions**

- Alabama, 2009

**Education**

- Cumberland School of Law, J.D., 2009, cum laude
  - Executive Editor, *Cumberland Law Review*
- Hamilton College, B.A., 1994

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## Baker Donelson DocBuilder

**Jennifer H. Johnson, Esq**

Knowledge Management Attorney

205-250-8328


[jjohnson@bakerdonelson.com](mailto:jjohnson@bakerdonelson.com)


BAKER DONELSON

EXPAND YOUR EXPECTATIONS™

# Extranet

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[Redacted]





**Team Info**


- Team Calendar
- Team Contacts
- NDA Direct (Baker Donelson ONLY)

**Resources**

- All Matters
- DM Documents

 Recycle Bin

 All Site Content



Click logo above to access NDA Direct

**Client Information**

**Client Number:** [Redacted]  
**Client Name:** [Redacted]  
**Open Date:** [Redacted]

**Client & Responsible Attorneys**

No Data Returned 0 record(s) found.

# DocBuilder Workflow

The screenshot displays the DocBuilder Workflow interface. On the left, there is a navigation menu with sections for 'Home', 'Templates' (containing 'NDA'), and 'Links' (containing 'All Items', 'All Approval Tasks', 'All Upload Tasks', 'Import a Template', 'Manage Approvers', and 'About ContractExpress'). The main content area is titled 'My Work in Progress' and features a 'Create NDA' button. Below this is a table of NDA items with columns for Title, DateGenerated, EntityLegalName, YourName, and Item Status. The table includes a 'Details' column with redacted information. The table is filtered to show 'All Items' and is in 'Detail View' mode.

Title	DateGenerated	EntityLegalName	Details	YourName	Item Status
2013-NDA-000021 <small>NEW</small>	5/6/2013	New Departure	[Redacted]	Doris Crawford	Ready
2013-NDA-000029 <small>NEW</small>	5/6/2013	Buster Brown Company	[Redacted]	Doris Crawford	Ready
2013-NDA-000027 <small>NEW</small>	5/6/2013	Opryland U.S.A., Inc.	[Redacted]	Lori McPherson	Ready
2013-NDA-000026 <small>NEW</small>	5/6/2013	Joe Smith	[Redacted]	Lori McPherson	Ready
2013-NDA-000025 <small>NEW</small>	5/6/2013	ABC Company, LLC	[Redacted]	Sarah Harrison	Wait for Signature
2013-NDA-000024 <small>NEW</small>	5/6/2013	University of Tennessee	[Redacted]	Sarah Harrison	Wait for Signature
2013-NDA-000022 <small>NEW</small>	5/6/2013	Vaporwary, Inc.	[Redacted]	Suzette Weber	Incomplete
2013-NDA-000023 <small>NEW</small>	5/6/2013	Marisa's Flower Shoppe	[Redacted]	Bonnie Lord	Ready

# Document Production and Standardization

The screenshot shows the NDA Direct web application interface. At the top left is a logo with three people icons. Below it is a navigation bar with a "Home" button. A dark grey bar at the top right contains the text "Save & Close". Below this is a breadcrumb trail: "Welcome To NDA Direct!" with a dropdown arrow and "Page 1 of 4". To the right of the breadcrumb is a progress indicator consisting of ten empty circles, with the text "Progress" and "No questions have been answered" below it. The main content area starts with the heading "Welcome To NDA Direct!". Below this is a paragraph: "NDA Direct is a simple six-step tool that will enable [redacted]". This is followed by the text "Before you begin, you will want to have:" and a list of three items: (1) Name, address, and contact person for the other company/entity who will be signing the NDA; (2) Type of company/entity (corporation, LLC, partnership, individual, governmental entity); and (3) State and Country in which the company/entity was formed (e.g., state of incorporation). Below the list is the text "If you need to stop and save your answers, click 'Save Answers' at the top of the screen." and another redacted line. At the bottom, a dark grey bar contains the text "Step 1". Below this bar is a question: "Is more than one company/entity" followed by a radio button and the text "Yes". To the right of this question is the text "A multi-party NDA requires the".



# Document Production and Standardization

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## Step 1

Is more than one company/entity involved [REDACTED]

- Yes  
 No

Type of company/entity that is the other party to your NDA:\*

A multi-party NDA requires the assistance of [REDACTED] please contact Legal.

Please choose the entity from the drop-down menu. If the company/entity type is not on the list, please contact Legal.

## Let's collect some information from you.

Your Name:\*

Please enter in first name/last name format. For example, John Smith.

Your phone number:\*

Please include area code. Must be in the following format: 901-555-1212.

Your e-mail address:\*

Your department:

# Document Production and Standardization

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## Step 2: Tell us about the other party to your NDA.

Full legal name of other company/entity:

DBA is not sufficient. Please enter full legal name.

Street Address (for Notice purposes):

Example format: 123 Main Street  
(Please do not include abbreviations.)

City (for Notice purposes):

Please spell out the city name without abbreviations.

State or Province (for Notice Purposes):

Please choose the state or province from the drop-down menu.

Zip code (for Notice purposes):

Was the company/entity formed (or incorporated) outside of the US or Canada?\*

- Yes  
 No

Check with your company/entity contact person if unknown.

In what state or province was the company/entity formed?\*

Check with the contact person if the other company/entity's state of formation is unknown. You may also get this information from the secretary of state website for the state where the other company/entity is located.

# Document Production and Standardization

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## Step 4

Please provide a brief description of your project. Do not include a period at the end of the description.

