Fair or Foul?

The Use of Guest Surveys and Customer Feedback

“The purpose of business is to create and keep a customer.”

- Peter Drucker
Real World Reviews

“Worst hotel ever!”
Reviewed March 13, 2013 via mobile

Dirty, filthy, run-down, smelly, crack-hotel feel to this place! Carpeting is stained and dirty. Towels are old, stained, & dirty. Beds are old, dirty, and stained. Walls are old, dirty, and stained. Bed spread full of hair. It is almost midnight and we cannot even force ourselves to stay here another minute! Camping in a tent in the middle of the woods is cleaner than this place!

Stayed March 2013
Value: 1 Location: 1 Cleanliness: 1 Service: 1

Was this review helpful? Yes 41
Ask cjytt about Parisian Hotel & Suites

“Needs to be shut down by health board”
Reviewed March 9, 2013

These rooms are the worst rooms i have ever stayed in. You pay good money and the room is disgusting. The sheets were dirty the floor was filthy. The beds were broken and they wont even give you a refund. Needs to be shut down.

Stayed March 2013, traveled with family
Was this review helpful? Yes 25
Ask katber69 about Parisian Hotel & Suites

This review is the subjective opinion of a TripAdvisor member and not of TripAdvisor LLC.
The Importance of Customer Satisfaction to Brand Success

• Customer reviews are often first step in deciding where to shop, eat, or stay

• Market research shows importance of customer feedback
  – 90% of customers claimed that positive reviews influence their buying decision
  – 86% said negative reviews also influenced buying decisions
The Importance of Customer Satisfaction to Brand Success

- Businesses lose 10 guests for every 1 who complains.
- Often won’t know about complaints at the time of service:
  - <50% of dissatisfied customers will tell an employee.
  - Instead, more likely to go home and post negative comment on review site or social media.
- Ubiquity and importance of social media – Facebook, Twitter, etc.
Risks of Reliance on Customer Surveys

- Can franchisor use survey results as basis for termination decision?
- Surprisingly little case law re use of surveys
- Recent case: HLT v. Worchester Hospitality Group (2d Cir. Apr. 9, 2015)
  - Franchisor terminated based on poor survey & QA scores
  - Franchisee challenged as arbitrary, inconsistent, and applied in bad faith
Traditional Ways Franchisors Have Measured Customer Satisfaction

• Actions by the franchisor
  – Periodic inspections (see what the customer sees)
  – Mystery shoppers ("pretend" customers)

• Passive receipt of customer comments
  – Comment cards or letters
  – Customer service telephone lines

• Active efforts to obtain customer feedback
  – Solicitations via loyalty programs, point of sale surveys
  – Web-based processes for receiving customer comments
Different Types of Customer Satisfaction Surveys

- Multiple questions that address different aspects of the customer’s experience
- “Net Promoter Score”
  - Single question: “How likely are you to recommend ____ to a friend or colleague?
  - 0-10 scale
    - 9 or 10 = “promoter”
    - 7 or 8 = “passive”
    - 0-6 = “detractor”
Different Methods of Obtaining Customer Feedback

- On behalf of the franchisor
  - Comment cards
  - Email after transaction
  - Internet pop-ups at time of web-based interaction
  - Printed survey codes on receipt
  - Social media links

- Third-party review sites (e.g., Yelp, TripAdvisor)
Guest Satisfaction Survey

Please rate your overall satisfaction with your visit at this Dunkin' Donuts.

- Highly Satisfied
- Satisfied
- Neither Satisfied nor Dissatisfied
- Dissatisfied
- Highly Dissatisfied

Progress: 18%

Next

Guest Satisfaction Survey

Based on this visit, what is the likelihood that you will...

- Highly Likely
- Likely
- Somewhat Likely
- Not Very Likely
- Not At All Likely

Return to this Dunkin' Donuts location in the next 30 days?
- Not at All Likely
- Not Very Likely
- Somewhat Likely
- Likely
- Highly Likely

Recommend this Dunkin' Donuts location to others in the next 30 days?
- Not at All Likely
- Not Very Likely
- Somewhat Likely
- Likely
- Highly Likely

Progress: 44%

Next
Guest Satisfaction Survey

Please rate your satisfaction with...

<table>
<thead>
<tr>
<th></th>
<th>Highly Satisfied</th>
<th>Satisfied</th>
<th>Neither Satisfied nor Dissatisfied</th>
<th>Dissatisfied</th>
<th>Highly Dissatisfied</th>
</tr>
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<tbody>
<tr>
<td>The speed of receiving your order after you placed it.</td>
<td>○</td>
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<td>The taste of your food.</td>
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<td>The length of time you waited in line to place your order.</td>
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<td>The taste of your beverage.</td>
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<td>The availability of the product(s) you wanted.</td>
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</tr>
<tr>
<td>The accuracy of your order.</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
</tr>
</tbody>
</table>

Next

Progress 23%

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Earlier in the survey you said you were SATISFIED with your overall experience at this Dunkin’ Donuts. Please tell us why you were not HIGHLY SATISFIED with your experience.

"Satisfied" is all I expected. Not sure I how I could be "highly satisfied" in this context.
Key Elements of a Well-Constructed Customer Survey

Need to know:
1. What to measure
2. How to score the survey
3. How to connect with customers and obtain responses
4. Number of responses needed for valid results
How To Connect With Customers?

• Implement a program to gather accurate customer information
• Make the surveys personalized
• Explain how the survey will benefit the customer
• Keep the survey short and simple
• Make the survey easy and convenient to access
• Provide incentives for responding
Internally vs. Externally Managed Programs

Internal:
- Quickly identify and address issues
- May not be as effective as possible
- Significant time and resources required

External:
- Effective creation and administration of the survey
- Can be expensive
- Lag-time between survey administration and receiving results
Use of Customer Surveys For Enhancing Operational Performance

- Training or informational tool for franchisees
  - Shows how customers view franchisee’s operation vs. how franchisee might perceive its operations
  - Shows how franchisee compares with others in system
- Maintain or improve compliance with standards
  - Promptly share survey data with franchisees
  - Provide incentives or penalties based on survey data
- Notice to franchisor of system-wide issues
Use of Customer Surveys as a Basis For Enforcement Decisions

• First question: What does the franchise agrmt say?
  – Expressly address deficient customer survey results as ground for default
  – Require compliance with QA and customer satisfaction programs as franchisor might implement
  – More generally, require compliance with ops manual

• Can a franchisor put in a survey requirement or change way it conducts/scores surveys?
Use of Customer Surveys as a Basis For Enforcement Decisions

• Can franchisor implement new system standards?
  – Yes – LaQuinta v. Heartland Props. (6th Cir. 2010)
  – Agrmt gave Zor right to add or amend system standards

• But limits on franchisor’s ability to change system by imposing new requirements or costs
  – Provision allowing Zor to make revisions to system did not allow Zor to impose additional fee for new program

• Best to provide clear right in franchise agrmt
Use of Customer Surveys as a Basis For Enforcement Decisions

• Leading case: HLT v. Worchester Hospitality Group (2d Cir. Apr. 9, 2015)

• Franchisee terminated for failure to meet QA and customer satisfaction standards – “SALT surveys”

• Hampton Inn License Agrmt:
  – Zee must participate in all system QA programs
  – Zee must adopt all changes to system Zor might designate
  – QA program may include conducting guest satisfaction surveys to ensure compliance with system standards
HLT v. Worchester Hospitality

• Facts:
  – Franchisee had failing SALT scores over several years
  – HLT gave multiple notices of default
  – Evidence that HLT wanted to terminate and replace hotel
  – HLT finally terminated and sued for fees

• Franchisee counterclaimed for wrongful termination
  – SALT scores did not evaluate Zee’s performance
    “reasonably and in good faith”
  – “inconsistent, arbitrary and lacked objective scoring scale”
  – Conducted in bad faith with desire to get rid of Zee
HLT v. Worchester Hospitality

- Courts held franchisor must “conduct evaluations in good faith and not arbitrarily or unreasonably”
- D Ct recognized importance of guest surveys:
  - Agrmt may take into account guests’ views “irrespective of whether reasonable minds could differ with those views”
  - “If guests continually found hotel’s service to be lacking, that is meaningful information to the franchisor, whether hotel’s service was, in some sense, ‘objectively’ bad.”
- 2d Cir affirmed: poor guest survey scores = rational and non-arbitrary factor supporting termination
Other Customer Survey Cases

- Most from auto dealer context, upholding use of CSI index for transfer or expansion decisions
  - Gray v. Toyota Motor Sales (NY)
  - Midwest Automotive v. Iowa Dep’t of Transp.
  - Colonial Imports v. Volvo (NH)

- Key points
  - Agrmts expressly require minimum CSI threshold
  - Reasonable because CSI = customer loyalty
  - Subjectivity of customer opinion does not mean use of surveys is arbitrary
Legal Theories to Consider

- Franchise agreement rights and limitations on use of customer surveys
- Implied covenant of good faith and fair dealing
- State relationship laws
Potential Arguments by Franchisees

- Inadequate Sample Size
- Bias in the data
  - Survey Methodology Bias
  - Non-Response Bias
  - Regional Bias
- Varying Interpretations
  - Repeatability
  - Factors outside Zee’s control
Best Practices for Franchisors

- Include in franchise agreement right to use guest surveys in QA process and as system standard
- Describe generally to maintain flexibility to change as needed
- Document franchisor’s process/rationale for survey
- Apply same standards to all similarly situated units
Best Practices for Franchisors

• Set Reasonably Achievable Standards

• Give prompt notice of deficiencies and reasonable cure period

• Disseminate data promptly to the system

• If Zor gives concessions, get something in return
The Soul of Franchising

October 14-16, 2015
Sheraton New Orleans Hotel New Orleans, LA
FAIR OR FOUL?
USE OF GUEST SURVEYS AND CUSTOMER FEEDBACK

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October 14-16, 2015
NEW ORLEANS, LA
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B. Traditional Ways Franchisors Have Measured Customer Satisfaction

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FAIR OR FOUL? USE OF GUEST SURVEYS AND CUSTOMER FEEDBACK

I. INTRODUCTION

A. Importance of Customer Satisfaction to Brand Success

Peter Drucker: “The purpose of business is to create and keep a customer.”¹

Few would argue with this quote from management guru Peter Drucker. It follows, then, that customer comments and reviews can play a huge role in the success or failure of a business or even an entire brand. We now live in a culture where people want to broadcast their opinions to the world about the experiences they have had with all kinds of businesses, from home repairs to car dealers to restaurants to hotels. Increasingly, a person’s first step in deciding where to shop, eat, or stay involves checking online reviews or other kinds of customer surveys.

