BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

Small Business Initiatives

Status and Outlook of Pending Federal Legislation

John Kinney
Senior Public Policy Advisor
jkinney@bakerdonelson.com
202.508.3431

EXPAND YOUR EXPECTATIONS

Table of Contents

The Politics of Small Business

According to the Small Business Administration, small businesses:

- Represent 99.7 percent of all employer firms
- Employ half of all private sector employees
- Pay 44 percent of total U.S. private payroll
- Generated 65 percent of net new jobs over the past 17 years
- Create more than half of the non-farm private GDP
- Hire 43 percent of high tech workers (scientists, engineers, computer programmers, and others)

The Politics of Small Business (continued)

According to the Small Business Administration, small businesses:

- Are 52 percent home-based and 2 percent franchises
- Made up 97.5 percent of all identified exporters and produced 31 percent of export value in FY 2008
- Produce 13 times more patents per employee than large patenting firms.

Source: U.S. Dept. of Commerce, Census Bureau; U.S. Dept. of Labor, Bureau of Labor Statistics; Kathryn Kobe, 2007 (www.sba.gov/advo/research/rs299.pdf); CHI Research, 2003 (www.sba.gov/advo/research/rs225.pdf)

The Politics of Small Business (continued)

Manta's survey of 1,022 business owners between January 4 and January 18, 2012:

"What political issue will have the biggest impact on your business?"

1. Tax policy 17%
2. Access to credit 16%
3. Health care 15%
4. Unemployment 15%

Source: http://www.manta.com/media/political_survey_012412

The Politics of Small Business (continued)

"How satisfied are you with the field of potential 2012 presidential candidates?"

Response: 54 percent unsatisfied

"Who do you plan to vote for in the 2012 presidential election?"

1. Barack Obama (34%)
2. Mitt Romney (17%)
3. Ron Paul (14%)
4. Rick Santorum (10%)
5. Other (20%)

Washington's Response

"We should support everyone who's willing to work and every risk-taker and entrepreneur who aspires to become the next Steve Jobs....After all, innovation is what America has always been about. Most new jobs are created in startups and small businesses, so let's pass an agenda that helps them succeed."

- *President Obama, State of the Union Address, January 24, 2012*

"The best thing Washington can do for our economy is remove barriers to private-sector job creation. That's why both parties should come together to support this small business tax cut, a key plank of the Pledge to America. It will free up much-needed resources for our entrepreneurs and job creators, making it easier for them to hire new workers and invest in their businesses..."

- *Speaker John Boehner, March 21, 2012*

Washington's Response (continued)

"Small businesses are vitally important job creators and engines of economic growth. Congress can make it easier for small businesses to succeed and strengthen the recovery with real tax relief that lowers the cost of doing business."

- *Senate Leader Harry Reid, March 26, 2012*

Proposed Tax Legislation
White House and Senate Democrats

The Small Business Jobs and Tax Relief Act (S. 2237)

- Extends existing 100 percent depreciation:

  - Extends existing tax break allowing small business to deduct 100 percent of the full cost of purchased equipment (Senate bill: placed in service before Jan. 1, 2013)

  - 10 percent tax credit for new wages and new hires (Senate bill allows for up to $5M in eligible wages per employer)

Senate bill excludes two White House proposals:

- Double the tax deduction for start-up expenses from $5,000 to $10,000
- Eliminate capital gains taxation on investments in small business stock

Proposed Tax Legislation
House Republicans

Small Business Tax Cut Act of 2012 (H.R. 9)

- Would provide a 20 percent deduction for domestic business income of qualified small business
  - Companies with 500 or less employees would qualify

Proposed Tax Legislation
Status and Outlook

Status and Outlook

- House GOP bill approved by Ways and Means Committee on March 28
- Senate Democratic bill introduced on March 26
- Favorable floor action in both chambers likely and election year pressures make agreement highly possible if not probable:
  - House passed 100 percent depreciation extension as part of old version of payroll tax extension in December 2011
  - Ways and Means Chairman Dave Camp (R-MI) supports 100 percent depreciation
  - Ways and Means Republicans supported proposed depreciation amendment during markup of H.R. 9 on March 28.

Jumpstart Our Business Startups (JOBS) Act (H.R. 3606)

Status: The Act was signed into law by President Obama on April 5, 2012

Purpose: Between 1985 and 2005, the Kaufman Foundation found that 96 percent of the jobs created at new companies are created within 5 years of an IPO - *Statement of House Financial Services Chairman Bachus (R-AL), March 27, 2012*

As the number of U.S. IPOs fell precipitously, fewer small companies have gone public....In order to grow...small companies must have access to capital. Unfortunately, the IPO Task Force found that...fewer small companies have gone public: the share of IPOs smaller than $50 million fell from 80 percent in the 1990s to 20 percent in the 2000s - *House Report 112-406, March 1, 2012*

U.S. capital markets raised only 15 percent of global IPO proceeds in 2010, down from an average 28 percent over the preceding ten years. Nearly 10 percent of the U.S. companies that went public in 2010 did so outside the U.S. ....Since 2010, capital markets in China, Hong Kong, and Singapore have seen more than 700 companies pursue IPOs, compared to fewer than 300 in the U.S. during the same period - *House Report 112-406, March 1, 2012*

Title I "Emerging Growth Companies"

Definition: Emerging Growth Companies (EGCs) are issuers that have total annual gross revenues of less than $1 billion.

"On Ramp" Exemptions: EGCs are exempt from certain regulatory requirements until the earliest of three dates:

(1) five years from the date of the EGC's initial public offering;

(2) the date an EGC has $1 billion in annual gross revenue; or

(3) the date an EGC becomes a "large accelerated filer" (e.g., a company that has a worldwide public float of $700 million or more).

Emerging Growth Companies (On Ramp continued)

- Longer transition period for filing quarterly and annual SEC disclosures: 5 years instead of the current transition period of 2 years;
- Audited financial statements are required 2 years prior to registration rather than 3 years;
- Exempt from Public Company Accounting Oversight Board (PCAOB) mandatory audit firm rotation requirement;
- Exempt from Dodd-Frank non-binding stockholder vote on executive compensation arrangements and median employee compensation comparison disclosure;
- Modifies prohibition on ability of investment bank to both underwrite IPO and publish research on EGCs;

Emerging Growth Companies (On Ramp continued)

- Greater pre-filing communications allowed to gauge the interest in potential IPOs by institutional and qualified investors to determine whether an IPO is likely to be successful; and
- Allows EGCs to pre-file confidential registration statements, thereby allowing them to begin the SEC review process without publicly revealing sensitive commercial and financial information to their competitors.

Crowdfunding (Title III)

Special Registration and Disclosure Requirements created for the offer and sale of securities to the public over website portals registered with the SEC:

- The issuer must be a U.S. company and not a reporting or investment company;
- The aggregate amount of securities sold by the issuer within the previous 12-month period (including prior crowdfunding) cannot exceed $1 million.

Proportional Investor Caps: If investor's income is $40,000 or less, the cap is $2,000; if between $40,000 and $100,000, the cap is 5 percent of annual income; if over $100,000, the cap is 10 percent of annual income.

Crowdfunding (continued)

Website Portal and Broker Registration: The offering must be conducted through a broker or funding portal that complies with the new crowdfunding disclosure and transparency requirements. A person who acts as an intermediary in an offering:

- Must register with the SEC as a broker or funding portal;
- Must register with any applicable self-regulatory organization;
- Is prohibited from taking any position on the various investment opportunities being listing (promoters of the offering must self-disclose on the intermediary portal);
- Must disclose risks and other investor education materials and certify that each investor has positively affirmed his/her understanding of risks;

Crowdfunding Website Portal/Broker Registration (continued)

A person who acts as an intermediary in an offering:

- Must check the background and securities enforcement regulatory history on each officer, director and person holding more than 20 percent of the outstanding equity of every issuer whose securities are offered by the intermediary; and

- Must make available to the SEC and potential investors any information provided by the issuer not later than 21 days prior to the first day on which securities are sold to any investor (or such other period established by the SEC).

Crowdfunding (continued)

Issuer Requirements: An issuer who offers or sells securities pursuant to the crowdfunding must file with the SEC and provide to investors and the relevant broker or funding portal certain information (including business description, the business plan, the financial condition and prior crowdfunding offerings within the preceding year).

Purchaser Actions: A person who purchases a security in a crowdfunding offering can sue the issuer for alleged material misstatements or omissions.

JOBS Act: Other Provisions [Changes to Regulation D Rule 506 (Title II)]

Provision: Expands SEC Regulation D Rule 506 exemption to securities marketed through general solicitation or advertising to "accredited investors" to determine extent of interest in a contemplated securities offering (SEC to issue rules on how an issuer verifies that the purchaser of securities is an accredited investor).

Purpose: Because banks have tightened their lending standards, equity financing is essential for small business start-up capital. Because current Regulation D Rule 506 limits the pool of potential investors, Title II is intended to give companies greater access to potential accredited investors, either prior to or after the date of filing of a registration statement with respect to such offering.

JOBS Act: Changes to Regulation A (Title IV)

Provision: Raises the offering threshold for companies exempted from registration with the SEC under Regulation A from $5 million - the threshold set in the early 1990s - to $50 million and authorizes the SEC to re-examine the threshold every two years and report to Congress on its decisions to adjust the threshold.

Purpose: Raising the offering threshold helps small companies gain access to capital markets without the cost and delay associated with the full-scale securities registration process. Because the SEC last set the Regulation A threshold at $5 million in 1992, issuers and market participants argue that the offering threshold has been too low to justify the costs of going public under Regulation A.

JOBS Act: Changes to Section 12(g) (Title V)

Provision: Would raise the threshold for mandatory registration under the 1934 Exchange Act from 500 shareholders to either 2,000 shareholders or 500 persons who are not "accredited investors" and excludes securities held by shareholders who received such securities under employee compensation plans.

Purpose: Section 12(g) requires issuers to register equity securities with the SEC if held by 500 or more record holders and the company has total assets of more than $10 million. Addresses concern that the shareholder threshold (unchanged since 1964) has created a disincentive for private companies to hire new employees or acquire other businesses for stock for fear of taking on too many shareholders.

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Spring 2012 Franchise Business Network Video Conference

Expanding a U.S. Franchise System to Quebec

Presented by Pablo Guzman
Davis LLP
April 10, 2012

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO
111472063.1

DAVIS LLP
LEGAL ADVISORS SINCE 1892

EXPANING A U.S. FRANCHISE SYSTEM TO QUEBEC

WHAT COMES TO MIND WHEN YOU THINK ABOUT EXPANDING INTO QUÉBEC?

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

The top three headaches we hear about are complications of:

- Québec's civil law rules
- Québec's language laws
- Québec's personal property security rules

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

WHAT RULES APPLY?

- The Civil Code of Québec
- Other Québec legislation
- An absence of franchise specific legislation

DAVIS LLP
LEGAL ADVISORS SINCE 1892

THE C.C.Q. GENERAL RULES

- Good faith
- Duty to inform
- Contract of adhesion

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

GOOD FAITH

Art. 6. C.C.Q.
Every person is bound to exercise his civil rights in good faith.

Art. 7. C.C.Q.
No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

Art. 1375. C.C.Q.
The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

DUTY TO INFORM

Three criteria established by the Supreme Court of Canada for the duty to inform to apply:

i) The franchisor's knowledge of the information, whether actual or presumed;
ii) The fact that the information in question is of decisive importance; and
iii) The fact that it is impossible for the franchisee to become informed, or if the franchisee is legitimately relying on the franchisor's representations.

DAVIS LLP
LEGAL ADVISORS SINCE 1892

DUTY TO INFORM

Scope of the duty to inform:

- To disclose frankly and fully the facts upon which the terms of the agreement may vary;
- To place at the disposal of the franchisee the key information allowing him to make a decision;
- To disclose to the other party certain information that is essential for him to contract; and
- To protect the integrity and the reliability of the information.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

CONTRACT OF ADHESION

Caveats for Franchisors:

- External clauses
- Abusive clauses
- Incomprehensible or illegible clauses

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

THE CHARTER OF THE FRENCH LANGUAGE

- In your business:
  - Contracts
  - Labelling
  - Forms
  - Catalogues, brochures, folders
  - Public signs
  - Websites
  - Trade-marks
- The "Even-Steven" rule…
- Exceptions…

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

THE CHARTER OF THE FRENCH LANGUAGE

With your employees:

- In general, communications with your employees must be conducted in French. Communications that are directed at all your employees may be in French or English and French. Communications with individual employees may be in French or in English depending on the employee's preference.
- An employer is prohibited from making employment dependent upon the knowledge of a language other than French, unless the nature of the employee's duties requires knowledge of that other language.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

THE CHARTER OF THE FRENCH LANGUAGE

With your employees:

- An employer is prohibited from dismissing, laying off, demoting or transferring an employee for the sole reason that he is exclusively French-speaking or that he has insufficient knowledge of a particular language other than French.
- Enterprises established in Québec which employ 50 or more persons must ensure that the use of French is generalized at all levels of the firm, including "the use of French in information technologies".
- Enterprises which employ 100 or more employees must create a "francization committee".

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

PERSONAL PROPERTY SECURITY IN QUEBEC

English Canada	Québec
GSA	Hypothec
PPSA	Hypothec
PMSI	Hypothec
Conditional Sale	Installment Sale
Lease	Lease

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

GENERAL PERSONAL SECURITY RULES

- Write your Agreements for Québec
- Publish (i.e. register) your Agreements
- Know your Agreements

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

FIVE EASY STEPS TO FACILITATE YOUR SUCCESS IN QUÉBEC

1. Consider incorporating a Québec subsidiary to become a presence in Québec and run the new Québec operation. Adopt a bilingual name for the corporation.
2. Hire a Québec lawyer who is bilingual, knowledgeable about franchising and connected with the franchise community in Québec. The lawyer should review key issues with your regular counsel to ensure legal uniformity in your system is preserved, so far as possible.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

FIVE EASY STEPS TO FACILITATE YOUR SUCCESS IN QUÉBEC

3. Arrange for your package of franchise documents to be reviewed and revised by your Québec lawyer for compliance with Québec laws. Then have the revised package translated into French for (prospective) French speaking franchisees.
4. Consider entering into a business relationship with someone who is bilingual, has worked in franchise systems in Québec and is well connected with the franchise business community in Québec. Document the relationship carefully using your Québec lawyer. Know your partner!
5. Join the Québec Franchise Association as a means of 'networking' in the province. www.cqf.ca

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

THANK YOU !

MERCI !

Pablo Guzman
Partner, Montreal
Davis LLP
514.392.8406
pguzman@davis.ca

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Spring 2012 Franchise Business Network Video Conference

Canadian Immigration Visas for Employees of U.S. Franchisors

Presented by Brian Tsuji
Davis LLP
April 10, 2012

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Canadian Immigration Visas for Employees of U.S. Franchisors

- In general Americans are Visa exempt
- Two main types of permit options available:
  - Business Visitor Permit
  - Work Permit

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Business Visitor

- Certain activities allowed.
- Activities more business-like than a tourist but not so business-like that actual “work permit” is required.

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Examples of business-like activities eligible for Business Visitor permit:

- Business research for new locations.
- Meeting with staff from the same organization.
- Providing information on direction and expected results.
- Meeting with potential investors.
- Meeting with potential purchasers of goods or services.
- Providing after-sales service advice to purchasers of goods, services, products or systems.