Provide the project description as a PHRASE (no complete sentences, please). For example:  
(1) "in-vehicle and remote telematics services"

How long should the confidential information protection period continue?

How long should the disclosure period (term) last?

parties' definitive agreement. A one-year term may be

# Document Production and Standardization

Save & Close

Final Steps: You're Almost Finished! Page 4 of 4

Progress   
1 question still to answer

## Final Steps: You're Almost Finished!

### Congratulations!

Your NDA will be complete when you click the "Next" button below this message. Now for a few final steps:

1. After completing NDA Direct, you will be sent an email (cc to Legal) with:
  - (a) a PDF version of your NDA, and
  - (b) the signature and records retentions processes.
2. Simply email the PDF version of the NDA to the other company/entity for signature. The other company/entity should send the

A with comments or changes.

Previous Next

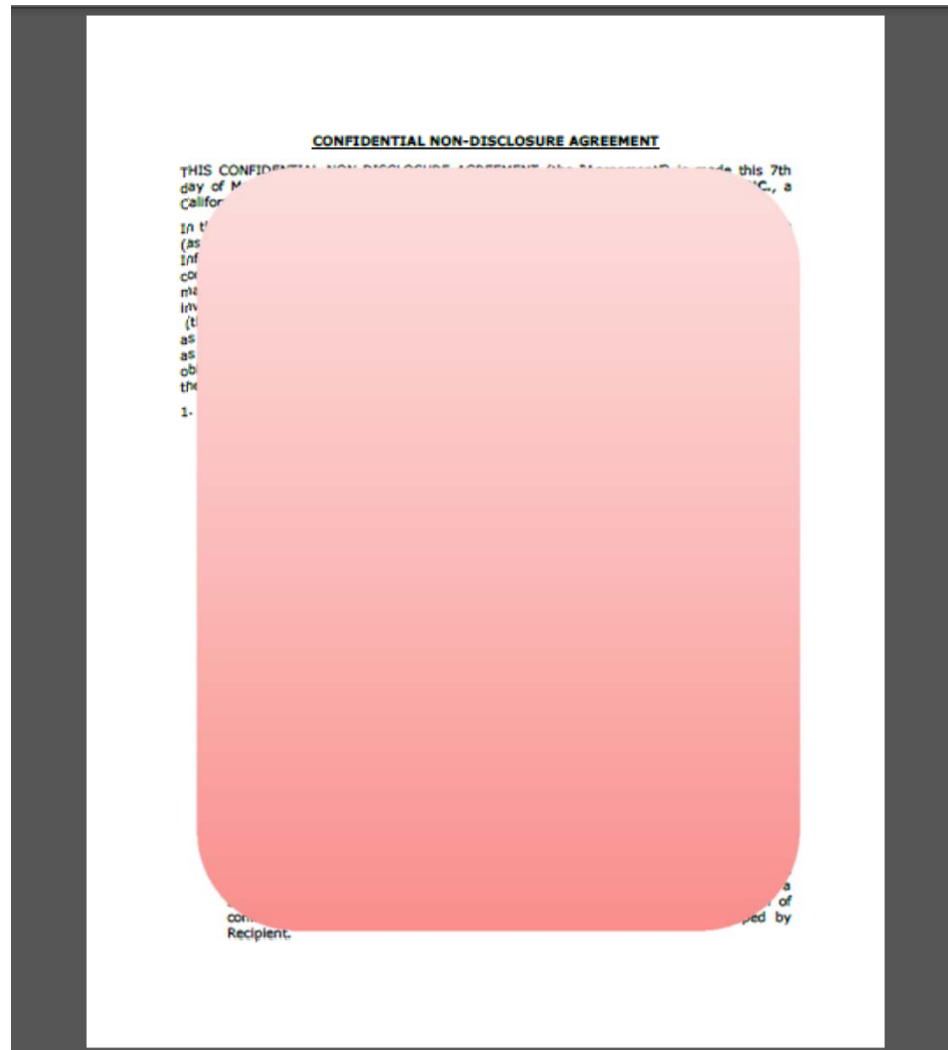
# Database and Documents Created

The screenshot displays a web application interface for managing NDAs. At the top, there is a navigation bar with a 'Home' button. Below this, a sidebar on the left contains 'Templates' (with an 'NDA' link) and 'Links' (with various task-related links). The main content area features a 'Create NDA' button and a 'My Work in Progress' section. This section contains a table of NDA records with columns for Title, DateGenerated, EntityLegalName, YourName, Current Owner, Item Status, and Email Notification. Two records are listed, both marked as 'NEW'. A red rectangular box is overlaid on the table, partially obscuring the 'EntityLegalName' and 'YourName' columns for the first record.

Title	DateGenerated	EntityLegalName	YourName	Current Owner	Item Status	Email Notification
2013-NDA-000031 <small>NEW</small>	5/7/2013	ABC Corp.	Rick Test	Krzyminski, Rick	Incomplete	Starting
2013-NDA-000020 <small>NEW</small>	5/6/2013		rrrr	Krzyminski, Rick	Incomplete	Completed

# PDF or Word Document

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# Admin View Documents & Data Set Database

031

Home

**Templates**  
NDA

**Links**  
All Items  
All Approval Tasks  
All Upload Tasks  
Import a Template  
Manage Approvers  
About ContractExpress

Request → Waiting for Signature → Executed → Exported

Edit Item Reassign Clone Delete

Contract Reference: **2013-NDA-000031**      Item Status: **Incomplete**      Current Owner: **Krzyminski, Rick**

**Documents**

Type	Name	Title	Modified
	2013-NDA-000031.docx	Confidential Non-Disclosure Agreement	5/7/2013 9:37:31 AM
	2013-NDA-000031.pdf	Confidential Non-Disclosure Agreement	5/7/2013 9:38:04 AM

**Attachments**

There are no items to show in this view.