Portable computers and smart phones have taken this phenomenon to a new level by allowing people to check reviews on the fly, including while on vacation or even in the car on the way out for the evening. The growth of websites like Yelp and TripAdvisor are a testament to this modern fact of life. And social networking sites like Facebook and Twitter allow people to inform their entire personal groups about good or bad experiences. Comments that once might have gone to a handful of friends via direct conversations now easily can go to hundreds with the touch of a button or the tap of a screen.

The business and franchise press has recognized the importance of customer reviews and the posting of guest experiences. In one recent Franchising World article, the author cited market research finding that “90% of customers who recalled reading online reviews claimed that positive reviews influence their decision to buy. On the flip side, 86% said that negative reviews had also influenced buying decisions.”² A prior Franchising World article described the results of a survey by the National Association of Retail Marketing Services which concluded:

[A]s a national average, companies lose 10 guests for every one that actually complains. In addition 13% of those unhappy guests will tell more than 20 people about their bad experience and 90% of unhappy guests will not do business with the company again. The good news is that 95% of those unhappy guests will in fact return if an issue is resolved quickly.³

Other surveys have found that fewer than 50% of dissatisfied customers will tell a server or manager; instead, they are now more likely to go home and post negative comments on a review site, or to their friends and followers on Facebook or Twitter. Thus, there is no doubt that franchise systems – including both franchisors and franchisees – have a strong business


interest in measuring customer satisfaction and evaluating franchised and company-owned outlets on how well they do in delivering customer satisfaction for the benefit of the brand.

B. Traditional Ways Franchisors Have Measured Customer Satisfaction

Customer satisfaction has always been important to franchise companies, as it has to virtually all businesses and brands. Most franchisors therefore have always paid attention to customer comments and complaints, and generally have tracked them to some degree. In the past, companies have maintained customer service telephone lines, and in more recent times virtually every company has a web-based process for receiving customer comments and complaints. Part of the standard due diligence and file review process for a franchisor before taking enforcement action against a franchisee typically includes reviewing evidence of customer complaints and guest satisfaction issues. Whether anecdotal or systematic, these considerations often are part of a termination, renewal, or transfer decision.

Businesses in industries that have traditionally had “loyalty programs” have used various methods to connect with their members and to solicit feedback about their experiences. Traditionally, businesses that obtained the home or business address of a customer might send survey forms by mail to seek answers to specific questions or more general comments about that member’s recent experience. In the age of the Internet, where transactions generally involve registering on a company’s website and providing the user’s email address, loyalty program surveys are generated automatically resulting in the customer receiving an email asking her to respond to the company’s survey questions. Many companies regularly send emails shortly after a transaction is completed, such as a hotel company sending a survey the same day as a guest checks out or a company sending an email shortly after a customer’s interaction with its call center.

Companies that might not have the same kind of interactions use other methods to obtain and measure customer satisfaction. Restaurants, for example, often will include on the point-of-sale receipt a website a customer can visit to take a survey or register any comments. Companies often offer incentives to induce customers to take this extra step, such as registering for a give-away for earning additional reward points. A quick web search reveals that there is no shortage of companies offering customer survey products and services to capitalize on this growing market.

C. Outline of The Paper

Given the indisputable importance of customer satisfaction and ways to measure it, this should be a “top of mind” issue for franchisors. This paper will describe different types of surveys and methods of obtaining customer feedback, and will identify the key elements of a well-constructed survey. It will then focus on the two ways most franchisors use customer survey results – as an operational tool within the ongoing franchise relationship and as a basis for enforcement decisions.

The paper will also analyze legal issues in customer surveys for enforcement purposes, and will analyze how courts have viewed and applied this kind of evidence. The paper will look at this issue from the franchisee’s point of view as well and discuss potential arguments by franchisees against the use of customer survey. Finally, the paper will discuss some best practices in the use of surveys to maximize both effectiveness for the system and enforceability by the franchisor.
II. DIFFERENT TYPES OF SURVEYS AND METHODS OF OBTAINING CUSTOMER FEEDBACK

A. Overview of Different Types of Survey Formats

Businesses have to balance their concern with imposing on their customers with their need to obtain the detailed and in-depth data they need for improving customer satisfaction and optimizing customer experiences. Customers are less likely to complete time-consuming, in-depth surveys regardless of the feedback mechanism. A single question, on the other hand, may provide higher rates of customer engagement, but less information for improving the customer experience. Customer satisfaction surveys and a net promoter score are alternative approaches to striking the right balance between participation rates and useful information. The most useful approach may be to blend more than one feedback method, but the value of different surveys or other methods of obtaining customer feedback will primarily depend on how well they are implemented and on the specifics of the particular franchise system.

1. Customer Satisfaction Surveys

Customer satisfaction surveys are designed to provide information regarding customers’ expectations and satisfaction. Customer satisfaction surveys typically require multiple questions that address different aspects of the customer’s experience. Customer satisfaction research typically measures overall satisfaction, satisfaction with the product as well as the level of satisfaction with service attributes. For a customer satisfaction survey to provide useful information, it must be tailored to the specific service or good that is sold.

For example, in the hotel industry, a thorough customer satisfaction survey might touch on the following categories:

- Overall satisfaction level;
- Would you recommend to others;
- Facility factors such as check-in process, condition of common areas, and condition and features of guest room;
- Customer service factors such as attentiveness of staff, and attention to guest-profile preferences;
- Quality of the restaurant and bar;
- Technology available;
- Any unresolved service issues; and
- Opportunity to connect to social media (e.g., TripAdvisor) to post a public review.

A quick-service restaurant survey, on the other hand, might include some different categories:

- Date and time of visit;
• Specific location visited;
• Quality and friendliness of service;
• Speed and accuracy of order;
• Taste/quality of the meal;
• Value for the money;
• Cleanliness of the restaurant;
• Would you recommend to others;
• Suggestions for improvement; and
• Offer to join a loyalty or promotions club.

2. **Net Promoter Score**

The Net Promoter Score is a customer satisfaction review based on one single question, “How likely are you to recommend a product/service to a friend or colleague?” Participants respond on an eleven point scale where zero equals “not at all likely to recommend,” and ten means “extremely likely to recommend.” In evaluating the results, customers are assigned to one of three categories based on their “likely to recommend” rating. A rating of six or less is counted as a “detractor;” a rating of seven or eight counts as “passive;” and a rating of nine to ten is a “promoter.” The score is calculated by subtracting the percentage of detractors from the percentage of promoters. A negative score thus means that you have more detractors than promoters and a positive score means that there are more promoters than detractors. An important advantage of the Net Promoter Score is that industry benchmarks are available in neutral publications, allowing businesses to easily measure against competitors.

The Net Promoter Score has received significant attention and use since its introduction in the 2003 Harvard Business Review article, *The One Number You Need to Grow* by Reichheld. Recognizable businesses like GE, Phillips, Procter & Gamble, and American Express, have used it, as well as smaller organizations. The benefit of the Net Promoter Score is that it is quick and easy for the customer, and it sums up the whole experience in one single question. Even if something went wrong, a customer can still be a promoter, in which case the Net Promoter Score really is the only relevant metric. Or, the corollary to this is that even if almost everything went right, if the customer is not happy, nothing else matters.

In the last two years, businesses and consultants have begun more carefully scrutinizing and criticizing the Net Promoter Score. One of the primary criticisms is that, even if overall customer satisfaction is important, it is not an all-encompassing measure. For example, the Net Promoter Score does not identify reasons why customers are promoters or detractors. It also does not measure different aspects of the customer's experience or identify what aspects are strong or weak points for the brand. A more detailed customer satisfaction survey is the best way to obtain feedback on and to measure these more specific issues. Especially if a franchisor is basing default, termination or non-renewal decisions on customer surveys, the franchisor

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likely wants more information than just one rating of how likely is the customer to recommend the brand.

Another easily avoidable criticism is that the original Net Promoter Score is based on an eleven point scale. If the scale is truncated, it may be more likely to provide an unreliable result. A five-point scale creates a high margin of error that undermines the value of the score.5

3. Supplementing Customer Surveys

The shortcomings of customer satisfaction surveys and the Net Promoter Score can be offset with additional information that may provide a better overall picture of customer satisfaction. Franchisors may use independent third party inspections to observe compliance or non-compliance with brand standards. Such inspections or mystery shoppers may evaluate many of the same aspects of the customer experience, such as service level or quality of the product. Merging observed compliance with system standards with a Net Promoter Score or data from customer satisfaction surveys may provide a better overall understanding of the customer experience, or provide information on the relationship between customer satisfaction and specific brand standards.

