



MEMORANDUM

To:	Clients of Holmes Lofstrom, PC
Date:	January 31, 2017
Subject:	Recommendations for 2017 Franchise Renewal Filings

- **The Payment Card Industry Data Security Standard (“PCI DSS”)**

The PCI DSS is established by the major credit card brands to help secure customer data and applies to all companies that accept, process, store or transmit credit card information. We have all seen the negative consequences to companies with customer data hacks and how a brand can suffer. Brand protection is one of the reasons that the International Franchise Association and security companies recommend that franchisors act to ensure all franchise network members maintain compliance with PCI DSS. This is particularly important for franchisors with centralized software systems. Some cyber security companies advocate that franchisors provide compliance instruction and monitoring for the benefit of the system. We encourage clients to contact a company that offers compliance related services to better understand their obligations and potential liabilities in this area.

Suggested Text:

We recommend including language in the franchise agreement requiring franchisee compliance with the PCI DSS similar to the following:

You shall comply with the then-current Payment Card Industry Data Security Standard and any revision to it adapted by the PCI Security Standards Council, LLC (the “PCI Council”) or any successor organization or standards we may specify. You shall implement enhancements and security requirements and other requirements established by the PCI Council for merchants accepting payment by credit or debit cards.

Franchisors with a more developed compliance program may also want to include language similar to the following:

You must demonstrate your compliance with PCI DSS upon our request, which may require an audit by a third party Qualified Security Assessor, among other activities. If you are unable to demonstrate compliance to our reasonable satisfaction, we may require you to engage the services of a third-party vendor for compliance assistance. Such vendor must be an approved vendor if we have identified any for such services. You agree to meet any cyber security requirements we may establish from time to time, including possibly the use of an approved managed firewall services vendor among other requirements.

We suggest clients speak with their insurance brokers about coverage for data theft and cyber security breaches and consider implementing a similar requirement in the franchise agreement. You may also want to refer to the FTC website, which has various publications designed to educate businesses about personal information protection.

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- **Notice Under the Defend Trade Secrets Act (“DTSA”)**

DTSA became federal law in 2016 and establishes a cause of action for theft of trade secrets. Trade secret owners can seek a wide range of remedies under the law from a violator, including exemplary damages and attorneys’ fees. However, the full range of remedies is only available with respect to employees, consultants and contractors if they are provided a notice prescribed under the law intended to protect whistleblowers. It is not entirely clear if the prescribed notice must also be given to franchisees, since franchisees are independent contractors of the franchisor’s. Many practitioners are suggesting as a best practice that the notice appear in franchise agreements, as well as in employment agreements and agreements with any contractor having access to a franchisor’s trade secrets.

Suggested Text:

We recommend including language in the franchise agreement that meets the requirements of the DTSA and is intended to assure that a franchisor can seek the broadest range of remedies available under the act against a violating franchisee, similar to the following:

While Franchisee and Franchisee’s employees and contractors do not perform any work for Franchisor as an employer or otherwise, the following notice is provided pursuant to the Defend Trade Secrets Act of 2016 to the extent it is determined or construed to be required for Franchisor to enforce its full rights under such Act or any other law:

“An individual shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made in confidence to a federal, state or local government official or to an attorney solely for the purpose of reporting or investigating a suspected violation of law. An individual shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made in a complaint or other document filed in a lawsuit or other proceeding if such filing is made under seal. An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding if the individual files any document containing the trade secret under seal and does not disclose the trade secret, except pursuant to court order.”

Similar language is suggested for franchise owners’ confidentiality agreements.

The above suggested changes are modest revisions and we do not anticipate either or both to have a substantial impact on legal fees. Once we receive your renewal responses, we will contact you regarding their possible inclusion in your franchise agreement.

- **FTC Rule Exemption Minimums**

While not a recommendation for franchise agreement revisions, this is a reminder that the minimum threshold amounts for certain FTC Rule exemptions were adjusted by the FTC in 2016, as happens periodically.

The Minimum Payment exemption threshold amount is now \$570.

The Large Franchise Investment exemption threshold amount is now \$1,143,100.

The Large Franchisee exemption threshold amount is now \$5,715,500.

If you have any questions about any of the above information, please feel free to give us a call.