[Add document](#)

**Data**

# Admin View Documents & Data Set Database

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- Data	
Item Status	Incomplete
Manual	No
Current Owner	Krzyminski, Rick
Created	5/7/2013 9:37 AM
Created By	System Account
Export Comment	
Description	Confidential Non-Disclosure Agreement
ConfidentialityObligationLength	five (5) years
ContactPerson	
ContractReference	2013-NDA-000031
DateGenerated	5/7/2013
DisclosurePeriod	three (3) years
EntityLegalName	ABC Corp.
EntityType	corporation
EntityTypeSelect	corporation
International	No
NDAEffectiveDate	5/7/2013





## FRANCHISOR TOOLKIT

Franchising regulations and recordkeeping can create a blizzard of paperwork. Mitigated Risks' Franchisor Toolkit automates the compliance and franchise sales communication process, giving you an easy way to track your transaction and communication documents, and to assure that your records demonstrate that you comply with state, federal and international requirements. That way, your management team can focus on running and expanding your franchise business.

Mitigated Risks LLC is a wholly-owned subsidiary of Baker Donelson offering training and compliance services. The web-based Franchisor Toolkit was developed to leverage Baker Donelson's extensive experience working with the franchise community. It gives you an easy-to-use, cost-efficient way to automate your record-keeping as well as organize and store all the documents related to your franchise as they are created. The system links all related files in an easy-to-access and shareable environment. No matter where your team members reside or work, your key documents are available in a virtual world, for instant review in a password-controlled access system.

Acting as your "virtual" franchise administration resource, the Franchisor Toolkit will help you:

- Track and maintain state filing disclosure documents and receipts
- Access real-time updates on registration status and maps of go/no go states
- Create, store, track and quickly retrieve transaction documents and franchise forms
- Avoid missing important compliance deadlines (through email reminders)
- Avoid unlawful sales
- Reduce the need for internal IT development, support and investment
- Reduce the cost of document assembly and production in the event of litigation
- Avoid the surprise of a forgotten document that affects the outcome of a dispute

Whether you are an established, large-scale franchisor, a mid-sized brand hitting a growth spurt, or a start-up concern, our Franchisor Toolkit is scalable to meet your unique needs and can free up internal resources so your management and legal team can concentrate elsewhere. Multi-system franchisors will appreciate the record standardization the ToolKit provides, so all systems use the same platform.

If you're interested in learning more about how the Franchisor Toolkit can simplify your compliance world, contact Joel Buckberg for a demonstration.



**Joel Buckberg**

615.726.5639

[jbuckberg@bakerdonelson.com](mailto:jbuckberg@bakerdonelson.com)

[www.mitigatedrisks.com](http://www.mitigatedrisks.com)

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*Mitigated Risks LLC is a wholly-owned subsidiary of Baker Donelson providing compliance resources and advanced online training products to companies of all sizes.*

**Federal Legislative Update  
June 2014**

**COMPREHENSIVE TAX REFORM**

Given that small businesses create nearly two-thirds of net new jobs in the United States, IFA's consistent position has been that any tax reform package must address both corporate and individual tax rates to empower franchise small businesses as they continue to drive the American economic recovery. Lowering corporate tax rates will make America more competitive globally and drive job creation. For years, tax reform has only been considered from the viewpoint of large corporations. However, the Administration and Congress should not ignore that many businesses, including 80 percent of franchises, file business income on individual tax returns.

The leadership of both parties in Congress seems committed to achieving tax reform, but the timetable is a bit uncertain due to political considerations and a shakeup of leadership of Congress' tax-writing committees. House Ways & Means Chairman Dave Camp (R-MI) will retire following this Congress and longtime Senate Finance Committee Chairman Max Baucus (D-MT) resigned to become U.S. Ambassador to China. Sen. Baucus' replacement is Sen. Ron Wyden (D-OR), who has also expressed a strong desire to accomplish comprehensive reform.

Chairman Camp proposed draft comprehensive tax reform legislation earlier this year to mixed reactions by the business community. The Ways & Means Committee had reached out to many stakeholders in the small business community during the drafting process including the IFA. The IFA has indicated that its members are willing to sacrifice individual business tax deductions if they are able to gain a lower overall effective tax rate for both corporations and pass-through entities.

Among the most important business tax extenders for franchise businesses are Section 179 expensing, accelerated and bonus depreciation, and the Work Opportunity Tax Credit (WOTC). In May, six bills to make expiring, temporary tax provisions permanent passed the Ways & Means Committee, including a Section 179 expensing bill. These measures were subsequently approved by the full House. The Senate also considered its own two-year tax extenders package, but the bill was held up by Senate Republicans due to Majority Leader Harry Reid's (D-NV) refusal to consider amendments to the legislation.

IFA continues to work with coalitions such as the Coalition for Fair Effective Tax Rates, where we serve on the Management Committee. IFA will continue to promote the needs

of the franchise community and make sure they are accounted for in tax reform discussions going forward.