B. Methods of Obtaining Customer Feedback

Convincing customers to participate by providing feedback on a specific experience is challenging, and businesses have developed a variety of methods for encouraging them to do so. The methods used are typically based on a variety of factors including type of customer interaction, length of encounter, whether the customer has an ongoing relationship with the brand or whether the interaction is one-time, and other situation-specific information. Methods include soliciting via email, website pop-ups, surveys embedded in websites, and printed codes on products or receipts. For example, retail franchisors may not have access to the customers’ email addresses (though retailers are requesting email addresses more often and in various ways). In those cases, a printed code on the product or receipt may be the best way to reach the customer. Frequently these printed codes will provide customers with complimentary goods or service experiences in order to incent them to take the additional time needed to go online and complete a survey. On the other hand, hotel guests or customers signing up for an ongoing service will likely provide their email address and will be easier to reach with emailed survey requests.

Pop-ups have become increasingly common for web-based service providers in recent years, in which the company hires a third-party vendor to manage a survey request that pops up on the company’s website. A related alternative is surveys imbedded in a website that must be completed before the customer can conclude a transaction. Of course, these approaches must balance reducing the customer’s positive experience with the brand with the value of the information received in the survey.

Finally, social media links and apps may be successful methods for obtaining customer feedback. These may be the most convenient and real-time survey responses available to

businesses, and in many ways represent the next steps beyond email, website and pop-up survey methods, though they may require greater customer engagement. The net result may be less overall customer data becoming available than through other electronic methods, but the data could be of greater quality.

C. Third-Party Review Sites Versus Managed Surveys

The Internet, combined with the rise of social media and mobile computing devices, allows customers to post their feedback and opinions for virtually any business. Third-party websites like Yelp, Angie’s List and TripAdvisor attract numerous reviews and comments about a wide variety of businesses, including many franchised businesses. Social media platforms also generate extensive customer comments, both on individual users’ accounts and on company-sponsored accounts.

While potentially valuable and enlightening, these third-party sites generally do not provide the kind of consistent content and statistically reliable data as the more formal survey methods described above. For example, unlike managed surveys, these review sites generally do not have a standard format or set of questions for all reviewers to follow in providing their input, so the information obtained is not consistent and comparable among reviewers. Also, these websites require customers to come to them to post a review, which can result in a less than representative or statistically significant sampling of customers. For these reasons, franchisors should be cautious about using such third-party websites as the sole or primary basis for actionable customer feedback, whether for operational purposes or for enforcement decisions.

These third-party sites, however, have value and can be useful in evaluating franchisees. They are more analogous to traditional "customer complaints" which in the old days might have come by letter or phone call. Franchisors and franchisees should pay attention to this kind of feedback, while understanding the limitations of how it is obtained.

III. KEY ELEMENTS OF A WELL-CONSTRUCTED CUSTOMER SURVEY

While the proverbial saying “one size does not fit all” rings true with customer surveys, there are some common aspects of a well-constructed customer survey. To begin, any customer survey should be short, concise, easy to comprehend, unambiguous, and drafted from the consumers’ point-of-view. Following these basic principles, this section will discuss (i) what to measure in a customer survey, (ii) how to score the survey, (iii) how to connect with customers and obtain responses, (iv) the number of responses necessary to obtain valid results, and (v) the pros and cons of internally versus externally managed programs.

A. What To Measure In A Customer Survey

In general, customer surveys should be constructed to measure all or a combination of the following topics: (1) overall satisfaction, (2) product and service satisfaction, (3) loyalty perception, and (4) operational performance.6

To begin, a customer survey should measure overall satisfaction with both the brand and the particular franchisee. For example, a survey might include a question such as, “How

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satisfied are you with Dunkin’ Donuts®?” or “How satisfied are you with Caribou Coffee®?” Further, the survey should measure overall satisfaction with a particular franchisee by asking questions such as, “How satisfied were you with your recent experience at Dunkin’ Donuts® #249 in Riverside Plaza?” It is important to measure overall satisfaction on a macro and micro level, so the survey results can be utilized to effectively evaluate a franchisee.

A customer survey should also measure satisfaction with the product or service. Again, a franchisor may want to include a broad question to determine whether the customer is generally satisfied with the product(s) or service(s) offered by the franchise system. In order to evaluate the franchisee, the survey should then contain specific questions to determine whether the customer was satisfied with the product(s) or service(s) purchased from a particular franchisee.

A well-constructed survey should contain question(s) to gauge customer loyalty by asking whether the customer would recommend the franchisee’s business to a family member or friend.7 The answer to this question provides a clear indication of how the franchisee is performing through its customers’ eyes. In fact, the Harvard Business Review administered a test to thousands of customers in six industries and found that a question whether the respondent would recommend the subject company to a friend or colleague was the most effective question.8 As such, a customer survey developed to evaluate franchisees should include a question of whether or not the customer would recommend the franchisee to a family member or friend.

Lastly, a customer survey should include questions that measure operational performance. For example, a survey may want to ask questions to determine whether the staff was courteous, how long the customer had to wait in line, whether the restaurant or facility was clean, and the like. These questions allow a franchisor to gauge how a franchisee is treating and dealing with customers and, thus, provide valuable information that can be utilized to evaluate a franchisee.

B. How to Score the Survey: 1 to 5 vs. 0 to 10

If a numerical scale is used in the survey, the type of scoring scale utilized can have an impact on the survey results. For the sake of this paper, assume that respondents to a survey will be divided into three (3) categories: promoters, passives and detractors.9 If a 0 to 10 scale is used, a “promoter” is a customer who gives a rating of 9 or 10, a “passive” is a customer who gives a rating of 7 or 8, and a “detractor” is a customer who gives a rating of 0 to 6. Thus, under a 0 to 10 scale, there is a 2/11 or 18% chance that a customer will be a “promoter” and a 7/11 or 63% chance a customer will be a “detractor.” If a 1 to 5 scale is used, a “promoter” is a customer who gives a rating of 5, a “passive” is a customer who gives a rating of 4, and a “detractor” is a customer who gives a rating of 1 to 3. In this scenario, there is a 1/5 or 20% chance that a customer will be a “promoter” and a 3/5 or 60% chance that a customer will be a “detractor.”

7 Id.
8 See Reichheld, supra n. 4.
9 Id.
While the difference might seem trivial, a 1 to 5 scale decreases the chance a customer will be a “detractor” and increases the possibility the respondent will be a “promoter.” In other words, a 1 to 5 scale leads to skewed results by unintentionally inflating the number of respondents who are “promoters” and deflating the number of “detractors.” As such, a well-constructed survey should utilize a 0 to 10 scale rather a 1 to 5 scale.

C. How to Connect with Customers and Obtain Responses

In order to utilize customer surveys as a mechanism to evaluate franchisees, a franchisor must overcome the hurdles of connecting with customers and obtaining valid responses. At the outset, a franchisor must successfully implement a program to gather accurate customer information so the customer can be contacted to complete a survey. Otherwise, a franchisor must rely on a customer to complete a survey on his or her own volition, which is likely to only happen after the customer had a very bad or very good experience with a franchisee.

The ability to obtain responses is generally correlated to the sample size—the larger the sample size, the greater the number of responses and vice versa. In addition, a franchisor should consider the following to compel customers to respond to surveys: (i) show users that the feedback truly matters and make surveys as personalized as possible; (ii) explain how the survey will benefit the customer; (iii) keep the survey short and simple; (iv) make the survey easy and convenient to access; and (v) provide the customer with an incentive to respond.10

Understandably, it is easier to collect customer data in certain kinds of franchise systems than it is in others. In any event, a franchisor should attempt to gather customer information contemporaneously with the transaction and harness technology to make it easy for customers to provide contact information. Further, in the systems where data collection is more difficult, a franchisor should consider developing a program to incentivize customers to provide contact information.

D. Number of Responses to Get Valid Results

Determining the number of responses required to obtain valid results is a never-ending quandary for researchers. On the one hand, the sample size must be large enough to yield accurate results. On the other hand, a larger-than-necessary sample size will lead to excessive and unnecessary costs. In order to properly calculate the sample size, franchisors must first determine the following about the target population in accordance with established methods of statistical analysis:11

- Population Size
  - How many customers does the franchisee have? It is not uncommon for the population to be unknown or approximated.

- Margin of Error (Confidence Interval)

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No sample will be perfect, so a franchisor will need to determine how much error to allow with the survey. A rule of thumb would be in the five percent (5%) to ten percent (10%) range.

- Confidence Level
  - How confident do you want to be that the actual mean falls within your confidence interval? The most common confidence intervals are 90% confident, 95% confident, and 99% confident.

- Standard of Deviation
  - How much variance do you expect in your responses? A franchisor should initially select a standard deviation of .5 because this is the most forgiving number and ensures that the sample will be large enough.

With the above information, the proper sample size can be calculated. To begin, a franchisor must determine the “Z-Score” that corresponds with the selected confidence level. A Z-Score, also known as a “standard score,” is a figure that measures how far a given data point falls away from the mean of the sample set. Z-Scores are measured in standard deviations from the mean. The Z-Score for the most common confidence levels are: 1.645 for a 90% confidence level; 1.96 for a 95% confidence level; and 2.576 for a 99% confidence level. In the likely scenario where the precise population size is unknown by the franchisor, the following equation should be used to determine the sample size:

\[
\text{Necessary Sample Size} = (\text{Z-Score})^2 \times \text{StdDev} \times (1-\text{StdDev}) / (\text{margin of error})^2
\]

E. Internally Versus Externally Managed Survey Programs

Another important step in conducting a survey is determining whether the survey program is going to be conducted internally or handled externally by a third-party.

