MERGERS & ACQUISITIONS:
THE BASICS FOR BUYING AND SELLING THE SYSTEM

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# Table of Contents

I. **INTRODUCTION** ........................................................................................................ 1

II. **STRUCTURE** ............................................................................................................. 2
   A. Unique Aspects to the Acquisition of a Franchisor .............................................. 2
   B. Asset Purchase and Key Considerations ........................................................ ... 3
   C. Stock Purchase and Key Considerations ........................................................ ... 5
   D. Alternative Structures...................................................................................... 6
      1. Minority Investments ........................................................................... 6
      2. Merger ................................................................................................. 6
      3. Tender Offer and Merger .................................................................... 7

III. **VALUATION** ............................................................................................................... 7
   A. Strategies to Maximize Valuation in Preparation for a Sale ............................. 8
   B. Items of Interest When Assessing Valuation ................................................... 9
   C. Common Multiples of EBITDA for Franchise Company Deals ....................... 11

IV. **DUE DILIGENCE** .................................................................................................... 11
   A. Overview and Goals of Due Diligence ........................................................ 11
   B. Franchise Specific Due Diligence Issues ....................................................... 12
      1. FDD (Including Registrations and Comment Letters)............................... 12
      2. Franchise Agreements ........................................................................... 13
      3. Area Developer Agreements ................................................................... 14
      4. Termination, Defaults, Renewal correspondence ...................................... 14
      5. Marketing Fund ................................................................................. 15
      6. Franchise Sales Materials ...................................................................... 15
      7. Franchisee Association Documents ........................................................ 15
      8. Supply Chain Contracts ....................................................................... 15
9. Real Estate Leases and Subleases ................................................................. 15
10. Intellectual Property .................................................................................. 16
11. Financial Reporting .................................................................................. 16
12. International Agreements .......................................................................... 16

C. Sample Due Diligence Listing .................................................................. 16

V. KEY PROVISIONS IN THE OPERATIVE AGREEMENTS ............................... 16

A. Handling the Initial Expression of Interest .................................................. 16

B. Letter of Intent ........................................................................................... 17
   1. Confidentiality ....................................................................................... 18
   2. Exclusivity ............................................................................................. 18
   3. Price and Escrow Concepts .................................................................. 18
   4. Initial Diligence Parameters ................................................................. 19
   5. Time Frames ....................................................................................... 20

C. Definitive Agreement Issues ....................................................................... 20
   1. Definitions ........................................................................................... 20
   2. Purchase Price and Potential Adjustments .......................................... 22
      a) Escrows and other Hold-backs ...................................................... 22
      b) Clawbacks and Earn-Outs ............................................................. 22
   3. Representations and Warranties ............................................................ 23
      a) Franchise Law Compliance – Registration, Sales and Termination .... 23
      b) Ability to Assign Franchise Agreements and Vendor Contracts ....... 24
      c) Advertising Fund Usage ................................................................. 24
      d) Dispute Actions with Franchisees ..................................................... 25
      e) Franchisee Advisory Councils and Independent Associations ......... 25
      f) Correctness of Financial Information Provided ............................... 25
g) Supplier and Vendor Relationships ........................................ 26
h) Sales Relationships – Franchise Brokers, Area Developers, Subfranchisors ........................................... 26
i) Intellectual Property ............................................................... 26
j) Existing Target Operated or Owned Locations – Environmental and Operational Compliance 26
k) Employee Representations .................................................... 27

4. Operation of Locations by Franchisor .................................................... 27
   a) Compliance with Laws ....................................................... 27
   b) Transferability of Leases .................................................... 28
   c) Ownership Transfer or Leaseback Issues .............................. 28

5. Franchise Specific Issues in the Schedules ........................................... 28
   a) Assigned Contracts ........................................................... 28
   b) Listing Of Intellectual Property and Form of Assignment ....... 28

VI. MANAGING THE FRANCHISEES IN THE SALES PROCESS 29
   A. Notifications to Existing System Franchisees and Employees ................................. 29
   B. Disclosure Requirements ...................................................................................... 30

VII. POST-CLOSING ISSUES AND STRATEGIES ......................................................... 32
   A. Private Equity Acquisition ........................................................................ 32
   B. Strategic Partner Acquisition ................................................................. 33
       1. Integration into Existing Platform .................................................... 33
       2. Assignments ........................................................................ 33
       3. Registrations and Filings (State and Local) ............................................ 34
       4. Shared Services ......................................................................... 34
       5. Non-Shared Services ....................................................................... 34

VIII. CONCLUSION ................................................................................................. 34

Appendix 1 – Preliminary Due Diligence List .................................................... 35
I. INTRODUCTION

Over the past several years the acquisition and merger of franchise systems continue to make headlines. What was once a "trend" appears to be the new normal in franchising as private equity funds and large franchise holding company conglomerates continue to acquire one franchise system after another. Franchisors of all sizes and in all types of industries appear to be potential targets for private equity funds, family offices, and strategic buyers looking to deploy capital and diversify portfolios. Indeed, the last two years alone have featured the full spectrum of merger and acquisition and investment activity in the franchise world – from high-profile, multi-billion dollar deals (e.g., the merger between Panera Bread and JAB Holding Company that is expected to close in Q3 2017; Marriott's acquisition of Starwood in 2016; and the 2014 merger of Burger King and Tim Hortons and the subsequent tender offer acquisition of Popeye's Louisiana Kitchen in 2017 by Restaurant Brands International – the holding company created in the Burger King/Tim Hortons merger), to significant transactions involving private equity funds (the 2017 acquisition of Checkers Drive-In Restaurants by Oak Hill Capital Partners), to relatively small acquisitions of regional or special industry franchises by private equity funds growing their portfolio (e.g., Roark Capital Group's 2016 acquisition of Express Lube (through Driven Brands, one of its portfolio companies)).

While the U.S. economy has experienced moderate recovery since the 2008 financial crisis – the unemployment rate is down, consumer spending has risen, and interest rates are starting to creep back up – businesses are just beginning to start investing again in their operations. In this economic climate, franchise systems may be the ideal investment for those looking to revitalize a familiar, but weakening brand, or looking to tap into an exploding market – and the fast-casual restaurant and health and fitness industries are prime examples of such industries with a lot of M&A activity. Some fast-food franchisors are still experiencing the effects of the economic downturn and changing consumer tastes as restaurant sales continue to decline, and may therefore be attractive targets for investors willing to take a risk on an existing brand. Financial institutions have become more conservative with their lending practices, so many franchisors' attempts to divest company-owned units have stagnated and they must resort to other outside sources to raise capital and increase franchise development – enter private equity investors and competitive franchisors. Conversely, buyers looking to capitalize on the booming health and wellness industry are looking towards fitness and personal services franchise systems as a way to expand quickly. Franchise systems appeal to private equity firms for a variety of reasons, including the relatively low capital investment needed to support and expand a franchise system in comparison to the recurring and predictable revenue stream the franchisor generates from franchisee operations.

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1 One of our author's firm, Greenberg Traurig, LLP, was counsel to Starwood Hotels & Resorts Worldwide, Inc., Tim Hortons USA Inc., and Checkers Drive-In Restaurants, Inc. in each of the above-referenced transactions.

royalties at the outset of the acquisition, brand recognition created by the network of existing franchised outlets, the existence of management teams already in place to manage the firm's investment, as well as efficiencies created by utilizing existing support infrastructure across multiple franchise brands. A struggling franchise brand may also be an attractive target company for a competitive franchisor with a solid reputation of its own and the capacity to revamp another franchise system.

The uptick in M&A deals in the franchise industry puts a spotlight on how the intricacies of franchising set these deals apart from the acquisition of a run-of-the-mill business. The strength of the franchise model lies not only in a recognizable brand and system of operating, but also in relationships – the relationship between the franchisor and its franchisees, and the franchise system's relationship with the consumer. This paper will examine the basic framework of common M&A transactions involving franchise systems and the various franchise-specific considerations in each aspect of the transaction: evaluating the franchise model and structuring the deal; the due diligence process; preparing and negotiating the operative agreements; how to manage franchisees during the sale process; and post-closing issues and strategies.

II. STRUCTURE

A. Unique Aspects to the Acquisition of a Franchisor

The purchase of (or investment in) a franchise system involves certain inherent issues that may not arise in a typical M&A transaction, so it is in the buyer's best interest to become familiar with the unique – and highly regulated – characteristics of the franchise model before any offer is made. For example, a buyer may be motivated by a desire to quickly grow a franchise system, or make substantial changes to a franchise brand, or immediately cut ties with franchisees in a region in order to withdraw from an underperforming market; however, in each instance, the buyer should be acutely aware of the business risks – and potential violations of franchise laws – that could result from such actions.

First and foremost, a buyer should have a general understanding of franchised operations and the franchisor/franchisee relationship. This is especially true for private equity funds or other investment companies which may have a portfolio of investments in non-franchised businesses and are not accustomed to the highly regulated and relationship-heavy world of franchising. Many mature franchise systems consist of both franchised units (operated by third-party franchisees), and company-owned units (which may be operated by either the franchisor's or an affiliate's employees). Unless they hold a significant number of company-owned units, most franchisors derive the bulk of their revenue stream from franchisees in the form of franchise fees, development fees, royalties, and product purchases, rather than selling products or services directly to consumers. Thus, franchisees are frequently the financial backbone of the franchise system, and buyers should be aware that a "typical franchisee" can vary widely - some franchisees are prototypical small-business owners who may lack business savvy and need extra hand-holding from a franchisor, but other franchisees may be sophisticated entities in their own right. While the buyer may choose to terminate some of the franchisor's employees (which in most cases is relatively straightforward), terminating a
franchisee is decidedly more difficult. Eighteen "franchise relationship" states have enacted laws which govern the business relationship between the franchisor and franchisee, including the limited circumstances in which a franchisor may terminate a franchise agreement (or not renew a franchise relationship), and most of these statutes require the franchisor to have "good cause" to terminate a franchise agreement. Of course, what constitutes "good cause" varies by state (and in some states is not defined), but the burden is generally on the franchisor to show the franchisee failed to substantially comply with the franchisor's requirements. For example, a buyer intending to overhaul a franchise system post-closing by withdrawing from a geographic region or discontinuing a line of products of services and therefore terminate franchisees based on either of these business decisions may not satisfy the "good cause" requirement in many franchise relationship states. Further, notwithstanding any statutory limitations on termination, most franchise agreements by their terms cannot be terminated without cause, so buyers should be ready to commit to existing relationships with franchisees.

In addition to the franchise relationship laws to consider, interested buyers must prepare to comply with the franchise registration and disclosure statutes in certain "franchise registration" states, in addition to the FTC's 2007 Amended Franchise Rule which mandates certain disclosures in a franchise disclosure document before the franchisor may offer or sell franchises in the U.S. Investors who are not familiar with franchise registration and disclosure requirements may be surprised at the extent of related due diligence necessary to determine whether a franchisor has operated in compliance with state and federal franchise laws. (See Section IV.B below for a discussion of franchise-specific due diligence). In addition, as discussed in greater detail in Section VI.B below, there are various requirements for updating the FDD that would apply upon the closing of an acquisition and temporarily affect franchise sales activity. The myriad regulatory requirements that franchisors must comply with may seem daunting to potential investors who are new to franchising, but the regulatory minefield has not stopped private equity firms and other non-franchisor buyers from closing numerous deals over the years.

B. Asset Purchase and Key Considerations

In an asset purchase, the buyer typically seeks to acquire some (but usually not all) of the target company's assets and assume certain specified liabilities. This type of transaction allows the buyer to identify the excluded assets and liabilities in the asset purchase agreement, and is therefore is generally the preferred structure for investors who are especially concerned with liability avoidance. By excluding certain problematic assets and liabilities in the asset purchase agreement, buyers can avoid becoming responsible for the conduct of the business prior to the transaction. Key areas to carve

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3 Arkansas, California, Connectcut, Delaware, Hawaii, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Rhode Island, Virginia, Washington and Wisconsin. In addition, Idaho regulates the venue for disputes between franchisors and franchisees and Maryland has a statute that may impact the termination rights of some franchisors.

4 California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Rhode Island, South Dakota, Virginia, Washington and Wisconsin. In addition, the following states have business opportunity laws which require notice filings that may need to be updated post-closing, depending on the structure of the deal: Florida, Kentucky, Nebraska, Texas, and Utah. Additional business opportunity state law filings may be required in some circumstances. See Section VI.B below for additional details.

out in the asset purchase agreement are assets and liabilities related to any legal or regulatory issues, environmental violations, and labor disputes.

Perhaps of greater importance than identifying the excluded assets, however, is ensuring that all of the assets that are critical to the franchise system are transferred. Franchisors tend to have few tangible assets when compared to other types of businesses (unless, again, they have a significant number of company-owned units). Instead, a franchisor's most valuable assets are usually comprised of the intellectual property, the franchise agreements (including multi-unit development agreements), management teams and other intangible assets that are the basis of the brand and typically include principal trademarks, trade secrets, websites, domain names, operations manuals, business methods, recipes or formulas, patents, and other proprietary information or materials. In addition to the intellectual property, the franchisor's other target assets may include ownership interests in any real property; and any proprietary or required equipment, hardware or software that is leased (or licensed) to franchisees. Depending on the identity of the buyer, the franchisor's assorted personal property (such as the furnishings, supplies and assorted items in the franchisor's corporate office) may also be transferred; for example, a private equity or other investor that will not have any part of day-to-day operations may want to keep the status quo and purchase such assets, while a strategic buyer who acquires a franchise system may be eager to consolidate the merged systems by excluding redundant assets.

