International Franchise Association
Legal Symposium
May 6-8, 2018

CORPORATE COUNSEL SESSION

MARKETING ISSUES: CONTESTS, SWEEPSTAKES AND SPONSORSHIP/NAMING RIGHTS

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GETTING YOUR HOUSE IN ORDER: PREPARING FOR IPO OR SALE TO PRIVATE EQUITY

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PART I

MARKETING ISSUES: CONTESTS, SWEEPSTAKES, SPONSORSHIP/NAMING RIGHTS

Marketing Issues

1. Promotional Sweepstakes and Contests - United States

a. Overview

Promotion law generally addresses **sweepstakes** and **contests** sponsored by commercial businesses to generate interest in their products or services. In the context of franchises, typically the franchisor is the sponsor, and depending on the structure of the promotion, franchisees may participate in the designated manner. Charitable entities also may offer promotional sweepstakes and contests, but must follow the same laws and regulations. Promotional sweepstakes and contests are the focus of this section. In contrast, most state and local governments have raffle laws to authorize local events for charitable fundraising under strict regulation. Lotteries may be offered by a state under statutory authorization, and gambling would be the subject of state licensing.

All states, and Puerto Rico, have laws that govern promotional sweepstakes, and this mash up of laws and interpretations must be considered when preparing a national sweepstakes. Section 5(a) of the United States Federal Trade Commission Act, enforced by the Federal Trade Commission ("FTC"), provides that "unfair or deceptive acts or practices in or affecting commerce...are...declared unlawful", 15 U.S.C. Section 45(a)(1), and has been applied to promotional sweepstakes and contests. "Unfair" practices are those that "cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. Section 45(n).

The interpretation of these laws often is not subject to bright lines, as the legislation, regulations, court decisions, enforcement actions, and attorneys general opinions of different states may be contradictory or may not have addressed the proposed structure of a planned sweepstakes. Further, with sweepstakes offered through social media and accessed on mobile devices, the possible structures and scale of sweepstakes have expanded tremendously. Old cases about paper submissions or in-person activities do not readily explain how a state might interpret a modern sweepstakes conducted online with mobile access.

In all states, a commonality of promotion laws is that where (1) a prize is offered, (2) prize winners are selected by chance, and (3) "consideration" is given to enter, the promotion is illegal. A legal sweepstakes must eliminate one of those three elements. Usually "consideration" is eliminated, hence the common statement, "No Purchase Necessary". Also, states require sweepstakes to be governed by Official Rules, which explain how the sweepstakes will be conducted and essentially serve as a contract between the company offering the promotion (the "sponsor") and the entrants who must agree to the Official Rules as a condition of entry.

b. Sweepstakes Based on Chance; Consideration

What is "consideration" depends on applicable state law. Most obviously, consideration could be a purchase that is required for entry into the sweepstakes. But a purchase might mean more than just buying a product or service from the sponsor as a prerequisite to entry. Payments by entrants for other purposes also might be treated as consideration. For example, questions have been raised whether payments to mobile carriers for text message entries are consideration. Further, some states such as California define consideration to mean only a monetary payment, while other states interpret consideration to include effort or time of the entrant, such as being required to physically visit a specified location, expend a significant effort, or give something of value that is non-monetary. Some sweepstakes require entrants to complete surveys, play games or share their contact lists as conditions for entry. Without much recent case law, it may not be clear if states would treat these activities as non-monetary consideration.

When a sweepstakes involves a monetary payment or non-monetary consideration that would render the sweepstakes illegal, the sweepstakes still may be legal if the sponsor provides a means to enter that that does not involve payment or effort. This is called an "alternate method of entry". Traditionally the typical alternate method of entry was to mail in a postcard with the entrant's name and contact information, while today an alternate method of entry may be online. An alternate method would have the desired impact to make the sweepstakes legal only if possible entrants are reasonably notified of the existence of an alternate method of entry, and if those who enter through the alternate method are given comparable, fair treatment, called "equal dignity". The states do not provide precise formulas for how alternate methods of entry should be presented and handled. Depending on the structure of a proposed sweepstakes, an alternate method of entry to eliminate consideration could provide technological and logistical difficulties in execution of the sweepstakes.

c. Chance vs. Skill; Contests Based on Skill

The element of chance is obvious in a promotional sweepstakes where the winner is selected by a random drawing, or by random seeding of winning tickets distributed to players. A promotional contest based on skill, in contrast, generally intends to eliminate the element of chance by requiring the entrants to exhibit some type of skill, and judging that skill based on objective criteria to select the winners. Where a promotional contest does not involve chance, most states would permit consideration, such as an entry fee, as part of a legal promotional contest. Some states, however, may not allow consideration for skill contests.