In-House

Conducting surveys internally may be beneficial because the franchisor can quickly identify an issue and bring it to the attention of a franchisee. However, there are several concerns that weigh against handling customer surveys internally. First, if the survey program is designed internally, there is a concern that the surveys might not be drafted to obtain the most effective results. For example, the questions could be ambiguous or easily misunderstood by respondents, leading to fewer responses or responses that are not representative. Second, there is a potential concern that the customer survey program could be mishandled. For example, a franchisee might not select the proper sample size or have some other bias, or fail to administer the program in a consistent and uniform manner across the entire franchise system. Third, if the program is handled internally, a franchisor will likely have to dedicate significant resources so the customer survey program is effectively facilitated and produces the maximum benefit to the franchisor. Lastly, if the survey program is conducted internally, a franchisor might not be analyzing the survey results properly or as effectively as a third-party with experience in conducting surveys would.

\[12\] Additional Z-Scores can be found at http://www.sjsu.edu/faculty/gerstman/StatPrimer/z-two-tails.pdf.
Outsourcing

Outsourcing the customer survey program allows franchisors to effectively administer the program and mitigate many of the concerns that result from conducting the survey program internally. Having a third-party design and construct customer surveys is advisable, because the questions will be properly worded and designed using proven techniques to obtain the most effective responses. Also, allowing a third-party to handle the survey program will ensure that the surveys are conducted properly in a uniform and consistent manner. For example, the third party can properly calculate the sample size, word the questions to eliminate any bias, and reduce the rate of error. Moreover, a third-party can provide a franchisor with greater data analytics tools to maximize the use of customer survey results. Lastly, using an independent third-party to administer customer surveys might enable a franchisor to potentially undermine a claim by a franchisee that the survey program was administered capriciously and arbitrarily in violation of the implied covenant of good faith and fair dealing.

There are also several drawbacks in outsourcing a customer survey program. First, outsourcing the program is typically more expensive than administering the program internally. Another concern is the lag time between survey administration and data analyzation.

IV. USE OF CUSTOMER SURVEYS AND FEEDBACK AS AN OPERATIONAL TOOL WITHIN THE FRANCHISE SYSTEM

A. Requiring Participation—Provision in the Franchise Agreement Versus Operations Manual

The ways in which customer surveys and feedback can be used as an operational tool depend in part on whether the franchise agreement specifies how customer feedback can be used. If the franchise agreement makes no mention of customer surveys and feedback as a basis for evaluating compliance with the franchise agreement, or more specifically making renewal or termination decisions, customer feedback could be used as a training tool and a service to franchisees, but could be risky to use as a basis for an enforcement mechanism. On the other hand, a franchise agreement that does specifically include customer satisfaction as a standard for evaluating contract performance could provide considerable latitude for franchisors to include customer satisfaction data as part of renewal or termination decisions. In practice, most organizations will have a mix of franchise agreements—some mentioning customer satisfaction as a basis for franchise agreement compliance by franchisees, and some not. Individual franchisees may fall into different categories, requiring careful evaluation by franchisors on how such franchisees will be treated.

The intended use of customer feedback data by franchisors may determine the way new franchise agreements should be drafted. If a franchisor is simply obtaining customer feedback in order to pass along that information to franchisees, or to use the feedback data as a training tool for franchisees, the contractual basis for requiring participation could be very general. If, however, a franchisor would like to be able to use the results of customer feedback as a tool in the default and termination process, then the franchisor must carefully consider the best way of reserving that right, while not limiting itself in the franchise agreement to a specific customer feedback model, since the agreement may run for many years. For example, license agreements in the hotel industry routinely have terms exceeding fifteen years, and it would not be wise to describe a particular customer feedback method (e.g., pop-ups or Net Promoter Score), since industry and company-specific practices are likely to change substantially over the period of the license agreement. Broader provisions in franchise agreements on how customer
satisfaction data be used may be the best approach. The franchise agreement could mandate that franchisees participate in, and pass, site inspections and customer satisfaction initiatives as provided in detail within the operations manual.

A more general approach could be to simply provide that franchisee must comply with all requirements as outlined in the operations manual, but such an approach may not be upheld as sufficient to allow franchisors to base default and termination decisions on customer satisfaction surveys. Ultimately, franchisors themselves may find that their intended use of customer satisfaction data may change during the term of the license agreement. This suggests that franchisors may be best served in using the broadest possible description of the permissible use of customer satisfaction data, while providing sufficient disclosure to franchisees that this type of data may be used in making default and termination decisions.

B. How to Respond to and Remedy Deficient Performance by Franchisees

Inherent in the nature of the franchise relationship is that the franchisor does not control the day-to-day business of the franchisee’s operations. Nor should the franchisor do so. The franchisor simply owns the trademark and system, and can protect the value associated with the brand. Therefore, the franchisor’s only concrete remedy for non-performance or deficient performance of franchisees is to default and ultimately terminate the franchised relationship.

For many instances of deficient performance by franchisees, however, the default and termination remedy appears excessive when compared to the infringement. As a result, many franchisors choose to use instances of deficient performance (as disclosed via customer surveys or feedback) as coaching opportunities for franchisees rather than bases for termination. Franchisors will provide the results of the surveys, and will offer guidance on how the franchisee can improve on its customer interactions in order to achieve higher and better customer ratings. For example, one gym franchisor does not default its franchisees based on a failure to receive a passing score, but instead will only take action if an owner does not respond to a customer complaint at all. Again, the first recourse is not to default the franchisee. After three failures to respond to customer complaints, within one month, the franchisee will first simply be required to participate in a customer service seminar. For most franchisors, the default and termination process is used as a last resort, when franchisees consistently fall well below standard requirements in customer satisfaction surveys and similar ratings.

V. USE OF CUSTOMER SURVEYS AND FEEDBACK AS A BASIS FOR ENFORCEMENT DECISIONS

A. Maintaining System Standards and Operational Compliance During the Relationship

The quality and consistency of a customer’s experience is crucial to enhancing the strength of the brand and, therefore, to enhancing sales and long-term prospects for the system. In the franchise context, establishing and maintaining system standards are key components in this process. Franchise agreements almost universally contain provisions requiring franchisees to comply with the standards set forth in the agreement and in the operations manual.

Customer surveys have become an important part of measuring a franchisee’s compliance with these system standards. In the “old days,” franchisors evaluated compliance with system standards by sending a field representative or quality assurance inspector to the franchisee’s unit on a periodic basis to perform a checklist-type inspection of the franchisee’s

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operations. This kind of activity usually measured things like proper use of marks and signage, cleanliness of the facility, and compliance with health and safety requirements. In addition, some franchisors made use of “mystery shoppers” to try to get a more accurate sense of a customer’s experience, including things like service time, friendliness of the employees, and compliance with procedures like offering certain product service options or giving a receipt. But these traditional tools, while helpful, represent the observations and opinions of the franchisor or third parties hired by the franchisor.

Customer surveys, however, offer the unvarnished perspective of the people who matter most to both the franchisor and the franchisee – the actual customers. Like franchisor inspections and mystery shopper results, guest survey data can be very helpful to a franchisor in helping to improve performance by its franchisees. Franchisors share customer survey data with the particular franchisee so that franchisee has an understanding of what its customers are actually thinking and the areas in which the franchisee can or needs to improve. Many franchise systems also share the survey data with all franchisees, so everyone in the system can see which franchisees are representing the brand well and which are not. Sharing results in this way can create positive “peer pressure” and encourage franchisees that are underperforming from a customer satisfaction perspective to step up their game for the benefit of the entire system.

Franchisors also can use incentives or penalties during a relationship based on customer survey responses. These alternatives to default and termination remedies can be effective to enhance performance and encourage a franchisee to get back on track. Incentives could be in the form of an additional contribution to a marketing fund or local advertising, motivational awards or bonus payments for the franchisee, or eligibility for expansion. Penalties might include a straight monetary payment or paying for additional training to address the identified deficiencies.

At a minimum, customer survey results can be the “canary in the coal mine” to give a franchisor a warning sign of potential problems that it can proactively address with particular franchisees. Bad customer survey scores or sustained negative customer comments can serve as a trigger for operational counseling or for additional training of a franchisee’s principals or employees. In addition to trying to improve operations and customer experiences, documented use of customer survey results to help improve a franchisee’s performance can provide valuable evidence in any subsequent enforcement action.

B. **Use For Enforcement—Default, Termination, or Non-Renewal**

Virtually all franchise agreements require the franchisee to comply with the franchisor’s system standards for operations and quality assurance. Sometimes those standards are expressly contained in the franchise agreement. More often, the franchise agreement makes fairly general statements and then refers to and incorporates an operations manual that contains more detailed standards with which the franchisee must comply. More recently, such standards may include the requirement that the franchisee maintain a certain level or score for customer satisfaction. The franchisee’s failure to maintain the required customer satisfaction score entitles the franchisor to declare a default under the franchise agreement. If the franchisee fails to cure within the required timeframe, this customer satisfaction default can be grounds for termination.

Due to the long-term nature of most franchise relationships, it is important that franchisors have the flexibility to adapt their systems and standards to changing business
conditions and customer preferences. Most franchise agreements, therefore, maintain fairly broad language recognizing that the franchisor can make changes from time to time to the system, operational procedures or other policies, and the franchisee agrees to comply with such requirements as they might change from time-to-time. This flexibility is particularly important when it comes to customer satisfaction and measuring the quality of the customer experience.

Difficult questions can arise, however, where a franchisor tries to enforce modifications to standards or policies that are not expressly set forth in the franchise agreement. Although not in the customer survey or guest satisfaction context, recent cases addressing a franchisor's ability unilaterally to alter franchise obligations through changes to operations manuals have not yielded uniform results. In *LaQuinta Corp. v. Heartland Properties, LLC*, a hotel franchisor terminated the franchisee after it refused to sign a new agreement to implement an upgraded computerized reservations systems. The franchise license agreement required the franchisee to maintain certain "system standards" regarding its facilities, technology, and service, and it gave the franchisor the right to "amend, modify, delete or enhance any portion of the System" with the franchisee absorbing the costs for such compliance. The agreement provided that the franchisor would maintain a reservations system that "in its sole discretion [it] determines will best serve the system." When the franchisor implemented a system standard calling for a new reservations system, the franchisee objected and refused to implement it. After unsuccessful attempts to resolve the dispute, the franchisor terminated the license agreement on that basis.