As noted above, acquiring a franchisor through an asset purchase requires the transfer of intangible assets like intellectual property, contractual relationships, licenses, and permits. Buyers must carefully review each material contract that must be transferred to identify assignment restrictions and termination rights, including termination fees, which may be triggered by the asset purchase. If a seller is able to obtain third-party and government consents in advance of signing an asset purchase agreement, less time will be required to close the transaction and the uncertainty between signing and closing will be reduced. However, often sellers do not want to disrupt relationships with contract counterparties or regulators, and are also sensitive about the confidentiality of the upcoming transaction, so the process of obtaining consents does not begin until the asset purchase agreement is signed.

From a tax perspective, buyers typically favor an asset purchase over an equity purchase if the acquired assets have a low basis, because in an asset purchase the basis of each acquired asset is “stepped up” to the portion of the purchase price allocable to that asset. The buyer can then depreciate or amortize the assets based on the new stepped-up basis. Although the tax benefits of an asset purchase may be favorable to buyers, the creation of a new entity to hold the purchased assets triggers certain post-closing procedures unique to franchising that must be followed by the buyer. For example, the FDD used for the franchise system must be updated to disclose required information about the new franchisor, including financial statements, and thus franchise sales must cease until the FDD is updated (and approved by applicable franchise registration states). Further, existing state franchise registrations will no longer

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be valid due to the "new" franchisor – even if there were effectively no changes to the franchise company other than the ownership of assets – so initial franchise registration applications must be submitted to the states with the updated FDD. If the franchisor had been relying on "large franchisor" or "super large franchisor" exemptions from certain state franchise registration requirements, the formation of a new entity necessitates an analysis of applicable state statutes, as a new entity with no operating history may no longer qualify for the exemptions previously relied on by the franchisor without obtaining a discretionary exemption.7 See Section VI.B below for a detailed discussion of post-closing registration and disclosure requirements.

C. Equity Purchase and Key Considerations

The acquisition of a franchisor through an equity acquisition (either directly from a few equityholders of a private company, or by acquiring the subsidiary of a public or private company) may require the unanimous or super-majority vote of all equityholders and is typically achieved by the exchange of cash, a promissory note or the buyer’s (or an affiliate’s) own equity. In some instances – and often when the target company is a public company – it may not be possible for a buyer to purchase all of the outstanding equity in a target company, usually due to the inability to get unanimous consent to the sale among a large number of equityholders. In the case of a corporation, if a buyer is able to acquire the majority of the stock (usually 90% or more, depending on the laws of the state of formation), the buyer may be able to do a short form merger to acquire the remaining stock. A short form merger does not require a stockholder vote, but the minority shareholders may have appraisal rights over the shares. (See Section II.D below for additional types of mergers.)

Equity acquisitions at a parent level are favored in the franchise context for various reasons. Unlike an asset purchase, the end result of a traditional equity purchase will leave the franchisor entity intact as a going concern (with the buyer having indirect ownership of all assets and liabilities) and the franchisor’s management and personnel can continue their day-to-day operations and procedures largely undisturbed. Because assets are not being transferred, there tend to be fewer formalities - there is no need to assign franchise agreements, vendor contracts, or other agreements (unless the transaction triggered any change of control provisions, though typically this is not an issue with franchise agreements). In addition, the franchisor can generally proceed with franchise sales as usual. Under the FTC Rule, the FDD must still be amended to include required disclosures regarding the new ownership (as well as any applicable parents and/or affiliates); however, depending on how the transaction was structured, the franchisor may continue to take advantage of any existing state franchise registrations – and may be able to continue to qualify for any available exemptions and exclusions. Again, the franchisor’s ability to continue to take advantage of state registration exemptions and exclusions post-closing requires a close analysis of each

7 In certain states, some new franchisor entities may be able to rely on a parent’s relevant operating history to qualify for an exemption or exclusion (in addition to minimum net worth or other requirements). For example, under California’s "large franchisor" exemption, the franchisor or “a corporation owning at least 80% of the franchisor” (i.e., a parent) must satisfy minimum net worth and experience requirements. See CAL. CORP. CODE § 31101. For a detailed discussion of registration and disclosure exemptions and exclusions available to franchisors, see EXEMPTIONS AND EXCLUSIONS UNDER FEDERAL AND STATE FRANCHISE REGISTRATION AND DISCLOSURE LAW (Leslie D. Curran and Beata Krakus, eds., American Bar Association 2017).
franchise registration state’s requirements, specifically with respect to the franchisor’s (or, often its parent’s) minimum net worth in the context of an equity purchase.

While it is beneficial to continue to operate and offer and sell franchises without significant interruption, the equity purchase of a franchisor tends to be riskier than an asset purchase because the buyer is essentially purchasing all of the franchisor's assets and known and unknown liabilities. Even if the parties agree to exclude certain liabilities, there may be liabilities that are unknown to both parties that the buyer will ultimately have to deal with, despite efforts to insulate from liability exposure in the purchase agreement. (Section V.C below includes an in-depth discussion of the importance of representations and warranties in an equity purchase agreement.)

D. Alternative Structures

Due in large part to a competitive marketplace, some investors have been exploring various alternative structures, such as minority investments, mergers, and, with respect to public companies, tender offers. The following is a high-level summary of some of these alternative types of transactions.

1. Minority Investments

In a minority investment, the investor acquires minority voting interests in a target company, and thus does not enjoy a controlling position. This type of deal can be attractive for franchisors that are looking to sell a portion of the business while maintaining control of the company. Potential buyers in this space include smaller private equity firms and family offices that are seeking investment return in the franchisor’s market but do not have the managerial resources to take a controlling position. Buyers may also use this structure initially, with the intent of acquiring a controlling interest at a future date. Minority investments may be effected by both equity and debt financing arrangements, and in some instances buyers have structured their deals as a hybrid debt and equity arrangement with no board member participation in order to differentiate themselves in a highly competitive marketplace.

2. Merger

A merger is a type of acquisition in which two entities (the buyer and the target company) merge into one legal entity which assumes the assets and liabilities of the target company. Generally, a statutory equity acquisition requires unanimous consent of the target company’s equityholders to consummate the transaction. In contrast, only a majority vote of the equityholders is required in mergers. Mergers are subject to the corporate laws of the state in which the surviving entity is formed, and typically take one of the following three forms: a forward merger (the target company merges with and into the buyer); a forward triangular merger (the buyer uses a new or existing subsidiary to acquire the target company, and the target company merges into the subsidiary); and a reverse triangular merger (the buyer’s subsidiary merges with and into the target company and becomes the buyer’s subsidiary). As in a typical asset acquisition, in a forward merger and forward triangular merger, the target company ceases to exist after

8 For a more detailed description of different types of mergers, see P. Thao Le, Reeves McGee, and Breton Permesly, Basics: Franchise-Related Mergers and Acquisitions, IFA Legal Symposium, at 15-17 (2014).
the transaction closes, while in a reverse triangular merger, the target company survives.\footnote{id.} Therefore, a reverse triangular merger, when used in a franchise acquisition, is often the preferred structure, as the franchisor entity remains as the surviving entity and can generally continue operations and franchise sales with little interruption.

3. Tender Offer and Merger

A buyer can acquire a target public corporation with many stockholders through a two-step process – the tender offer and merger. The recent purchase of all outstanding shares of Popeyes' common stock by Restaurant Brands International ("RBI") is an example of a successful tender offer. In a tender offer, the buyer offers to purchase shares of public company stock directly from stockholders in order to acquire a controlling (or significant) interest in the public company. In the Popeyes transaction, through a subsidiary, RBI offered the stockholders $79.00 per share, without interest and less applicable withholding taxes. A tender offer comes with certain terms and conditions and an expiration date, and if the conditions are satisfied and the tender offer is not further extended, the shares will be considered accepted for purchase and paid for by the buyer. Once the shares are tendered, the buyer can effect a merger in order to "squeeze out" ownership of the remaining shares and complete the acquisition.

III. VALUATION

In any market, the value of an object is ultimately determined by what buyers are willing to pay to possess it. In the case of commoditized goods and services like a gallon of gasoline or a carwash, pricing information is readily available. In contrast, information about what buyers pay for a company can be difficult to obtain and is often deliberately obfuscated by buyers and sellers.

When valuing a target company, the threshold question is whether the company is publicly or privately held. The starting point for valuing a publicly held company is to look to the current share price for each class of voting securities issued by the target company, determine what it would cost to purchase a controlling block of the voting securities in the open market, and then add a control premium and any sums necessary to overcome any shareholder protections built into any class of securities issued by the target company.

Because there is no transparent and open market for the equity of private companies, valuing them is far more difficult. Typically, buyers value a company by looking at its projected futures cash flows or at prior transactions that have occurred for comparable companies. Often, bankers will prepare valuations of a target company using multiple methodologies, and use the results to generate a valuation range for the proposed transaction.

Valuations based on projected future cash flows are typically performed using either a discounted cash flow analysis or a leveraged buyout analysis. In both cases, pro forma income statements are generated using management’s forecasts, as well as historical revenues, expenditures, and growth rates. A discounted cash flow analysis discounts predicted future cash flows by the cost of capital of the target company to...
determine the net present value of the business. Often, a discounted cash flow analysis will include prospective cost or growth synergies between the buyer and the target company, and so this method is favored by strategic buyers. A leveraged buyout analysis discounts cash flow projections by a hurdle internal rate of return, and is more frequently used by financial buyers like private equity funds. The use of an internal rate of return by financial buyers reflects the need of those types of buyers to meet return targets of their investors. A strategic buyer, on the other hand, may be willing to accept a lower internal rate of return because the target company offers some strategic or synergistic benefit.

An analysis of comparable transactions depends on the use of multiples. Multiples are ratios created by dividing the sale price for a comparable transaction by various financial metrics. The most common multiple used in a comparable transaction analysis for a private company is created by dividing the sale price of the comparable transaction by EBITDA, which reflects the earnings of the company in the comparable transaction, before taking into account interest, taxes, depreciation, and amortization. Bankers may also look at multiples of the sale price of a comparable transaction divided by gross revenue, sales, or net profit, in each case, to add support for the valuation range that is being developed for a target company.

In reviewing comparable transactions, bankers typically focus on the prior five to seven years. An inherent disadvantage in using a comparable transaction analysis is that the data can be devalued by rapid macroeconomic or regulatory shifts. For example, a comparable transaction analysis performed in 2008 may have relied on data between 2003 and 2007, and those sale prices would not have reflected the 2008 liquidity crisis and ensuing global recession. While projected future cash flow analyses would take into account a sudden negative sales and growth forecast, the weakness in those techniques is that they do not include the value of a control premium, which will ultimately need to be built into the buyer’s offer price for a target company.

A. Strategies to Maximize Valuation in Preparation for a Sale

There are two groups of financial strategies for making a company more attractive to prospective buyers. First, franchisors may modify their operations so as to concentrate on optimizing the financial metrics that have the greatest impact on the typical methods of calculating valuation. Second, franchisors may choose to build up certain business features that buyers are willing to purchase at a premium.

When maximizing value through the improvement of financial metrics, franchisors should assume that the valuation range will be based on three to five years of the company’s historical financials, though in some cases up to ten years of data may be used to evaluate a mature business. Of the various financial metrics that will be evaluated, growth rates typically have the greatest impact on valuation methodologies. This is especially true for valuations based on projected cash flow, where higher levels of projected growth are typically assumed to sustain for the duration of the period included in the analysis. In the context of a comparable transaction analysis, recent periods of high growth are often used to justify increasing the EBITDA multiple used to imply the valuation range.

The other typical financial strategy employed to maximize valuation through improved financial metrics is to reduce expenses as a way of increasing the output of the
EBITDA calculation, thereby increasing the implied valuation range. In addition to the obvious options of winding down poorly performing or duplicative products or lines of business, eliminating underperforming employees, and pruning out redundant business processes, prospective target companies may also choose to defer capital expenditures, especially in areas unrelated to the core business and not likely to fuel the company’s growth rate.

In addition to financial strategies, there are a number of operational strategies that can be used to boost the value of a franchisor prior to sale. First, franchisors can update their franchise agreements and audit franchisee compliance with the terms of their franchise agreements. Buyers of a franchisor expect that franchise agreements will protect the franchisor entity’s interests, and that the oversight and provisions of those franchise agreements will be enforceable against the franchisees if franchisees are underperforming or ignoring their covenants in the franchise agreements. To the extent a franchisor has not been regularly updating its form of franchise agreement to address then-current best practices in the industry and enforcing important provisions of its franchise agreement (e.g., proof of insurance, allowing franchisee activities outside their protected territory when otherwise prohibited or allowing franchisees to use unapproved marketing materials), it is best to address these items in due course well before there is a prospective sale of the franchise company, as opposed to a sudden change to these activities on the eve of a prospective sale, which could damage the franchisor-franchisee relationship and scare off prospective buyers.