## HEALTH CARE

Since its passage in 2010, the Affordable Care Act has been the top policy concern for franchise small business owners. Although the Obama Administration announced in July 2013 that the employer mandate would be delayed for the second consecutive year, until 2015, franchise owners are already facing increased costs and are making personnel changes in response. IFA and the U.S. Chamber of Commerce conducted a study in late 2013 to examine the impact of new health care regulations on workforce management practices. The study found that 28 percent of franchise businesses would drop health coverage for their employees, and 29 percent said that they were already seeing increased costs of insuring their workers. 59 percent of franchise businesses said that they would make personnel changes to stay below the 50 full-time equivalent threshold that would define them as a large business, forcing them to provide coverage to all full-time employees. This data is an important resource that IFA uses in meetings with Members of Congress and their staff.

In an effort to mitigate some of the law's negative impact, the IFA will continue to advocate for the passage of legislation to re-define "full-time employee" in the ACA as one working at least 40 hours per week, up from the current level of 30 hours per week. There are two bipartisan bills in Congress to accomplish this goal: H.R. 2988 / S.1188, the *Forty Hours Is Full Time Act*, sponsored by Rep. Dan Lipinski (D-IL) and Sens. Susan Collins (R-ME) and Joe Donnelly (R-IN), as well as H.R. 2575, the *Save American Workers Act*, sponsored by Rep. Todd Young (R-IN). The *Save American Workers Act* passed the House in April, and IFA and its coalition partners were able to secure the votes of 18 Democrats, giving the legislation a slight boost as it heads to the Senate. The issue continues to gain attention in the Senate, and Sen. Collins attempted to add a delay of the 30-hour definition as an amendment to a tax extenders package in May. **The House bill garnered the second-largest number of Democratic votes for a Republican bill in the 113<sup>th</sup> Congress so far.** IFA has taken a significant leadership role amongst business groups in efforts to pass this legislation.

IFA is also pursuing other changes to the employer mandate, such as the re-definition of "large employer" for purposes of the ACA to be an employer with 50 or more full-time *employees* instead of 50 full-time *equivalent employees*. This change will attempt to reverse the trend of employers hiring multiple part-time workers to fill full-time jobs and reduce health care costs. The recent release of the IRS rules on how business will report on their employee's benefits status has brought a new wave of legislation that IFA will steadfastly push to address the many concerns we have with the final rules. We also expect the so-called "discrimination" rules to be released in the next month or two. The rules will have a significant impact on how plans are offered and if the plans can be different for each level of worker.

We continue to work in concert with our coalition partners as part of Employers for Flexibility in Health Care (E-Flex), and retain Washington, DC-based Ernst & Young as counsel regarding health care issues. As additional health care rules and regulations emerge as implementation of the ACA proceeds, IFA will educate the franchise community on employer responsibilities under the law and propose common-sense fixes to make the law work better for franchise small business owners.

## **IMMIGRATION REFORM**

Last summer, the U.S. Senate passed S. 744, the *Border Security, Economic Opportunity and Immigration Modernization Act of 2013*, a comprehensive immigration reform package that includes an electronic employment eligibility verification program (E-verify) and a new W-visa program to allow low-skilled workers to enter the United States legally. While we support the basic framework of the Senate's plan, we believe the legislation does not go far enough to address the issues of most importance to franchise businesses. We instead have advocated for passage of individual pieces of legislation in the House, such as the *Legal Workforce Act* and the *Jobs Originated through Launching Travel (JOLT) Act* to achieve these critical reforms. **This approach to passing immigration reform reflects the ideological split in the House Republican Conference and the profound lack of trust in the Obama Administration to enforce laws that might be passed.** IFA continues to work with its partners in the hospitality industry to hold grassroots events to encourage the House to address immigration.

A bill for a low-skilled visa program has not yet been introduced, but we expect that such a bill will be considered by the House this year as part of a piece-by-piece approach to immigration reform. In late January 2014, House Republicans released a document, "Standards for Immigration Reform," which provided a framework for their approach to immigration reform in six pieces. Among the pieces were "Employment Verification and Workforce Enforcement" and "Reforms to the Legal Immigration System," which included items that addressed the most pressing concerns of the franchise community. We expect that the House will vote on some of these individual measures in 2014, though this is becoming less and less likely as we move toward November.

## **WORKFORCE POLICY**

This year will be critical in the ongoing struggle against overreaching labor regulations that benefit unions at the expense of America's workers and employers. While franchising will face escalating threats in these areas, the courts remain skeptical of many policies promulgated by the National Labor Relations Board (NLRB) and the Department of Labor (DOL). **As a bitterly divided Congress becomes a "graveyard" for President Obama's agenda (especially given the prospect for Republican control of the Senate following the 2014 elections), the Obama Administration has increasingly turned to Executive Orders and the political appointment process to**

**move its agenda forward.** Below is an update on the workforce policy issues most relevant to IFA and its members.

### ***Minimum Wage***

Proposed minimum wage increases will be a top concern for IFA in 2014, as union-backed protests at fast food restaurants continue to draw national attention to the issue. President Obama has also repeatedly called for an increase in the minimum wage; he called for an increase to \$9.00 per hour in his 2013 State of the Union address, and for an increase to \$10.10 in his 2014 address. Legislation in the Senate to increase the minimum wage to \$10.10 per hour failed on a procedural vote in late April.

As IFA's media and public relations team works to correct the media record on franchise-related issues, the Government Relations & Public Policy team will collaborate with other industries that employ low-wage workers to discourage the minimum wage increase through direct lobbying in the Senate and the House, with special attention paid to proposals to index future wage increases to inflation. IFA will also propose improving the Earned Income Tax Credit and other measures designed to help America's working families and to relieve the intense public pressure on employers of low-wage workers.

