



MEMORANDUM

To:	Clients of Holmes Lofstrom, PC
Date:	December 20, 2016
Subject:	Franchise Advisory Year-End 2016

2017 Franchise Disclosure Document updating and registration renewals will be upon us shortly. We hope that the following information will be helpful to your planning process.

A. As you get ready to sit down with your auditors, we want to remind you of a few requirements for your audited financials:

1. Financials must be searchable. That is, when we send electronic copies of the financials (pdf format) to the various states, an examiner must be able to search for specific words in the document.

2. The audited financial statements must be presented in a tabular form that compares at least two fiscal years. Additionally, the statements should include a balance sheet for the previous 2 fiscal year-ends before the disclosure document issuance date; and statements of operations, stockholders equity, and cash flows for each of the previous three fiscal years.

3. We will need a manually signed consent letter on the auditor's letterhead in the following format:

CONSENT:

_____ [NAME OF ACCOUNTANT] consents to the use in the Franchise Disclosure Document issued by _____ [NAME OF FRANCHISOR] ("Franchisor") on _____ [ISSUANCE DATE OF FRANCHISE DISCLOSURE DOCUMENT], as it may be amended, of our report dated _____ [DATE OF THE ACCOUNTANT'S REPORT], relating to the financial statements of Franchisor for the period ending _____.

We recommend that a DRAFT of your audited financial statements be reviewed by us before the auditors issue a final audit, so we can identify and try to address any red flag issues or inconsistencies with the FDD information as efficiently and economically as possible.

Remember, too, that many state examiners review financial statements very carefully. While they do not employ uniform criteria for evaluating a company's financial condition, we know that emphasis is often placed by them on a strong net worth, liquidity and healthy asset to liability ratios. We suggest you review your financial position with your accountants and financial advisors to assess your current position and whether or not any resource adjustments, cash infusions, etc. might be considered to enhance the company's financial year end position. Doing so may help a franchise company avoid a financial assurance condition being imposed upon its registration, like a fee deferral or an escrow requirement.

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B. As some of you may know, the Small Business Administration (“SBA”) recently announced changes in its operating procedures regarding franchise financing. While the new procedures to be implemented 1/1/17 have both positive and negative aspects, many franchisors are likely to view them as net positive.

Included among the key changes are the following:

1. The SBA will no longer maintain or require a franchise registry of pre-approved franchise systems. Franchisors do not have to apply to a registry for franchisees to be considered for an SBA-backed loan.

2. The SBA will require that franchisees seeking SBA backed financing have a franchise agreement that includes a specific form of addendum. The form cannot be changed. Lenders will be required to ensure the addendum is in place for franchise applicants.

3. SBA-backed financing will not be available for master franchise arrangements.

As a result of the above changes, the SBA will not routinely review franchise agreements, which should make for speedier, more efficient processing. Of course, individual applicants will still need to meet eligibility requirements to obtain funding.

While the form of required SBA Addendum cannot be altered, its terms are, in our view, somewhat more relaxed than terms some clients were required to accept in previous years. It remains unclear what the outcome will be if state law requirements conflict with a required term under the federal SBA Addendum.

A copy of the form SBA Addendum is attached for your reference and will be SBA-required after 1/1/17. The SBA Information Notice released on the subject also is attached for your information.

If you have any questions, please feel free to contact us for additional information.

ATTACHMENT

ADDENDUM TO FRANCHISE AGREEMENT

THIS ADDENDUM ("Addendum") is made and entered into on _____, 20____, by and between _____ ("Franchisor"), located at _____, and _____ ("Franchisee"), located at _____.

Franchisor and Franchisee entered into a Franchise Agreement on _____, 20____, (such Agreement, together with any amendments, the "Franchise Agreement"). Franchisee is applying for a loan ("Loan") from a lender in which funding is provided with the assistance of the U. S. Small Business Administration ("SBA"). SBA requires the execution of this Addendum as a condition for obtaining the SBA-assisted financing.