Franchisors should also audit their own compliance, specifically with respect to the FTC Rule and state franchise registration laws. Examples of common compliance issues that arise during diligence of a franchisor in connection with a potential sale include missing FDD receipts, inadvertent franchise sales while "dark" in a franchise registration state, partially executed agreements and expired franchise agreements. To the extent that any systematic problems exist, franchisors should correct those problems and plan to generate a record of maintaining compliance in advance of a sale. Additionally, franchisors should document any problems that were corrected and be prepared to explain to prospective buyers why the compliance issues arose and what was done to correct those issues. In conducting due diligence, prospective buyers are seeking to minimize risk and uncertainty, and will expect a detailed explanation of any periods of non-compliance with franchise laws.

Finally, franchisors should find ways to present buyers with evidence of a positive state of franchisor-franchisee relations. Buyers will look for areas of typical franchisee dissatisfaction, such as ad fund expenditures, supplier rebates, and frequency of changes to equipment, the product mix, or the franchisor’s marks. Franchisors should be prepared to explain past changes to those metrics in the context of franchisee relations, and should also have data available that provides a favorable picture of franchisee renewal rates.

B. Items of Interest When Assessing Valuation

When negotiating a purchase price derived from an EBITDA valuation, much of the negotiation is focused on “add-backs.” Add-backs are adjustments made to the earnings component of EBITDA in an effort to normalize the target company’s EBITDA with the EBITDA calculations made for comparable transactions. Typically, an add-back increases earnings, which in turn increases EBITDA and raises the implied valuation of
the target company. However, in some cases buyers argue that an acquisition of the target company will trigger a new regularly incurred expense, creating the need for a “negative add-back,” or reduction in EBITDA, which lowers the implied valuation of the target company.

Add-backs generally fall into two categories: one-time expenses that are not likely to recur and expenses made for the benefit of the current owner or owners of the target business. Examples of add-backs resulting from one-time expenses include litigation or settlement expenses that are unique or rare for the franchisor and for comparable companies in the same industry, one-time startup or development expenses, and certain capital expenditures that are unique or rare for the industry. Add-backs resulting from owner’s benefit expenses are very common in closely-held or family businesses, and include salary to the owners in excess of the market value of their services, above-market benefits, or perquisites provided to the owners and related parties, and above-market payments made to affiliate entities controlled by the same owners. Thought these types of add-backs are most common for family-owned businesses, they do appear in more broadly capitalized businesses as management fees for financial sponsors, or as above-market payments to affiliates of certain key investors.

Aside from financial analysis, there are a number of business features that can raise the value of a franchisor, including franchisor-owned real estate, a strong management team, stable contractual relationships, untapped territories, and high barriers to entry.

Franchisors that own the real property occupied by company-owned stores and franchisee locations can be attractive because of the stability that real estate may bring to the valuation range. To limit the downside risk from a transaction, buyers may have the option of selling owned real estate to generate additional revenue for the buyer post-acquisition or to cover losses. Additionally, owned real estate can be used as collateral for financing the acquisition.

Strong management teams are typically a value-add for financial buyers, especially those new to investing in the franchise space. Financial buyers often want to keep the existing management team in place, and place additional value on executives with employment contracts that do not need to be renegotiated during the critical ownership transition period. Strategic buyers, or financial buyers looking to grow an existing portfolio company, will likely not attach as much value to a strong management teams because those types of buyers likely already have a management team in place.

Areas of operational uncertainty may hinder the sale process, and even if a buyer is willing to consummate a transaction, those areas will manifest as discounts to the valuation of the business. Buyers, especially financial buyers without operational expertise in the franchise space, will expect stable contractual relationships, and place a premium on long-term agreements with franchisees, property leases, supplier relationships, and any other key third-parties. Of course, if any of these agreements are not in line with then-current best practices or market conditions, a long-term agreement could hinder the sale process.

Untapped territories, paired with strong growth in existing markets, are a key to selling buyers on the growth potential of a franchisor’s business. A strategic buyer may
place a premium on untapped territories if its existing business already has a presence in those areas. Additionally, untapped territories can be sold through development rights agreements as a way of raising operating cash. Franchisors who are interested in preparing for a sale should look for inexpensive ways to lay the groundwork for an eventual expansion, such as registering trademarks and any other critical intellectual property, and avoid tying up untapped territories through long term development agreements that cannot be terminated as part of a transaction.

Finally, most buyers place a premium on high barriers to entry that will protect the target company from competition arising from new market entrants. Common ways to raise the barriers to entry are to: use confidentiality and non-competition agreements for owners of the franchisee entity to protect trade secrets and critical intellectual property, make capital investments that would be difficult for potential competitors to replicate, and use customer loyalty programs to build network effects. To the extent barriers to entry exist, franchisors should identify and bolster them, and highlight them during the sale process to justify higher valuations.

C. Common Multiples of EBITDA for Franchise Company Deals

EBITDA multiples differ among the various market segments and between publicly-held and privately-held franchisors, but generally have been on an upward trend for the last three years. In the restaurant sector, transactions involving publicly-held franchise companies since the second quarter of 2014 have had a median EBITDA of 10.2x. Of those transactions, acquisitions by financial buyers had a median EBITDA of 10.3x, and acquisitions by strategic buyers had a median EBITDA of 8.8x.

Median forward EBITDA as of December 30, 2016, which estimates EBITDA for 2017 using projections provided by market participants, was 11.6x for the Fast Casual segment, and 13.6x for the Quick Service segment. Full Service restaurants such as Buffalo Wild Wings and The Cheesecake Factory had a lower median forward EBITDA of 9.5x. Other forecasters noted that among franchisee deals in 2016, Taco Bell was “supreme” at 8x+ EBITDA and other brands traded between 5.0 to 6.5x EBITDA. On the franchisor side, valuations ranged between 8.5x and 13.5x, including both restaurant operating companies and franchisors.

IV. DUE DILIGENCE

A. Overview and Goals of Due Diligence

The acquisition of a franchise system is unique from many other types of acquisitions because it does not usually involve the purchase of hard assets such as real estate, warehouses or factories, or particular products. The acquisition of a franchise system is comprised of predominantly intangible assets such as trademarks, trade

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11 Id.
12 Id at 5.
13 Id.
secrets, franchise agreements and relationships with suppliers and vendors. Therefore, the due diligence for this type of an acquisition must be tailored to obtain the appropriate information to properly evaluate the value of the target company as well as its ongoing economics. Furthermore, the buyer must have a clear understanding of the state and federal legal framework in which the franchise system operates, and must rely heavily on the ongoing relationships with franchisees and vendors in the system.

The legal framework of the franchise system must be thoroughly evaluated in this type of acquisition. The buyer must ensure that the seller has been compliant with all federal and state regulations in the operation of the franchise system, and must have a thorough understanding of the relationship with franchisees, both current and prospective.

The fundamental purpose of due diligence is to enable the buyer to evaluate the underlying value of the franchise system, and, more importantly, any potential liabilities and defects in the system. A comprehensive review of the franchise system will allow the buyer to assess the financial and operational strength of the system and its future growth, or maintenance. The buyer will want to evaluate the seller from various perspectives, including, to name a few: its legal structure and framework; international operations, if any; marketing, including social media and web/digital advertising; financial stability, including accounts receivables; operations; purchase and supplier obligations and relationships; real estate, including any direct leases and subleases with franchisees; point-of-sale framework; employment matters; and, research and development.

A buyer’s approach to due diligence should not vary depending on whether the transaction is structured as an asset or equity purchase. The buyer must investigate and evaluate all of the seller’s assets, its management, its franchisees and franchise relationships, its compliance with franchise laws (and other laws and regulations), its operations, and liabilities. Due diligence in an acquisition of a franchise system involves analyzing the various relationships that comprise a franchise network, not simply whether the seller has been compliant with franchise laws.

B. Franchise Specific Due Diligence Issues

1. FDD (Including Registrations and Comment Letters)

The seller’s FDD is likely the first document that a prospective buyer will want to review during due diligence. The FDD contains information that will allow the buyer to get an initial glimpse into the franchise system, including the seller’s structure, key personnel, litigation, and franchisee community. The FDD is by no means comprehensive for purposes of due diligence, but it is a good first step in evaluating a franchise system. It provides a glimpse into the system and helps the buyer identify certain issues that require further investigation during due diligence.

Certain items in the FDD provide a map to the buyer for areas that may require further investigation. A few of these items are listed below:

Item 1: Corporate structure. Information regarding the seller’s parent and affiliates and any entities providing support to franchisees is disclosed and should be
considered by the buyer, including the entity status of each entity if the acquisition is structured as an equity purchase.

*Items 3 and 4: Litigation and bankruptcy.* Certain types of material litigation and bankruptcy matters must be disclosed in the FDD. Although this is not a comprehensive list of all litigation that the seller may be involved in, it provides good insight to the litigious nature of the system and potential outstanding liabilities.

*Items 13 and 14: Trademarks, Patents, etc.* It is critical to ensure that the trademarks necessary to franchise the system are properly protected in all relevant jurisdictions.

*Item 20: Franchise system data.* Item 20 of the FDD contains data summarizing the number of franchised and company-owned outlets, the transfers of outlets to new owners, and the growth and departures from the franchise system. This data can be critical in determining the overall health of the system. High numbers of terminations and transfers can indicate that the system is struggling.

*Item 21: Audited financial statements.* Franchisors are required to attach audited financials to the FDD. The financials indicate the franchisor’s health, and reviewing the notes to the audited financials is a good way to check the accuracy of the information in the FDD.

The FDD includes much more information than what is listed above, and other information in the FDD may be extremely important to determine the health and viability of the franchise system. It can also prove beneficial to review several prior years’ FDDs to get a more complete picture of the seller and ensure that recent changes to the FDD are not hiding past issues within the system.

Fourteen states require that the FDD be registered with a state agency. A buyer should ensure the accuracy of the state registrations. Without a valid state registration, the buyer will not be able to sell franchises in that state after closing. It may also prove beneficial to review any comment letters received from the various states as they can indicate the completeness of the FDD.

2. **Franchise Agreements**

A complete review of all franchise agreements may not be feasible in the acquisition of a larger franchise system. With that said, a buyer should still review the standard forms of franchise agreements that have been used by the franchisor and which franchisees are still operating under, and those franchise agreements that have been heavily negotiated.

The most basic purpose of reviewing the form of franchise agreements is to ensure that they contain the provisions necessary to operate the franchise system in accordance with the buyer’s plans. For example, if the buyer wishes to implement costly improvements throughout the system, it should make sure that the franchisor has the right to require such changes. However, there are many provisions in franchise agreements that buyers should review, independent of their post-closing plans:
Certain provisions in the franchise agreements will prove to be critical in the ongoing relationship with franchisees. The buyer needs to familiarize itself with the dispute resolution and venue provisions in the franchise agreements as they will govern any future disputes with franchisees and are likely to be in a different state than where the buyer is located (unless the buyer is in the same state as the seller).

Some franchise systems do not provide renewal rights to franchisees. It is important to understand the implications this type of provision has on the franchise system, especially an older one where franchisees are approaching the expiration of their initial terms.

Franchisor’s termination rights and grounds for default will also require analysis, including not just the legal provisions in the franchise agreement, but the practical application and practices of the seller in enforcing those provisions. For example, was the seller diligent in documenting defaults or will franchisees be shocked when receiving notices for default upon an occurrence? How diligent was the seller in “papering the franchisee files”?

The review of franchise agreements shouldn’t stop at a review of the form of agreement. A buyer will also want to ascertain if the franchisor has been diligent in the execution of franchise agreements and related record keeping. For example, have transfers to new franchisees or to new owners of franchisees been properly documented? Are guarantees and other documents attached to the franchise agreement properly executed? This review will help a buyer determine its ability to enforce the agreements in the future and also provide a window into the franchisor’s general record keeping practices.

A strategic buyer with multiple brands may want to standardize its franchise agreements across all brands to ensure consistency in its provisions and enforcement. In this case, a thorough comparison of the franchise agreements of the newly acquired brand to the already existing brands will need to be completed, and consideration given to the conversion of the newly acquired brand over time.

3. Area Developer Agreements

When reviewing area developer agreements, the buyer will want to inquire about the performance and success of various area developers, and also identify any “problem” area developers that may be leaving, or should be leaving, the system. In addition, the buyer will want to have a thorough understanding of what territories have been granted to the area developers and what territories are open for future sales, whether the area developer model has been successful for the brand, or whether consideration should be given to buying back the territories and managing them directly.

4. Termination, Defaults, Renewal Correspondence

As part of franchise due diligence the buyer should review the correspondence between the franchisor and troubled franchisees. Many states regulate a franchisor’s ability to terminate or not renew a franchise agreement. If a franchisor is not renewing or has decided to terminate an agreement, the buyer will want to ensure that the seller has taken the proper steps and has adequately documented such decisions. This correspondence can also reveal when a franchisor has decided to give its troubled
franchisee a royalty reduction or abatement, or has decided to forgive some, if not all, of the outstanding monetary obligations. Reviewing this documentation will help a buyer determine if it is a sign of weakness within the system or merely indicative of a poor operator or bad location. It will also help assess the risk for post-closing litigation.