The franchisee sued for wrongful termination, alleging that the franchisor's implementation of the new reservations system breached the license agreement and the implied covenant of good faith and fair dealing. The franchisee claimed that the new reservations system "effected 'significant changes' and imposed additional demands. . . beyond those contained in the License Agreement." The court rejected the franchisee's argument, holding that implementation of the new reservation system "with its attendant costs was fully contemplated and permitted under the unambiguous terms of the License Agreement . . . [which] expressly gave [the franchisor] the right to add, amend, and/or delete System Standards, including the reservations system, and required [the franchisee] to participate in and bear such costs." The *LaQuinta* court applied Wisconsin common law, but it looked to franchise decisions from other states to support its decision.

In contrast to the *LaQuinta* decision, the franchisor did not fare as well in *Bird Hotel Corp. v. Super 8 Motels, Inc.* In that case, the franchisor changed the terms of a promotional program in a manner that required franchisees to pay an additional fee to participate in the new program. This change led to a franchisee class action. Although the franchise agreement provided that the franchisor "may, from time to time, make revisions in or amendments to such rules of operation which FRANCHISOR shall apply uniformly to all Super 8 Motels," the court ruled in favor of the franchisees:

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13 603 F.3d 327 (6th Cir. 2010).
14 *Id.* at 335.
15 *Id.* at 336.
16 *Id.* 336-38.
Even if Super 8 has retained the right in the Agreement to change its system standards and rules of operation and its customer loyalty program detailed therein, it may not unilaterally impose a fee for the operation of that program greater than what is provided for in the language of the Agreement. . . . The Court agrees with Bird Hotel and finds that [increasing the fee] amounts to a unilateral revision of the terms of the contract and not, as argued by Super 8, to a revision of the system standards and rules of operation.18

System changes that impose significant additional costs to the franchisee arguably could be viewed differently than changes in standards designed to enhance and protect the brand, such as establishing or modifying customer satisfaction programs. Franchisors typically fare better when the challenged standards relate to quality assurance or to health and safety issues. Franchise agreements usually do not set out specific quality standards or inspection procedures, but merely state that the franchisee must comply with the franchisor's quality assurance standards and procedures. Such general language is usually sufficient to support a termination for breach if the franchisee fails to comply with quality assurance standards that may be implemented from time to time.19 Potential issues and challenges a franchisor might face in establishing or modifying a customer satisfaction or survey standard are discussed below.

VI. LEGAL ISSUES IN USING GUEST SURVEYS AND CUSTOMER FEEDBACK FOR ENFORCEMENT PURPOSES

A. Rationale and Bases for Franchisors to Use Surveys as an Enforcement Tool

It is hard to dispute that a franchisor has a legitimate business interest in establishing system standards that maintain and enhance the goodwill of its brand and system. Doing so benefits the franchisees as well by enhancing the value of the overall brand and system, which can lead to increased sales and profits. It is equally hard to dispute that measuring and requiring an adequate level of customer satisfaction is important to maintaining and enhancing the franchisor’s goodwill. Numerous cases in a variety of contexts have upheld the franchisor’s right to insist on and enforce operational standards that are calculated to maintain and enhance the goodwill of the franchisor’s brand and system.20 If the franchise agreement contains express customer satisfaction standards the franchisee must meet, courts generally will enforce those standards under a straightforward breach of contract theory. Standards involving customer satisfaction survey scores should be no different. This situation is best illustrated in a recent case involving Hilton’s Hampton Inn brand.

18 Id. at *8.

19 See, e.g., Pooniwal v. Wyndham Worldwide Corp., 2014 U.S. Dist. LEXIS 61301 (D. Minn. May 2, 2014); (rejecting franchisee’s challenge that QA inspection evaluations failed to meet requirements of franchise agreement).

1. **HLT Existing Franchising Holding LLC v. Worcester Hospitality Group LLC.**

In this case, HLT Existing Franchise Holding, LLC, a subsidiary of Hilton and franchisor of Hampton Inn Hotels ("Hilton"), brought a lawsuit against its former franchisee, Worcester Hospitality Group LLC, for damages arising from Hilton’s termination of the franchise for failing to meet contractual quality assurance and customer satisfaction standards. Hilton had a quality assurance process that included both semi-annual quality assurance evaluations conducted by Hilton inspectors as well as guest surveys which could impact the overall score. Hilton referred to its guest surveys as Service and Loyalty Tracking ("SALT") surveys, which were sent to guests after their stay at the hotel. The SALT questionnaires asked guests to rate the hotel on a scale from one to ten on items such as lobby appearance, helpfulness of the staff, cleanliness of the room, and overall experience. The SALT score for a particular question was calculated by taking the number of guests who gave a rating of nine or ten, and dividing that number by the number of total responses to that question. Hilton aimed to receive 30 to 40 SALT responses per month for each Hampton Inn Hotel, and it used approximately the past six months’ worth of data to aggregate SALT scores for semi-annual evaluations. The district court noted that Hilton’s complex scoring process was "best described as baroque."**

Hilton’s Franchise License Agreement ("FLA") defined the “System” as “the elements we designate from time to time to identify hotels operating under the License Brand . . . [including] the standards, specifications, and policies for . . . operation, appearance and service of the Hotel” referenced in the FLA or the operations manual. The FLA further stated that the licensee agreed to:

- “[A]dopt, use and comply with the standards . . . and techniques set forth in the Manual, as it may be amended by us from time to time;”
- “[P]articipate in . . . all required System Quality Assurance Programs . . . and maintain minimum performance standards and scores for such quality assurance programs that we may establish from time to time in the Manual;” and
- “[C]omply with System standards, specifications and requirements as to maintenance, appearance and condition of the Hotel, and adopt in your business all changes or additions to the System as we may periodically designate.”**

The FLA also stated that Hilton’s quality assurance program “may include conducting periodic inspections of the Hotel and guest satisfaction surveys and audits to ensure compliance with System standards.”** The agreement gave Hilton the right to terminate if the franchisee


22 994 F. Supp. 2d at 525.

23 *Id.* at 523.

24 *Id.* at 526-27.

25 *Id.* at 527.
failed to cure a default after 30 days’ notice, and to terminate immediately for repeated non-compliance.

After several years of satisfactory quality assurance scores, the franchisee began to receive failing evaluations for its hotel due to unacceptably low scores for “overall service” on the SALT surveys. Hilton gave the franchisee multiple notices of default, but the franchisee continued to receive unacceptable overall quality assurance scores including deficient scores from the SALT surveys. Hilton therefore terminated the agreement and filed suit for past due fees, liquidated damages, and attorney’s fees.

The franchisee challenged Hilton’s use of the SALT scores as a basis for termination. The franchisee argued that Hilton failed to evaluate the franchisee’s performance "reasonably and in good faith," because Hilton’s evaluations allegedly were "inconsistent, arbitrary and lacked an objective scoring scale" and were conducted in bad faith with a desire to get rid of the franchisee.\footnote{Id. at 536.}

Both the district court and the court of appeals, applying New York common law, rejected the franchisee’s challenges. Although the district court noted that Hilton "was under an obligation to conduct its evaluations in good faith and not arbitrarily or irrationally," the court held that franchisee failed to show that its "persistent and broad-based failing grades on its evaluations derive from the factors" about which it complained.\footnote{Id. at 539.} The district court noted the importance of guest survey responses in a franchise system:

Relevant here, the FLA appears to contemplate a quality assurance process that takes into account guests’ views, irrespective of whether reasonable minds can differ with those views. That is perfectly understandable: A responsible hotel chain logically should care about what their guests think, even if officials of the chain or a franchise might take issue with the guests’ views. Put differently, if guests consistently found the Hotel’s service to be lacking, as the SALT surveys indicate, that is meaningful information to the franchisor, whether the hotels’ service was, in some sense, “objectively” bad.\footnote{Id. at 533.}

The district court held that the surveys were admissible and not hearsay, and that Hilton’s use of the quality assurance and customer survey evidence did not violate the covenant of good faith and fair dealing. Accordingly, the district court granted summary judgment to Hilton.