In consideration of the mutual promises below and for good and valuable consideration, the receipt and sufficiency of which the parties acknowledge, the parties agree that notwithstanding any other terms in the Franchise Agreement:

CHANGE OF OWNERSHIP

- If Franchisee is proposing to transfer a partial interest in Franchisee and Franchisor has an option to purchase or a right of first refusal with respect to that partial interest, Franchisor may exercise such option or right only if the proposed transferee is not a current owner or family member of a current owner of Franchisee. If the Franchisor's consent is required for any transfer (full or partial), Franchisor will not unreasonably withhold such consent. In the event of an approved transfer of the franchise interest or any portion thereof, the transferor will not be liable for the actions of the transferee franchisee.

FORCED SALE OF ASSETS

- If Franchisor has the option to purchase the business personal assets upon default or termination of the Franchise Agreement and the parties are unable to agree on the value of the assets, the value will be determined by an appraiser chosen by both parties. If the Franchisee owns the real estate where the franchise location is operating, Franchisee will not be required to sell the real estate upon default or termination, but Franchisee may be required to lease the real estate for the remainder of the franchise term (excluding additional renewals) for fair market value.

COVENANTS

- If the Franchisee owns the real estate where the franchise location is operating, Franchisor may not record against the real estate any restrictions on the use of the property, including any restrictive covenants, branding covenants or environmental use restrictions.

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SBA Form 1353.3 (4-93) MS Word Edition; previous editions obsolete
Must be accompanied by SBA Form 58



SBA Information Notice

TO: All SBA Employees

CONTROL NO.: 5000-1399

SUBJECT: Issuance of SOP 50 10 5(I) with
Revised Franchise Review
Procedures and Changes to Credit
Elsewhere

EFFECTIVE: November 22, 2016

The purpose of this Notice is to inform SBA employees and SBA Lenders of the issuance of SOP 50 10 5(I), Lender and Development Company Loan Programs, which will be effective January 1, 2017. The primary purpose for the revised SOP is to streamline the procedures for determining size eligibility based on affiliation for franchised businesses. SBA is also updating the SOP to incorporate recent changes in the Small Business Act (15 USC §636) regarding fee relief on certain loans to veteran-owned small businesses and certain requirements for credit not elsewhere available for borrowers. This update to the SOP will apply to all applications received by SBA on or after January 1, 2017.

REVISED FRANCHISE PROCEDURES

On July 27, 2016, SBA revised its regulations governing affiliation with respect to the Business Loan, Disaster Loan and Surety Bond Guaranty Programs (81 FR 41423). Under the revised regulations, the principles of affiliation with respect to these programs can be found at 13 CFR 121.301(f). The regulation identifying affiliation based on franchise and license agreements is found in §121.301(f)(5) and was modified to read:

Affiliation based on franchise and license agreements. The restraints imposed on a franchisee or licensee by its franchise or license agreement generally will not be considered in determining whether the franchisor or licensor is affiliated with an applicant franchisee or licensee provided the applicant franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. SBA will only consider the franchise or license agreements of the applicant concern.

SOP 50 10 5(I) replaces the current franchise review process with new guidance that reflects the changes to the affiliation regulations, and incorporates significant improvements in policy and process that will reduce time and costs.

Effective January 1, 2017, SBA:

- a) will no longer review franchise and license agreements to determine affiliation between the franchisor and franchisee; instead, SBA will require the SBA Addendum to Franchise Agreement (see Attachment I to this Notice) be executed by the franchisor and franchisee for each loan involving a franchise or similar agreement;

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- b) will no longer maintain an internal or external centralized listing of franchise systems where the franchisee is not considered affiliated with the franchisor for size determination (formerly known as the “Franchise Registry”);
- c) will no longer maintain an internal or external centralized listing of franchise systems where the franchisee is considered affiliated with the franchisor (formerly known as the “SBA Franchise Findings List”); and
- d) will identify the specific franchise of the applicant in E-Tran/SBA One.