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Other key requirements of eligibility for Business Visitor permit to Canada

- American be paid by an entity outside of Canada during visit to Canada.
- Business Visitor not negotiate and close deals and receive money for services provided or products sold during visit.
- Helpful if visit is for a short period. Example: 2-3 days; frequency of successive trips is less (e.g. once or twice a month).
- Possible to obtain Business Visitor permits for up to six months and then apply to renew that Business Visitor permit.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Work Permit

- Required if an American is performing an activity which would be deemed to be “work”.
- For example: if an American enters Canada to:
  - establish a new enterprise;
  - signs lease;
  - hires staff;
  - signs supplier contracts;
  - signs contracts to sell services or products; and
  - is paid while in Canada.
- These activities considered to be “work” in Canada.
- Also if American being paid by an enterprise in Canada, payment indicates this is “work”.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Methods for American to obtain Work Permit North American Free Trade Agreement (“NAFTA”) Intra-Company Transferee work permit category

- American citizen eligible.
- Transfer from “related” US company to Canadian company.
- “related company” is parent or subsidiary or companies with same controlling shareholder(s).
- To be eligible, American employee must have worked for a minimum of one year of previous three years for a related company.
- Must have been in a senior manager or specialized knowledge and experience position.
- Senior manager has managed staff or function.
- Specialized knowledge and experience could involve staff having worked with specialized knowledge and techniques used by American company.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

NAFTA Professional

- Under NAFTA there is a category for professionals.
- List of professions which are eligible.

NAFTA Treaty Trader

- If applicant will make significant investment in Canada.

General Agreement on Trade in Services (“GATS”)

- There is intra-company transferee work permit category.
- Main difference is GATS applies to more countries.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Intra-company Transferee category under *Immigration and Refugee Protection Act* (Canada)

- Available for all nationalities.
- Same requirements as exist under NAFTA Intra-Company Transferee category.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Labour Market Opinion

- If American employee not able to use any of the previously mentioned exemptions which allow the employee to obtain a work permit without advertising, the American needs to apply for a Labour Market Opinion ("LMO").
- LMO proves the Canadian employer advertised the position and no qualified Canadians were available.
- LMO gives the non-Canadian permission to apply for a work permit.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Provincial Immigration Programs

- In Canada, some provincial business immigration programs allow the applicant to be issued a work permit.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

Conclusion

- Number of different Canadian immigration options are available to be used by a US employee to enter Canada and conduct required business activities.
- Important to select appropriate category.
- Prepare complete documentation.
- Prepare employee for interview questions by immigration officer at port of entry or Canadian Consulate or Embassy in USA.
- If possible try to seek an exemption that does not require advertising.

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

DAVIS LLP
LEGAL ADVISORS SINCE 1892

THANK YOU !

Brian Tsuji
Associate Counsel, Vancouver
Davis LLP
604.643.6496
btsuji@davis.ca

WWW.DAVIS.CA VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO

Controlling and Managing Your Brand in the Social Media Craze

STRATEGIC SOCIAL TECHNOLOGY IFX FranBRAG™

Nikki Gahr Sells, CFE
Vice President Client Services
IFX Online

Social Media Challenges for Franchised Companies

- Consistent branding
- Shift in the way customers purchase
- Franchisees adoption of social media
  - "Why should I participate?"
  - "What do I say"?
  - Knowing how to have "social conversations"
  - How much time are franchisees spending on these issues?
- Which social platforms are relevant to your brand?

FranBrag is a 'Social Life-Line'

What is FranBrag™?

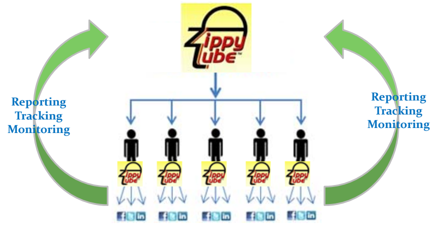
A proprietary technology that allows the franchisor to:

1. Post branded content on all social media pages while allowing customization and input by the franchisee
2. Automatically control the brand message
3. Be assured of a local presence in each franchise territory

One Click - One Application

Your Brand Message to Thousands of Your Franchisees' Social Media & Landing Page Customers through "Braggits"
...with Comprehensive Brand Analytics

A Snapshot of a Braggit



1. Franchisor controls the message through a franchisee dashboard
2. The message is automatically branded locally to each individual franchise location
3. Franchisor receives reporting/tracking/monitoring on social activity from all locations; Franchisee receives same on their location(s)

Introducing the FranBrag "Braggit"

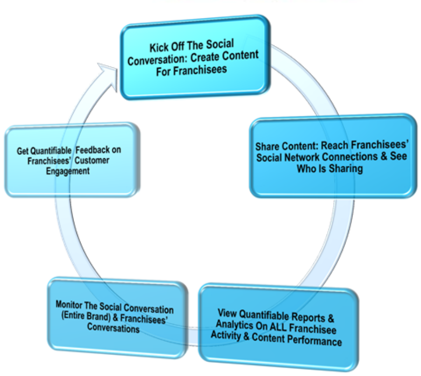
What is a "Braggit"?

A Braggit is a
social webpage
(a fancy, branded "post"!)
created in less than 3 minutes…
with no tech skills needed

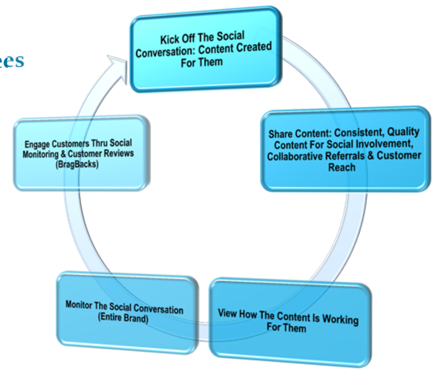
May include:

- Video, Image, Text, Gallery, Etc.
- Share It:
  - All Social Media platforms
  - Indexed On Search Engines
  - Blog Posting
  - Email
- Tracking & Reporting
- Unlimited posts

How the Franchisor will Benefit from FranBrag



How the Franchisees Benefit



Braggit Feed Website Widget

Increasing your Search Engine Optimization (SEO)

- Enhances website/microsite SEO
- Additional content can be added/customized with ease
- Fresh content – doesn't get boring
- Keeps customers informed with latest company news

How The Customer Benefits

Information

- Consistent Flow of interesting information
- See Activity/ Voyeuristic
- Coming to them
- Relevant information
- Feeds are replacing email

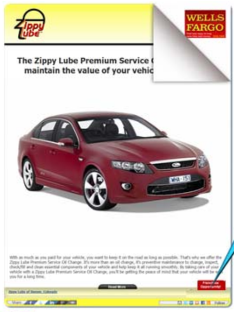
Resource

- Love being peer resource
- Love sharing unique things
- First in-the-know
- 77% of people trust social peer rec. & only 17% trust ads

Relationship/Rapport

- No reason to go anywhere else
- Social creates relationships
- Ability to connect with franchisees
- A sense of 'knowing a brand'

Last, but not least…Franchise Development



Franchise Opportunity!

Fran Dev gets social!
- Quantifiable
- Unique Approach
- Lead sent to email of choice
- Lead information compiled in dashboard
- Information indicates lead from specific Franchise location

FranBrag™ is the Most Comprehensive and Dynamic Social Media Management Platform for Franchise Companies

Establish a LOCAL PRESENCE in each territory on ALL social media platforms,
while controlling your Brand Messaging and Increasing your Social Media reach!

Nikki Sells, CFE
Vice President of Client Services
IFX Online

nsells@ifxonline.com
615-974-9008

Hospitalitas
2012 Issue 1
News and Views for Your Hospitality and Franchise Business

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC
EXPAND YOUR EXPECTATIONS℠

Franchisee Scores with Florida Franchise Act Claim Against Hockey School Franchisor

Christine M. Ho, 407.367.5405, cho@bakerdonelson.com

A franchise allows a business to utilize another's business model. A prospective franchisee assumes the franchise offered has a good track record of profitability; ease of duplication; detailed systems, processes and procedures; broad geographic appeal; relative ease of operation; and costs consistent with what is disclosed in the Franchise Disclosure Document (FDD).

continued on page 2

Franchisor's Addendum Enhances Franchisee's Right to Assign Store Lease

Joel R. Buckberg, 615.726.5639, jbuckberg@bakerdonelson.com

Many retail store leases signed during the past several years of down markets reflect favorable rents and terms, often with tenant-favorable renewal options. When a franchisee-tenant wants to sell its store and assign its lease, can the landlord use the opportunity to wrestle the lease terms into current market rates and conditions? Tennessee courts say no, because the franchisor's lease addendum modifies the assignment clause in the original lease.

A physician and his wife formed a limited liability company to lease and operate a

continued on page 4

Franchisees Must Carefully Consider Renewal Provisions

Steve Press, 404.221.6534, spress@bakerdonelson.com

Do franchise transaction participants usually pay much attention to renewal provisions in the franchise agreement? They should. Not all renewal provisions are created equally. A California appellate court recently construed a renewal provision in a Mail Boxes Etc. (MBE) franchise agreement in a decision yielding surprising results. The unreported opinion is styled *G.I. McDougal, Inc. v. Mail Boxes Etc., Inc. et al.*, Cal. Rptr. 3d, 2012 WL 90083 (CA. App. 2012).

McDougal, the franchisee plaintiff, entered into a franchise agreement with MBE

continued on page 5

Greetings from *Hospitalitas*

Hospitalitas is the Baker Donelson newsletter for our clients and friends in the hospitality industry – hotels, restaurants and their suppliers. It is published several times a year when we believe we can deliver first class, useful information for your business. Please send us your feedback and ideas for topics you would like to know more about. True to our Southern heritage of hospitality, we'll work hard to make each visit with us something special and worth repeating.

In this issue:

Franchisee Scores with Florida Franchise Act Claim Against Hockey School Franchisor, *continued*

The franchise agreement typically contains language that disclaims any promises of profitability to the franchisee, both generally and in the specific circumstances associated with the sales process for the franchise. However, such language may not necessarily protect a franchisor from claims by a Florida franchisee if the franchisee is not successful, and the franchisor has used financial performance representations that were strangers in the FDD.

The case of Hockey Enterprises, Inc. v. Talafous[1], concerns a hockey franchise gone awry. The franchisor and an affiliate, Total Hockey Worldwide and Total Hockey Products (collectively, "Total Hockey") entered into an agreement with Hockey Enterprises, Inc. (HEI) to franchise a business concept for operating hockey training facilities. HEI opened its franchise in Florida in December 2008 but, after experiencing an operating loss of more than $250,000, was closed by February 2010. HEI filed a lawsuit against Total Hockey, as well as Total Hockey's two owners, Dean Talafous and Brian McKinney. HEI's lawsuit claimed fraud, negligent misrepresentation and violation of the Florida Franchise Act by Total Hockey, Talafous and McKinney (collectively, "Defendants").

In its lawsuit, HEI argued that despite disclaimers in the franchise agreement as to any guarantees of profitability, the defendants made promises of franchise profitability to HEI. HEI specifically relied on projection worksheets provided by the defendants, which included a total annual revenue estimate of $437,000 and an annual profit estimate of $139,600. HEI claimed that McKinney made representations that the projection worksheet was reflective of other Total Hockey training centers and that HEI's center would be able to meet those numbers. Nevertheless, the projection worksheets contained a disclaimer that it was merely a projection template and that it did not guarantee the results based on the worksheet. HEI also relied on internal emails stating that other Total Hockey facilities were likely closing and might file bankruptcy. HEI argued that because the defendants had provided these projection worksheets and had failed to disclose the financial conditions of these other facilities, the defendants made misrepresentations to HEI.

After discovery, McKinney, who was an engineer and part-owner of Total Hockey, filed a motion for summary judgment as to HEI's claims against him. McKinney claimed that HEI had no evidence that he had committed fraud, made negligent misrepresentations or committed a violation of the Florida Franchise Act. McKinney therefore argued that based on HEI's lack of evidence, its claims against him should be dismissed.

As an initial matter, the court found that, even though the lawsuit was pending in Minnesota, Florida law applied since the franchise agreement contained a choice of law provision. The court agreed that HEI did not provide sufficient evidence of fraud. Specifically, the court found that there was insufficient evidence to establish that Total

continued on page 3

Third Time's A Charm

For the third year in a row, Baker Donelson has been named to FORTUNE's "100 Best Companies to Work For" list.

Here We Grow Again...

Baker Donelson continued its recent growth spurt with a second Houston acquisition. On February 1 the Firm announced a merger with Drucker, Rutledge & Smith, bringing its total number of attorneys and policy advisors to more than 630.

April 10 FBN Meeting to Feature Franchising in Canada - Part 2

Mark your calendars now for the Spring 2012 meeting of the International Franchise Association's Franchise Business Network on April 10. Topics will include "Northern Exposure: Franchising in Canada, Part 2." These quarterly lunch meetings are hosted by Baker Donelson in our offices across Tennessee, Alabama, Mississippi and Louisiana.

New ADA Regs Go Into Effect March 15 - Are You Ready?

Some lodging providers assume they are exempt from compliance with the new ADA regulations, or that past practices were acceptable. Baker Donelson Shareholder David Gevertz is quoted extensively in this recent hotelmanagement.net article on the new regulations that apply to all providers of transient lodging.

Gevertz notes, "There are a number of condo-hotels and corporate lodges who argue that they have not been covered by these regulations, and they haven't done the first thing to comply," he said. "The new rules now apply to them and they don't realize it."

Franchisee Scores with Florida Franchise Act Claim Against Hockey School Franchisor, *continued*

Hockey was in trouble financially or that McKinney knew of this financial trouble when the franchise was sold to HEI. The court accordingly dismissed HEI's fraud claim against McKinney.

However, the court denied McKinney's motion for summary judgment on the other two claims. For the negligent misrepresentation claim, McKinney argued that the franchise agreement, including the integration/merger clause, disclaimed any guarantees or warranties of profitability. McKinney further pointed to a questionnaire HEI signed at the closing in which HEI indicated that no employee or other person speaking on behalf of Total Hockey had made any statement or promise concerning the total amount of revenue that HEI would receive or the costs involved in the franchise.

The court acknowledged that the provisions in the franchise agreement and the questionnaire filled out by HEI presented evidence that refuted the reasonableness of HEI's reliance on the alleged misrepresentations. Nevertheless, the court found that it was an issue of fact that should be decided by a jury and not decided on a motion for summary judgment. The court also found that the issue of whether McKinney made representations to HEI without knowledge as to their truth or falsity should be submitted to a jury. In particular, the court found that a reasonable jury could find that McKinney, as an engineer and part owner of Total Hockey, had a duty to tell HEI that he did not have sufficient information to comment on Total Hockey's financial status or, at least, that he had a duty not to make statements to HEI concerning probability of success.

HEI's claim for violations of the Florida Franchise Act (the "Act") survived McKinney's motion for summary judgment. The court found that the issues underlying this claim should also be submitted to a jury. First, the court found that although McKinney was not a party to the franchise agreement, he qualified as a "person" doing business in Florida and was subject to the Act.

Second, the court noted that the standard required for showing a violation of the Act was lower than the above-discussed standard for fraud. Unlike fraud, which requires intentional false statement, the Act only requires that the franchisee relied to his detriment on the franchisor's "intentional words or conduct" concerning the profitability of the franchise "which are not in accordance with the facts." Based on this lower standard, the court found that a reasonable jury could find that McKinney, as an engineer and part owner of Total Hockey, was in a position to make representations concerning the financial condition of Total Hockey to HEI. Accordingly, the court found that HEI's claim for violations under the Act should be submitted to a jury.

In summary, the court found that the issue of whether McKinney's representations rise to the level of negligent misrepresentation or a violation of the Florida Franchise Act should be submitted to a jury and should not be disposed of on summary judgment. Notably, the court admonished both parties to settle by this bold dicta:

> It continues to be the Court's view that Plaintiff will have a difficult time prevailing in any significant way if this case proceeds to trial. Both parties bear some responsibility for this situation, and it is difficult for the Court to see how a trial would be in the interests of either party versus settlement of the case.

This case provides valuable lessons and cautions to any franchisor selling in Florida, particularly an early stage franchisor without a track record of successful franchise or company store operations. First, franchise agreement disclaimers of warranties or guarantees of profitability of the franchise are not sufficient to fend off claims by an unsuccessful franchisee based on negligent misrepresentation or violations under the Florida Franchise Act. Second, financial performance representations in the form of projections made to a potential franchisee as to profitability or costs of the franchise are a high-risk proposition. Finally, the principals of a franchisor may be held to answer personally for alleged misrepresentations as to the franchise if the franchisor has no basis in fact for the representations, even if they have no personal knowledge of the current status of the franchisor's finances or franchisee financial condition. The principals could wind up in the penalty box for someone else's infraction.