Cases in several states have assessed whether certain activities involve skill or chance. Guessing the number of beans in a jar, or being the first caller to a radio program, probably involves chance rather than skill. Some activities that one might consider involving skill may be more likely to be treated as involving chance. The states do not always agree; state interpretations might take different views about whether predicting

the outcome of a sporting event, the stock market, or even the weather, involves skill or chance. So the border between chance and skill is not always clear.

In a skill contest, the judging criteria must be explained up front so the entrants can exhibit their skill in the areas of the judging criteria when preparing their entries. The sponsor must appoint judges who are qualified to assess the areas of skill stated in the judging criteria, and the judges must judge the entries in an objective manner based on the stated criteria. If any element of chance is or becomes part of deciding the winner, such as using chance as a tie breaker between winners with equal scores based on skill, the entire promotion may be treated as a sweepstakes based on chance rather than a skill contest. If what was intended as a skill contest comes to be treated as a sweepstakes based on chance, the structure that was believed appropriate for a skill contest (e.g., an entry fee) may make the unintended sweepstakes illegal.

For example, sponsors are cautioned against relying exclusively on pubic voting to select a winner, purportedly based on skill criteria, in promotional contests where entrants post photographs or videos, because public voting often is based on popularity or depends on an entrant's circle of friends, rather than evaluation of skill. Sponsors might use public voting to narrow down a large field of entrants, and qualified judges to select winners from the narrowed group.

State laws provide less guidance on promotional contests based on skill, and some laws are written broadly so it is difficult to determine a state's position on skill contests.

d. Who May Enter

A sponsor may determine to whom a sweepstakes or contest is directed, and state the eligibility requirements for that promotion. Most commonly a sweepstakes or contest is open to adults who are legal US residents, perhaps limited to residents of certain states (or excluding residents of certain states, see Section I.I. below); who are not employees, or family members of employees, of the sponsor, its advertising agency or sweepstakes agency; and who have read and agreed to the Official Rules (see Section I.H. below).

Subject to the requirements of any applicable franchise agreement, if some franchisees do not participate in a sweepstakes or contest offered by the franchisor, and if local participation is necessary to the operation of the promotion (e.g., for distribution of game pieces), certain geographic areas may need to be excluded from the promotion. As sponsors of the promotion, franchisors should specify any excluded areas in both the Official Rules (see I.H. below) and in advertising of the promotion (see I.K. below).

The possible participation of children in sweepstakes and contests presents certain challenges. Some sponsors' products or services are directed to children, so their promotions logically would be open to children. Other sponsors may not intend to involve children, but children may find the promotion online and seek to enter.

Sponsors should note that minors do not have the capacity to enter into a contract, and thus are not bound by the Official Rules for the promotion. The Official Rules provide contractual protections for the sponsor that would not apply to a minor entrant. A minor

is any person under the age of majority in his or her state (and that age may differ by state). Most promotions exclude children by requiring entrants to be at least 18 years old. Some promotions may permit children age 13-17 to enter with a statement that they have parental permission, although this involves risk.

For children under age 13, the federal Children's Online Privacy Protection Act ("COPPA") and related FTC regulations apply. 15 U.S.C. Sections 6501-6505; 16 C.F.R. Part 312. COPPA imposes certain requirements on (i) operators of websites or online services directed to children under 13 years old, and (ii) operators of other websites or online services not specifically directed to this age group that have actual knowledge that they are collecting personal information online from a child under 13 years old. For any promotion with an online component, the sponsor must be aware of the COPPA requirements and either expressly exclude children under 13 years of age from eligibility, or address the COPPA requirements (which involve obtaining verifiable parental consent).

e. How to Enter

Sponsors often seek to use a sweepstakes or contest as a tool to excite and engage customers and potential customers to interact with the sponsor or its brand online and through social media, and to enhance opportunities to learn about entrants' preferences and use that information to communicate with entrants after the promotion ends. As a result, the means to enter a sweepstakes or contest may be limited only by a sponsor's imagination in considering how to engage its target market.