We expect that there will be at least one additional vote on a potential minimum wage increase this year, as Democrats continue to make wage inequality part of their election-year platform. There have been efforts by Sen. Susan Collins to compromise on the \$10.10 number with added benefits for business--40 hour ACA fix, Permanent WOTC and permanent section 179 expensing, but the proposals have received little traction from the Democratic caucus who have dug in their heels on \$10.10. We remain confident that minimum wage legislation will not pass the Senate this year.

### ***Nomination of David Weil as Wage & Hour Administrator***

Late last year, President Obama nominated Dr. David Weil, a Boston University professor, to head the U.S. Department of Labor's Wage & Hour Division. This division is responsible for enforcing federal minimum wage, overtime, record keeping and child labor regulations under the Fair Labor Standards Act (FLSA). Dr. Weil has repeatedly expressed hostility and bias towards the franchise industry for a perceived neglect of responsibility towards workers, and has indicated that he will target franchise companies for selective enforcement of labor regulations.

Weil's nomination was approved by the Senate Committee on Health Education, Labor and Pensions (HELP) in late January, and he was confirmed over IFA's objection on a party-line vote by the full Senate in late April. Dr. Weil's confirmation poses a direct and significant threat to franchising, and IFA continues to closely monitor the Labor Department and the Wage & Hour Division's activity under his leadership.

### ***Overtime Regulations***

In March, President Obama directed the Secretary of Labor to "restore the common sense principles" related to overtime. In his remarks, President Obama focused on his

belief that overtime protections have “eroded,” that “if you work more, you should be paid more,” and that “millions” of workers who currently are eligible for the FLSA’s overtime exemption should not be.

The President’s remarks indicate that any regulatory proposal will represent a fundamental change. Although the President mentioned that there will be some efforts at clarification and simplification, it is clear that the end goal for these regulatory revisions will be to dramatically decrease the number of employees for whom employers may claim an overtime exemption.

The details are still sparse, with the President directing the Secretary to consider how the regulations could be revised to:

- Update existing protections in keeping with the intention of the Fair Labor Standards Act;
- Address the changing nature of the American workplace; and
- Simplify the overtime rules to make them easier for both workers and businesses to understand and apply.

Based on statements by Administration officials, including Secretary of Labor Perez, it appears that the Administration will seek to raise the salary level for the exemption to apply. Articles reference salary levels ranging from \$640 per week (California’s current level) to as high as \$984 per week.

In some key respects, it appears that the Administration is attempting to “undo” the 2004 regulations. For example, they have indicated that they plan to adjust the primary duty test — described in some publications as something that employers can simply “declare” — presumably to implement a California-style hard 50% limitation on work deemed non-exempt. In addition, it appears that the Administration may attempt to eliminate the ability of managers to engage in management and non-exempt work concurrently. It is likely that other changes to the duty tests will also be proposed. For example, the Administration may seek to re-introduce the requirement that an administrative employee’s work be related to management “policies,” may make it more difficult for workers to meet the professional exemption, and may seek to limit the use of the computer employee exemption (within the parameters of the statutory language). We expect a formal proposed rule on these changes this fall. IFA has taken the lead on this issue and is serving on the management committee of the yet-to-be-named overtime coalition.

### ***NLRB Appointments***

According to U.S. Supreme Court precedent, the National Labor Relations Board must have a quorum of three members in order to issue decisions and promulgate rules. In 2011, with the terms of several NLRB members set to expire, President Obama made three controversial “recess appointments” to the NLRB, even though the Senate was not in recess, but in a *pro forma* session. A lawsuit brought by the CDW and others against the NLRB charges that the recess appointments were not valid, and therefore the Board was acting without a quorum. The U.S. Court of Appeals for the D.C. Circuit ruled in January 2013 that the recess appointments were unconstitutional, and the U.S.

Supreme Court heard oral arguments in the case in January 2014. We expect a decision by the end of the Supreme Court's spring term in June.

Although it is difficult to predict the outcome of Supreme Court cases based on oral arguments alone, it appeared as though even the most liberal justices were skeptical of the Obama Administration's argument that the Senate was in recess, and tended to lean towards the argument that the Senate itself determines when it is and is not in session. Invalidation of the recess appointments could have a retroactive effect on any decisions made between the initial recess appointments and the proper re-appointment and confirmation of the NLRB members in late 2013. The open seats on the Board were filled as part of a plan to initially avert the "nuclear option," a rule change to limit Senate filibusters, although the nuclear option was later enacted.

### ***Poster Requirement***

IFA and CDW filed a suit in federal court to prevent implementation of the NLRB's unlawful effort to force approximately 6 million workplaces to post notices that amount to advertisements for joining a union. The U.S. Court of Appeals for the D.C. Circuit ruled in May 2013 that the poster requirement violated the NLRA and was beyond the NLRB's authority. In January 2014, the deadline for the NLRB to appeal the decision passed without the NLRB filing a petition for review to the U.S. Supreme Court, officially killing the poster requirement and scoring a victory for the employer community.

### ***Ambush Elections***

This month, the NLRB re-issued its "ambush" election rule, which allows for union representation elections to be held in as little as 10 days and denies employers the opportunity to educate their employees as to the impact of unionization on the business. The initial rule had been rejected in court because of a lack of quorum (NLRB member Hayes had not participated in the vote), and the Board had delayed re-issuing the rule while the Board's authority was being questioned in court due to the President's controversial recess appointments. Now that the NLRB is legally constituted, they have re-issued the ruling, which IFA and CDW plan to appeal and have filed comments on. Legislation in the House, H.R. 4321, the *Workforce Democracy and Fairness Act*, would prevent ambush elections.