These changes apply to agreements or relationships, meeting the definition of “franchise” as defined by the Federal Trade Commission (FTC) in 16 CFR §436, which states:

Franchise means any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:

- (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;
- (2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and
- (3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

Changes have been made in Subparts A, B and C in SOP 50 10 5(I).

SUBPART A

Chapter 1, Paragraph IV.B.6.c)i.(a) - PLP Lenders’ Processing Responsibilities

The following language has been **removed** from the SOP:

“...SBA makes available a list of franchise agreements (the “Registry”) that have been approved by the SBA Franchise Committee for size/affiliation and control issues. This information is currently available to the public at no cost at www.franchiseregistry.com. (SBA also posts a list of approved agreements by year on SBA’s website at www.sba.gov/for-lenders.) If the franchisor’s agreement does not appear on the Registry, the lender may review the agreement to ensure that it meets SBA’s requirements as set forth in Subpart B, Chapter 2 of this SOP, or the lender has the option of submitting the franchise agreement to SBA for an affiliation determination. In such case, the documentation must be sent to DelegatedFranchiseReviews@sba.gov. SBA will notify the lender of its determination after completing its review. If SBA determines that the parties are not affiliated based on the agreement and any supplemental documentation, the lender may continue to process the application under its delegated authority. With the exception of franchise affiliation as discussed above,”.

SUBPART B – 7(a)

Chapter 2, Paragraph III.B.9. - Eligibility

This section has been retitled “Franchise and License Agreements” and is replaced with new language that reads as follows:

9. Franchise and License Agreements

The procedures described below apply to all agreements or relationships meeting the Federal Trade Commission (“FTC”) definition of “franchise” in 16 CFR §436, which states:

Franchise means any continuing commercial relationship or arrangement whatever it may be called, in which the terms of the offer of contract specify, or the franchise seller promises or represents, orally or in writing, that:

- (1) The franchise will obtain the right to operate a business that is identified or associated with the franchisor’s trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor’s trademark;
- (2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee’s method of operation, or provide significant assistance in the franchisee’s method of operation; and
- (3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

While exempt from FTC disclosure requirements, all agreements and relationships that are covered by the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. 2801 (e.g., gas stations), are included within the FTC definition of “franchise” and are, therefore, subject to the procedures described below.

All applicants must be independently owned and operated small businesses and not dominant in their field of operation. The restraints imposed on a franchisee or licensee by its franchise or license agreement generally will not be considered in determining whether the franchisor or licensor is affiliated with an applicant franchisee or licensee provided the applicant franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. SBA will only consider franchise or license agreements of the Small Business Applicant concern (13 CFR 121.301(f)(5)).

Lender must identify franchise loans as such when entering the loan application into E-Tran and/or SBA One. Lender must follow the instructions in E-Tran/SBA One to identify the specific franchise for the applicant. Failure to identify the franchise in E-Tran and/or SBA One and obtain the SBA “Addendum to Franchise Agreement” may result in a denial of liability on the guaranty.

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SBA Form 1353.3 (4-93) MS Word Edition; previous editions obsolete
Must be accompanied by SBA Form 58

Lenders will be responsible to ensure that the applicant meets all SBA eligibility requirements.

a) For each application involving an **applicant franchisee**:

- i. Lender must obtain the SBA “Addendum to Franchise Agreement” (SBA Form 2462 in Appendix 9 of this SOP) executed by the franchisor and applicant franchisee. No alterations to the Addendum will be accepted. Under the Addendum, the following provisions will apply and will override any conflicting provisions in the franchise agreement:
 - (a) If Franchisee is proposing to transfer a partial interest in Franchisee and Franchisor has an option to purchase or a right of first refusal with respect to that partial interest, Franchisor may exercise such option or right only if the proposed transferee is not a current owner or family member of a current owner of Franchisee. If the Franchisor’s consent is required for any transfer (full or partial), Franchisor will not unreasonably withhold such consent. In the event of an approved transfer of the franchise interest or any portion thereof, the transferor will not be liable for the actions of the transferee franchisee;
 - (b) If Franchisor has the option to purchase the business personal assets upon default or termination of the Franchise Agreement and the parties are unable to agree on the value of the assets, the value will be determined by an appraiser chosen by both parties. If the Franchisee owns the real estate where the franchise location is operating, Franchisee will not be required to sell the real estate upon default or termination, but Franchisee may be required to lease the real estate for the remainder of the franchise term (excluding additional renewals) for fair market value;
 - (c) If the Franchisee owns the real estate where the franchise location is operating, Franchisor may not record against the real estate any restrictions on the use of the property, including any restrictive covenants, branding covenants or environmental use restrictions; and
 - (d) Franchisor will not directly control (hire, fire or schedule) Franchisee’s employees.
- ii. The SBA Addendum to Franchise Agreement only addresses “affiliation” between the Franchisor and Franchisee. If the Franchisor and Franchisee have signed the SBA Addendum to Franchise Agreement, SBA will not deem the Franchisor and Franchisee to be affiliated. SBA will not make a loan to an applicant franchisee without the signed SBA Addendum to Franchise Agreement. Additionally, the applicant Franchisee and the franchise system must meet all SBA eligibility requirements.
- iii. Lender must not make any disbursement of loan proceeds without obtaining the executed Franchise Agreement, SBA Addendum to Franchise Agreement, and

reviewing all other documents the franchisor requires the franchisee to execute in order to ensure compliance with SBA Loan Program Requirements.

- iv. The Franchise Agreement, SBA “Addendum to Franchise Agreement” and all other documents the franchisor requires the franchisee to execute must be submitted with any request for SBA to honor a 7(a) guarantee.

b) For each application involving an **applicant franchisor**:

If the applicant is a franchisor, it must together with all affiliates not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, whichever is higher. **Applicant franchisors** are not required to execute the SBA “Addendum to Franchise Agreement”.

c) Applicants who operate or propose to operate under franchise development agreements (often referred to as Master Franchise Agreements) are ineligible as such agreements are considered to be passive investments and/or inherently speculative.

d) Applicants who operate or propose to operate under an agreement containing area development rights, which allow a specific franchisee to operate a number of franchises within a specified geographic area, may be eligible if the agreement complies with the guidance in this section.

Chapter 2, Paragraph III.D.3.i) – Businesses Which Restrict Patronage (13 CFR § 110(i))

Language formerly located in Chapter 2, Paragraph III.B. has been moved to this section which now reads as follows:

Businesses that restrict patronage for any reason other than capacity are not eligible. For example, a men’s only or women’s only health club is not eligible, regardless of whether the business is a franchise or not.

Fitness centers and other businesses that target one gender are not ineligible if they permit both men and women to join and/or use the facility. Lenders must document the file with the following:

- (a) Affidavit signed by the Small Business Applicant that the business is open to both men and women, and
- (b) Evidence that the facility is open to both men and women, such as two single-sex bath/locker rooms, or membership demographics.

Chapter 6, Paragraph I.A.2.o) -Contents of Lender’s Application for Guaranty for Standard 7(a) loans over \$350,000

The new language reads as follows:

Franchise – Lender must follow the instructions in E-Tran/SBA One to identify the specific franchise for the applicant.

COLLATERAL

Several concepts formerly included in the discussion of franchises in Chapter 2, such as deed restrictions, subordinations and other recorded documents, were moved to this section.

Chapter 4, Paragraph II A. - Collateral - The following language is added:

When assessing the adequacy of collateral, the lender must consider the impact that covenants and other restrictions recorded against the collateral may have on its value and marketability. The lender must document this analysis in the file. Examples of items to review include:

(a) Deed restrictions, covenants, easement provisions, reversionary interests, subordinations, leases and options, and other provisions that restrict the use of the property for the benefit of a third party; and

(b) Engineering Controls that require the small business concern or subsequent owners to install costly devices or structures such as extraction wells or subsurface barrier walls prior to constructing a building, remodeling, or otherwise improving the property.