Ms. Ho is an attorney in our Orlando office.

1. No. 10-2943, 2012 U.S. Dist. LEXIS 3322 (D. Minn. Jan. 10, 2012).

Franchisor's Addendum Enhances Franchisee's Right to Assign Store Lease, *continued*

Quiznos sandwich shop, which was to be staffed by their son. The LLC leased a store in Jackson, Tennessee, for a five-year term, with two options to renew for additional five-year terms exercisable on 180 days' notice. If the first renewal option was not exercised, the tenant would be obligated to repay half of the tenant improvement costs borne by the landlord. The lease and renewal documents prohibited assignments of the lease and the renewal options by the tenant. The landlord also signed the franchisor's lease addendum, which provided for transition arrangements if the franchise was sold or taken over by the franchisor or an affiliate. The tenant had the absolute right to assign the lease or sublet the premises to the franchisor and its affiliates. The addendum allowed either the franchisor or the original tenant the right to assign the lease and any related options to renew or extend to a duly authorized franchisee with the consent of the landlord, which was not to be unreasonably withheld or delayed.

After several years of operation, the franchisee wanted to sell the business. A purchaser was identified and approved by Quiznos' franchisor to become the authorized franchisee for the store. Since a short time remained on the initial lease term, the landlord refused to honor the addendum and instead offered to allow the successor to sublease the space (but only for the balance of the original term) and assign the lease for the balance of the original term and one renewal term but not the full two renewal terms. However, the landlord wanted the original tenant improvement cost to be escrowed for payment to him if the lease was not renewed.

The prospective successor balked at these terms and negotiated a lower purchase price to the seller franchisee, with an escrow of the tenant improvement cost put up by the seller and only one renewal option. The buyer walked away after the original lease term expired, leaving the seller to forfeit its escrow. The seller filed an action against the landlord for its damages. After discovery, a denied motion for summary judgment by the landlord and a bench trial, the court found for the seller and awarded the purchase price differential and the escrow amount.

The Tennessee Court of Appeals affirmed the trial court's decision. The court looked at prior Tennessee precedent in articulating a narrow standard for reasonably withholding consent. The language "not unreasonably withhold or delay" is read to mean that the landlord must act in a commercially reasonable manner. Consent may not be withheld on the basis of personal whim or taste, or for other arbitrary reasons. The landlord must act in good faith in a commercially reasonable manner and can only withhold consent purely on the basis of whether the landlord reasonably perceives the prospective assignee to present financial or other risks that are different from the risks accepted with the assignor. The landlord's desire to extract an economic concession or its aversion to working with an assignee who is a tough negotiator or perceived to be personally difficult were found not to be permissible reasons for withholding consent.

In this case, the franchisee benefitted from the franchisor's lease addendum, which changed the lease's assignment provision. The landlord had no obligation not to withhold consent unreasonably in the original lease language. The effort to obtain the landlord's signature on this frequently forgotten document was well rewarded. The overriding assignment provision designed to allow for easier transfers of the franchise would have worked well, had the landlord cooperated, to preserve value for the selling franchisee.

This court also erased any distinction under Tennessee law between "not unreasonably withhold" and "commercially reasonable" standards of conduct for parties with the right to consent. Indeed, the court limits the consent right to the consideration of the financial qualification of the proposed assignee and its ability to perform the contract to be assigned. The court foreclosed the landlord's notion that a request to consent to assign was an opportunity to renegotiate the terms of the contract or back out of a deal that may no longer make economic sense under changed market conditions. Tennessee contract drafters will need to be more specific if such rights are to be reserved and exercised at the time of assignment under this formulation of the Court of Appeals, if this precedent applies outside the lease context. Franchises should retain a higher level of discretion, because the economic interest of the franchisor is more complex and nuanced than that of a landlord. The court leaves open the possibility that withholding of consent is reasonable when the franchised unit is likely to fail at the proposed purchase price because of some intrinsic issue, such as a size too small to be sustainable given its level of investment. Withholding consent will likely need some articulated commercially tenable reason relating to the risk of future performance in future situations in Tennessee when a covenant not to unreasonably withhold consent is part of the bargain between the parties.

Mr. Buckberg is an attorney in our Nashville office.

Franchisees Must Carefully Consider Renewal Provisions, *continued*

on February 5, 1994. In 2001, UPS acquired MBE, which became a wholly-owned subsidiary of UPS. UPS and MBE offered certain financial incentives to MBE franchisees who re-branded from "Mail Boxes Etc." to "The UPS Store" and undertook certain other obligations. More than 90 percent of the MBE franchisees accepted the UPS brand and associated obligations/benefits. McDougal did not.

At the time McDougal signed the franchise agreement in 1994, the relevant part of the renewal provision stated:

> Such renewal shall be effected by the execution of an appropriate document extending the term of this Agreement *on the same terms and conditions as are contained in the then current Franchise Agreement for the sale of new MBE Centers.*

By the time McDougal's MBE franchise came up for renewal, McDougal was required to execute an agreement for The UPS Store as a condition of renewal. He refused and alleged that UPS and MBE breached the MBE franchise agreement by refusing to renew the MBE agreement. McDougal claimed the franchise agreement had to be renewed without change.

The court honed in on the words italicized above to reject McDougal's claims. The court first stated that if the italicized language was interpreted literally, McDougal would have no right to renewal because the franchisor no longer offered a franchise agreement for new MBE centers. The court then noted that the franchise agreement allowed MBE to change proprietary marks under certain circumstances. Consequently, MBE did not have to renew the franchise "intact and without change." Next, the court noted that in connection with the change in proprietary marks, the franchisor no longer offered MBE franchises and instead only offered "The UPS Store" franchises, which is what was offered to McDougal.

McDougal also argued that the 1994 franchise agreement did not allow modification unless by mutual consent. That argument was quickly dispatched by the court because the mutual consent language addressed the 1994 franchise agreement, not the offered agreement, and the offered agreement was "on the same terms and conditions as are contained in the then current Franchise Agreement for the sale of new MBE Centers." Similarly, the 1994 franchise agreement acknowledged that MBE may evolve, develop and change and that is exactly what happened through the acquisition by UPS.

McDougal's last stab was to argue that the renewal provision violated the implied covenant of good faith and fair dealing because it did not expressly reserve to MBE the right to condition renewal upon McDougal's acceptance of a materially different agreement. This argument also fell short because any implied covenant grows out of express terms and the renewal provision expressly allowed renewal "on the same terms and conditions as are contained in the then current Franchise Agreement," which is exactly what was offered to McDougal.

So what is the big takeaway from this case? Both franchisees and franchisors must seriously consider the renewal provision when drafting or negotiating agreements and not view the provision as "boilerplate." Franchisors need the flexibility to present renewing franchisees with franchise agreements that reflect the dynamically evolved franchise system, which will necessarily be different than those signed years earlier. The evolved brand franchise agreements may even offer different parties, products and business method requirements. Franchisees need to understand that the initial term may be the only term it receives a license to use and operate under a certain brand at the time of signing, and that at renewal, they may not have a chance to select the same terms for the same brand as they enjoyed at the inception, or the new offering. Material changes may be required to maintain and continue with the franchise affiliation, and their choice is to renew or cease operation.

Mr. Press is an attorney in our Atlanta office.

Puppies Too Frisky for ADA Shelter

Kelli Thompson, 865.549.7205, kthompson@bakerdonelson.com

A Burger King franchise was sued recently for violating the Americans with Disabilities Act (ADA) when an owner and his service dog-in-training were asked to leave the restaurant. A federal district court in California sided with the Burger King and dismissed the case in the last few weeks. The court focused on whether the puppy, a 13-week-old Great Dane named Barack, was actually a service dog under the ADA.

Privately-owned businesses that serve the public, such as restaurants, hotels, retail stores, taxicabs, theaters, concert halls and sports facilities, are prohibited by the provisions of the ADA from discriminating against individuals with disabilities. The law requires these businesses to allow people with disabilities to bring their service animals onto business premises in whatever areas customers are generally allowed. A restaurant, for example, cannot segregate a person with a service dog from other guests at the establishment, and the service dog and its owner can go in whatever areas other customers can access.

So what is a service animal? The ADA defines a service animal as any guide dog, signal dog or other animal individually trained to provide assistance to an individual with a disability. If they meet this definition, animals are considered service animals under the ADA regardless of whether they have been licensed or certified by a state or local government.

A service animal is not a pet. Service animals perform some of the functions and tasks that the individual with a disability cannot perform for him- or herself. Guide dogs are one type of service animal, used by some individuals who are blind. This is the type of service animal with which most people are familiar. But there are service animals that assist persons with other kinds of disabilities in their day-to-day activities. Some examples include:

- Alerting persons with hearing impairments to sounds
- Pulling wheelchairs or carrying and picking up things for persons with mobility impairments
- Assisting persons with mobility impairments with balance

In the Burger King case, a man with a degenerative back condition entered the restaurant with the 13-week-old Great Dane puppy. When he attempted to order food, the worker informed him the restaurant had a "no dog" policy. The man asked to speak to a manager. She pointed him to the restaurant's policy and the sign on the door which read "No animals except for service animals." The man explained that the puppy was a service dog in training, but when the manager asked to see the dog's service dog ID, his owner advised he did not have it. The manager told the man he could not stay in the restaurant, but he could either take his order to go or leave the puppy outside. The man left the restaurant, took a camera from his car and photographed the signs.

The restaurant asserted that Barack the Great Dane puppy was not fully trained as a service animal and only had basic obedience training. His owner, who was training the puppy to assist him with walking and balancing, countered that the puppy had a service dog tag from the county that was issued prior to the restaurant visit. The restaurant provided expert testimony that the puppy still had a "playful streak" and was too young to have complete control over its bladder and bowels for extended training periods.

However, the court focused on the fact that although the owner stated that the puppy was being trained to assist him with walking and balance, the puppy was not large enough at that point to assist with walking and balancing. According to the restaurant's expert, the owner could have actually injured himself and the puppy if he had leaned on the puppy for balance. The court found that the puppy was not a service dog, because it had not been trained to perform tasks for the benefit of the individual with a disability, and the work or tasks performed by a service dog must be directly related to the individual's disability.

So what does this mean for businesses such as restaurants and hotels? Generally, service animals, not just guide dogs, must be permitted to accompany the individual with a disability to all areas of the business where customers are normally allowed to go. Posting a "no pets" policy does not comply with the ADA regulations, because a service dog is not a pet. If someone enters a restaurant or hotel with a pet, it is reasonable

continued on page 7

Puppies Too Frisky for ADA Shelter, *continued*

to make an inquiry to determine if the animal is a service dog. Some, but not all, service dogs wear special collars or harnesses. Some, but not all, are licensed or certified and have identification papers. If the employees are not certain if the animal is a service animal, they may inquire of the person with the animal if it is required because of a disability. A person who is going to a restaurant will likely not be carrying documentation of his or her disability so the establishment cannot require proof of a disability or certification of the animal as a condition to providing service to the customer.

In addition, the business cannot charge any sort of maintenance or cleaning fee, even if deposits are routinely required for pets, such as at hotels, for example. However, if a service animal causes damage and it is the regular practice or policy of the establishment to charge non-disabled customers for such damage, the establishment can charge fees relative to any damage caused by the service animal.

What if a service animal is being disruptive or the animal's behavior otherwise poses a threat to the health and safety of other customers? It is perfectly reasonable to exclude an animal that displays aggressive behavior toward other guests or customers. But an establishment cannot make assumptions about how a particular animal will likely behave, simply based on experience with other animals of the same breed, for example. If a service animal should be excluded, the establishment should allow the individual with a disability the option of continuing to enjoy the establishment's goods and services without the service animal on the premises.

Although the Burger King case is an example that hospitality providers do not have to give unfettered access to customers with animals represented as service animals, they should exercise caution and common sense when encountering individuals with service animals.

Ms. Thompson is an attorney in our Knoxville office.

Broken Glass, Cut Tendon, No Franchisor Liability: Standards Versus Control Over Day-to-Day Operations

Kris Anderson, 205.250.8324, kanderson@bakerdonelson.com

A frequent question in franchise agreement negotiations is: who is liable when a customer is injured by an article required under franchise system standards and specified by the franchisor? In the recent case of *Karnauskas v. Columbia Sussex Corp.*,[1] a New York court found that in a broad variety of circumstances where the franchisor does not exercise day-to-day control over the franchisee, and there is no evidence of product selection, the franchisor is not liable for negligence in product selection or maintenance.

A hotel guest was injured when the glass coffee carafe from her Arizona Marriott hotel room shattered around her hand, severing a tendon. The guest sued Marriott International, Inc. as well as the franchisee and operator of the hotel, Columbia Sussex Corporation. The guest alleged that Marriott should be held vicariously liable based on its license agreement with Columbia Sussex. Accordingly, the central question of the case was whether Marriott could be liable for the alleged negligence of the franchisee based on that license agreement alone.

Initially, the New York federal court, (applying Arizona law) noted that a majority of courts apply a "degree-of-control analysis to determine whether a licensor is liable for the negligent operation of a licensee." The court surveyed a number of jurisdictions, including the Georgia case of *Pizza K., Inc. v. Santagata*[2] and the New York case of *Hart v. Marriott Intern., Inc.*[3]

Ultimately, the court held that "Marriott did not have a duty of care to plaintiff because it did not have any day-to-day control over the hotel and did not select, recommend, or inspect the coffee carafe at issue." The court found a clause in the license agreement establishing that distinction particularly helpful: "Licensee shall retain and exercise full operating control of the Hotel... [and] shall have the exclusive authority for the day-to-day management of the Hotel." That clause, combined with the fact that Marriott did not own the hotel, or play any part in the day-to-day operation of the hotel, was ultimately persuasive for the court in resolving any negligence maintenance issue. The court cited *Capriglione v. Radisson Hotels Intern., Inc.*,[4] in which the court found the defendant franchisor not liable because the franchisor of a hotel did not own or control the hotel on day-to-day basis. Although the court thoroughly analyzed day-to-day operations, the true nature of this

continued on page 8

Broken Glass, Cut Tendon, No Franchisor Liability: Standards Versus Control Over Day-to-Day Operations, *continued*

defective design case suggests that the court actually decided in favor of Marriott because the plaintiff "produced no evidence showing that Marriott selected, recommended, or inspected the coffee maker at issue."

While most franchisors anticipate that courts apply a "degree-of-control analysis" to determine whether a franchisor is liable for its franchisee's negligence, and have included a clause in the license agreement similar to Marriott's clause in this case, a franchisor should be wary about liability if it goes ahead and exercises control in fact. If a franchisor seeks to avoid liability, not only should the franchise agreement reflect the intention to stay out of day-to-day operations, but the actual business relationship should as well. In an Arizona case, the court reasoned that because a franchisor selected, recommended and inspected the article at issue, it functioned as a gratuitous supplier within the meaning of Section 324(a) of the Restatement 2d of Torts and could therefore be held liable for injury involving the equipment.[5]

Karnauskas is a positive case for franchisor liability, particularly in circumstances where Arizona law applies. The decision establishes great persuasive authority for summary judgment in Arizona with respect to circumstances where a plaintiff produces no evidence that a franchisor selected, recommended or inspected a product that caused or contributed to injury. Additionally, the decision provides a useful guide for franchisors to avoid certain forms of vicarious premises liability by: (1) avoiding specific selection, recommendation and inspection of potentially dangerous products for use at franchisee locations when possible; (2) carving out day-to-day operations in the licensing agreement as the sole domain of the franchisee; and (3) abstaining from any day-to-day management in fact of the franchised hotel. Day-to-day operations will be important to a court's analysis in a case of negligent maintenance; and selection, recommendation and inspection of products will be important for the analysis of defective product design on a franchisee's premises.

For franchisees who place coffee makers in hotel rooms, the *Karnauskas* court found enough evidence for the plaintiff to go to trial against the franchisee based on evidence that one-cup coffee makers are safer than glass coffee carafes.[6] The same path to trial would have likely occurred for the franchisor if the plaintiff had introduced evidence that Marriott had selected, recommended or inspected the coffee carafes. Hotel franchisors and franchisees alike should consider the costs and benefits of a switch to one-cup models from glass carafe models.