On appeal, the Second Circuit affirmed the district court’s decision. On the fundamental question, the court of appeals agreed that Hilton did not act arbitrarily, irrationally, or in violation of the implied covenant of good faith and fair dealing in relying on the guest survey reports that reflected customer dissatisfaction.\footnote{2015 U.S. App. LEXIS 5710, at *4.} The court of appeals also agreed that the surveys did not constitute hearsay, but on different grounds than the district court. The district court held that the surveys were not hearsay because they were admitted “solely for the purpose of

\footnote{Id. at 536.}

\footnote{Id. at 539.}

\footnote{Id. at 533.}

\footnote{2015 U.S. App. LEXIS 5710, at *4.}
determining what guests reported they thought about the Hotel,” and not to prove the truth of the matter asserted in the statement.\(^{30}\) The Second Circuit did not adopt the lower court’s evidentiary analysis, but held the surveys were admissible nonetheless “for the purpose of showing their effect on HLT’s decision to terminate the franchising agreement.”\(^{31}\) The Second Circuit further explained: “The surveys were not admitted for the truth of what the customers actually thought, still less for the accuracy of their purported reactions; what matters is that the data existed and that HLT did not act in bad faith or irrationally in relying on it.”\(^{32}\)

Hilton’s use of guest survey scores had an additional benefit in this case – that evidence overcame the franchisee’s additional argument that Hilton acted in bad faith in conducting its on-site quality assurance inspections which were part of Hilton’s grounds for termination. The franchisee alleged that Hilton acted arbitrarily, irrationally, or in violation of the duty of good faith and fair dealing by conducting inspections with the intention of finding grounds to create a default and get the hotel out of the system. Both the district court and the court of appeals acknowledged that “[w]hen a contract contemplates the exercise of discretion, [the implied covenant] includes a promise not to act arbitrarily or irrationally in exercising that discretion.”\(^{33}\) The Second Circuit concluded, however, that it need not determine whether there is a genuine factual dispute about the arbitrariness or irrationality of the on-site evaluations, because any such dispute was rendered irrelevant by Hilton’s independent basis for termination due to the failing guest survey scores. The Court of Appeals stated: “As such, even if HRT conducted portions of its on-site evaluations in an arbitrary or irrational manner, those arbitrary or irrational actions did not cause the termination of the franchising agreement. Because HRT terminated the franchising agreement based on a contractually permitted, rational, and non-arbitrary factor – the poor guest survey scores – it did not breach the implied covenant of good faith and fair dealing or act arbitrarily or irrationally.”\(^{34}\)

2. Other Customer Survey Cases

Although the \textit{HLT} case is the most recent and most detailed discussion of the significance of customer surveys as a ground for enforcement of franchise agreement rights, other cases have upheld the franchisor’s use of customer survey evidence as a proper ground for decisions under franchise agreement. Many of these cases are in the automobile dealership context, where manufacturers regularly use minimum customer satisfaction index (“CSI”) scores as a basis for transfer or expansion decisions.

In \textit{Gray v. Toyota Motor Sales, USA, Inc.},\(^{35}\) the plaintiffs claimed that Toyota violated state and federal motor vehicle dealer law by refusing to approve two proposed sales of their dealership to other Toyota dealers. Toyota refused to approve these transfers due to the transferees’ unsatisfactory CSI scores. In addition to their statutory claims, the plaintiffs

\(^{30}\) 994 F. Supp. 2d at 535.


\(^{32}\) \textit{Id}.

\(^{33}\) \textit{Id} at *6 (citation omitted).

\(^{34}\) \textit{Id} at *7.

asserted claims for breach of the dealer agreement, breach of the implied covenant of good faith and fair dealing, and tortious interference, among other claims.

The district court rejected the plaintiffs’ assertions that a sub-standard CSI rating is not an acceptable reason to withhold a consent to a transfer. The court first explained: “Customer goodwill is critical to any business, and it is logical for Defendant to be concerned about its dealers’ ability to satisfy their customers. This is particularly true because car dealers are often the face of a manufacturer, responsible for the ongoing integrity of the brand.”36 The court went on to state that the plaintiffs’ argument that the contract and applicable law did not permit Toyota to use CSI ratings to withhold consent “borders on sophistry.”37 The court likewise rejected the implied covenant and tortious interference claims because Toyota had exercised a clear contractual right in refusing to approve the proposed transactions.

The Supreme Court in Iowa reached a similar result in Midwest Automotive III, LLC v. Iowa Department of Transportation.38 In this case, the dealer appealed from a lower court’s order affirming the DOT’s grant of Jaguar’s application to terminate the dealer’s franchise. Midwest contracted to purchase an existing Jaguar franchisee, and as part of that process Jaguar required Midwest to submit as part of its Jaguar application three years of CSI data from the other auto franchises it operated. Jaguar required above average CSI ratings as a “gateway” criterion for approval of new dealer applications, and because Midwest’s CSI scores fell below the national averages for the brands of its existing dealerships, Jaguar rejected that application and terminated the franchise.

The Supreme Court affirmed an administrative law judge’s ruling that CSI scores were a rational basis upon which Jaguar may deny the transfer of a Jaguar franchise, and agreed with the conclusion that deficient CSI scores met the statutory standard that the proposed transfer would be “substantially detrimental” to the brand. The court noted that Jaguar presented evidence that above-average CSI scores related directly to successful marketing and sale of Jaguar vehicles. The court credited the testimony of Jaguar’s president that the company’s “very existence depended on customer loyalty,” “that customer loyalty correlated with customer satisfaction,” and “higher CSI ratings by customers indicated greater loyalty to the Jaguar product.”39 The court further explained that CSI scores were particularly important for luxury products, because luxury car customers are the most demanding segment with respect to customer service.

In Ford Motor Co. v. West Seneca Ford, Inc.,40 a car dealer challenged Ford’s termination of its dealership which was based, in part, on the dealer’s poor customer satisfaction scores. The dealer counterclaimed for violation of the New York Franchised Motor Vehicle Dealer Act, alleging that Ford did not have “due cause” to terminate. After a bench trial, the court ruled that Ford was “justified in terminating West Seneca for its failure to achieve a sufficient level of customer satisfaction and service” based on Ford’s "Quality Commitment

36 Id. at 623–24 (citations omitted).
37 Id. at 624.
38 646 N.W.2d 417 (2002).
39 Id. at 427.
Performance” measurement.\footnote{Id. at *20.} QCP measures the customer’s buying and service experience by asking customers to rank the dealership on a scale of 1 to 10. West Seneca’s scores were among the lowest in the region for several years, and for one year it was ranked number 48 of 48 Ford dealers in the area. The court held that ”West Seneca's consistently low QCP scores breached its obligation to 'develop good relations' with the public.”\footnote{Id.}

Courts have also upheld the use of CSI ratings as a basis for granting dealer incentives. In \textit{Colonial Imports Corps. v. Volvo Car of N. Am., Inc.},\footnote{2001 U.S. Dist. LEXIS 1172 (D.N.H. Jan. 9, 2001).} Volvo established a program to track CSI ratings for showroom and service satisfaction. Volvo used those CSI ratings as a basis to award cash incentives to dealers to upgrade their facilities and staff. Colonial’s CSI ratings dropped below the acceptable threshold, so it ceased to qualify for incentive awards. Colonial sued claiming that Volvo violated the New Hampshire Motor Vehicle Franchise Act by arbitrarily using subjective surveys to determine a dealer’s eligibility for incentive awards, and by hiring an allegedly unqualified contractor to conduct the surveys.

The district court rejected Colonial’s first argument, holding: “Customer satisfaction is ultimately a subjective opinion, not an objective fact, because only the customer knows whether she truly feels satisfied. This subjectivity does not, however, lead inevitably to the conclusion that use of customer satisfaction surveys is arbitrary.”\footnote{Id. at *18.} Because the court concluded that the customer satisfaction is important to any commercial endeavor, it held that Volvo did not act unreasonably to base dealer incentives on the results of surveys that measured customer satisfaction. For the same reasons, the court rejected the dealer’s implied covenant claim because Volvo’s actions in adopting and administering the incentive program were a reasonable attempt to improve customer satisfaction.\footnote{But see \textit{Knauz Continental Autos, Inc. v. Land Rover N. Am., Inc.}, 842 F. Supp. 2d 1034 (N.D. Ill. 1993) (denying motion to dismiss claim for violation of Illinois Motor Vehicle Franchise Act challenging manufacturer’s incentive program, which was based in part on customer satisfaction survey, where dealer attacked survey’s small sample size and allegedly arbitrary scope of customers surveyed).}

Finally, although not technically a customer survey case, the court in \textit{Ramada Franchise Systems, Inc. v. Cusack Development Inc.}\footnote{1999 U.S. Dist. LEXIS 7422 (S.D.N.Y. Mar. 24, 1999)} affirmed the franchisor’s reliance on excessive guest complaints along with failing quality assurance scores as a basis to terminate the franchisee. The court rejected the franchisee’s argument that Ramada had represented that it would not terminate if the franchisee completed certain renovations required by a previously agreed-upon workout plan, because that representation could not override the clear breaches of the quality assurance standards in the franchise agreement.
B. Legal Theories to Consider When Using Surveys

1. The Franchise Agreement and Rights and Limitations on the Use of Customer Surveys

The rights and obligations of the parties in a franchise relationship are, in large part, governed by the terms of the franchise agreement. As such, if the franchisor desires to use customer surveys as a mechanism to evaluate franchisees, the franchise agreement should contain a provision granting the franchisor the right to use customer surveys for that purpose. Any provision in a franchise agreement should be drafted broadly so that the franchisor is not restricted in the type of survey method to be employed or how it might use customer surveys down the road. The provision should provide the franchisor with sole and exclusive discretion to design and administer a customer survey program, including the ability to make changes to the survey program as the franchisor deems necessary. The franchise agreement should also provide the franchisor the right to administer a survey program in-house or to select, in its sole discretion, a third-party provider to manage the customer survey program. In addition, the franchise agreement should be drafted to allow the franchisor to access customer data collected by the franchisee(s) for the purpose of soliciting surveys and gathering feedback from customers.

If a franchise agreement provides for the use of customer surveys, the franchise agreement or operations manual should clearly delineate how the customer survey results will be evaluated by the franchisor and what constitutes a subpar customer survey. The default provisions of the franchise agreement should also explicitly define what constitutes an event of default stemming from the use of customer surveys. For example, a franchise agreement might provide for an event of default in the case of five (5) returned customer surveys with a score of seventy percent (70%) or lower within a twelve (12) month period, or for failure to meet an aggregate, system-wide threshold score for a certain number of periods. If such a default is curable under the franchise agreement, an obvious issue then arises as to how the franchisee cures the default to remain in compliance with the franchise agreement. Any cure period should be structured to provide the franchisee with a realistic opportunity to address the deficiency.