SUBPART C – 504

Chapter 2, Paragraph III.B.5 - Eligibility

This section has been retitled “Franchise and License Agreements” and replaced with new language that reads as follows:

5. Franchise and License Agreements

These procedures described below apply to all agreements or relationships meeting the Federal Trade Commission (“FTC”) definition of “franchise” in 16 CFR §436, which states:

Franchise means any continuing commercial relationship or arrangement whatever it may be called, in which the terms of the offer of contract specify, or the franchise seller promises or represents, orally or in writing, that:

- (a) The franchise will obtain the right to operate a business that is identified or associated with the franchisor’s trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor’s trademark;
- (b) The franchisor will exert or has authority to exert a significant degree of control over the franchisee’s method of operation, or provide significant assistance in the franchisee’s method of operation; and

- (c) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

While exempt from FTC disclosure requirements, all agreements and relationships that are covered by the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. 2801 (e.g., gas stations), are included within the FTC definition of “franchise” and are, therefore, subject to the procedures described below.

All applicants must be independently owned and operated small businesses and not dominant in their field of operation. The restraints imposed on a franchisee or licensee by its franchise or license agreement generally will not be considered in determining whether the franchisor or licensor is affiliated with an applicant franchisee or licensee provided the applicant franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. SBA will only consider franchise or license agreements of the Small Business Applicant concern. (13 CFR 121.301(f)(5)).

CDCs must identify franchise loans as such when entering the loan application into E-tran. SBA uses the specific information generated in E-tran to record the identify of each franchise. The issuance of a specific code for a franchise system does not ensure that the applicant is eligible for SBA financing. CDCs will be responsible to ensure that the applicant meets all SBA eligibility requirements.

a) For each application involving an **applicant franchisee**:

- i. CDC must obtain the SBA “Addendum to Franchise Agreement” (SBA Form 2462 in Appendix 9 of this SOP) executed by the franchisor and applicant franchisee. No alterations to the Addendum will be accepted. Under the Addendum, the following provisions will apply and will override any conflicting provisions in the franchise agreement.

(a) If Franchisee is proposing to transfer a partial interest in Franchisee and Franchisor has an option to purchase or a right of first refusal with respect to that partial interest, Franchisor may exercise such option or right only if the proposed transferee is not a current owner or family member of a current owner of Franchisee. If the Franchisor’s consent is required for any transfer (full or partial), Franchisor will not unreasonably withhold such consent. In the event of an approved transfer of the franchise interest or any portion thereof, the transferor will not be liable for the actions of the transferee franchisee;

(b) If Franchisor has the option to purchase the business personal assets upon default or termination of the Franchise Agreement and the parties are unable to agree on the value of the assets, the value will be determined by an appraiser chosen by both parties. If the Franchisee owns the real estate where the franchise location is operating, Franchisee will not be required to sell the real estate upon default or termination, but Franchisee may be required to lease the

real estate for the remainder of the franchise term (excluding additional renewals) for fair market value;

(c) If the Franchisee owns the real estate where the franchise location is operating, Franchisor may not record against the real estate any restrictions on the use of the property, including any restrictive covenants, branding covenants or environmental use restrictions; and

(d) Franchisor will not directly control (hire, fire or schedule) Franchisee's employees.