More importantly, as franchisors seek alternative remedies to termination of a weak performing franchise, and those remedies include periods of active supervision and management, the analysis in this case serves as a reminder that any such undertaking of active management will strip away this liability shield, and open the door to joint and several liability to parties injured or damaged at the franchised premises.

Mr. Anderson is an attorney in our Birmingham office.

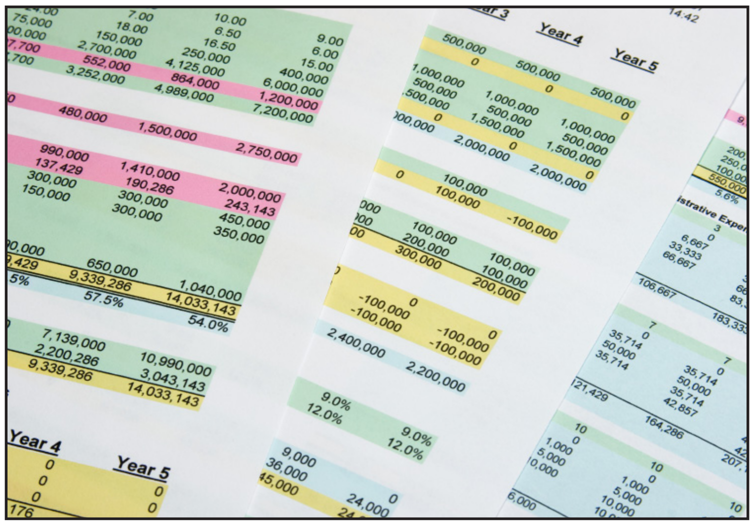
1. 2012 U.S. Dist. LEXIS 8988, (S.D.N.Y. 2012)
2. 547 S.E.2d 405, 406-07 (Ga. App. 2001) (pizza franchisor not liable for auto accident caused by franchisee delivery driver because franchisor was "not authorized under the agreement to exercise supervisory control over the daily activities of [franchisee's] employees")
3. 304 A.D.2d 1057, (N.Y. 3d Dep't 2003) (hotel franchisor not liable for alleged negligence of franchisee because franchise agreement did not give franchisor day-to-day control).
4. 2011 U.S. Dist. LEXIS 115145, at *2 (D. N.J. 2011)
5. *Papastathis v. Beall*, 723 P.2d 97, 99-100 (Ariz. App. 1986) (franchisor recommended and inspected soda machine involved in harm at franchise location)
6. *See* "One-Cup Coffeemakers Gaining Wider Acceptance in Lodging Industry: Upscale, Full-Service And Gaming Hotels Lead Latest In-Room Beverage Trend," Hotel Business, August 2006.

New IRS Regulations On Repair Expenditures Impact Hospitality Industry

Charles Pierce, 901.577.2164, cpierce@bakerdonelson.com

The Internal Revenue Service (IRS) recently released long-awaited regulations governing the tax treatment of expenditures incurred to repair tangible property. These new regulations attempt to clarify and expand upon the current regulations that exist under Sections 263(a) and 162(a) of the Internal Revenue Code, and also attempt to address issues associated with tangible property subject to Code Section 168.

Taxpayers must comply with the new regulations, even though they are in temporary and proposed form. They do have the potential to affect any taxpayer that owns, improves or repairs tangible property. The new regulations could impact owner/operators in the hospitality industry who may have previously deducted certain costs associated with their commercial real estate. As the economy continues to improve, and hotels and restaurants begin undertaking previously deferred upgrades and repairs, owner/operators should be aware of these new regulations to understand their impact on tax accounting for these costs.



Background

The new regulations have been an ongoing project within the Treasury Department for nearly a decade. The distinction between currently deductible expenses and expenditures that must be capitalized has generally been an analysis driven by the facts and circumstances of a taxpayer's particular situation. A taxpayer can generally deduct the full cost of a repair in the year that the expense is incurred; however, improvements constituting more than just repair generally must be capitalized over a fixed life of the repaired asset. Thus, the distinction over what constitutes a repair as compared to an improvement, as well as what piece of property was improved, led to much confusion and litigation. The IRS endeavored to simplify the process by releasing several hundred pages of proposed regulations in 2006, which were later withdrawn, as well as another set released in 2008.

The just-released new regulations retain many of the provisions of the 2008 draft, which incorporated much of the already existing authority that had been promulgated under the relevant Code sections; however, there are some significant changes in the new regulations as well.

Some Significant Changes

One significant change in the new regulations is the application of the improvement or repair standards to buildings. The expenditure in question for a building must be looked at for its effect on major components or systems of the building as opposed to the building as a whole. Thus, the taxpayer must determine whether a repair or improvement was made to the elevator system, the HVAC system or the plumbing system instead of determining whether a repair or improvement was made to the building generally. The specific building systems listed in the new regulations are HVAC, plumbing, electrical, escalators, elevators, fire protection and alarm, security, gas distribution and any other system identified in published guidance.

The new regulations also now allow taxpayers the ability to take a retirement loss for major building components such as those discussed above. Although the cost of a new component will have to be capitalized, the fiscal blow is somewhat softened by the fact that, under the new regulations, the taxpayer may take a loss equal to the amount of basis allocated to the retired property that is being replaced.

What the New Regulations Mean for Taxpayers

Perhaps the biggest change that taxpayers involved in the hospitality industry may encounter is that costs that were currently deductible may no longer be, and must be depreciated instead. The fact that individual building systems are now considered a unit of property as opposed to the building as a whole will greatly impact taxpayers who previously took an aggressive stance concerning expenditures associated with tangible property. This means that an expense that could have once arguably been deducted as a repair due may now be considered a capitalizable expenditure as it will almost always have a greater impact when examined for its effect on an individual building system as opposed to the building as a whole.

continued on page 10

New IRS Regulations On Repair Expenditures Impact Hospitality Industry, *continued*

For example, costs associated with the replacement of an HVAC compressor that may have once been deductible may now have to be capitalized, depending on the effect on the system as a whole. Similarly, the outlays required to return an elevator car to service could very well be considered a capital expenditure, depending upon the nature of the repair and to what extent it modifies the elevator system in its entirety.

The preamble to the new regulations states that they "are generally effective for amounts paid or incurred (to acquire or produce property) in taxable years beginning on or after January 1, 2012." Although taxpayers may not see the effect of these new regulations on taxable income until their returns for fiscal year 2012 are filed, proper accounting procedures should be put in to place as soon as possible to ensure that the returns conform to the new regulations. Additionally, taxpayers must consider that in many cases the implementation of the new regulations could require a Section 481 change in accounting method since the IRS is not allowing the new regulations to apply to the 2011 tax year.

Any taxpayer called upon to renovate, upgrade, replace and refurbish in the improved economy should consult with a tax advisor to understand the impact of these new regulations.

Mr. Pierce is an attorney in our Memphis office.

DAVIS | LLP

Canadian Immigration Visas for Employees of US Franchisors

By: Brian Tsuji and John L. Rogers, Davis LLP

With more and more American franchisors planning to expand their franchise systems to Canada, it is timely to review the Canadian immigration visas available to employees of US franchisors.

In general, Americans entering Canada are visa exempt. This means they can visit Canada without formally applying for a permit or visa. They may simply go to a Canadian port of entry at a land border crossing or at the airport. They would receive an entry date stamp in their passport when entering Canada. Unless some other notation is made in the entry stamp, there is an implied visitor permit for six months. This assumes the person is not coming to Canada to engage in activities that are considered "work". An implied visitor permit applies if an American is entering Canada to do such activities as sightseeing or shopping.

"Work" is any activity that if performed by a Canadian would result in him or her being paid. Even if the American is "volunteering", this may be considered work if a Canadian would be paid for it.

The "Business Visitor" category will be useful for an American who is entering Canada to do certain activities. These activities are more business like than being a tourist but not so business like that an actual "Work Permit" will be required. Some examples of business activities that would be eligible for a Business Visitor permit are: business research for a new location; meeting with staff from the same organization; providing information on direction and expected results; meeting with potential investors; meeting with potential purchasers of goods or services; and providing after sales service advice to purchasers of services, products or systems. Other key requirements of eligibility for a Business Visitor permit are that the American be paid by an entity outside of Canada during the visit to Canada, and the Business Visitor not negotiate and close deals and receive money for services provided or products sold during the Canadian visit. It is also helpful if a visit to Canada is for a short period, say 2 to 3 days and the frequency of the successive trips is less, say once or twice a month. However it is possible to obtain Business Visitor permits for up to six months and then apply to renew the Business Visitor permit.

A “Work Permit” is required if an American is performing an activity which would be deemed to be work. For example if the American enters Canada to establish a new enterprise, signs leases, hires staffs, signs supplier contracts, signs contracts to sell services or products and is paid while in Canada, these activities would all be considered work in Canada. Also, if the American is being paid by an enterprise in Canada, this would also indicate the activities in Canada to constitute work.

There are several methods for an American to obtain a work permit.

The North American Free Trade Agreement (“NAFTA”) has an Intra-Company Transferee work permit category. NAFTA applies to a citizen of the US, Canada or Mexico. This permit allows an employee of a US company to transfer to a related company in Canada and obtain a work permit. A “related company” is one that has common shareholders such as an American parent and Canadian subsidiary or two subsidiaries (one American subsidiary and one Canadian subsidiary) of the same American parent company. To be eligible, the American employee must have worked for a minimum of one year in the past three for a related company either in a senior manager position or a specialized knowledge and experience position. A senior manager position requires the person to have managed staff or a particular function in the company. Specialized knowledge and experience could involve the employee having worked with specialized systems and techniques used by the American company. This work permit may be applied for at the land port of entry or the airport port of entry. The processing time is approximately 30-60 minutes.

Under NAFTA, there is also a work permit category for “professionals”. There is a list of professions who are eligible. Some categories are accountants, computer systems analysts, economists, engineers, hotel managers, lawyers, management consultants, dietitians, nutritionists, pharmacists, scientists, and teachers. This work permit may also be applied for at the land port of entry or the airport port of entry, with the processing time of approximately 30-60 minutes.

Under NAFTA, there is a third category, Treaty Trader. If the applicant will make a significant investment in Canada, a work permit will be issued.

Under The General Agreement on Trade in Services (“GATS”) there is also an Intra-Company Transferee work permit category. The main difference is that GATS applies to more countries than the three NAFTA ones.

There is also a general Intra-Company Transferee category available under the Immigration and Refugee Protection Act (Canada) for all nationalities having the same eligibility as exists under the NAFTA Intra-Company Transferee work permit category.

If the American employee is not able to use any of the foregoing exemptions which allow the person to obtain a work permit without advertising the position, the American employee and the Canadian employer will be required to obtain a Labour Market Opinion (“LMO”). An LMO shows that the Canadian employer advertised the position and that there was no qualified Canadian available, so the non-Canadian who is qualified is given permission to apply for a work permit. Applying for an LMO will require the Canadian employer to advertise the position in Canada for a minimum of 14 days.

The reason for the advertisement is to give qualified Canadians the chance to compete for the position. After the advertisement has appeared, any qualified Canadian will need to be interviewed as well as the American employee. Assuming the American employee is found to be the only qualified candidate, LMO application is submitted to Service Canada. It takes approximately 3-6 weeks for Service Canada to process the LMO application. After the LMO is obtained, the American employee can apply for a work permit either from Canada Border Services Agency at the land port of entry, the airport port of entry or to Citizenship and Immigration Canada at a Canadian Consulate or Embassy in the US.

In Canada, there are some provincial business immigration program categories which allow an applicant to be issued a work permit. These categories require the applicant to make a business plan application to the business immigration program in the province where the business will be located. Each provincial business program has its own unique rules. For example, in British Columbia, franchised businesses are not generally eligible if established in Vancouver which is the main city. However, if an American franchisor establishes the franchise in a smaller city outside of Vancouver it may be eligible for its employee to obtain a work permit.

In conclusion, there are a number of different Canadian immigration options that can be used by a US employee to enter Canada and legally conduct required business activities. It is very important to select the appropriate category, to prepare complete documentation and for the American employee to be properly prepared for an interview with the immigration officer at the port of entry or Canadian Consulate or Embassy in the USA. If it is possible to seek an exemption that allows the American employee to enter Canada and conduct required activities without having to obtain a work permit or without having to advertise the position to obtain a work permit, this route is strongly preferred.

Bio
NIKKI GAHR SELLS, CFE
nsells@ifxonline.com

With 29 years experience in Franchising, serving in most every capacity, Nikki Sells currently serves as Vice President of Client Services with IFX Online, a strategic franchise consulting organization which also offers the finest in social media management and franchise management technology.

Prior to IFX, Nikki was with Tasti D-lite, in Nashville, Tennessee, from February 2008 to January 2012, serving as Vice President of Franchise Development overseeing domestic development for the company as they rolled out their initial franchise program.

Prior to Tasti D-Lite, she spent 25 years with the Express Services organization, most recently serving as vice president of franchising for Express Personnel Services in Oklahoma City, overseeing the sale of franchises in the U.S., Canada, and South Africa, from 2004-2008.

Before joining the Express headquarters team in 2004, Sells and her husband, Robert, were the franchise owners of the Springfield, MO, Express Personnel Services franchise. In addition to her responsibilities as a franchisee, Sells served as the Regional Developer for Missouri, Kansas and northern Arkansas from 1994 through 2003. She and her husband were named International Franchise Association (IFA) Franchisees of the Year in 2001, and were Express Franchisees of the Year in 1995, 1997 and 2001. They received the Gordon Blair Heritage Award, Express' highest award, in 2002.

Active in the International Franchise Association since 1993, Sells was a founding member of IFA's Franchisee Advisory Council and served as chairperson in 1997. She has served on the IFA Board of Directors and as chair of both the Marketing/PR Committee and the Women's Committee. Sells was the recipient of the IFA's prestigious Bonny LeVine Award in 2005. Sells currently sits on the ICFE Board of Governors. She is an active presenter and coach in the CFE program.

Sells holds a BSE from the University of Arkansas and received her Certified Franchise Executive (CFE) designation in 2005.

~ ~ ~ ~ ~

FranBrag™ Introduction

FranBrag™ is IFX's new Social Media Landing Page Management Application designed to control the franchisor's brand, message and promotions on all social media platforms and landing pages/micro-sites associated with each franchisee.

FranBrag™ allows the franchisor to create a singular branded message, post, or promotion and direct it automatically to their franchisees for automatic inclusion into whatever social media platforms they're associated with and/or their local micro-sites and landing pages.

The message, post or promotion can embed videos, images, text and links plus it localizes itself to automatically insert the franchisee's profile location into the message, post or promotion without the franchisee having to create the content in the first place. The application also associates keywords with each message, post or promotion so customers can view them when conducting ordinary searches using keywords and/or a franchisee's location keywords. FranBrag™ will also sweep the web and report on instances where the franchisor's brand is being mentioned regardless of the platform.

IFX's FranBrag™ application tracks who clicks on the message, post or promotion on any of the social media or landing pages it appears on, as well as any replies or "shares" that friends, followers and customers have initiated. Micro-reporting dashboards for the franchisee. Macro-reporting dashboards for the franchisor.

IFX's FranBrag™ application can be fully administered by the franchisor. However, creative content services are also available from IFX's Social Media Agency to assist the franchisors if needed.

IFX Products and Services Overview

IFX is a full-service Franchise Management Firm

IFX offers services from 3 divisions: **STRATEGIC** advisory services, the latest **SOCIAL** applications including social media management, and the latest web-based **TECHNOLOGY** applications designed specifically for franchise organizations and franchise suppliers. With 16 years of experience, servicing 300+ brands, IFX is the leading Strategic Advisory Firm & Technology Service Provider in franchising.