5. **Marketing Fund**

Many franchisors have marketing funds to which franchisees, and often company-owned stores, contribute. It is important to study the marketing fund, how it is being spent, and whether there is a deficit or not. The marketing fund is frequently a point of contention between franchisors and franchisees, so it is important for a buyer to understand the history of the marketing fund in the system. Another important consideration is how the marketing fund is managed. Typically, if the franchisor has an advertising council made up of franchisees, that council would only have advisory rights. However, in some systems advertising councils have decision making rights, significantly limiting how a buyer may be able to use the funds post-closing. Likewise, the marketing fund provisions in the franchise agreements should be reviewed to ensure that they permit the use of the fund towards such purposes as the buyer is envisioning. Marketing fund provisions usually give the franchisor the right to spend the fund towards most marketing, advertising and PR-related purposes, but that is not always the case. Especially in older agreements, the permitted scope of use can be more limited.

6. **Franchise Sales Materials**

Franchise sales materials are important from the perspective of whether the seller has complied with registration requirements of sales materials. A thorough review of the seller’s marketing practices as a whole needs to include the franchise sales materials.

7. **Franchisee Association Documents**

Not all franchise systems have a franchisee association, but if one exists, it is a vehicle for franchisees to voice complaints. It is important to understand the structure of any such franchisee association and to review its relationship with the seller.

8. **Supply Chain Contracts**

Purchasing and distribution contracts are important intangible assets in a franchise system. While they may determine beneficial pricing for franchisees, they also may contract volume or minimum order requirements. It is important to review these supply chain contracts, especially those with the highest volumes or dollars, and determine whether any minimums still need to be met, the expiration dates, and what benefits and liabilities may exist for the buyer on a going-forward basis. In addition, some of these contracts may require consent to an assignment, which must be obtained prior to closing.

9. **Real Estate Leases and Subleases**

While it may be obvious to review all current leases, it is equally important, if not more so, to review any subleases in existence. In conjunction with a review of a sublease, a buyer may want to consider reviewing the franchise agreements and
relationships with such franchisees that are tenants on those subleases. These subleases may be risky and expose the seller, and the buyer after closing, to liability to the landlord should the franchisee default on any of its obligations. In addition, leases should be closely reviewed for any landlord consent requirements to the transfer of the franchisor.

10. **Intellectual Property**

As previously mentioned, the intellectual property is vitally important to a franchise system. While the FDD will give the buyer a preliminary list of all registered trademarks and patents, a thorough review of the entire portfolio should be conducted, including all applications that are still pending, and any possible objections that may exist for registrations worldwide.

11. **Financial Reporting**

While the audited financials required to be included in the FDD typically provide a preliminary review of the financial state of the seller (especially the notes), a diligent buyer will want to review all the financials of the seller, including accounts payable and accounts receivable, and the aging of any outstanding amounts. The buyer should investigate any receivables, especially from franchisees, that have been outstanding for a significant amount of time and question whether they are indicative of a failing relationship with such franchisee. Long outstanding payables can provide insight to the financial health of the seller, as well.

12. **International Agreements**

Not all systems have an international presence, but to the extent they do, these franchise agreements should each be evaluated. A buyer may want to look at any development schedules that are included in such agreements and query whether the franchisee is compliant with those obligations. A buyer may also want to inquire about any obstacles to receiving payments the seller has encountered in various international markets to ensure that the royalty stream can continue smoothly post acquisition. Especially if the franchisor has a significant international presence, a buyer may wish to retain local counsel to help evaluate the agreements with foreign parties.

C. **Sample Due Diligence List**

A comprehensive due diligence list is attached as Appendix 1.

V. **KEY PROVISIONS IN THE OPERATIVE AGREEMENTS**

A. **Handling the Initial Expression of Interest**

The beginning stages of an acquisition can range in formality from a casual discussion at a trade show between officers of compatible or even competing systems to an arrangement with an investment banker to officially list a franchise system or its equity ownership as being available for purchase. If the formal sales approach is started by the seller, the seller might have already prepared a “Confidential Information Memorandum” or “Confidentiality Agreement” that discusses the intended sales process in general terms, the parameters of the diligence process, restrictions on contact with
franchisees and a firm agreement to keep any further information disclosed as confidential.

A formal “Expression of Interest” may be provided by one or even a series of buyers to indicate serious interest in acquiring the seller in some manner. An Expression of Interest is not required and may not be provided if an informal approach is being used. An Expression of Interest typically contains a method of the valuation that the buyer is offering to pay, a discussion of the potential advantages that the buyer wishes the seller to consider in determining if the buyer is a “good fit” with the seller’s ownership and system, as well as the timing of the proposed acquisition and any other information that the buyer thinks would persuade the seller into moving forward with the acquisition. An Expression of Interest is nonbinding on all parties. The seller’s response can be a call to express an interest in proceeding with the next steps or brief letter declining the buyer’s interest. As the franchise community is relatively closely interwoven, a professional manner is encouraged in all communications. While Expressions of Interest may be provided, a “Letter of Intent” is more commonly provided by the buyer.

B. Letter of Intent

A Letter of Intent can be a useful and even necessary agreement beyond merely memorializing the basics of the deal. It helps to reassure the seller that the buyer has a credible intention of purchasing and it helps to reassure the buyer that the franchisor is serious enough to justify the buyer’s time and effort in the diligence process. The Letter of Intent can help the buyer address some of the tougher issues in determining price and can also include provisions on a penalty or termination fee. Also, certain lenders and landlords may require a Letter of Intent before entering into negotiations for financing or for assumption of leases for company-owned units. If the franchisor is a public company, the Letter of Intent can be submitted with certain required affidavits under the Hart-Scott-Rodino Antitrust Improvements Act to meet the premerger notification requirements.16

The Letter of Intent can vary from a bullet point list of general terms that the parties have agreed on to a very formal and detailed agreement. Sellers may prefer to have a brief Letter of Intent in order to have more negotiating leeway but will usually be motivated to have provisions dealing with confidentiality of disclosed information, the scope of due diligence, and limited access to franchisees. Buyers may need to be counseled to address the more challenging subjects of exclusivity during the negotiation, fluctuations in purchase price, potential guaranties of parents or affiliated entities and escrow of part of the purchase price at this early junction.

Certain of the terms in a Letter of Intent will not be binding. The obligation to close the deal is often dependent upon the due diligence process and may be conditioned on financing or other necessary approvals. The purchase price may also vary based on the system characteristics such as the number of units that are open as of the closing date, although the parties might agree on the calculations to be used at

15 See samples of Expression of Interest at the Securities and Exchange Archives at https://www.sec.gov/Archives/edgar/data/1117119/000119312508129978/dex99d10.htm

16 16 C.F.R. § 801, et seq, including § 803.5(b).
The binding terms in the Letter Agreement are typically confidentiality and exclusivity, as well as the general provisions governing state law, notices, and the forum for any disputes.

1. Confidentiality

A confidentiality provision in a Letter of Intent needs to be binding on a buyer. If the buyer withdraws from the sale after any due diligence has been conducted, the seller will want assurances that the buyer will not use the information in any manner, but especially not to set up a competing system. The applicable parties to any confidentiality provision should be not only the buyer entity but also its officers, owners and agents. It may be appropriate for these officers and owners to sign the Letter of Intent on an individual basis, especially if a limited single purpose entity is executing the Letter of Intent. If a breach of contract action is necessary, the seller will need to be able to pursue an entity with appropriate financial means as well as pursue the individuals. Beside the general requirements to keep the disclosed business operations, trade secrets, potential marketing campaigns, customer, financial, and system data confidential, the parties will need to address the manner and restrictions on access to the seller's personnel and franchisees.

A buyer will need to be able to evaluate the system in depth and may wish to have in-person discussions with key employees of the seller, but the seller is likely to wish to have only certain trustworthy employees involved in the process, both to be able to keep the system properly managed but also so as to not cause undue distress if the sale does not proceed. Buyers should have access to key personnel in franchise services, franchise sales, operations, marketing and legal departments, either directly or through a named “gatekeeper.” The “when, where, and how” of the buyer’s access to these resources can be provided in the Letter of Intent.

A seller is likely to restrict any buyer’s access to the franchisees until the last possible moment in the sales process. The seller may provide access only after a definitive agreement is signed but the buyer may require access to certain franchisees that hold a large percentage of locations.

2. Exclusivity

A “no solicitation” time period may be provided in a Letter of Intent. Upon execution of the Letter of Intent, both parties may agree that franchisor is prevented from continuing to accept offers from possible purchasers and the buyer is restricted from evaluating other potential purchases.

Depending on the length of the time period, there may be a deposit required that would be forfeited if the buyer decides to not proceed. A termination or “break-up” fee may also be negotiated for such an exclusive right, especially if the franchisor elects to not sell franchises during the diligence period.

3. Price and Escrow Concepts

With any purchase, there are certain representations and warranties on the system and the assets that will be contained in the definitive agreement, as well as certain liabilities to be assumed by the buyer. Given the intangible nature of the assets
purchased in a franchise system, it may be difficult for a buyer to adequately assess the system’s strengths during the due diligence period. Buyers should consider negotiating at the Letter of Intent phase for holdbacks and escrow arrangements in case certain contingencies arise. For example, if the franchisor is willing to provide a representation that its assets are in good working condition, then perhaps an amount could be escrowed to account for any equipment that fails within the first six months. An escrow can also be imposed as an enforcement mechanism for any noncompetition provisions. From a practical standpoint, it will be easier for the buyer to deduct money from an escrow than to pursue the franchisor into arbitration. Franchisors may be reluctant to agree to the escrow concept if it is raised during the drafting and negotiation of the definitive agreement but the concept can be generally agreed upon with the details developed in the definitive agreement. This area is discussed in more detail below.

The drafting of the Letter of Intent may also be the venue to discuss the concept of guaranty of any purchase price obligations that are to be paid to the franchisor or its owners over an extended time period. Even if the franchise system’s revenue streams are currently sufficient, changes in the system can occur. Further, the buyer may not be well established or the buyer may be a single purpose entity without substantial net equity. A personal guaranty by the buyer’s owners or a corporate guaranty by a more well-established parent or affiliated entity can provide the seller with more adequate assurance of payment. If the buyer’s owners or affiliates are not willing to guaranty a long-term payment structure, then the payment structure can be more easily adjusted earlier in the negotiation process than after the asset purchase agreement is being prepared.

4. Initial Diligence Parameters

While any buyer of a franchise system is likely to have already visited several operating locations and obtained the most recent franchise disclosure document from one of the public sources,17 there are many operational issues in a franchise system that may affect the buyer’s ability to manage or grow the system and that are not obvious from location visits or reviewing the FDD. A system may have many locations but may also have a number of franchisees that may be considering arbitration with their franchisor or independent franchise associations that may be challenging the franchisor’s practices. There may also be uncured defaults that a buyer may not wish to manage after a purchase. The Letter of Intent will typically include a provision granting access to all records regarding the system, any litigation and any correspondence with franchisee groups (as described in more detail in the Due Diligence Section IV above), but may also address when the buyer will have access to the key individuals on a franchise advisory council or key franchisees. If the franchisor’s system is large, its documentation may be sufficiently cumbersome that some diligence parameters may be

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17 Several state agencies provide online public access to franchise documents that have been filed with the agency for registration or exemption. The Minnesota Department of Commerce Securities Section provides free access to franchise documents filed in the past three years through its Commerce Actions and Regulatory Documents Search (CARDS system). The website location as of the date of this paper is [https://www.cards.commerce.state.mn.us/CARDS/](https://www.cards.commerce.state.mn.us/CARDS/). The California Department of Business Oversight also provides an online method for searching for franchise filings through its website at [https://docqnet.dbo.ca.gov](https://docqnet.dbo.ca.gov). There are many other more commercial websites and businesses that offer franchise disclosure documents on a membership or on a fee basis.
necessary in order to streamline the process and minimize the time and expense in responding to diligence questions. Certain documents will be more relevant to a buyer’s evaluation of the system than others. Historical financial performance, history of defaults or complaints, non-enforcement of standards, and commission structure will be more relevant than providing office equipment contracts. A financial materiality or a time frame limit could be imposed to minimize unnecessary responses and the review of immaterial information. The parties may also wish to determine in the Letter of Intent if the buyer will be accessing the records in the seller’s office, at an attorney’s office or in an electronic diligence room.

5. **Time Frames**

The Letter of Intent is an applicable venue to include anticipated time frames. The time frame for performing the due diligence review may be stated in certain stages of preliminary and final review. The franchisor may wish to protect itself and provide for a time frame for the buyer to provide adequate assurances of its financing commitments. The parties can also agree on the appropriate time frames to start drafting the definitive agreements, circulate first drafts, revisions, and final execution copies. If the parties are anticipating a closing at a calendar year-end, then the parties should be encouraged to circulate first drafts in late October or early November in order for there to be sufficient time to negotiate the key provisions. Franchisors with a fiscal year end that is different from a calendar year end will need to adjust these deadlines accordingly.

C. **Definitive Agreement Issues**

Regardless of whether a private equity investment group is purchasing the equity interests in the franchisor or a new buyer is purchasing the franchisor’s assets and assuming certain liabilities, there are certain franchise system issues that need to be negotiated and well documented beyond the provisions in a typical merger or acquisition of a non-franchise system.¹⁸

1. **Definitions**

The detailed definition of key terms helps to ensure that the parties’ intentions are properly reflected and to allocate risks between the parties. While clients may be more inclined to focus on the financial provisions, a careful development of the definitions is necessary for any transaction. The definitions discussed below highlight generic issues in a typical franchise system. For each transaction, the definitions and other sections of the definitive agreement will need to be tailored for the results of the due diligence review and that particular system.