In light of the inherently complex issues associated with defaulting a franchisee exclusively based on customer surveys results, a franchisor should consider using surveys as additional evidence to show that “good cause” or “reasonable cause” exists for termination or non-renewal, if the franchisor is required to clear this legal hurdle. The following states and territories require a showing of “good cause” or “reasonable cause” for the termination or non-renewal of a franchisee:


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evidence to show that the franchisor had good or reasonable cause to terminate or not to renew the franchisee.49

2. The Implied Covenant of Good Faith and Fair Dealing and the Use of Surveys

As a general proposition, the implied covenant of good faith and fair dealing requires a party vested with contractual discretion to exercise that discretion reasonably and with proper motive that is consistent with the parties’ reasonable expectations under the franchise agreement.50 In the likely scenario, the franchise agreement will provide the franchisor with exclusive discretion to design, implement and use customer surveys as a mechanism to evaluate franchisees. Thus, a franchisor must be cognizant that the use of customer surveys could likely trigger a duty of good faith and faith dealing.

In order to avoid running afoul of the implied covenant of good faith and fair dealing when using customer surveys, a franchisor should exercise its discretion in a reasonable manner and with a proper motive. Stated differently, customer surveys used to evaluate franchisees should not be done in an arbitrary or capricious manner that is inconsistent with the reasonable expectations of the parties.51

Franchisors and franchisees (and their respective lawyers) might disagree on the particular standards or application of the implied covenant to the use of surveys as an enforcement tool. Franchisors might contend that the implied covenant has no application so long as the survey methodology or scoring system is based on a reasonable business judgment or is not undertaken in subjective bad faith.52 Franchisees, on the other hand, might argue that the franchisor must meet a more general commercial reasonableness standard, which arguably allows broader room for second-guessing the quality or motives of the franchisor's decisions.53 In all events, customer surveys should be used uniformly and for a proper business purpose, such as maintaining the integrity of the franchise system.

HLT Existing Franchise Holding, LLC v. Worchester Hospitality Grp., LLC,54 a recent case discussed above, confirms that the proper use of customer surveys does not run afoul of the implied covenant of good faith and fair dealing. In HLT, the franchise agreement was

49 HLT Existing Franchise Holding, LLC v. Worcester Hospitality Grp., LLC, ___ F.3d __, 2015 U.S. App. LEXIS 5710 (2d Cir. Apr. 9, 2015) (affirming trial court decision to allow guest surveys to be introduced as non-hearsay evidence “for the purpose of showing their effect on [franchisor’s] decision to terminate the franchise agreement.”); see also Randy’s Studebaker Sales, Inc. v. Nissan Motor Corporation in U.S.A., 533 F.2d 510, 52 (10th Cir. 1976) (affirming trial court and finding that customer surveys tend to be admissible evidence because the surveys “reflect the then existing state of mind of the customers as to the quality of [the franchisee’s] service generally.”).


51 Austin, 805 F. Supp. at 1014.

52 See, e.g., Burger King Corp. v. Agad, 941 F.Supp. 1217, 1222 (N.D. Ga. 1996) (franchisee "cannot use the implied covenant of good faith and fair dealing to second-guess [the franchisor's legitimate business decisions]").

53 See, e.g., U.C.C. § 2-103 (defining duty of good faith in context of sale of goods to require “observance of reasonable commercial standards of fair dealing in the trade”).

54 See supra n.19 and accompanying text.
terminated after the franchisee failed two on-site performance evaluations because of poor scores on guest surveys.\textsuperscript{55} The franchisee counterclaimed and alleged that the franchisor conducted the on-site evaluations in an arbitrary and irrational manner in violation of the covenant of good faith and fair dealing.\textsuperscript{56} On appeal, the Second Circuit affirmed the trial court and held that whether portions of the on-site evaluations were conducted arbitrarily or irrationally was irrelevant because the franchisor had an independent basis—poor guest surveys—for terminating the franchise agreement.\textsuperscript{57} In so holding, the Second Circuit stated that “[b]ecause [the franchisor] terminated the franchising agreement based on a contractually permitted, rational, and non-arbitrary factor—the poor guest survey scores—it did not breach the implied covenant of good faith and fair dealing or act arbitrarily or irrationally.”\textsuperscript{58}

3. The Impact of State Relationship Laws on the Use of Surveys

a. Good Cause for Termination or Non-Renewal

As previously mentioned, certain state franchise relationship laws require “good cause” or “reasonable cause” before terminating or electing to not renew a franchisee. In general, these statutes require a showing that, among other things, the franchisee did not comply with a material term of the franchise agreement to establish “good cause” or “reasonable cause.”\textsuperscript{59}

A franchisor might be able to use poor customer survey scores alone to meet this requirement, although there is scant case law in this context. For example, a franchisor could potentially use customer surveys to show that the franchisor is operating the business poorly or is mistreating customers, and thus is negatively impacting the goodwill of the brand. However, this assumes that the surveys the franchisor is relying on are not susceptible to being attacked by the franchisee. For example, if the survey data is weak or not representative, a franchisee will be able to attack the surveys and possibly refute the contention that the franchised business is being operated poorly. Additional arguments that might be available to franchisees are discussed in Section VI.C below.

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\textsuperscript{55} Id. at *2.

\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} Id.

\textsuperscript{59} Ark. Code Ann. § 4-72-202(7) (failure to substantially comply with the requirements under the franchise agreement); Cal. Bus. & Prof. Code § 20020 (failure of the franchisee to comply with any lawful requirement of the franchise agreement); Conn. Gen. Stat. Ann. § 42-133f (failure to comply substantially with any material and reasonable obligation of the franchise agreement); Haw. Rev. Stat. § 482E-6(2)(H) (failure of the franchisee to comply with any lawful, material provision of the franchise agreement); 815 Ill. Comp. Stat. Ann. 705/19(a) (failure of the franchisee to comply with any lawful provisions of the franchise or other agreement); Ind. Code Ann. § 23-2-2.7-1(7) (any material violation of the franchise agreement); Iowa Code Ann. § 523H.7 (failure of the franchisee to comply with any lawful provision of the franchise agreement); Mich. Comp. Laws Ann. § 445.1527(c) (failure of the franchisee to comply with any lawful provision of the franchise agreement); Minn. Stat. Ann. § 80C.14(3)(b) (failure by franchisee to substantially comply with the material and reasonable franchise requirements imposed by franchisor); N.J. Stat. Ann. § 56:10-5 (failure by the franchisee to substantially comply with the requirements of the franchise agreement); Tenn. Code Ann. § 47-25-1502 (failure to substantially comply with the requirements of the franchise agreement); Wash. Rev. Code Ann. § 19.100.180(j) (failure of franchisee to comply with lawful material provisions of the franchise or other agreement); and Wis. Stat. § 135.02 (failure to substantially comply with the essential and reasonable requirements).
In the more likely scenario, a franchisor would be able to establish “good cause” or “reasonable cause” based on something more tangible, such as the failure to pay royalties, and subpar customer survey results could be used as additional evidence to support the termination or non-renewal.

b. Improper Discrimination Among Franchisees

Although a franchise agreement may provide a franchisor with the ability to vary standards or make exceptions for certain franchisees, customer surveys should be used uniformly by a franchisor. If a franchisor utilizes poor customer surveys to target a certain franchisee while turning a blind eye to other franchisees with poor customer surveys, the targeted franchisee could argue that the use was arbitrary or capricious in violation of the implied covenant of good faith and fair dealing. Further, if customer surveys are not used uniformly, a targeted franchisee may have a statutory cause of action for unfair discrimination. For example, Indiana prohibits a franchisor from “[d]iscriminating unfairly among its franchisees or unreasonably failing or refusing to comply with any terms of a franchise agreement.”

Similarly, in the motor fuel context, Connecticut prohibits a franchisor from “discriminat[ing] between [petroleum] franchisees . . . in any other business dealing” unless the discriminatory conduct falls within one of the limited statutory exceptions.

As such, customer surveys should be used uniformly to evaluate all similarly-situated franchisees. If a franchisor utilizes customer surveys sporadically or targets certain franchisees, such use may trigger a claim for violation of the implied covenant of good faith or run afoul of a statutory provision proscribing unfair discrimination amongst franchisees. There might be some situations, however, where it is reasonable and appropriate to differentiate in using survey scores, such as where a hotel franchisee converts from another system and must upgrade its facilities.

C. Potential Arguments by Franchisees Against Enforcement Decisions Based on Customer Surveys

There are currently very few cases dealing explicitly with a franchisor’s right to terminate a franchisee based on the results of customer satisfaction surveys. As such, the potential arguments to challenge the use of customer surveys remain untested in the franchise context. This section provides an overview of some possible arguments that might be available to franchisees.

1. Statistical Significance

A potential argument of a franchisee would be that the sample size was inadequate, and thus, the survey results are skewed and are not an accurate representation of the franchisee. In contexts outside of franchising, customer surveys have been attacked because the sample size was insufficient. Thus, to avoid this argument, a franchisor should ensure that the sample size is large enough and that a similar sample size is utilized when evaluating other franchisees.

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60 Ind. Code Ann. § 23-2-2.7-2(5).
62 See Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 121 n. 6 (1st Cir. 2006) (noting as to consumer survey submitted in trademark litigation that the “small sample size and large margin of error combined to cast
2. **Survey Methodology Bias**

The manner in which the survey is administered may also affect survey results. If a customer interacts directly with the person administering the survey, results tend to be higher because consumers have a natural tendency to be more positive when there is another person directly receiving feedback. On the other hand, survey results tend to be lower if a customer has no direct interaction because the consumer often feels more freedom to provide negative feedback.

Additionally, the phrasing or wording of a question (or tone when administering a verbal survey) can affect how the respondent perceives the question, which can result in a different answer.

3. **Non-Response Bias**

Bad experiences often have a greater impact on a person than pleasant ones. As such, surveys conducted via mail, e-mail, internet, and even telephone are often completely ignored by customers with neutral or even positive experiences. People with negative experiences, however, are often quick to want to share their experiences, and are likely to respond. This is known as “non-response bias.” Although survey administrators often try to establish a “random sample” of respondents, the fact is, that unless the survey is administered in person or is in some way required or incentivized, the responses will often times be skewed towards a lower average score.