IFX clients benefit from products and strategies that take into consideration certain political, practical and legal components inherent in the franchisor-franchisee relationship. When it comes to 1) commercial website redesign; 2) the development of localized unit websites that a franchisee can modify, but that the franchisor actually controls; and 3) Intranet/Extranet Support Systems designed to enhance both communications and support IFX technology solutions are designed to:

- Increase revenues
- Increase brand equity
- Streamline operations
- Increase communication
- Reduce administrative costs
- Reduce legal liability
- Increase support
- Make the client look good

Powerful and Affordable Applications

IFX is the leader in the development and implementation of powerful and affordable technology solutions designed specifically for franchise organizations. IFX utilizes state-of-the-art production and design standards operating on the latest platforms, light years ahead of the competition. Still, IFX keeps things simple and affordable for even the smallest franchise organization.

All Inclusive Hosting, Maintenance and Support

As a full-service ASP, IFX typically provides 24/7 hosting, maintenance and support. IFX makes continual investments in hardware and software upgrades throughout the year so that clients do not have to purchase expensive equipment or hire expensive programmers. Moreover, IFX continually refines its products and services as technology evolves. In the majority of cases, IFX serves as the IT specialist for dozens of franchise organizations in dozens of industries. And the price for all of this support? Very reasonable and clearly less than hiring in-house IT staffing and purchasing massive servers, routers, storage, backups and bandwidth. Concerned about your existing IT staff flying the coop with a lucrative stock offering from another company? With IFX hosted solutions these types of scenarios go away. The end result? IFX clients sleep better at night.

IFA Executives Focus on Change, Communication and Challenges

Franchise executives discuss innovative solutions to today's business challenges.

Franchising World January 2012

By: Matt Haller

Franchise business executives and multi-unit franchisees from across the spectrum of the industry gathered Nov. 16-18 in Miami, Fla., for the International Franchise Association's Franchise Executive Leadership Conference. The three-day conference included speakers and networking sessions geared to finding innovative solutions to today's business challenges.

"With more than 30 years of experience owning and operating franchises, collaboration is a personal passion of mine," said Lawrence "Doc" Cohen, CFE, president, Cookie Associates, and chairman of the Franchise Executive Leadership Conference. "I have seen what can be achieved when franchisors, franchisees and suppliers work together as a team and learn from each other–and the results are powerful."

Executives Share Insights on Collaboration and Franchise Relations

Welcoming attendees to the conference, Jack Earle, managing director, Earle Enterprises LP (multi-unit McDonald's franchisee) and IFA chairman of the board, introduced a panel session of franchisors and franchisees, who discussed how their franchise systems manage collaboration and communication to ensure success when implementing system-wide change.

The session featured Steve Joyce, president and CEO of Choice Hotels International and Azim F. Saju, vice president of operations, general counsel, Hotel Development & Management Group (multi-unit franchisee of Choice Hotels), who described their brand's movement to an online reservation system and managing the competition for lower prices through such third-party sites as Orbitz and Travelocity. The panel also included Kat Cole, president of Cinnabon, FOCUS Brands, Inc. and Frank Ross Jr., Cinnabon franchisee of Albany, Ga., who talked about Cole's focus on improving franchisee relations since taking the helm of Cinnabon and ensuring open lines of communications between her and the company's franchisees. Politics, Credit Access and Seeking Solutions to Pressing Industry Issues

Attendees heard from distinguished Harvard Business School Professor Frances Frei. Her research, course development and teaching examine how organizations can more effectively design service excellence and she wowed attendees during her session about "Managing Service Operations."

As a widely-respected and published author, Frei offered her principles of service excellence, including real-world examples from such companies as Walmart, Progressive, Yum! Brands and General Electric on how companies can better meet their customers' needs. Frei also counseled attendees about how creating value from the customer's viewpoint should include an understanding of how excellence is paid for, how employees are set up for success, and how customers are managed and trained.

The program connected attendees with political prognosticator Juan Williams, who spoke about the current Republican presidential primaries and the logjam and congressional gridlock currently taking shape in Washington, which has caused great uncertainty by franchise business leaders.

During the lunch session, attendees received an update from one of the most respected voices in journalism, Geoff Colvin of FORTUNE magazine. His presentation tackled the most pressing issues franchise leaders face, including the future of tax rates on small and large businesses and how Washington may move forward on those issues in the midst of the 2012 presidential election.

Jeff Rosensweig, associate professor of international business and finance, and director, global perspectives program, Emory University, provided attendees with how franchise businesses are positioning themselves amid the recovering economy, with a particular focus on the challenges posed by the ongoing credit access challenges facing franchising.

Attendees took advantage of a unique opportunity to participate in small discussion groups with other franchise leaders, focused on finding innovative solutions to some of the most pressing issues affecting franchised businesses all over the country. Sessions included:

- Creative Financing, facilitated by Bill Hall, CFE, CEO, William G. Hall & Co. (Dairy Queen multi-unit franchisee) and IFA Credit Access Task Force chairman;
- Private Equity for Multi-Unit Franchisees, facilitated by Steve Romaniello, CFE, managing director, Roark Capital Group;
- Health Care Solutions, facilitated by Diana Furchtgott-Roth, director, Center for Employment Policy and Senior Fellow, Hudson Institute;
- Growth Strategies (including integrating brands), facilitated by Aziz Hashim, president and CEO, NRD Holdings, LLC (multi-unit franchisee of Popeyes, Checkers/Rally's Drive-In Restaurants, Inc., Subway and Moe's Southwest Grill);
- Succession Planning/Exit Strategies, facilitated by Mike Bidwell, CFE, COO, The Dwyer Group;
- Compensation Issues for Key Executives, facilitated by Michael M. Isakson, president and COO, Service-Master Company; Benchmarking, facilitated by Kenneth D. Walker, CFE, chairman and CEO, Driven Brands, Inc.; and
- The Future of Franchise Development, facilitated by Shelly Sun, CFE, CEO and Co-Founder, BrightStar Franchising, LLC and IFA FranPAC President's Council co-chairwoman.

Matt Haller is senior director of communications for the International Franchise Association. He can be reached at 202-662-0770 or mhaller@franchise.org.

IFA Benchmarking Tool Garners Praise From Members on its Benefits

More than 140 IFA members are using "OnTrack" to measure performance against their peers.

Franchising World October 2011

By: Bue C. Mcneely

Since the launch of the IFA's newest member benefit, OnTrack: Performance Benchmarking for Franchisors, more than 140 IFA-members are using the Web-based benchmarking tool to measure performance against their peers. Some member companies have as many as nine users collaborating to get the most they can out of the analysis of key franchising performance indicators or KPIs.

At the sixth-month mark, the question raised was, "What have we learned?" The answer is a two-fold one. The benchmarking tool has great potential, and with a small investment of time in answering a few key data points, IFA members are seeing significant returns.

Participation in OnTrack is free and new users are joining weekly. IFA Benchmarking Task Force Chairman Brian Spindel, CFE, president/COO of PostNet International Franchise Corp., says IFA members are seeing great potential in OnTrack and the tool's potential and adds:

There are a wide range of franchisors that have found the power of benchmarking against their peers useful, and are using OnTrack to get analysis on unit metrics, lead costs, expenses and employee allocations. The business leaders using the free member service come from diverse franchises in all 10 business categories. OnTrack users vary from franchisors with less than five units to those with more than 10,000 units and from those who have less than one year of experience franchising to those with more than 50 years' experience. The total sales of franchise brands using the tool range from less than $400,000 to more than $1 billion. The variety of businesses using this IFA service has created a strong foundation of data.

As more companies begin using OnTrack, the data becomes even more valuable, enabling users to filter who they are being compared to by system size, business category, total revenue and years in franchising. The result is that the most valuable data is not found by looking at the averages of all franchise businesses, but drilling down to comparisons that are most relevant to your individual franchise.

The table below is an example of how filtering can help a new franchisor get more detailed information by changing the characteristics of the franchisors they are benchmarking against. For example, the data in the first column is from every user who has completed the 2010 survey. The second column filters the pool down to eight emerging companies who have less than 10 years in franchising and less than $10 million in total revenue.

The emerging companies opened 11 domestic franchisee-owned units in 2010; this is lower than the entire pool which includes more established brands. Although the emerging companies may have averaged opening fewer units, their growth rate for new units was almost five times that of the entire pool. This example demonstrates how franchisors can use the filters to help fine tune their benchmarking efforts and set goals and growth strategies. Furthermore, this example illustrates how as the number of OnTrack users grow, everyone reaps the benefits because users can do more fine tuning to compare KPIs with others.

The continuing growth in the number of OnTrack users demonstrates that the program is an easy-to-use interface which delivers essential information for timely, relevant reports that is an asset to IFA members.

Create Your Account Today

Now it’s time for your franchise business to take advantage of this free member benefit. To found out more about OnTrack, visit franchise.org/benchmarkeing.aspx. To get started and sign up with OnTrack now, visit benchmarking.franchise.org/signup.aspx .

Bue McNeely is the research coordinator for the International Franchise Association. He can be reached at 202-662-0796 or bmcneely@franchise.org.

Measuring the Franchise Relationship

***Franchising World*, February 2006**

By Greg Nathan

Maintaining constructive relationships with franchisees is a lot easier to talk about than it is to put into practice. For franchisors, this is an ongoing challenge. Several things can strain relationships. Among them are:

Stress

When people are stressed they get cranky and difficult to deal with. Whether you are a franchisor or a franchisee, financial and workplace pressures will always test your patience and resolve. If stress levels get too high they can cause erratic and hostile behavior which can lead to a breakdown in communication and relationships.

Change

The ongoing changes that have been sweeping the world are also affecting franchise systems, resulting in a constant need to innovate. This means franchisees often have to adopt new systems, reinvest in their business and sell new types of products or services. Most people resist having change foisted upon them which can also create a strain in the franchise relationship.

The Law of Perception

A company may think it has clearly explained something, but people will always put their own interpretation on what they hear. The saying “When perception meets reality, reality always comes out second best” is very true. What the listener heard is more important than what was said. For instance, franchisees sometimes misinterpret a franchisor’s motives for taking certain decisions and this can undermine the trust so important for a healthy franchise relationship.

The Franchise E-Factor

Franchisees, I believe, will typically move through six psychological stages in their relationship with their franchisor. I call this the “Franchise E-Factor,” which is characterized by the stages Glee, Fee, Me, Free, See and We. Franchisees may quickly move from initial feelings of glee to the third, me, stage. Not all franchisees make it to the sixth, we stage. The more franchisees that are stuck in the middle stages of the Franchise E-Factor, the more unrest there is likely to be in a franchise system.

Insensitivity to the feelings of others

Whether it is called emotional intelligence, people skills or just good manners, franchisors should show their franchisees adequate respect and consideration. Leaders who are overly authoritarian or insensitive are likely to create a residue of resentment in their franchisees. At some stage this is likely to express itself as a relationship breakdown.

Incompetent support

Franchisees expect to receive reliable support from people who know what they are doing. As a company grows it is not unusal for the franchisor team to find itself out of its depth in managing the more complex demands of a larger corporation. This can also undermine its credibility and put strains on the franchise relationship.

Why Measure Franchisee Satisfaction?

Many franchisors will have experienced problems with individual or groups of franchisees due to one or more of these areas. As a franchisor management team becomes more perceptive of these inevitable challenges they also become more capable of successfully managing them.

A good way to tackle this challenge is by applying the principle, “If you can’t measure it you can’t manage it.” In other words, measuring the state of your franchise relationships is good business practice. I’d suggest a thorough survey at least every two years.

There are three common myths that deter franchise systems from embarking on this journey.

Myth One: “There are more important things to focus on.”

Franchise systems that are plagued by poor relationships and do not face up to this challenge are not commercially sustainable. The cost of litigation, the distractions, the stress on the parties and the decline in customer focus inevitably takes its toll.

Myth Two: “This stuff is too difficult to measure.”

The fact is attitudes and feelings can be measured in a reasonably objective manner. This can be done by creating a forum in which people can give you feedback, either in the form of a survey, an interview or a focus group. What is essential, of course, is to ask the right questions and to listen to the answers with an open mind.

Myth Three: “Asking them what they feel will just stir them up.”

While seeking franchisee feedback can be challenging, it sends the right messages to franchisees that the franchisor is interested in their views. This in itself can prove to be a positive trust building initiative, especially if the feedback is acknowledged and the process is professionally managed.

How To Find Out What Franchisees Want

There are several ways to discover what franchisees want. Interview them individually or in groups and ask them questions about what they like and dislike about the franchise system.

Ask them to complete a survey of carefully-worded questions. To gain greater honesty it is preferable that the responses are anonymous. The use of an external consultant can ensure confidentiality.

There are two types of questions typically used in franchisee surveys. The first are open-ended questions such as:

- What do you want and expect from your franchisor?
- What's good about being a franchisee with this system?
- What would you like to change about how this franchise system operates?

The other type of question uses rating scales, which enable responses to be quantified. Results can then statistically be analyzed and compared with industry benchmarks. One question to ask franchisees is, "If you had a choice, would you buy the franchise again?"

Using open-ended questions and rating scales are both approaches that have unique benefits. Ask franchisees to rate both the importance of specific services provided by their franchisor and how effectively these services are delivered. This enables a franchisor to distinguish high priority services from "nice to haves" and to determine any significant gaps in how effectively the most important services are being delivered.

Fifteen years of research into what franchisees want from their franchisors has uncovered the following significant findings.

Help me develop my business

Not surprisingly, franchisees want their franchisor to negotiate deals with suppliers that will reduce their operating costs and to provide ideas and systems for enhancing productivity.

They also want regular access to useful and relevant business information that will help them grow their business and stay in control of their financial position. A benchmarking program that shares results on agreed key performance indicators is a great start.

While franchisors are often very effective in providing initial training, franchisees want more ongoing training to improve their skills in the areas of people management, business planning, goal setting and marketing. This is especially true of more mature franchisees who tend to become skeptical and dissatisfied if their evolving needs are not met.

Make my phone ring

Marketing is a broad term so let's be more specific. Two important factors to franchisees are advertising that attracts new customers and a strong brand. In fact many franchisees buy a franchise on the strength of the brand.

Franchisees also want a well-thought-out marketing strategy that will give them an edge in their local market and help with the skills to convert inquiries into sales. And they expect ongoing innovation that will excite customer interest.

Finally, they value unique promotional tools such as point-of-sale signage–things they would not be able to source if they were on their own.

Listen to me

Franchisees often refer to the sense of security they get from being part of a united, cohesive group. In particular, they value the opportunity to interact with other franchisees at meetings and conferences. However, they frequently refer to a desire for meetings to be more interactive.

They also say they want more opportunity to have their ideas, questions and concerns heard by their franchisor through open forums and discussions.

The introduction of operational changes without adequate consultation is particularly frustrating and puzzling to franchisees who feel they have more insight about operational matters than their franchise system.

Credible leadership

One theme to emerge from our research is that franchisors often have clear goals for the organization, but fail to provide franchisees with a sense of where they fit into the big picture. The result is that franchisees can feel threatened rather than excited by a company's expansion plans.

Consistent with other international research on what people want from their leaders, franchisees expect the franchise system and foremost to be honest and fair in their business dealings. A competent management team is also seen as essential.

Loyalty from a franchisor is important. Having supported the franchise system over a period of years they expect this to be reciprocated. For instance, they may become resentful if they think the company has an unbalanced emphasis on attracting new people while ignoring the needs of longer-standing franchisees.

Getting on together

Most people dislike conflict. In fact, unresolved conflict has emerged in our research as a major reason why people want to sell their franchise.

This highlights the need for robust conflict resolution processes to be an integral part of every franchise system. It also highlights the need for members of the franchise system to be able to have conversations with franchise in which difficult issues can be discussed and resolved in a mature and respectful manner.

Show me you care

Franchisee advocates are vital for growing a franchise system. Our research suggests that the strongest predictor of whether a franchisee will recommend a franchise to others is whether he feels the franchisor is genuinely concerned about his success.

Indeed, franchisees frequently say they would love to have their franchisor call, just to see how they are doing, without any ulterior motive.

On a related matter, quick response times to calls and e-mails are frequently rated by franchisees as vital.

What about the money?

Sometimes it's assumed that because people are in business, everything's about the money. While most might not like to admit it, most behavior is influenced by emotions not by logic.

While return on investment is one of the drivers of franchisee satisfaction, there are other issues such as feeling cared for, optimism for the future, confidence in top leadership and the relationship between a franchisee and the franchisor management team that are just as important.