The definition of “Action” should include not only arbitrations but also mediations with franchisees, as franchise agreements commonly provide for alternative dispute resolution. The definition can also be broadened to include asserted claims that may have only been raised in franchisee correspondence, notices of cure, notice of default, and notices of termination.

¹⁸ For the exact wording of these and other definitions, see **Mergers and Acquisitions of Franchise Companies, 2nd Ed.**, Appendix A-1 Defined Terms (Leonard D. Vines and Christina M. Noyes, eds., American Bar Association 2014).
The definition of the “Assets” to be transferred or, for an equity transfer, that exist in a franchise acquisition, is heavily weighted in terms of intangible and contractual rights, but may also include a significant component of hard assets if the franchisor operates company or affiliate locations. While it may be tempting to include a general statement that all assets used in the business will be transferred, this approach may subject the buyer to unintended assumed liabilities. Further, the definition of the “Intellectual Property,” which is a considerable part of the Assets should be expanded past the typical listings of registered trademarks or trade names to include a statement on the transfer of copyrighted materials such as the system manuals and advertising formats as well as any common law rights to trademarks or trade names currently or previously used in the franchise system. Additionally, website rights, social media sites, domain names, and even Twitter accounts will need to be included, along with the obligation to transfer the passwords to each.

“Advertising Fund” and “Advertising Fund Deposits” are two definitions that are not typical in a standard purchase agreement. Advertising Fund Deposits should include all deposits, payments, and advances paid by franchisees. It should also include any other funds deposited into or placed into the Advertising Fund if for example, the franchisor elected to place supplier rebates in the Advertising Fund.

The evaluation and definition of “Assumed Liabilities” will differ depending on the type of transaction. In an equity purchase or investment, the equity owner assumes all the liabilities of the existing entity, although there may be some reserves or adjustments to the purchase price for certain negotiated contingencies. In an asset purchase transaction, the assumption of liabilities needs to be carefully negotiated. Although the ongoing regular obligations of the franchisor under the franchise agreements or assumed lease agreements will be known and therefore acceptable, there exists that chance that a franchisee will initiate an action against the franchisor, or a customer in a franchisor-operated unit will pursue a claim. This risk should be addressed both in the representations on alleged potential actions and in the indemnification provisions.

The “Excluded Assets” evaluation will be significant in a franchise acquisition and will depend on a thorough diligence review. Of particular concern is the existence of broker agreements that may grant the rights to a long-term residual value in the ongoing revenue stream from operating units. The costs for early termination of the agreements will need to be factored into the purchase price calculation if the broker agreements are not assumed by the buyer. There may be certain franchise agreements that a buyer will not want to assume, such as those already in default or in the termination phase. There may also be certain company-operated locations which do not provide the target economies of scale or the desired revenue or that may be located in such areas that they conflict with the buyer’s other systems. The practical considerations of any non-assumed units will need to be weighed against the covenants against competition provisions for the exiting officers and owners of the franchisor.

A “Laws” definition should include a reference or definition to “Registration Laws and Relationship Laws.” The language should generally describe the laws of the various states that require disclosure or registration for the offer and sale of franchises and business opportunities and include any and all applicable state relationship laws that govern the notices of default and cure as well as the obligations of the franchisor regarding default, non-renewal, termination, and prohibition of unfair practices.
The definition of “Permits” would typically be expanded to include registration or exemption approvals, orders, certificates and licenses by state regulatory agencies. Depending on the time of year, this definition may need to be qualified as all pending or in process applications for Permits.

2. **Purchase Price and Potential Adjustments**

   In any acquisition there may be the need to provide a mechanism to address issues that arise after the closing date, such as undisclosed liabilities, amounts due under the indemnification provision and other defaults. In a franchise acquisition, much of the value of the system will be in the ongoing revenue stream from the contractual rights with franchisees, intangible assets and customer goodwill. While the historical earnings from these assets are known, franchisees may close their units or file a class action lawsuit. These intangible rights may make valuation difficult prior to the closing date. In either circumstance, a buyer may wish to include creative measures to adjust the purchase price to reflect these issues.

   a. **Escrows and other Hold-backs**

      In certain instances it may be appropriate for the buyer to retain or “hold-back” part of the purchase price until a certain date has occurred and the actual system results are known. A hold-back may be easier to accept if the franchisor’s key management is in place to ensure that the historical results are typical or as represented. While any franchisor is likely to resist any deduction in their purchase price payment, a franchisor may also be reluctant to trust a buyer’s judgment post-closing. In an escrow arrangement, an independent third party holds a certain amount of funds from the closing for a predetermined time until one of the parties applies for either a payment or release of funds utilizing a pre-determined application process. In either case, the process and proof of support for payment or release should be determined in the definitive agreement. For example, if the seller makes a representation that all equipment is in good working condition, then an escrow or hold-back for an estimated amount of equipment repairs during the first three or six month may be requested by the buyer. Similarly, if a tax clearance letter will not be received from the state agencies for a certain time after the closing or if it can only be obtained for a limited time period before closing and there are potentially several days in which the seller might not pay employment taxes, then the amount that the buyer is at risk for such taxes could be estimated and escrowed or held-back. There may also be certain payments such as rental payments or other utilities whose amounts may not be exactly known until thirty days after closing. A short-term escrow can provide both parties with a reasonable assurance of review and payment/release.

   b. **Clawbacks and Earn-Outs**

      If the purchase price was determined from a historical revenue stream or performance criteria, then the definitive agreement may provide for a repayment or a “clawback” of part of the purchase price if the post-closing performance is materially different than expected. This expected post-closing performance is commonly called an “earn-out.” The clawback may be structured to require a post–closing payment from the franchisor to the buyer (or a decrease in the buyer’s payment obligations) if the franchisor fails obtain a specific revenue target within a specific time period after the sale.
or fails to achieve a stated performance level from a certain percentage of operating units. Another post-closing obligation that would protect the buyer is to require the franchisor to pay the buyer a certain amount if the buyer becomes involved in any franchisee litigation due to the sale in the first year after closing.

With any of the above protection options, there is the practical reality that it may be time consuming and cost prohibitive for the buyer to force repayment from a seller that is no longer involved in the system. To address this issue and keep the buyer from having to pursue the seller in arbitration or in other action, a buyer may require the seller to deposit a specific amount in an escrow. Of course, any escrow agent will charge a fee. One alternative to an escrow arrangement is to have the parties agree that the buyer may reduce a future payment to the franchisor by clawback or specified amount. However, in either such arrangement, the definitive agreement should address the standard of proof, notice of application and provide for a period for review or challenge.

3. **Representations and Warranties**

Each definitive agreement will contain certain statements called “representations and warranties” from a seller on the past history of its operations. Aside from providing additional disclosure on the franchisor’s business, a buyer that discovers a misleading representation before closing can terminate the agreement, and can pursue indemnification or damages if a material breach is identified after closing. Franchisors and their buyers will need to carefully scrutinize and tailor the standard representations and warranties to be applicable to a franchise system given the number of third party franchisees, the complicated system of state and federal franchise laws, the application of different jurisdictions, and the longer time frames of some franchise agreements. Any qualifications or exceptions will typically be described in schedules to the definitive agreement. The following sections contain suggestions for representations and warranties, primarily as seen from the buyer’s perspective. Naturally, sellers will try to limit these representations and warranties and the relative bargaining power of the parties will determine what is included in the final agreement.

a. **Franchise Law Compliance – Registration, Sales and Termination**

A standard definitive agreement will have a representation or warranty that the seller has complied with all laws. For a franchise system, this disclosure must be expanded to include an affirmative representation of compliance with federal franchise laws, state franchise registration laws, state franchise relationship and termination laws, and either complying with or meeting an exemption from state business opportunity laws. A buyer would typically desire to have a specific representation that the franchisor knows of no violations of the state and federal requirements on financial performance representations made to prospective franchisees. The representation should include a statement that the franchisor has complied with all applicable franchise laws not only in the offer and sale of franchises but also in terminating franchises under the applicable relationship laws, including providing the required “notice to cure” in the applicable time periods. A franchisor may try to negotiate language that it has “materially complied” or “to its knowledge” it has complied with these laws given that closing a sale by accident one day early is a violation of the franchise disclosure laws. Such qualifications could limit the indemnification to the buyer should a claim arise post-closing. Buyers could
insist that the representation is made “to the best of Franchisor’s knowledge” as a higher standard than the materiality limitation.

Representations that the franchisor is “doing business” in certain states where it has franchisees but no corporate or affiliate offices or locations can be troublesome because states have been refining their policies in order to recapture franchise revenue sources. Often times the approach has been to respond to state agency inquiries but not to affirmatively register in a state unless the need is clear due to the potential tax liability. Franchisors may add a qualification that the franchisor has not been notified by any state agencies that it is obligated to register as a foreign entity or obligated to pay additional taxes for doing business in a particular state.

b. Ability to Assign Franchise Agreements and Vendor Contracts

During the diligence period, a buyer will want to review as many forms of franchise agreements and vendor contracts as possible to confirm that such agreements are assignable to the buyer and whether or not there is a requirement for obtaining consent before an equity assignment or asset purchase. It may not be practicable to do so in a transaction with a significant number of franchised units and even if so, the buyer will want a representation that there are no amendments from the standard forms of franchise agreement that require a franchisee to consent prior to assignment (or a list of exceptions). Although medium and large-sized franchise systems are unlikely to have negotiated amendments restricting sale rights, emerging or smaller franchisors may have done so when the need for growth outweighed the future concerns. Any such contracts may need to be excluded from the closing and the purchase price might need to be adjusted if there are a significant number.

c. Advertising Fund Usage

An advertising fund comprised of collections from franchisees and used by the franchisor is typical in most franchise systems. While most franchise agreements grant broad rights to the franchisor to use the collected funds for the system, franchisees are often skeptical that the funds are used appropriately and may file an action for a proper accounting or allege a violation of the franchise agreement. There should be a

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19 In 2013 and 2014 alone, the District of Columbia, Illinois, Massachusetts, Michigan, Mississippi, Missouri, New York, Oregon, Pennsylvania, Rhode Island, and Virginia instituted changes in their determinations of state nexus, unitary group-type tax changes or apportionment-type changes. See also INDIANA DEPARTMENT OF STATE REVENUE, LETTER OF FINDINGS: 02-20130047 (in which a hotel franchisor lost its battle with Indiana over whether its royalty and initial franchise fees from its Indiana based hotel franchisees were income attributable to Indiana); DEPARTMENT OF TAXATION, COMMONWEALTH OF VIRGINIA, PD 13-239, 2013 WL 6979020 (Va. Dep’t Tax. Dec. 19, 2013) (Virginia denied a refund requested by a franchisor on royalty fee income); Gore Enterprise Holdings, Inc., v. Comptroller of the Treasury, 437 Md. 492, 87 A.3d 1263 (Md. 2014) (Maryland may tax the apportioned sum of royalty income and other income from a manufacturer’s intellectual property and investment firm).

20 See Hanson Hams, Inc. v. HBH Franchise Co., LLC, 2004 WL 5470401, *6 (S.D. FL 2004) (existing franchisee sued after franchisor sold to a competing ham franchise system, alleging violation of the Florida Deceptive and Unfair Trade Practices Act from favoring one system over another and acting in a disproportionate and unfair manner to eliminate the franchisee’s current system. The court found that making business decisions on the acquired system was not a violation of the Florida act.)
representation that the franchisor has properly collected, accounted for, segregated (if required) and spent the advertising funds collected.

d. **Dispute Actions with Franchisees**

Given the broad and many faceted obligations that a franchisee has imposed on it from the franchise agreement and system manuals, a general representation that all franchisees are in compliance under their franchise agreements is likely to either be immediately incorrect or, more likely, require qualification by the franchisor for “substantial compliance.” A franchisor may need to include a qualification if it knows of any system standard, such as a reporting requirement, that it has chosen to not enforce.