4. **Regional Biases**

A regional bias can occur when the survey involves multiple geographic regions, states, cities or the like. If a survey is administered in various geographic regions, customers in one region might interpret certain questions differently than customers in another region. As a result, survey results for a franchisee in a given geographic region may be lower not because the franchisee is underperforming, but rather because customers did not understand the questions presented in the survey. In the automobile dealership context, courts have noted that customer service index scores can vary from one region to another.

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64 Id.


66 See e.g., *In re Van Ness Auto Plaza, Inc.*, 120 B.R. 545, 550 (Bankr. N.D. Cal. 1990) (noting that customer satisfaction ratings are generally lower in the West than in the East, lower in California than the rest of the West, and lower in central cities than in suburban and rural locations).
5. Variation in Customer Interpretation

Another potential pitfall that could pose a problem for franchisors is the variation in customer interpretation. Similar to regional bias, this means that different people often vary their opinions in terms of their satisfaction with the franchise, even when in the same geographic area. This variation is not due to any action or inaction by the franchisee and can result in an unfair assessment of the franchisee’s performance by the franchisor.

Even more difficult to account for is the fact that individual people can have varying responses depending on factors outside of the franchisee’s control. The respondent’s mood, the time of day, and other personal factors can consciously or subconsciously impact the respondent’s satisfaction with the franchisee. It is both extremely important and quite difficult for the franchisor to ensure that the survey satisfies “repeatability”—that is, that if taken multiple times by the same person, the results will be generally the same. Based on the aforementioned uncontrollable factors, an issue with repeatability is almost impossible to remove completely and could result in an unfair or non-representative assessment of a franchisee.

VII. BEST PRACTICES FOR FRANCHISORS

Customer satisfaction surveys are not necessarily a “one-size-fits-all” endeavor. Different types of businesses might benefit from using different ways to track and evaluate customer satisfaction. Moreover, different businesses might value one measure of customer satisfaction over another – for example, preferring a single “overall satisfaction” rating over an aggregation of multiple ratings for different aspects of the customer experience. There are some practices, however, that can apply across the board to enhance the value of a customer survey both as a business tool and as an enforcement tool.

A. Expressly Reference in the Franchise Agreement the Right to Use Guest Surveys in the Quality Evaluation Process

The first step in any analysis of a franchisor’s rights or restrictions is to study the terms of the franchise agreement. Where the franchise agreement expressly allows the franchisor to require certain conduct or to take certain enforcement actions, generally there should be no legal impediment to its doing so. Similarly, where the franchise agreement expressly grants the franchisor discretion to make decisions regarding a specific business area, such as system standards and quality assurance requirements, courts generally will uphold the franchisor’s good-faith exercise of discretion over those areas in the face of a franchisee challenge.

Franchisors therefore would be well served to include in their franchise agreements explicit references to the use of customer surveys as part of the quality assurance process. In the HLT case, for example, Hilton’s franchise agreement included the following statement: “We will administer a quality assurance program for the System which may include conducting periodic inspections of the Hotel and guest satisfaction surveys and audits to ensure compliance with system standards.” While a generic reference to compliance with standards, procedures, and policies set forth in the operations manual might be sufficient, a franchisee could argue that the use of third-party surveys was not contemplated by the parties so survey results should not be a legitimate ground for default or termination. A franchisor need not describe the nature of the survey in detail, but mentioning it in the agreement should enhance the franchisor’s ability to defeat any challenge that the agreement does not authorize use of such a tool.
B. Document the Process and Rationale for the Survey

In creating a customer survey program, franchisors should document their process to show that the program was the result of considered business judgment designed to enhance customer goodwill and thus benefit the entire system. Market literature and studies showing the importance of surveys in the particular industry might be helpful. To the extent available, franchisors should gather evidence of what kinds of surveys or related processes other companies in their industry might be doing. This process of documenting the decision-making process gives the franchisor an opportunity to create a favorable record to use if its decisions are later challenged as being arbitrary or unreasonable under the implied covenant of good faith and fair dealing, as the franchisee tried to do in the HLT case. Evidence showing that the franchisor exercised reasonable business judgment should go a long way toward insulating the franchisor from challenges by franchisees that might, in hindsight, try to second guess the strategy or simply object to it.

Further, a franchisor should document any efforts to obtain input or “buy-in” from its franchisees in developing a customer survey program. If there is a recognized franchisee association, approval by the association can be effective to convince skeptical franchisees to embrace the program. Obtaining support from large franchisees or other leaders in the franchisee community can achieve a similar result. Support from a franchisee association or group of influential franchisees can also provide valuable evidence of the reasonableness of a customer survey program and its importance to the system, which the franchisor can use to defend any subsequent legal challenges by unhappy franchisees.

C. Apply the Same Standards to All Similarly Situated Units

It seems like an obvious statement, but franchisors using a customer survey program should apply the same standards to all similarly situated outlets within the system. In addition, franchisors should apply the same standard to company-owned outlets as to franchised outlets. As discussed above, some states have franchise relationship laws that prohibit discrimination among franchisees. Even in the absence of a statutory requirement, failure to apply the standards consistently throughout the system could open the franchisor to challenge on the grounds that the program either is arbitrary, being implemented or enforced in bad faith or for an improper motive, or is simply not a material requirement of the franchise agreement.

In some cases, there might be good reason to treat a particular unit differently or not to strictly enforce the survey score requirements for a limited period of time. For example, a new franchisee taking over an existing unit that has been run down and needs extensive renovation might legitimately be given an exemption from the customer survey score requirement for some period of time. In those cases, the franchisor should document the rationale for any temporary deviations from the general requirements, and should not allow such deviations for longer than it determines is reasonably necessary.

D. Set Reasonably Achievable Standards

Not every brand should expect customer satisfaction ratings like the Ritz Carlton. Franchisors therefore should set customer satisfaction threshold levels that are appropriate for the brand and type of business involved. Those thresholds should be reasonably achievable by the franchisees. If a franchisor sets a minimum customer satisfaction threshold of 80%, yet more than half of systems units are scoring below 80%, that threshold might be of limited usefulness. Setting a threshold that most, or even many, franchisees regularly do not meet also
could be evidence that the guest survey program is not rationally suited to achieve the stated objective, or is otherwise unreasonable.

E. Give Prompt Notice of Deficiencies and a Reasonable Cure Period

If the franchisor intends to use a guest survey program as a potential basis for default and termination, the franchisor should treat its survey program as an important feature of the system. That means giving prompt notice of any deficiencies and following up to help the franchisee in question address those deficiencies. If a franchisee’s customer satisfaction scores fall below the designated threshold, the franchisor should send prompt notice of the deficiency explaining what areas need to be improved and suggesting how the franchisee might do so. The franchisor should consider offering to send a field support representative to the franchisee’s unit to help address the issues. If a franchisor intends to use the failing customer survey scores as a basis for default and termination, evidence that the franchisor tried to help the franchisee improve and achieve compliance can be very helpful to defeat a franchisee’s challenge.

The franchisor also should give a reasonable cure period. If the survey results are compiled and issued monthly, it might not be reasonable to expect a franchisee to turn-around an unsatisfactory operation by the next reporting period only 30 days later. The franchisor should consider preparing an action plan to address the nature of the identified deficiencies and use its business experience to identify a reasonable time for completion and re-evaluation.

Similarly, if a franchisor is changing its standards or implementing a new kind of customer survey, it should consider what is a reasonable time for its franchisees to make any adjustments and be in a position to comply with the new program. Again, the more reasonable a franchisor can be in supporting the rationale for any changes and giving the franchisees an adequate opportunity to comply, the more likely it is that a court will uphold its enforcement decisions.

F. Disseminate the Data Promptly to the System

Customer satisfaction data is most valuable when it is disseminated promptly so people can act on it as soon as possible. Data can become stale and much less useful, particularly in businesses subject to seasonal fluctuations. Franchisors therefore should disseminate the data as quickly as possible to get maximum benefit from a guest survey program.

In addition, franchisors should consider publishing data about each franchise to the entire system to get the benefit of positive “peer pressure” by fellow franchisees. Further, franchisees performing well are much less likely to support a dissident franchisee in a dispute with the franchisor if they have seen that dissident franchisee consistently at the bottom of customer satisfaction results. Publishing this data to the entire system can help show that the franchisor is not “picking on” a franchisee or retaliating against a franchisee for some perceived improper motive.

G. If the Franchisor Gives Concessions, Get Something in Return

Not every failing survey score merits immediate default or termination. As discussed above, there might be good reasons why a franchisor would want to allow more time for certain franchisees to turn around negative customer survey scores. If the franchisor grants extensions or second chances, however, it should make sure to get something valuable in return. That quid pro quo might be the franchisee’s written acknowledgment of the deficiency or grounds for
default. Ideally, such an acknowledgment should be accompanied by a release of the franchisor through the date of the concession. Obtaining appropriate consideration from the franchisee also reinforces the importance of compliance going forward.

VIII. CONCLUSION

Customer survey data can provide important information to measure how a franchised outlet is representing the brand in the eyes of the consuming public. It also can be the basis to default a franchisee who receives excessive negative customer feedback if language exists in the franchise agreement to support such action, and if the negative customer data is compiled in an appropriate manner and fairly reflects the customers’ perceptions of the franchisee’s performance. If not, the franchisee may be able to challenge the fairness and reliability of the data in defense of an enforcement action. Franchisors would be wise to include a reference to customer survey data in their franchise agreements as a ground for default to allow a clear basis to take action against a franchisee who routinely receives negative customer feedback.
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