While a profitable franchisee is no doubt more likely to be a happier franchisee, franchisors should not underestimate the power of good old-fashioned courtesy and respect in building a prosperous, happy and vibrant franchise system.

Greg Nathan is managing director of the Franchise Relationships Institute. He can be reached at gregnathan@franchiserelationships.com

"No-Brainer" Technologies

August 2008 *Franchising World*

If a system hasn't implemented these no-brainer steps yet, it is a great place to start.

By Brian Spindel, CFE

The franchising industry has now reached a point where technology, at some level, reaches into every discipline within a franchise company. From reporting and marketing to support and communication, technology has increased efficiency and effectiveness for franchise organizations worldwide that choose to embrace it.

Of all the ways technology can be applied in a franchise system, there are those uses and applications that are "no brainers" because of the positive effect they can have on franchisors and franchisees. To make the no brainer list, the technology must:

• Be affordable and readily available: All of these technologies are supported by International Franchise Association Supplier Forum members, and many of them are affordable even for the smallest systems.

• Save time and money: All increase efficiency and output and allow the franchisor to do more for franchisees and themselves by spending less.

• Create value: With proper implementation, all of these capabilities increase value and benefits for both franchisees and franchisors.

Involve Franchisees in Technology Initiatives and Development
While this is not a technology itself, implementing this step is critical if a franchisor's executive or information-technology team wants to be truly successful in implementing any technology that touches or impacts their franchisees. When implementing these technologies, it is always best to create a collaborative process in which the franchisor and franchisees work together not only to create, test and implement the solutions, but also to continually improve and enhance them. A great way to get started is to develop a technology committee under a franchisee advisory council that consists of volunteer franchisees with a passion for, and knowledge of, technology. By having a focused group of "techies" to provide ideas, feedback and testing, any technology that is rolled out to franchisees is sure to be well-received. Involving franchisees in this way provides shared ownership of these projects.

Use Internet-based Surveys
The Internet is perfectly suited for surveying far-flung stakeholders. Surveys can be produced on a very low-cost basis and can be very valuable. In particular, conducting an annual satisfaction survey of franchisees—with questions about training, support, marketing, relationship and financial performance—is great for benchmarking improvement from year-to-year. The summary information from these surveys can also be used to help prospective franchisees judge system-wide satisfaction in key areas of concern. Also, surveys can reach to the end user, franchisees' customers, to identify areas for improvement in operations, service or product delivery. The Internet allows the various people in

the organization, even if not centralized, to monitor customer satisfaction and follow up if needed.

Implement Electronic Reporting and Comparative Performance Dashboards

Tired of chasing paper reports and re-entering data? Want to create productive, positive, internal competition in the company's system? Any franchisor who fails to transfer the system to electronic data collection, take note: The franchise is behind the times, and needs to automate both at the franchisee and headquarters level. The goal is to create a digital record at the franchisee level and never have that information in an analog state again. Once it's on a purely digital system, the capabilities to have timely, detailed information increases exponentially. Further, there is a powerful way to "incentivize" franchisees to embrace the digital age, and that is to give back meaningful comparative data on key performance indicators. That way, franchisees know how they are performing in relation to other franchisees in the system. The term "dashboard" best describes this real-time graphic representation of key performance indicators measurements and comparisons. Franchisees can access their goals and see how their franchises are performing against others via the franchise system extranet. This use of technology is one of the most powerful things a franchise can do to help expand a franchise system and become performance-focused.

Create and Support Open Communication and Forums

While this technology is not complex, it is powerful when it comes to a franchise system. Open-message systems allow the free flow of communication, ideas and feedback in every direction in a franchise system—from franchisor to franchisee (typical), from franchisee to franchisor (better), and from franchisee to franchisee with headquarters' feedback if requested (best). While these open communication capabilities can be abused by franchisees if neglected by franchisors, the positive aspect of a well-directed and well-managed open forum far outweighs any negative implications or liability. Further, the open dialog creates a productive and collaborative environment in the franchise system and can help to create trust and confidence in the franchise relationship. In this environment, best practices are easily identified and shared, and head office feedback on important issues is timely, effective and efficient.

Develop Online Ad Builders, Online Marketing Centers

Every franchise system has one thing in common—it needs to get and keep customers. Does the company want to enable busy franchisees to quickly and easily create and implement campaigns that are designed to attract new customers or keep existing customers? The answer is "Of course you do." At the same time, is the franchisor concerned about protecting brand standards and making sure that franchisee advertising is performed in a dignified and professional manner? By implementing a template and marketing process Web tool, a system can realize these benefits. In addition, the easier it is and the more complete the online-marketing or ad-builder system is, the more franchisees will use and embrace it. If a company hasn't implemented a basic ad builder yet, this is a good way to start. Then it can build in direct mail, e-mail and other start-to-finish campaigns and functionality.

Utilize Online Accounting Solutions

One of the biggest challenges of small- and medium-sized franchisors is in the area of compliance on financial reporting requirements. This is due to a number of reasons, including franchisee privacy and the absence of adequate financial management. In the past few years, online accounting applications have come a long way, and they lend themselves perfectly to finally solving the financial reporting challenge. These Internet-based applications allow the franchisor access to a real-time look at a franchisee's accounting and access to timely data. The data can be used to power dashboards described earlier and for the development of detailed financial performance representations for a system's franchise disclosure document. Further, by aggregating the information and providing goal posts and benchmarks for the franchise system, the franchisor can provide franchisees with valuable tools and motivation to focus on financial management of their franchised business.

Leverage the Power of Webinars for Training
All franchisors use the telephone to communicate one-on-one and, in some cases, via teleconference, but don't think about how well telephonic communication serves them. Webinars enhance and expand what can be accomplished via telephone. Webinars allow the attendee not only to hear about something, but also to see what is being explained or discussed. Internally-produced Webinar recordings can help deliver training and information to franchisees and staff on system changes, operational procedures and new techniques. The Webinars are recorded and hosted so they are available 24/7, and the franchisor can track who attended the session. Live Webinars also allow for real-time interaction and Q&A sessions.

Electronic Communication, Event Management and Documents
If franchisors are still mailing anything to franchisees, they should stop. If they are still printing, updating and distributing paper manuals, they should stop. If franchisees are filling out paper forms for any reason, stop the process now. Outside of legal notices, everything needed to send to a franchisee can be delivered electronically for little or no cost, real time, with an audit trail. Manuals, bulletins, newsletters and service-procedure updates should all be sent using electronic methods. Information online is indexed, archived, can be updated and is searchable. Also, registration for programs, advertising campaigns or events should be promoted and conducted online. On event and sign-up sites, encourage franchisees to attend by providing information on who else has registered. The opportunity to update content and information as the event develops is quick and easy, unlike updating written information.

This article has focused on the "low-hanging fruit" in franchise-system technology solutions. There are many more sophisticated and costly technologies available to help franchise systems grow. However, if a system hasn't implemented these no-brainer steps yet, it is a great place to start.

Brian Spindel, CFE, is president/COO of PostNet International Franchise Corp. He can be reached at 720-240-5801 or spin@postnet.com.

Metrics That Matter: Benchmarking

***Franchising World*, October 2006**

Remember grade school? Back then, knowing your rank amongst your classmates used to be as simple as ABC.

By Rick Batchelor

Remember grade school? Back then, knowing your rank amongst your classmates used to be as simple as ABC and bringing home that "A" was a sure way to get to stay up late or get some extra dessert. Years later in business, particularly in franchising, things tend to be a bit more complex. Luckily, there is a method through which the complexities and nuances of running and ranking a successful franchise can be reduced to a simple set of grades or ratings; this is called "benchmarking." Benchmarking, like grading a student on a test, is a way of comparing the performance of a certain location or process execution to that of another. This, in turn, allows franchise systems in any industry to target the ideas and processes which work the best and to utilize these throughout the concept.

What is Benchmarking?
Benchmarking, applied to franchising, is the combined practice of targeting, measuring and analyzing procedures and processes from throughout the concept in order to drive improvements in the organization. Franchising, due to its unique nature, fosters a certain degree of experimentation, freedom and creative practice. It is not uncommon to have an experienced veteran franchisee often deriving slightly different operational practices which, if properly researched and formalized by the franchise company, can have a dramatically positive effect on the community. Benchmarking helps a franchise system harness the disparate process executions of all franchise locations to focus in on what works best and what does not.

How to Use Benchmarking in Your Concept
There are three basic types of benchmarking: performance, process and strategic. Performance benchmarking deals with comparing one company's results to that of another, and determining how each company achieves these results. Strategic benchmarking deals with executive-level, long-term results, while process benchmarking deals with analysis and comparison of daily operational practices. All of these types can be extremely effective when used properly; however, this article will focus primarily on process benchmarking, as it is the easiest to apply to franchising and can result in concept-wide benefits quickly.

No matter if a franchise system is in the food industry, retail or business services, no concept is outside the benefits of a focused benchmarking effort. In order to keep pace with competitors in your marketplace, streamlining common tasks and reducing costs are a continuing effort. Benchmarking is important to the profitability of your concept as well as your franchisees individual profitability.

What are the most measurable aspects of your particular concept? If one is in the food service industry, it may be average sales per ticket or average turns per hour. Business services often use average order price and basic customer profiling to great effect. In any case, one probably knows best what these metrics are and uses them everyday in business. For a starting point, pick your more measurable and actionable processes as your key metrics. Focusing on these key metrics and standardizing how they are measured allows one to put together an important part of effective benchmarking, the Franchise Report Card.

The Franchise Report Card serves a dual purpose: it standardizes the process by which one grades franchise locations and it also allows each franchisee to quickly and easily see how they compare to the community at large. Franchising utilizes a system of standard business methods to deliver a product or service; the benchmarking process of standard measurement and ranking is a natural compliment. One can choose to rank franchises by a handful of important key metrics, or by many; it's your choice.

There is no reason this report card must remain static, in fact, it is vital that a franchise company continues to update and involve its franchisees in the methods that it uses. As some people may well know, community support can make or break an initiative. Be sure to involve franchisees early and often in the process. Emphasize that benchmarking efforts are not about forcing change for the sake of change; the franchise system is trying to add value to the business.

The franchising community has shown a great deal of interest in benchmarking. There are many letters written by franchise executives with questions and comments on their experience; and more than a few International Franchise Association roundtable discussions at conventions have focused on testing standards. Having accurate results on the health of the concept and position versus industry competition can augment a quarterly or annual update to each franchise location. All owners pay attention to concept growth, unit profitability and how to out-perform the competition.

Benchmarking got a big push in the mid-1990s, and has been a core part of business ever since. There are many articles and books available to assist companies with their particular efforts, and technology is always improving to make the process easier and the results more accurate. To get consistent, accurate data, collect sales and inventory data directly from POS or back-office software. Instead of using old comment cards, send or e-mail Web-based surveys directly to both franchise owners and their end customers; this gets immediate answers from across the concept.

One veteran concept, FASTSIGNS, had a very common problem. It needed a method to reliably get information from their franchisees' POS system, and gain insight into franchisee performance. It had no way to validate reported sales, and did not have adequate information from the community on other aspects of its business. The company recently decided to get data from its POS systems and to provide the Web-based reporting necessary to view this information. Once up and running, the company will be able to group its franchisees into regions and peer groupings and to establish standard measuring and ranking systems based on the data collected directly from the franchise software.

"We are getting through the initial challenge (collecting the data) and soon we will be able to gauge the health of our overall concept, from average dollars per sign to peer group performance to customer satisfaction levels," says FASTSIGNS Chief Information Officer Raj Croajer, CFE. "Benchmarking has to start and end with the franchisor, but without franchisee buy-in, nothing happens. The franchisees that we have been involved with so far see the possibilities; they understand what it can do for their local business, for the brand and the system."

After choosing a testing focus and adopting an information collection strategy, it is time to see what has been uncovered. Start with the obvious, but use an organized analysis procedure. Divide franchisees into regions, countries, or peer groups. Peer groups can be an arbitrary grouping, franchises with similar revenue numbers, or have been in business for the same number of years, whatever works for your company. Pick a grouping that has a long history, or has particularly high profitability and see how they've performed. One will probably quickly uncover a process or method that these franchises use especially well, or have evolved to be more effective. Use this to gain an advantage. Call any peer group or franchise that seems to have found a successful process that could be applied to the concept, get that owner or director involved and providing continued feedback.

Other suggestions for easy and effective performance measurements include:

- Standardize software.
- Outsource benchmarking to a vendor with franchise experience.
- Establish a corporate culture of consistent measurement and improvement.
- Get your franchise community involved with concept growth.
- Start small and don't try to measure or demand too much from franchisees at the beginning. Show results and value as soon as possible.
- Solicit feedback and suggestions from the entire concept.
- It's a Journey, Not a Destination

Designing a standardized system to effectively measure and compare franchise locations and their processes can be easier that previously thought. Benchmarking at its core is focusing on what to measure, getting the information accurately and timely, and having standard methods of finding why certain locations or processes are most effective. Start things rolling with such questions as, "How are we doing?" "How do I compare to my peer group?" and "Are my customers happy?" Then get your community involved and leverage what they have learned through years of experience. Keeping your concept competitive and efficient is a journey, not a destination; use tools like report cards and benchmarking to help you along the way.

Rick Batchelor is president of ZeeWise. He can be reached at 678-383-4040 x1105 or rbatchelor@zeewise.com.

GOVERNMENT RELATIONS & PUBLIC POLICY

IFA Franchising — Building local businesses, one opportunity at a time.

April, 2012

FEDERAL LEGISLATIVE ACTIVITY

Tax Issues

Revenue Needs in 2012
The failure of the Joint Committee on Deficit Reduction to reach agreement on deficit reduction measures in November triggered a sequester mechanism to cut $1.2 Billion from the federal budget. From this outcome it appears that the Administration and the Congress are guaranteed to continue the acrimony displayed throughout last fall into early 2012.

Tax Reform – Forecast
We believe that a serious tax reform effort by the tax writing committees in Congress could be initiated this year. The leadership of both parties in Congress is committed to comprehensive tax reform, even if it is not completed until the next Congress.

- President Obama and Secretary of the Treasury, Tim Geithner, have asked Congress over the past two years to work on corporate tax reform first. In September, the President promoted tax reform proposals for both corporations and individuals. His recent proposals to pay for his new jobs bill and his recommendations to the Joint Special Committee on Deficit Reduction call for tax revenues which would require significant tax reform.
- Chairman Dave Camp, of the House Ways and Means Committee, has repeatedly said that he is ready to do tax reform at any time. In October, he circulated a "Territorial Tax" proposal which he suggests is a working document with several more components to come.
- In November, House Speaker Boehner said that he expects tax reform to be a top priority for Congress in the coming year and insists that Republicans' goal for a 25 percent top tax rate can be attained. Boehner sees tax reform as a pro growth element for a stronger economy in the long term.

Chairman Camp has offered a corporate tax proposal to begin discussions on general tax reform that would lower the corporate rate to 25 percent and remove many of the world wide tax schemes for U.S. taxpayers by transitioning to a territorial tax system that would tax only U.S. income. This proposal was positioned to meet President Obama's proposal from earlier in the fall and to begin the debate on comprehensive tax reform.

We expect the President will continue to make tax reform a campaign issue particularly after the failure of the Joint Committee on Deficit Reduction. The repeated failure of a millionaire's surtax as a pay-for for several legislative proposals last fall signals that the President and the Democratic leadership will make taxes a significant campaign issue for the 2012 elections.

The tax writing committees of the Congress will continue to hold hearings throughout 2012 in order to educate their own committee Members but also create the legislative record from which other Members will be able to study many of the more difficult tax policy issues. Tax writers prefer to maintain control of any tax reform efforts and, as they showed during the Deficit

Committee process, they will be unwilling to cede any of their jurisdiction to the current Conference Committee currently working on the 10-month extensions of the payroll and unemployment benefits.

Tax Relief

The 2001 and 2003 tax rates have been extended until December 2012. IFA strongly supports making permanent these lower tax rates across all brackets, including the lower capital gains and dividends rate. We will continue to promote these lower rates so that small franchise business owners will have greater certainty as they develop future business plans.