A buyer should not assume that an exhibit listing franchisees that have been sent a default letter is fully representative of the system issues. A buyer will want a representation regarding the franchisees that have been sent notices of violation, notices to cure, any extensions, any work-outs, payment plans or compromise agreements. Franchisees may have also sent such notices of violation or alleged violations of the franchise agreement to the franchisor that should be included on a schedule if received. Additionally, the buyer will want to know if the franchisor has received any correspondence or notice that any franchisee has elected to not renew or plans to exercise a right to voluntarily terminate its franchise agreement. Any representation regarding ongoing franchise litigation will need to be expanded to include arbitration action as well as demands for arbitrations, withdrawn arbitration demands and any settlement agreements.

e. **Franchisee Advisory Councils and Independent Associations**

The definitive agreement will need a representation on the existence and contact information of any franchisor-formed advisory councils or franchisee associations. Such organizations may not be formal entities, and the representation should be broad enough to include “informal” groups of franchisees. While the definitive agreement may prevent a buyer from contacting these organizations, it may indicate system problems or unrest. The buyer may wish to include a specific indemnity provision for any allegations that arise post-closing or may wish to perform additional diligence pre-closing such as the review of correspondence from these franchisee groups.

f. **Correctness of Financial Information Provided**

In a franchise acquisition, the franchisor will not only provide its own financial reports and statements, but may also provide detailed information on franchisee revenues and collections. Even if the franchisor requires its franchisees to utilize a common reporting software or standard set of accounts, it must rely upon its independent franchisee’s reporting. A franchisor’s representation will need to carefully state that it has properly accounted for all information received from franchisees, including amounts for accounts receivable, payments, advertising fund collections, credit terms, billing rates and any adjustments.
g. **Supplier and Vendor Relationships**

Many franchise systems have key relationships with certain vendors. In addition to knowing the terms of the contracts, and confirming that those contracts do not require consent before an equity or asset transaction occurs, a buyer will wish to have a representation on the status of the contract, any defaults, or any circumstances that might lead to changes or even termination. A buyer may also find it beneficial to have a representation on the proper accounting of any supplier rebates which could be in the vendor representation or be included in a representation on accounting methods.

h. **Sales Relationships – Franchise Brokers, Area Developers, Subfranchisors**

Arrangements with the various sales “agents” in a franchise system are likely to be technically covered in any representations and warranties regarding contracts, ability to assign and “undisclosed liabilities.” A separate representation may be necessary if any of these arrangements contain a specific restriction on assignment without consent of the sales agent. Such restrictions may be more common than anticipated as many broker contracts are not as scrutinized as franchise agreements and boiler point restrictions could be included. Given the level of investment by a subfranchisor into a franchise system, it is also possible that an experienced subfranchisor may have insisted on an assignment restriction in its subfranchise agreement.

A separate representation on the existence of any “trailing” or residual payment streams from agent sales and indemnification for any lawsuits is also worth considering. If the buyer does not assume the contract and stops the payment stream once the underlying contracts are sold or terminates the contract, then the agent may institute a claim on both the franchisor and the buyer. Even if the agent’s contract continues with the buyer, the buyer is likely to restructure the sales activities and the agent may sue both parties on bad faith or breach of contract claims.

i. **Intellectual Property**

The franchisor should represent that all intellectual property listed on the schedule, is owned by the franchisor, has been properly maintained, and is not subject to any disputes, challenges, or claims. Any claims could be asserted from outside third parties through letter, asserted in a United States Patent and Trademark Office (“USPTO”), Trademark Trial and Appeal Board matter or in federal or state court. Claims are even possible by franchisees if the franchisees have developed any intellectual property for their own use and the franchisor takes the position that it is the proper owner.\(^{21}\)

j. **Existing Target Operated or Owned Locations – Environmental and Operational Compliance**

A buyer will need to perform extensive diligence on any unit locations that are owned or operated by the franchisor or a related party entity. Even with such diligence,

\(^{21}\) See *Pinnacle Pizza Co. v. Little Caesar Enters., Inc.* as an example of the lawsuits between a franchisee and a franchisor for a slogan developed by the franchisee. 596 F.3d 970 (8th Cir. 2010).
a representation and warranty will be necessary to allocate the risk of any employee claims or lawsuits post-closing. The representation could include any demand letters received as well as any state or federal employment investigations. A strong environmental representation should be included for any successor liability on environmental issues, especially for industries with significant environmental risk exposure. Dry cleaners, automotive repair units, gas stations, and even restaurants in their disposal of grease are examples of industries in which the franchisor may not have any actual knowledge on whether or not their employees followed their policies on proper disposal. A buyer should consider hiring an environmental attorney to evaluate the existing sites. A Phase-1 report may be necessary to shield the buyer from successor liability for actions that may have occurred under the ownership of two or three prior parties in the ownership chain of title.

k. Employee Representations

Standard representations will include statements regarding any employment contracts, proper withholding, and payment of payroll taxes, payment of employment benefits, calculations of retirement plans, compliance with all labor and employment laws and the lack of known unemployment and other claims by employees. If the franchisor has any personnel that they have classified as independent contractors, a representation on the proper classification should be considered in view of the potential vicarious liability issues if the Internal Revenue Service or applicable state agency reclassifies the independent contractor as an employee. The issue of whether the employees of a franchisee are also employees of the franchisor is a highly contested and debatable issue in the franchise community. Certain systems such as the janitorial franchises have faced strong scrutiny and adverse decisions. In any franchise system, the buyer will likely request a representation that the franchisor has not received any inquiries or notifications by any state or federal agency on the classification of the franchisee’s employees, but the buyer should also consider a strong indemnification in case of future investigation.

4. Operation of Locations by Franchisor

a. Compliance with Laws

In systems where a franchisor or its affiliate operates locations, extra care is needed to identify any violations of the myriad of regulatory, employment and environmental laws that might apply and to have the franchisor present accurate information on the operating locations. This is especially important in an equity arrangement in which the buyer assumes all the potential liabilities and relies upon indemnification provisions.

22 Awuah v. Coverall North America, Inc., 707 F. Supp.2d, 80, 85 (D.Mass. 2010) (Massachusetts district court ruled that Coverall employees were misclassified as independent contractors under state statute’s narrow definition and ordered to pay franchisees $3 million, including a refund of franchisee fees and damages); De Giovanni v. Jani-King Intern., Inc., 262 F.R.D. 71, (D.Mass. 2009) (court approved classification of janitorial franchisees on issue of misclassification); but see, Juarez v. Jani-King of California, Inc. (failing to certify a class of franchisees alleging violations of California labor law) and Patterson v. Domino’s Pizza, LLC, 60 Cal.4th, 474 (Cal. 2014) (finding franchisor did not have comprehensive and immediate day-to-day authority over its franchisee’s employee).
The definitive agreement should include a covenant that the units will be operated in the ordinary course of business until closing and may provide that the buyer’s consent is required for certain larger scale purchases or the closure of any unit. A franchisor would typically be required to notify the buyer of certain material actions such as vendor issues, claims, or resignation of a significant percentage of employees. Schedules of operated units often include square footage, type of unit (end cap or stand-alone) and number of employees in order to assist the buyer in its evaluation and eventual operations.

b. **Transferability of Leases**

Unlike many franchise agreements in which the franchisor’s assignment right is nonnegotiable, lease agreements are more likely to contain assignability restrictions. It is not unreasonable for a landlord to desire to know, and be in a position to prevent, the assignment of its lease to an undercapitalized subsidiary. Negotiations with each landlord on the leasehold interests are likely to be both time consuming and frustrating. The alternative of the existing franchisor continuing to operate and potentially compete with the system is unappetizing to most buyers. Certain locations may be so unprofitable or may carry such potential liability that the buyer will not wish to assume the lease or operations. In these cases, the buyer and franchisor will need to negotiate a reasonable approach which may include de-identification timelines or timeframes for sale within the system to existing franchisees.

c. **Ownership Transfer or Leaseback Issues**

Certain franchise systems choose to control the real estate used by the franchise system’s franchisees. If the franchisor also operates units, a buyer of the franchise assets will be reluctant to continue to have its former franchisor (or more likely, the franchisor’s affiliated entity) as the owner of its leased real estate. The purchase of this real estate will significantly increase the transaction complexity and cost, as well as the indemnification and representations in the definitive agreement. The buyer may wish to have an appraisal of existing locations in order to properly allocate the purchase price as well as to ensure proper compensation.

5. **Franchise Specific Issues in the Schedules**

a. **Assigned Contracts**

The schedule of all contracts owned or to be assigned will be one of the most significant schedules in the definitive agreement. Careful attention should be paid not only to the franchise agreements, but to the broker agreements, employment agreements, letter agreements, office equipment contracts, and even contracts for the ownership of domain names.

b. **Listing Of Intellectual Property and Form of Assignment**

The list of intellectual property will likely be a separate schedule on the definitive agreement and will often be utilized as an exhibit to an assignment of such property to the buyer. The schedule should include a listing of any copyrighted materials even if in general categories in order to assign the ownership and any "moral rights" to the
VI. MANAGING THE FRANCHISEES IN THE SALES PROCESS

A. Notifications to Existing System Franchisees and Employees

Determining when and how a franchisor will notify its system franchisees of a pending equity or asset sale will depend in part on the system characteristics and size. Regardless of the method of notification, all franchisors must be cautious in approaching its franchisees with information about a sale.

Franchisors will typically desire to wait as long as possible on the disclosure. Premature disclosure may cause employee unrest and resignations, franchisee unrest, delay the closing, and provide competitors with ammunition. In most cases, the definitive agreement is likely to have been signed and perhaps the transaction will have closed. If the franchisor or buyer is a public company, the securities laws will need to be evaluated, as there could be litigation risks from a lack of disclosure and from a premature disclosure of a possible sale that is never executed. In exceptional cases, a larger system with several brands may announce to the public that it is seeking to divest itself of a particular brand. In that case, the disclosure to existing employees and franchisees will need to occur prior to any public announcement and before a letter of intent has been received.

A strategic order should be determined. While each system may be different, the disclosure order typically is internal employees first, then existing franchisees, then current vendors, then pipeline prospective franchisees, and lastly the public through a press release. High level employees that have not been previously involved in the sales process are likely to be disclosed before general employees and other staff. The decision of when to cease sales efforts and when to disclose new prospects is discussed further below.

Smaller systems may have a more informal approach with scheduled calls first to the larger franchisees and then direct calls to the remaining franchisees individually or in small focus groups. Franchisors that utilize a franchise advisory council may initiate the conversation within the advisory council because the council should be accustomed to participating in the franchisor’s confidential plans and often has a direct relationship with the franchisee population. Using the advisory council as a focus group to review the materials presented regarding the buyer and any other disclosures can help to streamline the later franchisee disclosures. In larger systems, a direct one-on-one approach may not be practical and a firm wide announcement through the intra-system may be necessary. Even with an intra-system notice, conference calls by state or region or other type of franchisee group are likely necessary to reassure the system and answer questions.

In either event, franchisees will need to be presented with the overall reasons for the sale, a description of the buyer, its key personnel, its asset structure, the economies of scale from the new buyer, the names of current officers being retained, the transaction timeframe, the timeframe for exiting officers and the plan to address any territorial overlap if the buyer has an existing competitive system. Even with a private equity
ownership purchase where a majority of the existing officers may remain with the system, existing franchisees will be concerned with the vision of the new buyer and their plans for system operations and growth. It will be imperative for the buyer to be involved in the preparation of the initial information statement. Any press release is likely to be jointly coordinated if not jointly issued.

Franchisors, especially first generation entrepreneurial owners, may feel the need to reassure the system’s franchisees that the franchisees will receive the same level of care and attention as before the purchase. As such representations and statements may later be challenged in court as misleading or false, a specific script and strong counsel on the potential risks of definitive reassurance may be the better course of action. Franchisors will still need to project confidence in the new owner and the future of the system while not making promises that may not come to fruition under the new buyer. For existing employees, encouragement by the franchisor that successful performance during this sales period will be an incentive for the new buyer to retain current staff may soften the statement that the buyer will make their own staff decisions. Regardless, the disclosure to employees and current franchisees will need to be coordinated with the updating of the franchise disclosure document in order to have all the materials in place to minimize the time in which sales may be suspended.

B. Disclosure Requirements

Franchise systems are subject to extensive federal and state disclosure laws. While the FTC Rule does not specifically address the disclosure obligations for a pending sale of the franchise system, disclosures on the parents and directors/officers affects disclosures in Item 1 (The Franchisor and any Parents, Predecessors, and Affiliates), Item 2 (Business Experience), Item 3 (Litigation) and Item 4 (Bankruptcy) at the very least. Further, several state statutes address an actual change in the ownership of the franchisor or management control as a material disclosure event.

The decision on when to disclose a potential or actual change in control is a serious evaluation and is often a balancing of legal and business risks. A change in control will raise significant questions on the continued operations of the system and employee relations. Competitors may also attempt to take advantage of a change in

24 Fourteen states require franchisors to register their franchise offering and deliver state-approved franchise disclosure documents to prospective franchisees. California (CAL. CORP. CODE §§31000-31516); Hawaii (HAW. REV. STAT. §428E-1, et seq.); Illinois (1987 ILL. LAWS CH. 85-551); Indiana (IND. CODE §§23-2-2.5-1, et seq.); Maryland (Md. Ann. Art. 56 §§14.201-14.233); Michigan (MI COMPLIED LAWS §§445.1501 – 1545); Minnesota (MINN. STAT. §§80C.01-22); New York (N.Y. Gen. Bus. Law §§680-695); North Dakota (N.D. CENT. CODE §§51-19-01-17); Rhode Island (R.I. Gen. Laws §§19-28-1-15); South Dakota (S.D. CODIFIED LAWS ANN. §§37-5A-1-87); Virginia (VA. CODE ANN. §§13.1-557-574); Washington (WASH. REV. CODE §§19.100.010-940); and Wisconsin (WIS. STAT. §§553.01-78). Oregon requires delivery of disclosure documents, but does not impose registration requirements. (OR. REV. STAT. §§ 650.005-.085). Connecticut, Florida, Kentucky, Nebraska, Texas and Utah require the filing of a one time or annual notice form in order to be exempt from their business opportunity laws and occasionally other business opportunity laws will also apply.
25 Hawaii (HI DEPT. OF COMMERCE AND CONSUMER AFFAIRS, Tit. III, Bus. Registration § 16 37 1); Maryland (Md. REGS. Tit. 02, § 02.02.08.01B(9)); Minnesota (MINN. REG. § 2860.2400B); and Wisconsin (WIS. ADMIN. CODE § Sec. 31.01(2)(b)).
control in the seller’s franchise company to increase their own franchisee sales and potential customers. Accordingly, many franchisors will wish to delay any updating of the franchise disclosure document until the last possible moment. Franchisors cannot delay the inevitable forever though. Aside from the potential violations of federal and state disclosure laws, potential franchisees could also make a claim of common law fraud for negligent misrepresentation if the franchisee believes that the franchisor did not properly disclose the change in control.26

Accordingly, most franchisors will not make any disclosures while negotiations are ongoing and no letter of intent has been signed. Once a letter of intent has been signed, the franchisor will need to evaluate its litigation risks and the circumstances of whether a deal is likely. Letters of intent are typically nonbinding and the parties will still need to negotiate the specific terms and representations in a definitive agreement.