Typical methods of entry include online forms through a website or promotion microsite, or text entry, or by posting photos, videos, or comments online or on social media (known as "user generated content" or "UGC"). Online entry raises the problem of sweepstakes entering services and rogue software known as "bots" that may create automated entries on behalf of individuals seeking to win prizes with no interest in the sponsor or its products or services, defeating the promotional aspect of the sweepstakes. Often the Official Rules of the promotion expressly exclude sweepstakes entering services, automated entries, bots, and any form of entry other than by an individual human.

Text message entry often is a sponsor's preference, as consumers widely use text messages for personal communications. However, in a business context, entry by text message raises consideration issues since some mobile service plans charge by the number of texts, and premium text messages are subject to additional charges. At a minimum disclosures should be made that text entry (and any online entry) may involve charges from the entrant's online or mobile service provider, premium text message services should be avoided, requirements for text message marketing should be followed, and sponsors may want to consider an alternative method of entry in lieu of text.

Using social media in any way to promote or execute a sweepstakes or contest requires review of the terms and conditions of use of the social media platform to determine

permissible and impermissible uses of that platform. For example, see Facebook's guidelines on Promotions at https://www.facebook.com/page_guidelines.php. Among other things, Facebook provides that "[p]romotions may be administered on Pages or within apps on Facebook. Personal Timelines and friend connections must not be used to administer promotions (ex: "share on your Timeline to enter" or "share on your friend's Timeline to get additional entries", and "tag your friends in this post to enter" are not permitted)." Section III.E.3. Sponsors should check the terms and conditions of the relevant social media platforms before each sweepstakes or contest to see if the terms and conditions have been recently revised.

Asking entrants to post user generated content in connection with their entries raises additional issues of possible copyright infringement, ownership and use, liability for illegal or tortious posts, and potential public relations issues. Sponsors also should be aware of the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, https://www.facebook.com/page_guidelines.php, which may impose disclosure requirements for social media and other public posts as a means to enter a sweepstakes.

f. Types of Prizes

Typically prizes may involve the sponsor's products or services, attendance at a special event (concert, sports), or travel to a desirable destination. Sponsors should be cautious about offering any prizes that might be subject to regulatory, postal or other shipping restrictions, such as alcoholic beverages shipped out of state, or medical services. Prizes of popular third party products (e.g., an Apple i-Pad) might falsely suggest a relationship with or involvement by the third party, so steps should be taken to avoid creating a misimpression. Promotions offering prizes involving travel or attendance at events should be subject to broad disclaimers of liability in the Official Rules, as well as language to remove winners and guests from events or hotels for disruptive behavior.

g. Sponsorship and Naming Rights

Generally the sponsor of a sweepstakes or contest is the business entity that is the driving force behind the promotion, and that seeks to enhance exposure to and interest in its brand, products or services through the promotion. However, sometimes various entities come together to offer a promotion, and those entities can play different roles:

1. Sponsor or co-sponsors. Should be named as a sponsor in the Official Rules

2. Prize Provider. A non-sponsor may provide its own product or service free of charge to the Sponsor to promote its brand through the promotion. A sponsor may want to have a written agreement with a prize provider regarding what will be provided, its retail value, how the sponsor may or must identify the name of the prize provider or its brand, product or service (e.g., may the brand of the prize be part of the title of the promotion), and which party is liable for any problems with the product or service.

3. Company that offers a product or service which the sponsor purchases at retail to use as a prize. This company is not a prize provider. The sponsor must be careful about using the name of the company or implying that the company is participating in or endorses the promotion.