Business Activity Tax Simplification Action

Bipartisan legislation to address the aggressive nature of state tax nexus rulings by state departments of revenue was introduced during the 112th Congress, as H.R. 1439, filed by Representatives Goodlatte and Scott both of Virginia. The Business Activity Tax Simplification Act (BATSA) would assist businesses throughout the country in limiting audits and tax bills from states where they do not have any buildings, property or staff. BATSA seeks to clarify the intent of existing interstate commerce law and re-establish the primacy of the Commerce Clause in multi-state business activity. The bill also codifies the "physical presence" standard and eliminates confusion for state tax administrators and businesses alike. BATSA would ensure that one standard of taxation applies for taxing multi-state companies, taking some of the confusion out of interstate commerce.

BATSA passed the House Committee on Judiciary and was reported to the House floor on July 7. At this time the legislation has not been scheduled for a vote by the Majority Leader. IFA will continue to encourage a vote and passage of BATSA.

The House Judiciary Committee approved the legislation in July. In August, the National Governors Association wrote a letter to the bipartisan leadership of the House Judiciary Committee opposing the Goodlatte legislation saying that it 'represents an unwarranted federal intrusion into state affairs that will harm states' ability to manage their finances an assist in recovery.' States have opposed the legislation for years while multistate businesses have pursued uniformity if not lower tax rates across state lines. The burden for multi-state businesses to comply with multiple state taxing requirements has increased dramatically in the past several years as states look for additional tax revenues.

Healthcare Reform

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (PPACA). Since its passage, many businesses have claimed that the new mandates under the law will add tremendous additional costs to their bottom lines and will result in job loss. Congress remains divided on the future of the law. Many Republicans would like to repeal the law but understand that President Obama would veto this legislation and there are not enough votes to override.

Some gains were made last year when Congress approved, and the President signed, legislation to repeal the 1099 Requirement. IFA is working diligently to repeal the employer mandate but expects that any additional gains, in the short run, will be made on the regulatory front since outright repeal of the mandate is unlikely.
We are working to mitigate the effects of implementing regulations by:

- Reworking the definition of "full-time employee"
- Reducing paperwork and consolidating reporting requirements;
- Clarifying the definition of "affordability" and "minimum value" coverage.

Congress is unlikely to act on any healthcare legislation until the U.S. Supreme Court delivers its ruling on the law, following the three days of hearings held March 26-28.

Veterans in Franchising

Help Veterans Own Franchises Act

In September 2011, Reps. Aaron Schock (R-IL) and Sen. Bob Casey introduced H.R.2888 and S.1540, the Help Veterans Own Franchises Act. The bill currently has nineteen co-sponsors in the House of Representatives and two co-sponsors in the United States Senate. Both bills have been reported to their appropriate committees and are waiting for further action by the Chairman of those committees. These bills, which the IFA strongly supports, will provide a tax credit to veterans who purchase franchise businesses. The veteran will receive a tax credit of up to 25% of the franchise fee not to exceed $100,000. With the constant budget fights, upcoming election, and the battle over tax reform looming in Congress, the Help Veterans Own Franchises Acts has limited chance for movement in 2012. IFA will continue to push for co-sponsorships in both the House and Senate to set the stage for future action to increase veteran participation in franchising. IFA created an online toolkit for more information at www.franchise.org/veterans.aspx.

AGREE Act

The language of the Help Veterans Own Franchises Act has been inserted into a larger piece of legislation sponsored by Sen. Christopher Coons and Sen. Marco Rubio entitled the AGREE Act. The legislation currently has eleven co-sponsors in the Senate. A companion piece of legislation was introduced in the House of Representatives by Rep. Richard Hanna and has four co-sponsors. IFA will continue to push for the passage of either the AGREE Act or the Help Veterans Own Franchises legislation in 2012.

Interchange Fees

In 2010, IFA aggressively lobbied for interchange fee (or "swipe fee") reform alongside a broad range of other businesses, and was initially successful when the Federal Reserve announced a cap of 12 cents per transaction. Lobbying against swipe fee reform were banks and credit card issuers. However, after subsequent legislative activity and a Senate vote against a bill to raise the fees, the Federal Reserve issued its final rule setting the cap at 24 cents per transaction.

On October 1, 2011, the new debit interchange fees took effect. Several card issuers such as Visa and MasterCard indicated that they would treat the swipe fee cap as a minimum fee as well, guaranteeing fee hikes for merchants, such as many IFA members who process transactions via debit and credit cards at very small amounts.

Many franchise businesses eagerly looked forward to the October 1 date and lower swipe fees they would be required to pay. However, it is apparent that although banks achieved a much higher fee (thanks to the Fed rule) than was originally proposed, many banks have also implemented additional fees for debit card users, intended to raise revenue lost by the interchange fee cap.

IFA is exploring strategies including a communications campaign focused on banks and credit card companies so that they understand the burdens these swipe fees place on franchise establishments with small transactions and urge banks to change the rates they charge. We will join with other organizations who share our members' concerns, such as the Merchants Payments Coalition, of which we are members, which is also considering additional legal, legislative and regulatory solutions.

Labor Issues

IFA continues to push back on the Department of Labor (DOL) and the National Labor Relations Board (NLRB). Both organizations have taken an aggressive stance against employers in the past year. We expect both to continue their aggressiveness in 2012. Below are the issues most concerning to IFA and its members.

NLRB Appointments
In an unprecedented decision, the Obama administration appointed three new members to the NLRB during a *pro forma* recess in the Senate. The decision to make the appointments during the 3 day recess was highly controversial and will likely see legal action upon the Board's first ruling with the new members voting. The Board requires three members to have a quorum and as of December 31st, there were only two members remaining on the board. With the appointment of the three additional members during the recess the Board will be fully functional for the next two years. The appointments will likely mean IFA members should expect to see more rulings similar to those of the *Specialty Healthcare* case, the "ambush election" ruling and the poster requirement.

Ambush Elections
NLRB issued the final rule and will begin to implement the new "ambush election" rule. The length of time between a union's filing a representation petition and the holding of an election has been reduced to as little as 10 days. The Coalition for a Democratic Workplace (CDW), which IFA is a member of management committee, filed suit along with the US Chamber of Commerce on December 21st against the NLRB and the "ambush election" ruling.

Poster Requirement

NLRB again extended the timetable for businesses to post the new employee rights notice until April 30, 2012. IFA and CDW will continue to push to have the poster requirement rule reversed completely.

Persuader Rule
In addition to the proposed NLRB representation election rules, there is another set of rules being proposed by DOL that will further stack the deck in the union's favor. DOL's proposed revised rules eviscerating the 'advice' exemption from persuader activity reporting requirements under the Labor-Management Reporting and Disclosure Act would chill the ability of employers to obtain the advice of outside legal counsel during union organizing campaigns. Lawyers would no longer be able to advise employers on lawfully communicating with employees through speeches, written materials, audio visuals without publicly disclosing all the outside law firm's financial arrangements, not only with that client, but with all clients for all labor relations services, even those services having nothing to do with 'persuader' activities.

Under current law, outside entities must report as 'persuaders' when they communicate directly with employees about how to vote in a union organizing campaign. Under the proposed rule, law firms and consultants would be required, under threat of criminal sanctions, to report whenever they give advice to employers regarding communications with employees, and would be required to disclose the identity of all their labor relations clients, including all labor relations services and related financial arrangements. Employers would be required to report as well on forms signed by their president and treasurer. (Note: The public comment period on the DOL's proposed 'advice' exemption rule is open until September 21.) IFA will comment.

For more information on the Coalition for a Democratic Workplace please visit www.myprivateballot.com.

Companion Exemption

The Department of Labor made a recent ruling on the companion exemption within the Fair Labor Standard Act (FLSA). The ruling removes the exemption from the FLSA for the third party providers in regards to in-home care. IFA is working with in-home care franchise companies to submit comments on the ruling to the Department of Labor as well as work to reverse the ruling through legislation.

Capital Access and SBA Lending

Congress passed appropriations to continue to fully fund the Small Business Administration and its lending programs. This was a significant victory for IFA considering the continued cuts in the overall Federal budget.

IFA is continuing to focus on new ways to help ease the flow of credit to our small business owners. To that end, IFA will host another Small Business Lending Summit on April 17th along with the Consumer Bankers Association, the Financial Services Roundtable and the American Bankers Association. The Summit will include representatives of franchising, the lending community and government regulators to discuss additional methods to ease the credit crunch.

The IFA has created a one-stop toolkit for the franchise business community to learn more about our ongoing efforts and take action. Please visit the toolkit at www.franchise.org/capitalaccess.aspx.

Franchise Relationship Legislation

Congress has not considered any legislation regulating the franchise relationship for the past few years. However, with more than 90 new members of Congress, several with a background as small business owners and entrepreneurs, there is potential for a "Fair Franchising Bill of Rights." The same is true at the state level, where IFA has been active in Massachusetts, North Carolina and Puerto Rico.

We will closely monitor all state and federal activity with regard to franchise relationship legislation. IFA has conducted outreach to all new members of Congress to demonstrate the positive impact of franchising to the U.S. economy and in local communities with our updated *Economic Impact* study.

GRASSROOTS

Franchise Congress Program Development:
In January 2012, IFA hired Erica Fitzsimmons as the new Director of Political Affairs and Grassroots Advocacy. Erica will be overseeing the Franchise Congress program and FranPAC.

We have now received commitments from approximately 250 franchise members for the Franchise Congress initiative. Again, recruitment in 2012 is open to all 50 states, and includes outreach to key franchisors, franchisees and suppliers who have a relationship with their members of Congress. The Franchise Congress will continue its recruitment efforts in 2012, working to uncover candidates through both broad and targeted methods to cover all 50 states by the end of the year.

A special thanks to active Franchise Congress members for continuing to build relationships with key members of Congress and their staff. These visits are instrumental and incredibly effective in communicating both the fundamentals of franchising as well as key issues of concern to lawmakers. It should be noted that the Franchise Congress set a goal to achieve at least 10 visits with members of Congress in 2011. The group has successfully held approximately 25 visits with lawmakers and members of the Small Business Administration.

FranPAC

The past few years have been a time of tremendous growth for FranPAC. To continue this success, increased fundraising efforts and a new strategic identification of "Franchise Champions" in Congress were the program's key objectives in 2011. As a quick review of the strategic plan, FranPAC's fundraising goal in the 2011-2012 election cycle is $750,000 and $1 million in the 2013-2014 election cycle. If fundraising efforts continue at the current pace, FranPAC will meet its $1 million goal in the 2011-2012 cycle. To accomplish this, FranPAC will continue to promote its successful cornerstone programs, such as annual events and donor clubs, as well as continually introduce new initiatives to enhance IFA member involvement in the program.

In addition to achieving fundraising goals, FranPAC has also implemented a new "giving strategy" designed to better utilize FranPAC's resources to initiate and foster relationships with members of Congress. Our Government Relations and Public Policy team identifies "Franchise Champions" in Congress who have the capacity to carry and execute IFA's pro-franchise, pro-small business message. Heavy emphasis has also been placed on actively controlling the setting in which these contributions occur so that IFA's message is communicated in an even stronger manner.

FranPAC ended 2011 with approximately $371,000 cash on hand and total receipts of $603,693.75 (compared to $401,253 in 2010). Additionally, we have contributed $234,500 to franchise-friendly federal members/candidates in the 2011-2012 election cycle. This puts FranPAC in an excellent position to begin the election year.

The cornerstone of the FranPAC fundraising program continues to be the 365 Club, Chairman's Club, Congress Club and Cabinet Club (otherwise known as the "Max Donor" Program). The following indicates the number of donors in each club at the end of 2011:

- Cabinet Club (Maximum Donor - $5,000): 76
- Congress Club ($2,500 - $4,999): 25
- Chairman's Club ($1,000 - $2,499): 58
- 365 Club ($365 - $999): 137

Moving forward into 2012, the FranPAC Advisory Board and FranPAC President's Council will continue their hard work bringing forth a growing number of contributions from IFA membership. We will also keep refining and developing our "Franchise Champions" giving strategy. By doing this, when we become the $1 million PAC we strive to be, we can rest assured that FranPAC's resources are being utilized in the best possible manner to help deliver tangible results for our organization and membership.

STATE LEGISLATIVE ACTIVITY

The IFA monitors legislative activities in all 50 states and the territory of Puerto Rico, to guard against policies that could negatively impact the franchising community. The number one priority at present is to protect the franchise business model from further government intrusion into the franchise relationship, believing that such matters are best determined between franchisor and franchisee and specific to the unique characteristics of that franchise system. The government relations team has also continued to execute a multi-state initiative to address the misapplication of independent contractor laws to the franchise business model. Beyond franchise specific legislation, the IFA has engaged in numerous issues that also affect the broader small business community, such as paid sick leave and tax reform.

In March, Dean Heyl joined IFA as Director, State Government Relations, Public Policy and Tax Counsel.

California: On February 24, 2012, Assembly Bill 2305 was introduced. Despite being entitled, "The Level Playing Field for Small Business Act of 2012," the legislation will hurt franchise businesses, job growth efforts, and consumers by adding unnecessary restrictions to franchising opportunities. Although portrayed as pro-franchisee legislation, the bill will harm franchisees and franchisors alike.

The following are some of the negative aspects of the bill:

- Increases termination notice to franchisees from 30 to 60 days.
- Provides 60 rather than 5 days for franchisees to pay overdue amounts
- Prohibits a franchisor, upon termination or expiration of a franchise, from enforcing against the franchisee any covenant not to compete.
- Provides certain rights to a franchisee if the franchisor develops a new location or grants a new franchise in essentially the same market in unreasonable proximity to an existing franchise.

• Prohibits the registering of any franchise offer that restricts venue for resolution of dispute
solely to a forum outside this state.
• Makes it unlawful for a franchisor to refuse to recognize and deal fairly and in good faith with an independent franchisee association.

IFA has met with legislators and staff from the Assembly Committee on Business, Professions and Consumer Protection as well as other stakeholders such as the California Retailers Association, which have expressed their opposition to AB 2305. IFA has also met with California Senate Republican Leader Bob Huff and California Republican Assembly Leader Connie Conway to shore up opposition against the bill.

In addition, IFA is actively pursuing a grassroots campaign to reach out to franchisees to testify against AB 2305.

Massachusetts: While working to defeat H.B. 1391, independent contractor legislation detrimental to the franchise community, IFA is also promoting H.B. 3513, which includes language to exempt franchises from independent contractor regulations established by *Awuah v. Coverall North America*. IFA has met with Massachusetts legislators and staff to discuss independent contractor and anti-franchise legislation opposed by IFA, and they will be advocating for legislation clarifying the independent contractor status of franchisees.

Georgia: IFA-backed legislation, H.B. 548, which codifies franchisee/franchisor relationships as contractual business relationships, passed the Georgia General Assembly by unanimous votes in both houses at the end of March, 2012 and will become law upon the Governor's signature. The bill is the result of IFA's ongoing work with the American Legislative Exchange Council (ALEC), which recently adopted as official policy a Resolution on the Misapplication of Employee Classification Laws, recognizing that business format franchising is a major contributor to the United States economy and that franchising is a contractual business relationship, not akin to an employment relationship.

Detailed Summary
Jumpstart Our Business Startups (JOBS) Act
(Became Public Law No. 112-106 on April 5, 2012)

TITLE I -- Reopening American Capital Markets to Emerging Growth Companies (New IPO "On Ramp" Rules)

Purpose: Title I would make it easier for small companies and start-ups to go public by establishing IPO "On Ramp" rules for "Emerging Growth Companies" (EGCs). In enacting Title I, Congress sought to remove barriers to capital experienced by small business and start-ups and reverse the recent decline in IPO offerings in the United States. According to the IPO Task Force report, the SEC acknowledged that Sarbanes-Oxley would "discourage some companies from seeking capital from the public markets" because those rules "increase the cost of being a public company." Title I of the JOBS Act would incentivize EGCs to go public by waiving regulatory requirements in their initial post-IPO years before having to comply with certain SEC regulations that now apply to all public companies.