Franchisors and buyers that operate existing franchise systems in other lines of business should proceed with caution in closing sales with new franchisees once the transaction is poised to become reality. A prospective franchisee will be making a significant investment in the system and will be relying on the existing system’s characteristics and structure in its evaluation. Even if the franchisor has met the technical aspects of the federal and state disclosure laws, new franchisees are likely to feel that a change in ownership is a material fact that should be disclosed to the franchisee before becoming part of the system.

A franchisor should not forget to consider when its existing franchisees are up for renewal or may be considering selling a unit. Many franchise agreements require considerable updating before a new term is granted or a sale is approved. A renewing franchisee may prefer to sell rather than spend significant resources updating its unit for an uncertain future. In such situations, a franchisor may be advised to grant a limited extension to the current term or a delay in any renovation requirements. Ongoing franchisee sales contain additional risk in that the selling franchisee’s asking price is likely to be affected by any franchisor change.

At some point, however, the transaction is more likely to occur, either because the definitive agreement is mostly completed or has been actually executed. At this point, a franchisor may decide that it would rather suspend franchise sales until the

26 In Red Roof Inns, Inc. v. Murat Holdings, LLC, 223 S.W.3d 676 (Tex. App. 2007) a new franchisee sued its original franchisor and its buyer alleging fraud and negligent misrepresentation from the franchisor’s failing to update the disclosure document for the possible acquisition. In that case, the franchisor sent the prospect a disclosure document in February 1998, in March 1998 the franchisor and its buyer entered into confidential negotiations, the prospect signed the franchise agreement in December 1998 and the sale closed in early 1999. In August 1999, the new franchisor’s management company informed the franchisee that the new franchisor would require the completion of all renovations before opening. Subsequently, the new franchisor changed its expansion strategy and offered to terminate the franchise. After the franchisee refused, the franchisor terminated the franchisee for failing to make the updates and the franchisee sued. The franchisee alleged that he would not have entered into the franchise agreement if he had known about the negotiations. The court determined that Red Roof Inn did not have a duty to disclose the sale negotiations under those circumstances and dismissed the fraud and misrepresentation claims; see also Century Pacific, Inc. v. Hilton Hotels Corp, 528 F. Supp. 2d 206 (S.D.N.Y. 2007) (in which the franchisor disclosed that a pending sale was one of several possibilities in disclosure document, then the franchisee purchased and once sale was a reasonable possibility, franchisor updated the disclosures. The franchisee sued for violations of the New York Franchise Act, common law fraud, negligent misrepresentation and fraudulent omission. The court dismissed the franchisee’s claims, finding the disclosure was sufficient.)
transaction is closed or the parties are ready for a public announcement. It is likely that some “dark” sales period will need to occur while the disclosure document is being updated and refilled, but a long suspended sales period may be impractical from a revenue generating perspective and from an employee morale standpoint if salaries are commission based. While there may not be a bright line on the disclosure requirements pre-closing, once the deal has been closed, it would be difficult to argue that a material change in control has not occurred.

Once the franchisor has updated its disclosure document, the parties will need to re-disclose any potential franchisees that are in the sales pipeline and to disclose renewing franchisees as well. This process can be complicated if the buyer also operates a franchise system and needs to both update its franchise disclosure document for its existing line of business and the franchise disclosure document for the new line of business and disclose its prospects in the sales pipeline for both businesses. If the acquired system is an actual or potential competitor of the existing system, extensive discussions and meetings will need to be held on the actual location of the existing units and the potential competitive impact. During the required fourteen day waiting period, the buyer will need to make most of its officers available to prospective franchisees and existing competitive franchisees in order to provide reassurance and forge ongoing relationships.

VII. POST-CLOSING ISSUES AND STRATEGIES

Regardless of the structure of the acquisition, the buyer will need to carefully plan the ongoing operation of the newly acquired franchise system. New relationships will need to be built with the seller’s franchisees. And existing franchisees, if any, will require communication and assurance, especially if the brand acquired is a competing brand of another brand already owned by the buyer. An understandable concern of the acquired franchisees is whether they will be converted to one of the buyer’s existing competing brands. And while it may well be within the buyer’s rights to convert certain locations, or to make business decisions that favor one brand over another, franchisee relationships and the success of individual franchisees is the lifeblood of a franchise system and the buyer should be ready to deal with its franchisee community, and any resulting litigation, of both systems.

A. Private Equity Acquisition

A private equity company acquiring a franchise system is not generally looking to change or overhaul the franchise system as a whole. The private equity company acquires the franchise system as an asset to hold in its portfolio, with the general intent of increasing its value, perhaps with the hopes of selling the system at a later date. From

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27 A franchisor’s or a buyer’s right to rebrand locations will, from a legal perspective, be a matter of contract. The agreements for the location to be rebranded will have to be reviewed to make sure that it permits rebranding. If the buyer already operates another franchise brand it would also be necessary to review the agreements of any nearby locations of that brand to ensure that the rebranding will not result in any territorial encroachment issues.

28 See Hanson Hams, Inc. v. HBH Franchise Co., LLC, 2004 WL 5470401, *6 (S.D. FL 2004) where an existing franchisee sued after franchisor sold to a competing ham franchise system, alleging violation of the Florida Deceptive and Unfair Trade Practices Act from new buyer favoring one system over another, including not offering new franchises in the franchisee’s current system and converting many locations to the new system. The court found that the buyer’s making of business decisions on the acquired system was not a violation of the Florida act.
that perspective, an acquisition by a private equity firm generally means that the operations of the seller franchisor will substantially stay the same, perhaps with some efficiencies implemented and a few costs cut. Generally, however, the senior leadership and staff of the seller franchisor remain in place, the headquarters of the seller remain open, and the acquisition results in an influx of capital into the system.

B. Strategic Partner Acquisition

An acquisition by a strategic partner, however, can have very different results. A strategic partner is generally looking to integrate the newly acquired franchise system into an already existing infrastructure, thereby reducing general and administrative expenses, and eliminating any redundancies that may exist with the already existing platform, while also maintaining the identity and independence its various brands.

1. Integration into Existing Platform

There are many different facets to the integration of the newly acquired franchise system into an already existing platform. Various functions relating to the operation of a franchise system can be consolidated, which means that many positions of the newly acquired franchisor may be eliminated.

Likely one of the first decisions made by the buyer post-closing is whether to maintain the seller’s headquarters or whether to close those offices and transition the operations to the buyer’s headquarters. Naturally, the terms of the lease for the headquarters and other logistical considerations will play a role in this decision, but a strategic partner is going to look to reduce that expense and transition those operations to its headquarters to the fullest extent possible.

Assuming the headquarters will be consolidated, the buyer will also evaluate all the various functions and personnel of the seller to determine which functions and positions will be eliminated, which can be performed remotely, and which personnel will be asked to move to the new location. For example, accounting and legal functions can generally be consolidated at the buyer’s headquarters. To the extent the buyer wants to maintain any of such personnel, they may be asked to relocate, or otherwise be let go.

On the other hand, operational support and development functions can be performed “in the field” or remotely, and such personnel may continue with the buyer performing the same duties as they did pre-acquisition. The same may be true for research and development, depending on the type of system being acquired.

2. Assignments

The buyer will have identified all the contracts needing assignment during due diligence. An equity purchase will require very few assignments of the agreements as the seller entity will remain intact, and merely the ownership will have changed. Any consent requirements for a change of control event will have already been met and no further action may be required by the buyer. Alternatively, an asset purchase will require that all agreements, including but not limited to leases, franchise agreements and vendor agreements, will require an assignment to the buyer.
3. Registrations and Filings (State and Local)

A change in ownership is considered a material event, regardless of the structure of the transaction. The acquisition will need to be disclosed in Item 1 of the FDD. The new leadership, and any change in the existing leadership, will need to be disclosed in Item 2. The ownership changes may also lead to additional disclosures in Items 3 and 4. In addition, if the seller franchisor operated what could be considered a competing brand to a brand that the buyer already owned, then that will also need to be disclosed.

The buyer will need to file amendments with all registration states requiring the filing of material change amendments, for the FDD of the seller, and possibly, for the brands it already owned. Sales activity will need to be halted while the FDD is updated and amendments are filed, and any prospective franchisees may need to be re-disclosed.

4. Shared Services

Consolidation of the accounting and legal functions is an easy way for the buyer to reduce costs and expenses soon after closing. Other functions may be prone to consolidation as well. For example, operations services, which may include supply chain, training, project management and similar services, can also be consolidated. Typically vendor relationships can be governed by a master agreement with addenda addressing the needs of individual brands. This type of consolidation is not only beneficial to the buyer, but possibly also beneficial to the franchisee communities of existing brands, and the newly acquired brand. Economies of scale and increased buying power are beneficial to franchise systems under common ownership as a whole.

5. Non-Shared Services

On the other hand, to maintain brand identity, certain functions cannot be consolidated. For example, each brand will require its own marketing personnel, field support, and research and development. While one employee may be able to support more than one brand depending on the size of the system, each brand will need to have designated personnel for these types of functions as they are brand specific and necessary for the continued success of all the brands.

VIII. CONCLUSION

Franchise acquisitions have inherent issues that provide a certain level of complexity. Buyers and sellers that devote time to planning and structuring not only the initial offer and acquisition documents but also the post-closing strategies will reap the benefits of a system that can continue to be provide the benefits that sparked the initial expression of interest.
Appendix 1
Preliminary Due Diligence Request

Franchise, License and Territory Agreements:

- Provide copies of the most recent version of the Franchise Disclosure Document offered by the company.
- Copy of any and all forms of Franchise Agreements for which you are the franchisor (this is to determine if any different forms of the Franchise Agreement are in place).
- Copy of any and all forms of License Agreements for which you are the franchisor (this is to determine if any different forms of the License Agreement are in place).
- Copy of any and all forms of Area Representative, Area Developer, Territory or Product Sales Agreements for which you are the issuer, licensor, seller, franchisor, etc.
- Provide a detailed list and situation assessment of any franchisee that has informed you that they are currently experiencing financial struggles, threatened closure or any reason to believe that their operation may be in jeopardy.
- Provide a list of franchises that the company has taken action to terminate the franchise agreement during the past three years.
- Provide a schedule of all Broker, Area Representative and Area Developer agreements which are in force, including a summary of each’s agreements significant terms.
- Provide a list of any known Broker, Area Representative or Area Developer disputes or threatened disputes during the past three years.
- Provide a list of any Broker, Area Representative or Area Developer agreements that you have terminated in the last three years.
- Provide copies of the most recent version of the complete franchise sales development packet as presented to potential franchisees and used in marketing of the system/brand.

Legal:

- Summary of all franchise agreements, ADA’s, masters, etc. (collectively, the “Franchise Contracts”); that includes the following items: (a) parties; (b) franchise term; (c) transfer and renewal history; (d) identification of compliance – any open defaults or receivables; (e) royalty and advertising contribution rates; (f) transfer fee; (g) renewal fee; (h) identify any guarantors; and (i) any current royalty or advertising contribution reductions in place;
- Access to copies of all Franchise Contracts and international agreement;
- Corporate headquarters lease agreement and other corporate real estate holdings – including lease abstracts for commercial real estate leases where serve as tenant or guarantor (collectively, “Leases”);
- Access to copies of all Leases;
- Lease Abstracts for all franchisee controlled leases;
• Summary of lease riders or any lease/occupancy rights triggered by default of franchisee;
• Litigation history for the past 10 years that is not reflected in the current FDDs;
• Copy of Current FDD for both brands (Baja Fresh and La Salsa);
• Copies of Attorney Audit Letters received during your last three financial statement audits;
• Filed Federal and State Tax returns – last 5 years;
• Summary of all outstanding promissory notes, security agreements, liens, loan agreements, judgments, mortgages, pledges, etc. (collectively, “Loan Documents”) and access to copies of the Loan Documents;
• Worldwide IP inventory, including applications, registrations, and office actions;
• Employment and severance agreements, payroll info on all employees, terminations within last 12 months, severance policy, and other benefit package info;
• Copies of all ERISA benefit documents;
• Summary of all purchasing, supply, distribution, requirement (or similar) agreements (collectively, “Purchasing Agreements”), and access to copies of the Purchasing Agreements;
• Any agreement that cannot be terminated on 30 days or less notice without a fee, including all agreements having change of control provision that will be triggered by this transaction;
• Copies of all currently effective royalty or ad fee reduction agreements;
• Listing of all past due royalty and ad fees;
• Collection status report on all outstanding fees owed by franchisees, including copies of notices of default;
• Stock option plan (performance incentive plan) and related documents (including planned flow of funds for termination of plan);
• Corporate org chart including ownership, filings, and bylaws; and
• Copies of all Insurance policies.