4. Social media platforms. Some platforms require language stating that the social media company is not a participant in a promotion using their platform. For example, Facebook terms require "Acknowledgement that the promotion is in no way sponsored, endorsed or administered by, or associated with, Facebook." https://www.facebook.com/page_guidelines.php, Section III.E.2.b.

h. Official Rules

Official Rules should accompany a sweepstakes or contest. The Official Rules should provide the title of the promotion and all the details about how the sweepstakes or contest will operate, including who is eligible to enter, how and when to enter, any alternative method of entry, any skill criteria and how those criteria will be applied in judging a skill contest, how chance winners are selected and confirmed, descriptions of the prizes and how they will be awarded and delivered, etc. The Rules are the instruction manual for the promotion, for both entrants and sponsor. If done properly, the Rules can serve as a contract between the entrants and the sponsor. This is beneficial since the Rules often contain several clauses that are intended to protect the sponsor from liability for claims by entrants.

The Official Rules for sweepstakes should include the following information. This is not an exhaustive list but rather a general guideline highlighting key provisions.

1. NO PURCHASE NECESSARY. [For California: NO PURCHASE OR PAYMENT OF ANY KIND IS NECESSARY TO ENTER OR WIN THIS SWEEPSTAKES.]

2. Eligibility (e.g., legal U.S. residents, 18 years old or older, and any other special restrictions)

3. How to enter (e.g., online registration via sweepstakes microsite)

4. Promotion dates (e.g., opening and closing dates for submission of entries; winner selection dates) and times (including time zone)

5. Entry limitations (e.g., one entry per person, per household or per email address)

6. How winners will be selected (e.g., random drawing, skill criteria determined by qualified judges)

7. Prize description, approximate retail value and odds of winning if sweepstakes based on chance

8. Winner verification requirements (e.g., affidavit of eligibility, publicity release and travel release)

9. If applicable: Guest eligibility and documents (e.g., publicity and travel release)

10. Sponsor's decisions are final; if skill contest, judges' decisions are final

11. How and when to obtain the winner's list

12. Winner responsible for taxes, incidental expenses

13. Limitations on sponsor's liability; disclaimers (i.e., not responsible for lost or late entries, Internet problems)

14. Sponsor name and address

15. VOID WHERE PROHIBITED.

For the Official Rules to create a binding contract with entrants, access to the Rules should be provided in a manner so that entrants have the opportunity to locate them easily and read them before entry. Official Rules typically say that by entering, the entrant confirms that he or she has read, understands and agrees to the Rules.

i. Registration and Bonding of Sweepstakes Based on Chance

Sponsors should be aware in planning a sweepstakes that certain states require advance registration and possibly bonding.

New York - Requires registration of all sweepstakes where the total retail value prize of all prizes exceeds $5,000. Sponsor must post a bond or set up a trust account for the total value of all prizes. The New York registration must be filed at least 30 days prior to commencement of the promotion.

Florida - Requires registration of all sweepstakes where the total retail value of all prizes exceeds $5,000. Sponsor must post a bond or set up a trust account for the total value of all prizes. The Florida registration must be filed at least 7 days prior to commencement of the promotion.

Rhode Island - Requires registration of all sweepstakes offered by a "retail establishment" where the total retail value of all prizes exceeds $500. No bond or trust account is required. The meaning of "retail establishment" is not clear, although Rhode Island has specified that online retailers are included in the meaning.

The other states of the United States do not require registration for sweepstakes.

If a sponsor does not want to register and bond in New York and Florida, for example because there is not enough time to do so before the scheduled opening date of the sweepstakes, residents of New York and Florida should be excluded from eligibility to enter the sweepstakes.

j. Winner Notification and Verification

Entrants who are selected in a drawing, through skill judging or as otherwise described in the Rules should be treated as prospective winners until they are verified as winners. Prospective winners usually are required to sign an affidavit of eligibility, and liability and publicity release, before confirmation as winners. The Official Rules and sponsor's procedures in administration of the promotion should provide a means to disqualify potential winners who cannot be found, do not respond to winner notifications, or do not follow winner verification requirements, and to select substitute prospective winners for winner verification.

k. Advertising of Sweepstakes

Each state has requirements for key information that must be included in advertising of sweepstakes, and some states may require that the full Rules are included in advertising (e.g., Florida requires that the full rules must be published in all advertising where the prize value exceeds $5,000). The key information to be included, sometimes called mini-rules, will depend on the structure and specifics of the sweepstakes as stated in the rules, applicable law, and any limitations of the advertising medium.