### ***Companion Exemption***

The U.S. Department of Labor ruled last year to remove the companion exemption within the *Fair Labor Standards Act* that exempts in-home companion aides from receiving overtime pay, and removes the exemption for third-party employers of in-home aides. IFA is pursuing legislative action to reverse this ruling, and has assembled a coalition of franchised home health care companies. IFA will participate in a lawsuit on behalf of its members and other like-minded trade associations to reverse the DOL ruling. The initial brief will be filed in early June.

## **VETERANS IN FRANCHISING**

IFA strives to honor our nation's returning veterans through VetFran. As part of VetFran, 640 member companies voluntarily offer financial incentives to honorably-

discharged veterans to purchase a franchise. To expand on these efforts, IFA is urging Congress to pass legislation to aid our veterans by investing in their futures. S. 1015, the *Help Veterans Own Franchises Act*, sponsored by Sens. Bob Casey (D-PA) and Marco Rubio (R-FL), and H.R. 3725, the *Veterans Entrepreneurs Act*, sponsored by Reps. Bill Flores (R-TX) and Mark Takano (D-CA), would both provide significant incentives for veterans to start a franchise business in the form of a refundable tax credit worth up to 25% of the initial franchise fee.

IFA is currently seeking additional co-sponsors for this legislation in both chambers. We have developed advocacy materials, including a rough estimate of the bill's cost. We expect that we will be able to secure at least 30 co-sponsors for the House bill, which currently has 12 co-sponsors in addition to two co-sponsors for the Senate bill. Former IFA chairman Jim Amos testified in support of the legislation at a House Veterans Affairs Committee hearing in January. Wade Franklin, a franchisee of The UPS Store, also testified before the House Small Business Committee in May about private sector programs to increase veteran business opportunities, and highlighted the successes of VetFran.

IFA's VetFran program has not only been enormously successful in both promoting veteran hiring and entrepreneurship, but also in improving industry relations and building a relationship with First Lady Michelle Obama's Joining Forces Initiative and the U.S. Chamber of Commerce's Hiring Our Heroes Initiative. Building on the success of VetFran is critical to assisting our nation's veterans, but equally important, to establish franchising as a leader in the business community on this important issue.





# Five Steps to Drive Business Growth

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BY STEVE BEAGELMAN, CFE

In this economy, growth is the only possibility for business survival. Competition is aggressively awaiting brands that go stagnant or grow slowly, so it can pounce and overtake leadership of a category. In franchising, it truly is survival of the fittest.

Over the past few years, many brands have tried to discover or rediscover their “secret sauce:” That special thing which helps them stand out in a crowded marketplace and how can they leverage it to grow. Unfortunately, because of increased competition, identifying the secret sauce is more challenging today than ever before.

Without the secret sauce, though, it is challenging to pique the interest of a potential franchisee. In the most simplistic way, franchisees buy on two themes: emotion and money. Emotionally, they must see something special that will drive the brand to earn money. When the emotional electricity runs dry, brands scramble to find ways to adjust.

When it comes time to try something different to spark growth, brands don’t have to jump all over the place to find a potential solution. Simplicity and fundamentals are typically where the next degree of secret sauce exists. This often comes in the form of a rebranding effort or a renewed growth focus, such as co-branding or downsized square footage.

To effectively compete, brands must rediscover their secret sauce and leverage it to thrive. Here are five tips to note when igniting new growth:

## **Step 1: Conduct a Brand Deep Dive**

For a brand to jump-start its business growth, it must first reflect on itself and determine what it can be doing differently. When you are on the inside, it is challenging to see the holes. This is why finding a friend, partner or consultant to punch holes in your process will help you tremendously.

When it comes to growth, you need to leverage your assets as much as possible. Do you have an Item 19 in your franchise disclosure document? Which current franchisees validate best? How do you show your points of differentiation from the competition? How big or small are your territories? Are you analyzing your website’s analytics to put the most energy in the highest traffic areas? Is your franchise development website robust and does it make you want to buy your brand?

Asking yourself a basic set of questions will help determine if you have the baseline for success. If someone on the street tried selling you your brand with the assets you deploy, would you buy it?

Poke holes in your model to find new ways to grow.

## **Step 2: Adjust Your Sales Process with Addition by Subtraction**

Far too often, not doing the little things well halt your franchise’s growth. After conducting a brand “deep dive,” you will have an idea of which things you can adjust. But you have to do it.

Often we see a gap in Step One of the sales process: Calling people back. It’s amazing how many franchisors, in their sales process, don’t call franchise prospects within 24 hours. Proper communication can make a big difference in finding one or two more deals a year. When a prospect inquires, it’s up to

you to show how smooth your brand is and how buttoned up your processes are. The prospect is looking for this.

Taking days to return a call or only sending a form email can sour the emotional connection a prospect has with you and your brand. When they click the “Apply Now button,” their emotions are at a high point. You must keep that emotion high until you can decide if they are the right fit for your brand.

### **Step 3: Don’t Stop Spending**

No matter which franchise conference you attend or which franchisor you speak with, the math is usually pretty much the same. The average franchise deal, these days, will cost \$8,000 to \$12,000 in outbound marketing to complete a franchise sale. If your goal is 10 units in 2014, you should have, at least, \$80,000 to \$120,000 to spend on marketing (shows, brochures, sales collateral), public relations, advertising (hyper-localized to the specific markets you want to grow in, and the trades specific to your trade) and digital (website, pay-per-click and search-engine optimization). Each deal comes with a price tag. This means you can’t stop spending when times get tough or if you want to spark growth. You have to maintain a healthy budget to create enough impressions in the marketplace. Each potential franchisee will require a different number of impressions before he is willing to make an inquiry. You will need to work all the communications channels to find them.