- ii. The SBA Addendum to Franchise Agreement only addresses "affiliation" between the Franchisor and Franchisee. If the Franchisor and Franchisee have signed the SBA Addendum to Franchise Agreement, SBA will not deem the Franchisor and Franchisee to be affiliated. SBA will not make a loan to an applicant franchisee without the signed SBA Addendum to Franchise Agreement.
- iii. CDC must not make any disbursement of loan proceeds without obtaining the executed Franchise Agreement, SBA Addendum to Franchise Agreement, and reviewing all other documents the franchisor requires the franchisee to execute in order to ensure compliance with SBA Loan Program Requirements.

b) For each application involving an **applicant franchisor**:

If the applicant is a franchisor, it must together with all affiliates not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, whichever is higher. **Applicant franchisors** are not required to execute the SBA "Addendum to Franchise Agreement".

c) Applicants who operate or propose to operate under franchise development agreements (often referred to as Master Franchise Agreements) are ineligible as such agreements are considered to be passive investments and/or inherently speculative.

d) Applicants who operate or propose to operate under an agreement containing area development rights, which allow a specific franchisee to operate a number of franchises within a specified geographic area, may be eligible if the agreement complies with the guidance in this section.

Chapter 2, Paragraph III.D.3.i) – Businesses Which Restrict Patronage

Language formerly located in Chapter 2, Paragraph III.B. has been moved to this section which now reads as follows:

Businesses that restrict patronage for any reason other than capacity are not eligible. For example, a men's only or women's only health club is not eligible. Fitness centers and other businesses that target one gender are not ineligible if they permit both men and women to join and/or use the facility. Lenders must document the file with the following:

(a) Affidavit signed by the Small Business Applicant that the business is open to both men and women, and

(b) Evidence that the facility is open to both men and women, such as two single-sex bath/locker rooms, or membership demographics.

COLLATERAL

Several concepts formerly included in the discussion of franchises in Subpart C, Chapter 2, such as deed restrictions, subordinations and other recorded documents, were moved to this section.

Chapter 3, Paragraph I. A. – Collateral - The following language is added:

When assessing the adequacy of collateral, the lender must consider the impact that covenants and other restrictions recorded against the collateral may have on its value and marketability. CDC must document this analysis in the file. Examples of items to review include:

(a) Deed restrictions, covenants, easement provisions, reversionary interests, subordinations, leases and options, and other provisions that restrict the use of the property for the benefit of a third party; and

(b) Engineering Controls that require the small business concern or subsequent owners to install costly devices or structures such as extraction wells or subsurface barrier walls prior to constructing a building, remodeling, or otherwise improving the property.

REVISED CREDIT ELSEWHERE PROCEDURES

SUBPART B – 7(a) - CHAPTER 2, Paragraph III.C.4.

Acceptable factors that may demonstrate credit is not available elsewhere have been modified to incorporate changes made to section 7(a)(1) of the Small Business Act (15 USC §636(a)(1)) by the Veteran’s Entrepreneurship Act of 2015. The lender’s legal lending limit and the fact that the lender’s liquidity depends upon selling the guaranteed portion of the loan on the secondary market were removed from the list of examples of acceptable factors.

SUBPART C - 504 - CHAPTER 2, Paragraph III.C.4.

Acceptable factors that may demonstrate credit is not available elsewhere have been modified to reflect current SBA requirements. Credit elsewhere based on third party lender liquidity was removed as an acceptable factor.

This version of SOP 50 10 5(I) may be found on SBA’s website at www.sba.gov.

Notification and Questions

SBA field offices must notify Lenders and CDCs about the updates to the SOP. Questions concerning this Notice should be directed to the lender relations specialist in the local SBA field office. The local SBA field office may be found at www.sba.gov/about-offices-list/2.

Erin E. Andrew
Associate Administrator
Office of Capital Access

Attachment

EMPLOYMENT

- Franchisor will not directly control (hire, fire or schedule) Franchisee's employees.

This Addendum automatically terminates on the earlier to occur of the following: (i) the Loan is paid in full; or (ii) SBA no longer has any interest in the Loan.

Except as amended by this Addendum, the Franchise Agreement remains in full force and effect according to its terms.

FRANCHISOR:

FRANCHISEE:

By: _____

By: _____

Print Name: _____

Print Name: _____

Note to Parties: This Addendum only addresses "affiliation" between the Franchisor and Franchisee. Additionally, the applicant Franchisee and the franchise system must meet all SBA eligibility requirements.