Many sponsors use the following as a checklist for the minimum information to include in advertising of sweepstakes:

1. NO PURCHASE NECESSARY. [For California: NO PURCHASE OR PAYMENT OF ANY KIND IS NECESSARY TO ENTER OR WIN THIS SWEEPSTAKES.]

2. Void Where Prohibited

3. Eligibility requirements

4. Entry deadlines

5. How to enter; description of entry methods

6. Prize descriptions and value

7. Odds of winning; any conditions on winning a prize

8. Official Rules or how to access them

9. Sponsor name and address

10. Any other information material to participation in this sweepstakes (which depends on the structure of the sweepstakes).

While many sponsors provide a link to the full Rules in online ads, the states requiring inclusion of the full Rules in advertising have not confirmed that is adequate but simply have not seemed to enforce this requirement recently.

Overall the sponsor benefits if the Official Rules and its advertising of the sweepstakes are easy to read and understand, which will help in enforcement of the contract created by the Official Rules. In addition, under state and federal laws and guidelines, advertising of sweepstakes should accurately describe the sweepstakes, not be misleading, not contain material omissions, and generally meet appropriate advertising standards. The FTC provides general guidance about how to make advertising disclosures legible and understandable online and on mobile devices. See, e.g., the FTC's .Com Disclosures guidelines: https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

The Deceptive Mail Prevention and Enforcement Act, 39 U.S.C. Section 3001(k), imposes requirements for sweepstakes and contests promoted through the United States mail. Among other things, the Act requires mail concerning sweepstakes to clearly display the full Official Rules; and mail concerning skill contests to disclose details about the costs of entry, method of judging and identity of the judges. See https://postalinspectors.uspis.gov/investigations/MailFraud/fraudschemes/sweepstakesfraud/SweepstakesFraud.aspx.

I. Privacy and Marketing Communications

Many sponsors use promotions to collect contact information and interest profiles from entrants. Sponsors may plan to expand their marketing lists for future marketing to entrants who have shown an interest in sponsor or its brand, products or services.

Sweepstakes rules should explain what personally identifiable information will be gathered from entrants, and how that information will be used. If the personally identifiable information will be handled in the same manner as described in the sponsor's privacy policy, the sponsor may reference its privacy policy in the rules. But many privacy policies do not address collection of information through sweepstakes entries, or use of personally identifiable information to contact entrants who are prospective winners.

All commercial emails (marketing emails) must comply with applicable laws (primarily the federal CAN SPAM Act) concerning email marketing, including providing an "unsubscribe" mechanism. Controlling the Assault of Non- Solicited Pornography and Marketing Act of 2003 or CAN SPAM Act, 15 U.S.C. Section 7704; FTC's CAN SPAM Rule 16 C.F.R. Part 316; FTC guidance on CAN SPAM, such as https://www.ftc.gov/news-events/blogs/business-blog/2015/08/candid-answers-can-spam-questions.

Text message marketing requires express prior written consent in the form of affirmative agreement by email, text, click box, etc. to receive advertising or telemarketing messages on a specified phone number, and other disclosures. See Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227; Federal Communication Commission Rules and Regulations Implementing the Telephone Consumer Protection Act, 47 C.F.R. Parts 64 and 68.

m. After The Sweepstakes Ends

Certain states require that all prizes are awarded, and it is good practice to award all prizes to avoid questions about the sponsor's intentions and the truth of sponsor's advertising. Certain states also require publication or distribution of the list of winners, which also is good practice to confirm the integrity of the sweepstakes. The registration states of New York and Florida, as well as some other states, require that records concerning the promotion must be maintained.

n. Risk Exposure

Many sweepstakes involve small prizes or are offered to a limited audience or for a limited time, and may not raise challenges even if they do not comply with the law. Higher profile sweepstakes may get more attention and scrutiny. Risks of non-compliance or questionable compliance with FTC standards or any state's law may include an FTC enforcement action, state criminal prosecution (misdemeanor), state regulatory enforcement, class action litigation, and individual lawsuits.

2. Promotional Sweepstakes and Contests - Canada

a. All Provinces (Quebec has additional requirements, see B below)

1. Promotion: Promotional language may say "enter for a chance to win" or "you could win", but may not say "Enter to win" or simply "Win a [prize] …".