### **Step 4: If Your Marketing Didn’t Work Last Year, Change It**

No matter how much you spent last year, if it didn’t net the results you wanted, you should probably make a change. Far too often, franchisors stick with the same marketing materials year after year. This is fine if you are meeting your development goals. If not, you should adjust your message.

Identify your brand assets. Often, these assets exist among your staff.

Prospective franchisees buy on emotion, first. This means, they have to believe they can make great things happen for their families with your brand. If they see your beautiful building and you’re No. 1 in category product in your advertising, they might not be able to relate. If they see another franchisee who took a risk and joined your brand, they may be able to make that connection if they have similar characteristics. People sell to people.

Don’t be afraid to make adjustments to your marketing materials; a very simple change can lead to a renewal in growth.

### **Step 5: Speak Loudly**

There are too many franchise brands that turn the lights on and expect prospects to show up. Sure, there will be that initial rush of friends, family and prospects one-degree separated; however, to grow you must scream proudly about your brand. Don’t just sit there and expect prospects to come in.

With a strong, process driven website, you will be able to entertain prospects. But without an outbound marketing strategy, you won’t ever reach significant growth goals.

There are certainly efficient ways to spark growth, such as the use of franchise sales brokers (if they believe in your brand), referral incentives and an aggressive/proactive sales team, but without a good look at yourself, a proper plan and execution, you won’t grow to be a great brand.

Franchise growth is not magic; it is the right combination of a lot of small wins working together to build a successful brand.

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# Testing the Franchisor's Financial IQ In Today's Lending Environment

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Regional and national lenders are still active in the franchise arena; however, they are evaluating both the franchisor and franchisee.

By Jerry Jones and Randy Jones

Financing for franchisees continues to be an obstacle to the growth of franchise brands. Conventional lenders have pulled out of franchise lending unless the concept meets very stringent criteria. The International Franchise Association has gone to great lengths to educate Congress and the U.S. Small Business Administration on the impact franchising has on the economy and job creation. It appears the advocacy has gotten the ear of the SBA, as Karen Mills, the administrator of the SBA, made an appearance at the IFA's annual convention in February. Mills announced a proposal that offers community banks more incentive to be more involved in SBA programs.

Regional and national lenders are still active in the franchise arena; however, they are evaluating both the franchisor and franchisee. Local banks may not have knowledge of a particular concept, and they must be educated on the strengths of the brand. Therefore, whether a franchise prospect is seeking financing through a local, regional, or a national lender, the ability of a franchisor to properly service the franchisee will be evaluated. In the past, franchisors simply provided a franchise disclosure document for this purpose. Today, franchisors will be better served by providing supplemental information. What information will help? Thinking like a bank will answer this question.

## **How has the economy impacted franchise units?**

Current data on key analytics of the brand demonstrates to lenders that franchisors are paying attention. What data is collected to monitor the health of stores? Has action been taken to reduce operating costs for the franchisee? Are franchisees financial statements submitted on a regular basis? Do unit economics demonstrate profitability? If the answers are positive, boast about them. If they are negative, what changes have been made to prevent further declines?

## **A franchisee is struggling...now what?**

What assistance is provided to a struggling unit? If the franchisee has given up altogether, does the franchisor assume operations? Further, does the franchisor have an action plan to assist lenders with potential losses? Assistance does not need to be guaranteeing a loan, and programs such as unit/ asset resale offerings have proven to be helpful.

## **Has the franchisor increased the quality of franchise prospects they are seeking?**

Franchisors spend significant amounts of money on lead generation and on development teams converting leads. If lead criterion is not modified to match current lending trends, then franchisors are wasting resources on prospects that may not come to fruition. Additionally, due to potentially slower ramp up periods, a prospect with more staying power might be less of a risk to the franchise system.

### **What is the new credit criterion?**

- Experience: SBA lenders want more applicable experience than in the past. Franchisors should be prepared to discuss training programs, and the type of franchisee that has been successful within the system.
- Down payment: 20 percent to 30 percent equity is the new 10 percent to 20 percent.
- Collateral: Requirements vary greatly by institution; however, it is safe to say that collateral will be required, especially if it is the franchisee's first unit. Home values are discounted when calculating collateral values. Therefore, the equity available on the personal financial statement will not be the same as the collateral value the lender is considering. With home values varying widely, a Web site such as [www.zillow.com](http://www.zillow.com) can be a good resource to test if the listed value is in the acceptable range.
- Personal credit: SBA lenders allow the prospect to provide explanations for past credit derogatory remarks. It is highly recommended to provide these explanations up front.
- Liquidity: Three to six months of personal debt obligations available after injection for a personal reserve is recommended.
- Income outside of the new business: For new franchisees, lenders want to know that personal expenses can be covered by outside employment. Therefore, an income strategy should be implemented prior to seeking financing.
- Debt-to-income ratios: For existing and new franchisees, lenders will want to see that a prospective borrower is not over-extended.

None of these factors have greater importance over the other. Strengths in one area can overcome weaknesses in another. Additionally, the criterion varies greatly from lender to lender. To focus development efforts on quality leads, it is important for franchisors to understand these criteria, or use the expertise of a franchise finance consultant to guide them through the maze.