Definition of an EGC: Emerging Growth Companies' (EGCs) are issuers that have total annual gross revenues of less than $1 billion.

"On Ramp" Incentives: EGCs are exempt from certain regulatory requirements until the earliest of three dates:

1. Five years from the date of the EGC's initial public offering;
2. The date an EGC has $1 billion in annual gross revenue; or
3. The date an EGC becomes a "large accelerated filer" (e.g., a company that has a worldwide public float of $700 million or more).

EGC regulatory relief provisions are as follows:

Sarbanes-Oxley Section 404 Disclosures: EGCs would still be required to comply with SEC-mandated quarterly and annual disclosures, but they would be exempt from Section 404(b) of Sarbanes-Oxley for up to five years instead of the current transition period of two years. EGCs would still be required to establish and maintain internal controls over financial reporting required by Sarbanes-Oxley and the CEO and CFO would still have to certify the company's financial statements.

Audited Financial Statements: EGCs would be required to provide audited financial statements 2 years prior to registration rather than 3 years as currently required by law. Within a year of its IPO, the EGC would report 3 years' worth of financial statements as currently required for larger companies.

PCAOB Audit Firm Rotation: EGCs would be exempt from Public Company Accounting Oversight Board (PCAOB) rules which require mandatory audit firm rotation (thus allowing EGCs to avoid the unnecessary costs of changing from an auditor familiar with the company to one that is not).

Dodd-Frank Corporate Governance: EGCs would be exempt from two corporate governance requirements established by Dodd-Frank. First, the bill exempts EGCs from Section 951, which requires public companies to hold a non-binding stockholder vote on executive compensation arrangements. Second, EGCs would be exempt from Section 953(b)'s requirement that public companies calculate and disclose the median compensation of all employees compared to the CEO.

Availability of Research & Communications: Title I would modify existing SEC rules to allow investment banks that underwrite a company's IPO to publish research on EGCs. Title I would:

1. Permit the publication or distribution by a broker or dealer of research about an EGC that is the subject of a proposed public offering even if the broker or dealer is participating or will participate in the offering (Sarbanes-Oxley Section 501 conflict-of-interest rules are not affected);

2. Expand the range of permissible pre-filing communications to institutional buyers and accredited investors to allow EGCs to assess prospective interest in a contemplated securities offering;

3. Permit members of the investment banking team for a broker or dealer participating in an offering to arrange for communications between securities analysts and potential investors in EGCs;

4. Permit research analysts to participate in communications with management of the issuer that are also attended by other members of the broker or dealer;

5. Permit the publication and distribution of research reports about EGCs during post-IPO quiet periods and lock-up periods established by the SEC or national securities associations;

6. Permit U.S. companies to submit draft registration statements to the SEC on a confidential basis but must publicly disclose its initial confidential submission and all amendments resulting from the SEC review process at least 21 days before it begins a pre-IPO "road show" for potential investors.

TITLE II - Access to Capital for Job Creators (Rule 506 of Regulation D)

Current Law: Under SEC Rule 506 of Regulation D, securities may be sold through private offerings (e.g., sales made to a limited number of eligible investors rather than to the general public) without being registered with the SEC. Issuers of securities through such private offerings are prohibited from using general solicitation or advertising to market the securities.

Provision: Title II would require the SEC to amend Rule 506 within 90-days of enactment approximately July 5, 2012) to eliminate the existing regulatory prohibition on general solicitations or advertising in private offerings by allowing an issuer to advertise the availability of a private offering to "accredited investors." The revised regulation would require the issuer to take reasonable steps to verify that only accredited investors purchased the securities. Title II would also:

1. Clarify that the prohibition eliminated by Title II is only to be treated as a regulation pursuant to exempt transactions pursuant to the Securities Act of 1933, as amended (the "1933 Act") (which covers "transactions by an issuer not involving any public offering"). Title II also clarifies that a private offering is not be construed as a public offering simply because the private offering was made through a general solicitation or advertisement; and

2. Clarify that Regulation D broker-dealer limits on general solicitations and advertising intended to protect inexperienced investors do not apply to Expand Seed/Angel Capital arrangements, such as online platforms and incubators that facilitate exchange between start-ups and angel investors. Such arrangements would not have to register as broker-dealers if they receive no compensation in connection with the purchase or sale of the security; do not manage the investors' funds; and only permit accredited investors to use their platform.

Title II's Purpose: Because the prohibition on general solicitation and advertising has been interpreted to mean that potential investors must have an existing relationship with the issuer before they can be notified of private offerings, the pool of potential investors has been very limited, thus impairing the ability of small companies to raise capital. Title II is intended to give companies greater access to potential accredited investors.

TITLE III - Entrepreneur Access to Capital (Crowdfunding Exemption)

Generally: Title III would exempt crowdfunding arrangements from regular registration and disclosure requirements imposed by the 1933 Act and create special registration and disclosure requirements for the offer or sale of securities to by an issuer through a “broker or funding portal.”

<u>Qualifications to be a Crowdfunding Issuer</u>: To qualify for the crowdfunding exemption, the issuer must be a U.S. company (and not a reporting or investment company) and the aggregate amount of securities sold by the issuer within the previous 12-month period (including prior crowdfunding) cannot exceed $1 million.

<u>Investor Limits</u>: To qualify for the crowdfunding exemption, the aggregate amount sold to any one investor by a crowdfunding issuer, including any amount sold in reliance on the exemption during the preceding 12-month period, cannot exceed:

1. The greater of $2,000 or 5 percent of the annual income or net worth of such investor if either the annual income or the net worth of the investor is less than $100,000; and

2. 10 percent of the annual income or net worth of such investor (not to exceed an aggregate amount of $100,000) if either the annual income or net worth of the investor is equal to or more than $100,000.

<u>Website Portal and Broker Registration</u>: A "funding portal" is defined as any person engaged in the business of effecting securities transactions for the account of others pursuant to the crowdfunding exemption that does not:

1. Offer investment advice or recommendations;

2. Solicit purchases, sales, or offers to buy the securities offered or displayed on its website or portal;

3. Compensate employees, agents, or other third parties for such solicitation or based on the sale of securities displayed or references on its website or portal;

4. Hold, manage, possess, or otherwise handle investor funds or securities; or

5. Engage in other activities determined by the SEC.

<u>Qualifying Crowdfunding Offering</u>: To qualify for the crowdfunding exemption, the offering must be conducted through an intermediary broker or funding portal that is required to:

1. Register with the SEC and any applicable self-regulatory organization;

2. Provide disclosures related to risks and other investor education materials required by the SEC;

3. Ensure that each investor reviews and acknowledges investor-education information, including knowledge of the risks of such investment;

4. Take measures to reduce the risk of fraud with respect to such transactions, including obtaining background and securities enforcement regulatory history check on each

officer, director, and person holding more than 20 percent of the outstanding equity of every issuer whose securities are offered by such person;

5. Not later than 21 days prior to the first day on which securities are sold to any investor (or period of time established by the SEC), make available to the SEC and to potential investors any information provided by the issuer;

6. Ensure that all offering proceeds are only provided to the issuer when the aggregate capital raised from all investors is equal to or greater than a target offering amount, allow all investors to cancel their commitments to invest in accordance with rules to be established by the SEC; and ensure that no investor in a 12-month period has purchased crowdfunding-offered securities that exceed individual aggregate investor limits; and

7. Not compensate promoters, finders, or lead generators for providing the broker or funding portal with the personal identifying information of any potential investor.

Crowdfunding Issuer Registration and Disclosure Requirements: To make a crowdfunding offering, an issuer must:

1. File with the SEC and disclose to investors and the relevant broker or funding portal prospectus information regarding the issuer's business description, business plan, financial condition, prior crowdfunding offerings within the preceding year, and securities pricing and valuation.

2. Not advertise the terms of the offering, except for notices which direct investors to the funding portal or broker;

3. Not compensate or commit to compensate, directly or indirectly, any person to promote its offerings through communication channels provided by a broker or funding portal, without taking steps in accordance with rules to be issued by the SEC to ensure that such person clearly discloses the receipt, past or prospective, of such compensation, upon each instance of such promotional communication; and

4. File reports each year with the SEC and provide investors reports of the results of operations and financial statements of the issuer in accordance with rules to be issued by the SEC.

Liability for Material Misstatements and Omissions: An investor may bring an action for material misstatements and omissions in connection with the crowdfunding offering subject to the provisions of sections 12(b) and 13 of the 1933 Act "as if the liability were created under section 12(a)(2)." (e.g., liability for any person who offers or sells a security through a prospectus or an oral communication containing a material misstatement or omission);

An issuer is liable if, in making a crowdfunding offering, the issuer is found to have made untrue statements of a material fact or omits to state a material fact "required to be stated or necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading, provided that the purchaser did not know of such untruth or omission." The issuer does not sustain the burden of proof that such issuer "did not know, and in the exercise of reasonable care could not have known, of such untruth or omission."

SEC Rulemaking: The SEC is issue rules necessary to implement Title III not later than 9 months from the date of enactment (approximately January 5, 2013).

TITLE IV - Small Company Capital Formation (Regulation A Offerings)

Current Law: Under current law, companies issuing securities with an aggregate offering amount that is less than $5 million -- the threshold set in 1992 -- are not required to register the offering with the SEC.

Provision: Title IV would increase the offering threshold for companies exempted from SEC registration under Regulation A from $5 million to $50 million if the issuances meet certain conditions, including filing an audited financial statement. It would require the SEC to re-examine the threshold every two years and report to Congress on its decisions to adjust the threshold. Title IV would:

1. Exempt securities with the following characteristics:

    a. The aggregate offering amount of all securities sold within the prior 12-month period in reliance on the exemption shall not exceed $50 million;

    b. The securities may be offered and sold publicly;

    c. The securities shall not be restricted securities within the meaning of the Federal securities laws; and

    d. The securities must be either equity securities, debt securities, or debt securities convertible or exchangeable to equity interests.

2. Permit an issuer to solicit interest in the offering prior to filing any offering statement in accordance with rules to be issued by the SEC "in the public interest or for the protection of investors." The SEC shall require issuers to submit an audited financial statement annually;

3. Authorize the SEC to impose other terms and conditions for these offerings, which may include (1) a requirement that the issuer of the securities prepare and electronically file with the SEC and distribute to investors an offering statement and (2) disqualification provisions under which the exemption shall not be available;

4. Subject Regulation A prospectuses to liability under section 12(a)(2) of the 1933 Act (e.g., liability for any person who offers or sells a security through a prospectus or an oral communication containing a material misstatement or omission);

5. Authorize the SEC to require the issuer to make available to investors periodic disclosures regarding the issuer, its business operations, its financial condition, its corporate governance principles, and its use of investor funds; And

6. Exempt Regulation A offerings from state securities laws offered or sold through a broker or dealer; offered or sold on a national securities exchange; or sold to a qualified purchaser as defined by the SEC.

Title IV's Purpose: Title IV is intended to help small issuers, such as venture-capital backed companies, gain access to funding without the costs and delays associated with the full-scale securities registration process. Because the SEC last set the Regulation A threshold at $5 million in 1992, issuers and market participants argue that the offering threshold has been too low to justify the costs of going public under Regulation A.

TITLE V -- Private Company Flexibility and Growth (Section 12(g) Shareholder Thresholds)

Current Law: Under Section 12(g) of the Securities Exchange Act of 1934, as amended (the "1934 Act"), companies with assets greater than $10 million that have issued a class of security held by more than 500 people must register securities with the SEC if those securities are to be traded on a registered exchange.

Provision: Title V would amend Section 12(g)(1) to set the asset limit at greater than $10 million for any issuer and to raise the threshold for a class of equity security “held of record” to either (1) 2,000 persons or (2) 500 persons who are not "accredited investors." However, it would exclude persons who received stock as part of an employee compensation plan in when determining whether the stock-ownership threshold has been met. Title V would also require the SEC to:

1. Issue regulations to revise the definition of "held of record" pursuant to section 12(g)(5) and to adopt safe harbor provisions that issuers can follow when determining that holders of their securities received the securities pursuant to an employee compensation plan; and

2. Study and report Congress within four months of enactment (approximately August 5, 2012) on whether the SEC needs new enforcement tools to enforce the Section 12(g) anti-evasion provision. The provision was adopted in response to concerns that broker-dealers may be deemed the official record holders for thousands of individual investors and that by increasing the number of record holders to 2,000, the new threshold may be used to circumvent the purpose of Section 12(g)'s threshold limits.

Title V's Purpose: Title V addresses concerns that current Section 12(g) thresholds discourage private companies from hiring new employees or acquiring other companies for fear of taking on too many shareholders. In January 2012, the SEC's Advisory Committee on Small and Emerging Companies expressed concern that under current 12(g) thresholds that trigger registration and reporting, "some private companies may be required to register and begin reporting sooner than desired" and, "to avoid registration…. may be driven to manage their capital raising or employee compensation activities in ways that may not be in their or their security holders' best interests." The committee is also concerned that small companies may be discouraged from compensating their employees with stock, making it more difficult for companies to attract and retain employees.

TITLE VI - Capital Expansion
(Section 12(g) Shareholder Thresholds for Banks and Bank Holding Companies)

Current Law: Under Section 12(g) of the 1934 Act, companies with assets greater than $10 million that have issued a class of security held by more than 500 people must register securities with the SEC if those securities are to be traded on a registered exchange.

Provision: For banks and bank holding companies, Title VI would amend Section 12(g) of the 1934 Act to require registration if such entities have total assets of more than $10 million and a class of equity security held of record by 2,000 or more persons. Unlike Title V, the increased threshold would apply regardless of "accredited investors." Title VI would also amend the 1934 Act to increase the deregistration thresholds for banks and bank holding companies. The SEC is required to issue final regulations implementing Title VI within one year of enactment (e.g., approximately April 5, 2013).

Title VI's Purpose: Increasing the shareholder threshold has been a top priority of community banks. According to the American Bankers Association (ABA), banking organizations are often forced into registering with the SEC because of the "organic growth in shareholder ownership." Without the increase in the deregistration threshold, community banks have been forced to buy back shares from their existing investors, which have negative consequences for local communities.

TITLE VII--SEC Outreach Requirement

Under Title VII, the SEC is required to provide online information and conduct outreach to inform small and medium sized businesses, women owned businesses, veteran owned businesses, and minority owned businesses of the changes made by the JOBS Act.

References

American Bankers Association (ABA), Updating SEC Registration Requirements, Issue Brief, 2011.

Congressional Record, House Proceedings, March 7, 2012, Daily Ed., pp. H.1236-64.

Congressional Record, House Proceedings, March 8, 2012, Daily Ed., pp. H.1277-89.

Congressional Record, Senate Proceedings, Statement of Senator Merkley, March 20, 2012, Daily Ed., pp. S. 1828-31

H.R. 3606, "Jumpstart Our Business Startups Act," Enrolled Bill as Passed Both House and Senate, March 27, 2012.

House Report 112-206, To accompany H.R. 1070, "Small Company Capital Formation Act of 2011," September 14, 2011.

House Report 112-262, To Accompany H.R. 2930, "Entrepreneur Access to Capital Act," October 31, 2011.

House Report 112-263, To accompany H.R. 2940, "Access to Capital for Job Creators Act," October 31, 2011.

House Report 112-327, To Accompany H.R. H.R. 2167, "Private Company Flexibility and Growth Act," December 12, 2011.

House Report 112-406, Pt. 1, To accompany H.R. 3606, "Reopening American Capital Markets to Emerging Growth Companies Act of 2012," March 1, 2012.

IPO Task Force, Rebuilding the IPO On-Ramp: Putting Emerging Companies and the Job Market Back on the Road to Growth, Presented to the U.S. Department of the Treasury, October 20, 2011

President's Council on Jobs and Competitiveness, Jobs Council Recommendations, Nurture the High-Growth Enterprises That Create New Jobs, October 2011.

Securities and Exchange Commission Advisory Committee on Small and Emerging Companies, Letter to SEC Chairman Schapiro, Recommendations Regarding Registration Requirements and Reporting Obligations Under the Securities Exchange Act of 1934, March 9, 2012.