2. Skill Testing Question: A skill testing question must be included in any promotion, except if the promotion already involves a significant level of skill (e.g., a judged photo contest). The skill testing question must include a time-limited, 4-step question (+, -, x, ÷) applied to prospective winners from Canada.

3. No Purchase Necessary: A no-purchase entry method must be included, except for "games of skill".

4. Advertising: Minimum Disclosure ("Mini Rules"): In any promotional materials, include (in small print if desired):

    - "No purchase Necessary".
    - Eligibility
    - Number and approximate retail value of prizes;
    - Regional allocation of prizes, if any;
    - Odds of winning and any other factor that materially affects chances;
    - Requirement to correctly answer a skill testing question, and the type of skill testingquestion;
    - Contest close date;
    - Place where full contest rules are available (e.g. online).

5. Contest Rules ("Long Rules"): include the points set out above and how to enter.

b. Province of Quebec Only.

The rules for other provinces, above, apply to Quebec. In addition, the following requirements also apply to Quebec:

1. French Language: Contest rules, contest materials (e.g., entry page/form), promotional materials, must be provided in French.

2. Fees: If total prize value is over $100, the following fees apply for prizes offered to:

   - Quebec residents exclusively: 10% of total prize value;
   - contestants from Canada exclusively, including Quebec: 3% of total prize value.
   - any other group of contestants (e.g., North America), including Quebec: 0.5% of total prize value.

3. Rules: Contest rules must be accessible to the public and must include as a minimum:

   - conditions for entering the contest;
   - where entrants deposit or send entry forms;
   - deadline for entering the contest;
   - description of the method of awarding the prizes;
   - the number and a detailed description of the prizes offered and the value of each prize;
   - place, date and precise time the prize winner will be named;
   - media used to inform the winners of the prizes won;
   - place, date and deadline for claiming prizes, or where applicable, whether the prizes will be delivered to the winner;
   - whether a jury will be used to choose winners, where applicable;
   - nature of the skill-testing requirement;
   - how and where public may obtain text of rules;
   - a statement to the effect that the person for whom a publicity contest is carried on, his employee, representative or mandatary, a member of the jury and the persons with whom they are domiciled may not enter the contest;
   - the text: “Any litigation respecting the conduct or organization of a publicity contest may be submitted to the Régie des alcools, des courses et des jeux for a ruling. Any litigation respecting the awarding of a prize may be submitted to the board only for the purpose of helping the parties reach a settlement”.

4. Registration: For contests with a total prize between $100 - $1,000, the contest must be registered with the Régie des alcools, des courses et des jeux (RACJ) and fees paid 5 days prior to launch. For a total prize value between $1,000 and 2,000, the contest must be registered with RACJ and fees paid 30 days prior to launch. For a total prize value over $2,000, including without limitation contests where one prize exceeds $5,000 in value or the total prize value is $20,000 or

more, the contest must be registered with RACJ and fees paid 30 days prior to launch, and further submission obligations apply.

3. Promotional Sweepstakes and Contests - Mexico

Promotional sweepstakes are addressed at the federal level in Mexico under the Ley Federal de Juegos y Sorteos (Federal Gaming and Sweepstakes Law – "FGSL") and the Regulations of the Federal Gaming and Sweepstakes Law ("RFGSL"). There are no local or state laws or regulations addressing promotional sweepstakes in Mexico.

Under the FGSL, a permit from the Ministry of Interior (Secretaría de Gobernación) is required for a sweepstakes or drawing. If sweepstakes are performed without prior authorization, the Ministry may order closure of the premises where the sweepstakes is conducted in addition to any other penalty. Sweepstakes may not be conducted at premises located near schools or work centers. Sweepstakes may not promote the consumption of tobacco, alcoholic beverages, medicine or products that may be harmful to health under Mexican Health Law.

The RFGSL establishes the following categories of sweepstakes:

1. Sweepstakes with the sale of tickets;

2. Sweepstakes without the sale of tickets, where tickets are obtained by purchase of goods;

3. Instant win sweepstakes (scratch and win);

4. Sweepstakes related to commercialization systems;

5. Sweepstakes of symbols and/numbers; and

6. Sweepstakes broadcast through massive means of communication (subject to additional authorization of the General Director of TV, Radio and Cinematography).