Leases
• Provide a detailed listing of all real property leases and subleases to which the company is either a party or guarantor. Include current occupancy costs, expirations and renewal options. Include a schedule of future rent obligations through the initial or current term of the lease.
• Provide a schedule of all equipment or asset acquisition leases or rental agreements.

Purchase and Supplier Obligations and Relationships:
• Provide a detailed schedule of all vendor/supplier funds that have been paid to you during each of the last three years and the current year to date, which are attributable directly or indirectly to the purchasing of products by you, individual franchisees or your franchise system in total.
• Prepare a schedule of all vendor and supplier contracts and include pricing and rebates. Provide copies of all agreements. This includes but not limited to: credit
card processing, food and beverage products, equipment suppliers and gift cards. Include annual spend. Include start and stop date for contracts.

- Provide all accrual/rebate programs including start and stop dates.
- Provide listing of all proprietary products produced for company including, any agreements for the products and proof of intellectual property.
- Provide schedule listing all of the company’s executed license agreements.
- Provide schedule listing all of the products licensed under the company’s name/trademark (CPG).
- Provide schedule with vendor/supplier contact information.
- Provide a list of any obsolete inventory.
- Provide list of top 20 purchases by dollar and vendor.
- Provide a list of all inventory or purchase orders that the company is liable.
- Are there any internal/external warehouse storage and if so what is stored and what are the storage costs.
- Provide a detailed list of any hedging or commodities with summaries.
- Have there been recalls or food safety issues in the past 3 years. If yes, provide detailed summaries of incidents.

**Distribution**

- Provide copies of all distribution agreements/contracts of any type for which the company has obligated its self, franchisees or the franchise system as a whole.
- Provide a schedule with all distributors’ margin and/or mark-up schedule.
- Provide a list of distributors and which stores they service, indicating stores that are on COD.

**Operations**

- Provide a complete overview of the franchise training process.

**R&D**

- Provide a list of current R&D resources (staffing, outside consultants, etc.)
- If outside consultants, provide details on scope of work.

**Construction/Equipment**

- Provide a schedule of store equipment list.
- List any unique or non-traditional locations.
- Provide a list of stores under construction and include proposed opening dates.
- Provide any CAD or drawings on existing stores.

**Employment Matters:**

- Provide copies of all employment agreements, letters or commitments of any type or form for which you believe the company is obligated in any way with the respect to employment.
- Provide a list of any known employment claims or threatened employee claims by current or former employees in the last three years.
- Provide a list of all current employees, including: date of hire, current salary and summary of other compensation paid to each employee paid outside their regular salary (bonuses, car allowance, benefits, etc.).
• Provide a detailed list of all claims or obligations related to the equity of the company or compensations to employee that could in any way become a liability to the company.
• Provide a detailed schedule of all accrued vacation, sick leave and any other form of leave obligations owed to employees.
• Provide a copy of any employment or policy manuals that have been provided to employees.
• List any outstanding bonus or commission obligations to employees including continuing agreements and provide copies of these agreements.

Property, Plant and Equipment:
• Provide a detailed listing and schedules of all company fixed assets.
• Provide a detailed listing of all real estate holdings.
• Provide a schedule of all corporate owned restaurants, including: monthly sales and income or loss and summary of lease term.

Accounts Receivable:
• Provide a detailed schedule of all accounts and notes receivable as of the most recent month end closing and for the last two year end closing.
• Provide a detailed schedule of all account receivables charge offs for the past three years and the current year to date, including reason for charge off.

Royalties:
• Provide a complete list of current franchise units, including the stated royalty and ad fee per the franchise agreement and acknowledge if the franchisee is paying the stated rates.
• Provide a list of current franchise units that own multiple units.
• Provide a list of new store openings and store closings for the last three years.
• Provide a list of all months in the last three years, where stores did not report sales or where you estimated sales for the purpose of collecting royalties.
• Provide a detailed listing of all written or oral agreements you have a place to waive or reduce royalties or ad funds.
• Provide a schedule of franchisees royalty payments/ad funds and the frequency of the payments.

Debt and Financial Obligations:
• Provide a detailed listing of any form of debt for which the company is obligated.
• Provide a detailed listing of any contingent liabilities of the company.
• Provide a detailed listing of any contingent obligation of the company for which the company has acted as a guarantor or surety.
• Provide a detailed listing of all future obligations to brokers, developers, franchisees, employees or area developers which may result from the company’s collection of initial franchise fees, transfer fees, ad funds or royalties.
• Provide a detailed list of accounts payable and accrued expenses.
Financial Reporting and Compliance:

- Provide copies of all audit reports and financial statements for the last three years.
- Copies of any and all communications concerning actual or proposed audits or adjustments in any tax obligations in the last five years.
- Copies of all tax returns of any type for the last three years.
- List all jurisdictions for which may have tax obligations and for which the returns have not been filed or the corresponding tax not paid.

Marketing Due Diligence

- What is the annual marketing budget?
- P&L Request and Detailed Summary Report
- How is that budget broken down? Percentages to coop/National/etc.
- Are stores broken into coops?
- If so, who determines the coop media plans? Corporate HQ or coop vote?
- Who is your media buying agency?
- Who is your creative agency?
- Who is your PR agency?
- Who is your digital/interactive agency?
- What are the monthly retainers on the above agencies?
- Are there other agencies of record?
- What consultants do you use?
- Who is your current print vendor? Does everything for the stores go through this vendor?
- Who prints and pays for local store marketing materials? The franchisee or headquarters?
- Do you have an online franchisee portal for creating marketing collateral from the franchisee’s end?
- Mystery Shop Program and associated costs (if applicable)
- Loyalty Program Overview and associated costs (if applicable) – Current members in program, offers, redemptions, etc.
- Gift Card Program Overview and Costs
- Marketing Calendar Request
- Copies of all media plans including all ad spends (Traditional and Digital) – National and Regional
- Do corporate stores contribute to the national marketing budget?
- How many corporate stores?
- What is the percentage breakdown of how you spend your advertising dollars?
- What support does marketing provide to franchisees? What are the expectations from fz of corporate marketing?
- Are there research decks or focus group findings that can be shared?
- Org Chart of Marketing Department & Associated Job Descriptions
- Are there marketing managers/team members based in the field?
• How is International marketing handled?
• List of all registered trademarks, etc.
• Listing of Licensed Products and how are they marketed? In-house marketing or marketed by partner?
• Greatest issue facing the marketing of ________?
• Greatest point of strength regarding the marketing of ________?

Social Media
• Complete list of all social media accounts, including passwords
  o List should include both active and inactive accounts
  o Include notes/considerations for agencies, vendors, etc that should continue to have administrative access to accounts.
  o Social media community management guidelines & responses (e.g., canned responses, customer service responses, FAQ’s)
  o Social media reporting across primary platforms (e.g., sample performance reports)
  o Overview of Maui Wowi Blog strategy
    ▪ List of bloggers (if available)
  o List of brand hashtags, social sayings, and brand quotes (to help maintain the social brand voice)
  o Overview of their social media strategy & goals
  o Include notes/considerations for agencies, vendors, etc that should continue to have administrative access to accounts.

Web & Digital Advertising
• List of owned channels, tools & partnerships. Who maintains the website or other channel?
  o All Domain Names Owned (Active and Inactive)
  o All Websites
  o Microsites
  o Franchise sites
  o Intranet(s) – Any private portal that the franchisees access for company news, creative files, POP, etc.
  o All Blogs
  o eCommerce sites or Platforms
  o Email Marketing Platforms
  o Content Management Systems
  o Digital Media Plans & Budgets (including overview & status of each current or upcoming campaign)
    ▪ Digital media reporting (e.g., performance reports/ digital benchmarks)
  o Overview of current digital media strategy/plan
  o List of top SEO terms for brand

IT
• Who is their Domain Registrar (registers domain names) – need username/password
• Who hosts their Websites – need username/password
• How many Physical Servers? - need username/password for each
  o If no Physical Servers, who hosts their Data – need username/password
• Is Email Server on premises – need username/password:
• If not on premises, who host email – need username/password
  • If using databases on premises – need username/passwords
    o What do they use for and extranet, portal for the franchisees.
    o How long do they give access to sales numbers for FZ’s?
    o Are they able to manually enter sales, sales reporting tool?
    o Are store sales automatically imported?
    o Is training documentation stored here?
• How many desktops/laptops?
  o Are there company cells phones?
  o How many:
    o Carrier & Account number:
    o Contracts?
• Who is the local phone carrier?
  o Account number:
  o Contract?
• How do people enter the building?
  o Software:
    o Username/password:
• Building Alarm Company:
  o Username/password:
  o Contract?
• Electric\Power provider:
  o Account number:
• Water/waste provider:
  o Account number:
**POS**
• POS software/hardware provider:
• Digital menu board provider:
• Is anything POS mandated for the franchisees?
• Do sales automatically report to Corporate?
• Can franchisees POS systems be accessed by a 3rd party?
Alan Greenfield is a Shareholder in the Chicago and Miami offices of Greenberg Traurig, LLP. Mr. Greenfield concentrates his practice on international and domestic franchising, licensing and distribution matters. Mr. Greenfield works with both experienced and start-up franchise companies in structuring franchise programs and drafting franchise-related documents. He counsels franchisors and manufacturers on everyday compliance and other franchise or distributor-related issues, such as registration and disclosure matters, negotiating agreements, relationship termination laws, maintaining good franchisee/distributor relations and resolving disputes with franchisees/distributors. Mr. Greenfield also works extensively on international franchising, licensing and distribution transactions. He counsels a broad range of clients in expanding their brands internationally through all types of arrangements, such as master franchise and area development relationships, joint ventures, distribution relationships, non-traditional venue franchises (such as military bases, airports or train stations), area representative relationships, and any combination of these arrangements. He also handles mergers and acquisitions and sophisticated financing transactions involving franchise, license or distribution networks. Mr. Greenfield earned his J.D., cum laude, from the University of Miami School Law and his B.A., cum laude, from the University of Central Florida.

Christina Noyes is a partner with Gust Rosenfeld, P.L.C., in Phoenix, Arizona, a full service law firm in Phoenix, Arizona. She is a member of its Executive Committee and Chair of its Franchise Department. She has been in private practice since 1996 and was a certified public accountant for three years with Deloitte and Touche, LP before starting her legal career. Ms. Noyes focuses her transactional practice on franchise and corporate law, as well as handling intellectual property registrations and infringement matters. She represents franchisors in all aspects of developing and maintaining a local, regional or national franchise system. She also represents franchisees in evaluating the franchise contracts and other corporate and real estate matters. For her corporate practice, Christina regularly serves as general corporate counsel, handling matters from start-up to exit, including mergers and acquisitions, as well as issuing loan opinions and non-consolidation opinions. Ms. Noyes has written on franchising, business opportunity issues and intellectual property issues for the American Bar Association Forum on Franchising, the International Franchise Association and various Arizona business groups. Most recently, Ms. Noyes was a co-editor with Leonard D. Vines on Mergers and Acquisitions of Franchise Companies (2.Ed ABA 2014), was the co-author of Annual Developments, an analysis of the franchise and distribution cases for the 2013-2014 year a co-author of Chapter 3, Agreements and Issues Relating to the Franchise Sales Process, Collateral Issues in Franchising (K. Costello, Editor) and the author of the Arizona Chapter of Covenants Against Competition in Franchise Agreements (M. Grey and N. McNew, co-editors). Ms. Noyes is a graduate of Miami University (B.A., cum laude, Accounting, 1990) and Arizona State University College of Law (J.D., cum laude, 1996, managing editor, Arizona State University Law Journal).

Sherin Sakr was born in Cairo, Egypt, and lived in Germany and Puerto Rico before settling in the United States. She is fluent in Arabic, German, Spanish and English. She received her B.S. from the University of Cincinnati in 1996. She obtained her JD and LLM in Taxation from the University of Denver in 1999 and 2001, respectively. Before leaving Denver, she worked for the regional law firm of Snell & Wilmer LLP, during which time she assisted in the drafting of disclosure documents and franchise agreements for Cold Stone Creamery’s development into Taiwan, China and South Korea. She left Denver to work as a Senior in the International Tax Services group of Ernst & Young LLP in Irvine, CA, and the joined Kahala Brands in Scottsdale, Arizona. She started at Kahala as International Counsel and drafted and negotiated
international franchise agreements, managed the international trademark portfolio for all 14 brands franchised by Kahala, and prosecuted trademark infringers around the globe. She was Senior Vice President and Deputy General Counsel when she left Kahala and was working closely with the Executive Team on all new brand acquisitions, successfully negotiating the acquisition of Planet Smoothie®, Tasti D’Lite®, Maui Wowi®, Pinkberry®, Baja Fresh®, and La Salsa Fresh Mexican Grill®. She is now Vice President of Legal at Realogy Franchise Group in Madison, New Jersey, supporting the Century 21® brand. Ms. Sakr has been a panelist and speaker at various venues, including the American Bar Association Forum on Franchising and the IFA Legal Symposium, and is the former chair of the Corporate Counsel Committee for the ABA Forum on Franchising.