### **What points should a franchisor address on its balance sheet?**

During these unstable economic times, financing sources will be reviewing the franchisor's balance sheets to make a judgment of whether the system will be able to complete its mission of serving its franchisees. For that reason, it is important to educate lenders about the franchisor's ability to survive. This process may require additional education about the unique nature of accounting for franchises.

- Are liquid assets sufficient to cover expenses with the possibility of declining revenues?
- Have royalty collections been negatively impacted due franchisees inability to pay?
- How are deferred revenues handled? Revenues for franchise fees which have not been earned (generally meaning the franchisee is not operational) are normally treated as current liabilities. This is required for proper franchise accounting. For emerging and poorly-capitalized systems, this treatment can substantially erode the working capital position which is important to lenders.
- It is imperative for the franchisor to explain to the lender the exposure of potential refunds of the franchise fees. What is the refund policy? Historically, what percentages of fees have been returned? A high percentage of refunds may demonstrate that the system emphasizes unit sales, as opposed to opening stores.

- The success of a franchisee and franchisor is dependent on the ability to efficiently open stores. Consider preparing a chart that tracks the time from when a franchise fee is collected until the store opens. This is a key barometer for the operating efficiencies of the system. Further, it is a start in explaining the amount of deferred revenues.

- Taking all of these factors into consideration, does the balance sheet currently show that a franchisor has the ability to reimburse franchisees for any potential fee refunds?

- Are the financial ratios similar to or better than other franchisors in your segment? Include a computation of working capital with and without deferred revenue, debt to equity ratios, and other relevant tests to highlight your systems financial strengths.

- In the franchise industry, there are various ways for making distributions to owners, partners or parent companies. They are required to be detailed in the Statement of Stockholders Equity. Because many of these transactions may be deemed by lenders as depleting the system's working capital, be prepared to provide explanations.

### **What points should a franchisor address on its income statement?**

Lenders will be reviewing Statements of Income to determine if the franchisor has been and will continue to be able to support the franchisees. Profitability is important to the growth and stability of the system. Lenders are more interested in past performance and not as interested in the future. Points of emphasis are:

- Answers for the differences in year-to-year operating results, both good and bad.
- If franchise unit sales have been slow, does the system require franchise fees to maintain profitability? Also, what is the impact of potentially reduced royalty revenues? Is there a plan for supporting franchisees if revenues are reduced?
- Product development and system improvements should be an ongoing function of the franchisor. Are the profits sufficient to continue to enhance the health of the system?

### **What does the FDD really say?**

The FDD is a required franchisor document. It is in a prescribed format and does not permit leeway for any explanations. As a result, there are areas in the FDD that need expanded discussions. If the franchisor does not provide more detail, lenders will assume the FDD as being "gospel."

Franchisors should not assume that the FDD is their friend in the lending environment. A story needs to be told to the lenders. Specific areas come to mind:

- **Item 7: Estimated Initial Investment**  
Franchisees that experience cost overruns may be under-capitalized, and in the long run, may end up an unfavorable statistic in FDD Item 20. What systems are in place to determine that initial project budgets are realistic and being met? Has the franchisor developed ways to reduce start-up costs?
- **Item 19: Financial Performance Representations**  
The debate continues with respect to earnings claims. Much of the discussion is legal in nature. In the lending environment, a "mature" system with statistically meaningful data, could gain an advantage by making financial representations. If nothing else it can validate the assumptions in the franchisee's financial forecasts required by lenders. Also, it provides transparency for the lender.

For new franchisors, where meaningful information is not readily available, it is easily explainable why representations are not offered.

From a franchise development perspective, is the system losing sales because competitors are providing financial performance representations?

- Item 20: Outlets and Franchisee Information

This area is closely scrutinized by lenders. It is the scoreboard of franchisee entrances and exits from the system. A franchisor might benefit from expounding upon the raw numbers as presented.

Does Item 20 suggest an aggressive growth plan? Is there financial strength to support it?

Lenders are uncomfortable with apparent unrest in the system. Abnormally high transfers and exits from the system raise questions about franchisee satisfaction.

It is important that the franchisor knows the details of these changes. Who exited the system? Why did they leave? Did a franchisee with multiple units leave the system? Is the exit rate normal for the industry and the system? "

- Miscellaneous FDD Items

Franchisors should explain any areas that can raise questions about the operation of the system. As an example, commentaries should be made regarding the status of specific legal actions. Detailed comments of any bankruptcies should be made.

Expanded biographies should be considered for key operating officers. Profiles in the current FDD generally do not explain the successes of those individuals.

### **Are there resources available to franchisors to guide them through the lender education process?**

Franchisors will need to play a key role in assisting franchisees with obtaining loans. Lenders are not only looking at the strength of the franchise applicants, but also at the franchisor's financial ability to support those in the system.

The following is a partial list of available tools and resources to further prepare for educating the lending community:

- Bank credit report: Reviews the franchisor's credit worthiness and compares concepts within the industry.
- Industry reports, such as IBIS World, which discuss industry trends.
- Consultants with lending experience who can carry the system's story to the financing markets and guide prospects through the lending process.
- SBA Registry. Small lenders will not lend to franchisees if the system is not on the Registry.
- FDD will be reviewed by all lenders. Franchisors should prepare expanded explanations for areas which better explain the data reported in the FDD.
- IFA Benchmarking Study when available.
- Coleman Report regarding the SBA activity. Be aware that data may be inaccurate and prepare what is believed to be the correct information.

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