Information required for issuance of a permit for a sweepstakes includes:

1. Name and domicile of the applicant;

2. Taxpayers identification number of the applicant;

3. Articles of incorporation of corporate applicant and power of attorney of its attorney in fact;

4. Address where the drawing will take place, and statement that any person may have access to the premises;

5. Detailed explanation of the mechanics of the sweepstakes, including the terms and conditions (Official Rules) the number and price of tickets and when they will be issued;

6. Description and value of the prizes (advertised value of the prizes may not be higher than their retail price);

7. Bond to guarantee payment of the prizes, issued by a Mexican bonding company in an amount equal to the total retail value of the prizes (for sweepstakes that take place in Mexico);

8. Geographical area covered by the sweepstakes;

9. Communications to publicize and promote the sweepstakes (all rules and advertising of sweepstakes shall be in Spanish, and abbreviated rules are forbidden); and

10. Where the results (winners list) will be published, including the publication date.

The winning tickets may be determined by any of the following methods:

1. Drawing;

2. Number allocation;

3. In accordance with the results of the Mexican Lotto; or

4. Special software that has been authorized by the Ministry of the Interior.

If the drawing is held in Mexico, an official from the Ministry of Interior must be present for the drawing. Unclaimed prizes must be delivered to the Ministry of Interior, for beneficial and pro bono purposes.

Following the drawing, the sponsor must report the following information:

1. Value of the prizes in Mexican pesos.

2. Mechanics used to select the winners.

3. How long the participants have to claim prizes.

4. Time and date in which the prizes will be awarded to winners within Mexico.

4. Promotional Sweepstakes and Contests - United Arab Emirates

In the UAE, sales promotions, including sales as well as competitions and prize draws (prize campaigns, sweepstakes, raffles, and instant prizes, etc.), are regulated on an emirate-by-emirate basis in each of the seven emirates that make up the UAE.

In Dubai and Abu Dhabi, the respective Department of Economic Development ("DED") requires entities planning sales promotions to first obtain a permit. If a promotion were to specifically target any of the other emirates, then it would be appropriate to considering seeking permits in such emirates.

The process for obtaining a sales promotion permit from the DED is straight-forward, and can usually be completed within a week or so. Information on the proposed promotion, such as its general nature, the nature, quantity and value of any prizes, and the period over which the promotion will be run, should be submitted to the DED along with a copy of the organizer's trade license and premises lease, an application form for the permit, and the official fee.

Official fees are relatively modest and can vary depending on aspects such as the duration of the promotion, the value of any prizes and the extent of any advertising.

Products such as tobacco, alcoholic beverages or pharmaceuticals are not permitted as prizes. Cash prizes are generally not permitted, although they may be permissible in circumstances where cash is a key aspect of the organizer's core business, such as a money exchange. There are no stated requirements with regard to any "skill" element. Raffle-type prize drawings, where participants simply purchase tickets, are generally not permitted. For competitions involving prize drawings, it is necessary to have an official from the DED in attendance at the prize drawing to act as an official witness.

Running a sales promotion without a permit can be subject to a penalty. The penalty can vary depending on whether the sales promotion is one for which a permit, if sought, would have been issued. If an unauthorized sales promotion (for a subject matter where a permit might have been granted) were to come to the attention of the DED, then penalties could range from around USD $500 to USD $6,800 for a first offense, and higher for subsequent offenses. If the subject matter is not something that the DED would have approved, then higher penalties are likely to apply.

The DED is unlikely to object to an on-line promotion that does not specifically target participants in the UAE. If the DED were concerned by the lack of a permit for such a promotion, then the DED most likely would ask the local telecommunications regulator to block access to the offending site.

There are two "formal" sale seasons in Dubai during which it is customary for retail stores to offer sales promotions. The Dubai Shopping Festival is an annual retail event during the month of January. The Dubai Summer Surprises is a separate retail event, held for 30 days between June and September. Sales promotions conducted during the Dubai Shopping Festival and the Dubai Summer Surprises are regulated by the Department of Tourism and Commerce Marketing, which issues permits for these sales promotions. Retail stores issue rules for their retail events during each sales season, which generally track the DED's rules.

