Between You and Me: A Toolkit to Counsel in and to Smaller Systems

Mike Coccaro; Cheryl Mullin; Antonia Scholz
Franchising a Business
In-House Counsel Enters the Picture

"Uh-oh."
Areas of Concern

- Managing the Franchise Development Team
- Managing the Marketing Team
- Managing Franchisees
- Managing Suppliers
Managing the Franchise Development Team

“If I seem excited, Mr. Bolling, it’s only because I know that I can make you a very rich man.”
Managing the Franchise Development Team

What should be on our checklist for the application process?

What should I be considering during the franchisee screening process?
Managing the Franchise Development Team

Sales Process

Step 1: Application
Step 2: FDD Waiting Period
Step 3: Deeper Screening
Step 4: Negotiation of Agreements
Managing the Franchise Development Team

Step 1: Application

- Minimum Information
- Geographic Area
- Basic Contract Protections (Confidentiality; Rep of Accuracy; Check Auth.)
Managing the Franchise Development Team

Step 2: FDD Waiting Period

• Federal – 14 days
• State Specific Rules
• Calculating Days
• Evidence by Receipt
Managing the Franchise Development Team

Step 3: Deeper Screening

- Supporting documents
- Background/credit checks
- OFAC search
- Citizenship issues
- Organizational entities
Managing the Franchise Development Team

Step 4: Negotiation

- Owner Guaranties
- Waiting Periods for Unilateral Changes
Managing the Franchise Development Team

Other Considerations

1. Discrimination
2. Privacy
3. Confidentiality
Managing the Franchise Development Team

What circumstances might require my development team to stop selling?
Managing the Franchise Development Team

1. Materiality standard
2. State specific rules
3. Timing of amendments
4. Internal reporting
5. Going dark
Managing the Marketing Team

"I know your type, you're the type who'll make me prove every claim I make."
Managing the Marketing Team

Franchise Ad:

Tired of Working like a Dog?

Join mBARKCo and you’ll be riding the Gravy Train!
2016 AUV $2,500,000
Managing the Marketing Team

- Is it an earnings claim?
- Supported by FDD?
- Complies with state rules?
- Filed with the state?
- Internet exemption?
Managing the Marketing Team

Consumer Ad:

Join us on Saturday for Steak and Swim!

Enjoy a Delicious Filet while your Canine Companion Paddles in the Pool! $75 per Person
Managing the Marketing Team

• Contract authority to set retail prices?
• Federal antitrust concerns?
• State antitrust concerns?
• Participating locations only?
Managing the Marketing Team

Note to California franchisees:
As you may be aware, we are preparing for “National St. Bernard Day,” a one-day national promotion featuring $2 off all Brandy Alexanders.

We understand that California’s Cartright Act may affect our right to require participation in the promotion. For stores operating in California, therefore, we will be advertising the promotion for the benefit of locations that choose to participate.

Note to Maryland franchisees:
As you may be aware, we are preparing for “National St. Bernard Day,” a one-day promotion featuring $2 off all Brandy Alexanders.

We understand that, under Maryland’s antitrust law, an agreement to set minimum prices is considered an unreasonable restraint of trade. Please be assured that this promotion does not establish the minimum price that you charge your customers. It merely requires that you offer your customers $2 off the price that you normally charge. We will be advertising the promotion for the benefit of participating locations, but you are certainly free to offer a more generous price at your option.
Managing the Marketing Team

Consumer Ad:

Smooch your Pooch Sweepstakes:
Upload a photo of you giving your dog a smack on the lips, and win a chance to win $5,000!

No purchase necessary
Managing the Marketing Team

• Prize promotion laws
• Rules
• Publicity Releases
Managing the Marketing Team

Consumer Ad:

Fresher ingredients!
Friendlier service!
Customers prefer mBARKCo over THE POOCH PATIO 10:1

Can my employees “like” this ad? Facebook Sponsored Stories? Can I text this to customers?
Managing the Marketing Team

- Use of another’s trademark
- Comparative advertising
- Advertising claims
- Endorsements
- Publicity rights
- TCPA
Managing Franchisees

“They don’t look too happy. Do your Harpo Marx imitation.”
Managing Franchisees

What should I consider before granting approval of a franchise transfer?
Managing Franchisees

Franchisor Approval

1. Factors:
   • purchase price
   • financing
   • assets
   • conditions

2. State Statutes
   • Timeframe
   • Rationale
Managing Franchisees

What procedures should control the approval and documentation process?
Managing Franchisees

Transfer Documents

1. Consent
2. Conditions
3. Release
4. Termination of Seller
Managing Franchisees

What mistakes do you see when it comes to managing compliance?

When is it time to terminate a franchisee?
Managing Franchisees

1. Compliance (record keeping and tracking)
2. Notice and Cure
3. Mutual terminations
4. Unilateral terminations
Managing Suppliers
Managing Suppliers

Can we require franchisees to purchase pool toys from designated suppliers?

Can we accept rebates from our pool toy supplier?
Managing Suppliers

- Contract authority for required purchases?
- Disclosure obligations
- State restrictions
- Illegal tie under antitrust laws?
Questions?
Thank you!