“OH NO, THEY DID WHAT?!”  WHAT DO WE DO NOW?
ALMOST ANYTHING CAN GO WRONG

Forgot to renew?
Untrue disclosure?
Undocumented transfer?
Unsigned receipts?
Missing signatures?
Incomplete disclosure?
Illegal FPR?
Inaccurate information
No disclosure?
Unregistered offer?
FDD missing exhibits?
LAWS THAT APPLY TO DIFFERENT PROBLEMS

• Pre-Sale Disclosure
  - FTC Franchise Rule
  - State Registration, Disclosure & Exemption laws
  - “Little FTC Acts”
  - Common law (e.g., fraud)
LAWS THAT APPLY TO DIFFERENT PROBLEMS

• Post-sale Relationship
  - State Relationship laws
  - State Registration, Disclosure & Exemption laws
  - Common law (e.g., fraud, breach of contract, duty of good faith & fair dealing)
  - Special industry laws (potentially)
WHY DO THINGS GO WRONG?

• Complicated regulatory rules
  • What Is a material change?
  • Jurisdictional reach of the franchise laws
• Incentives to sell
• Miscommunication / misunderstanding
• Poor compliance program
• Understaffed or wrongly staffed franchisor
WHY DO THINGS GO WRONG?

• Closing deals due to exogenous factors
  • Closing of transfer or purchases
  • Lease issues
• Issues with documentation, changes to the transaction or changes to the franchisee
  • Missing signatures
  • Handwritten changes
• Other?
DEALING WITH PRE-SALE PROBLEMS
STEP 1:
EVALUATE THE HARM

• Has a violation already occurred?
  - Unambiguous offer where prohibited
  - Illegal FPR

• Or can you stop and fix?
STEP 2:
CAN YOU PREVENT HARM TO THE FRANCHISEE?

- Don’t close the sale!
  - Re-disclose with the proper FDD
  - Get registered
  - Side letter disclosing additional information

- What if the franchisee takes the position that delaying the sale will cause more harm?
STEP 3: CAN YOU CURE HARM TO THE FRANCHISEE?

• Rescind the sale and start over?

• Additional disclosure and acknowledgment / waiver letter?

• What is the necessary documentation?
  • Is a material modification disclosure document required (CA)?
STEP 4: YOUR FRIENDLY, NEIGHBORHOOD REGULATORS

- Is there a violation and how many franchisees involved?
  - Prohibited offer or sale?
  - Misrepresentation?
- Reason(s) to self-report
- Avoid self-reporting?
- Notice of violation
  - Impact on other franchisees?
STEP 5: EVALUATE RISKS TO THE SYSTEM OF A CLAIM

- What are the downstream risks of not addressing a claim?
- What is the statute of limitations for a claim?
- Can the statute of limitations be shortened?
What is the statute of limitations?

- **CALIFORNIA (1)**
  Earlier of 4 years from violation event; or 1 year after franchisee discovered violation

- **HAWAII (2)**
  5 years after violation; or 2 years from discovery of facts

- **ILLINOIS (3)**
  3 years after violation event; or 1 year from awareness of claim

- **INDIANA (4)**
  3 years after discovery of violation facts

- **MARYLAND (5)**
  3 years after grant of franchise

- **MICHIGAN (6)**
  4 years after violation event

- **OREGON (10)**
  3 years after franchise sale

- **RHODE ISLAND (11)**
  4 years after violation event

- **SOUTH DAKOTA (12)**
  2 years from discovery of facts or 3 years from violation

- **VIRGINIA (13)**
  4 years after action accrues

- **WASHINGTON (14)**
  2 years from signing of franchise agreement

- **WISCONSIN (15)**
  3 years after violation event

- **MINNESOTA (7)**
  3 years after action accrues

- **NEW YORK (8)**
  3 years after act or transaction constituting the violation

- **NORTH DAKOTA (9)**
  5 years after franchisee discovering violation facts
Can we shorten the statute of limitations?

1. California
2. Rhode Island
3. Wisconsin
4. Illinois
5. New York
6. North Dakota

- 90 days
- 30 days
MINIMIZING RISKS TO THE SYSTEM

- The ostrich (bury your head in the sand and hope that there’s no claim)
- Notify the franchisee of a disclosure issue
- Address it head-on with the franchisee
- Does a rescission offer work if offered outside the statutory process?
- Releases
DEALING WITH POST-SALE PROBLEMS
TRANSFERS

• Undocumented or undisclosed transfers

• Potential waiver by the franchisor?

• Communicate with the franchisee

• Default and potential termination
RENEWALS

• Undocumented renewals versus hold-overs
• Documentation disputes
• Notice of intent not to renew
• Documentation of non-renewal
TERMINATIONS

• Potentially required conduct:
  - Good cause
  - Written notice
  - Cure periods
  - Notice periods
  - Repurchase of inventory

• Potentially required documentation
AN OUNCE OF PREVENTION EQUALS LITIGATION AVOIDANCE

- Franchisor policy and culture
  - Business departments and legal collaboration
- Compliance checklists
- Compliance training
- Franchisee acknowledgements
IN SUMMARY

• Stop and cure (pre-violation)
• Confess and cure (post-violation)
• Rescission
• Damages/settlement
• Acknowledgment / waiver / releases?
• Regulatory processes with state agencies
• Utilize authority under Franchise Agreement to compel compliance
THANK YOU!