If a sales promotion is limited to a specific free zone, then the sponsor should consider whether any requirements specific to that free zone may apply. The DEDs generally do not have authority to control activities in the many free zones located in the UAE.

Any business planning to run a sales promotion in the UAE should consider the regulatory regime relating to such promotions and seek to obtain a permit. It may be appropriate to get in contact directly with the relevant authority to discuss exactly how the laws and regulations may be applied to a particular sales promotion.

5. Promotional Sweepstakes and Contests - India

The requirements of conducting a sweepstakes or a contest will vary depending on the Indian state in which it is being conducted. Under the Indian Constitution, both the Central Government and the State Governments are empowered to frame legislation for prize competitions.

Under the laws of the Central Government, gambling is up to the state governments. Generally gambling involves an element of wager or betting wherein the participants have a certain amount of consideration at stake, and excludes games of mere skill or where skill is the dominant element. But some state definitions of gambling may include what would be considered sweepstakes in the United States. For example, in the state of Karnataka, most gambling is barred, and gambling is defined to include "a game of chance and skill combined and a pretended game of chance or of chance and skill combined, but does not include any athletic game or sport." The state of Tamil Nadu bars "prize schemes", defined as a means "whereby any prize or gift (whether by way of money or by way of movable or immovable property) is offered, or is proposed to be given or delivered to one or more person to be determined by lot, draw or in any other manner from among persons who purchase or have purchased goods or other articles from shops, centers or any other place whatsoever specified by the sponsors of the scheme or on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in relation to such purchasers."

Also under the laws of the Central Government, prize competitions are regulated under the Prize Competition Act, 1955 (the "Prize Competition Act"), but Section 20 of the Prize Competition Act allows State Governments to frame rules for regulating the conducting of prize competitions in their respective states. The Prize Competition Act controls and regulates puzzle competitions and any other incidental competitions such as crosswords and missing words competitions. Further, the Prize Competition Act provides for licensing and disclosure requirements for organizing prize competitions in India. Under the Prize Competition Act, a prize competition is defined as "any competition whether called a crossword prize competition, a missing-word prize competition, a picture prize competition or by any other name, in which prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words or figures." The Act only covers only those competitions in which success does not depend on any substantial degree of skill.

The Prize Competition Act bars prizes valued more than about USD $15 and caps the number of participants in a prize competition at 2,000 participants. The Act requires sponsors to get prior approval from the licensing authority, in addition to maintaining and submitting statements of accounts to the licensing authority. Since the procedure for obtaining approval and submission of accounts can be determined by the State Governments, this procedure may vary across states.

Any promotion in India is subject to the Consumer Act, 1986, which addresses unfair trade practices. Unfair trade practices would include offering a prize that purports to be, but is not, free to consumers; offering a prize without intending to deliver the prize; or requiring entrants to buy more services from sponsor for entry while giving the impression of free entry.

In collecting personal information from entrants in sweepstakes or contests, the sponsor must comply with the Information Technology Act, 2000 (the "IT Act") and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (the "IT Rules").

6. Promotional Sweepstakes and Contests - China

In China, prize promotions mean a business operator's (sponsor's) supplementary provision of goods, money, or other economic benefits to purchasers when selling products or providing services. Prize promotions may be conducted via the Internet, a television program, phone calls and text messages, etc.

Unlike the United States, China does not divide promotions into sweepstakes (based on chance) and contests (based on skill). Instead, prize promotions take the following two forms in China:

- Prize promotion with gift offers;
- Prize promotion with lucky draws (like sweepstakes).

Official Rules for prize promotions in China generally include following key elements:

1. Who is the business operator;

2. What is the prize;

3. Who may enter;

4. How to enter;

5. Selection of winners;

6. Winner notification;

7. How to claim the prize;

8. Technical issues; and

9. Legal statement (no cheating, force majeure, dispute resolution, governing law, limitation of liability, reference and link to Terms of Service and Privacy Policy, etc.).

Prize promotions are primarily regulated by Law of the People's Republic of China against Unfair Competition (Anti-Unfair Competition Law), Certain Provisions on Prohibition of Unfair Competition Acts in Prize Promotions and Advertising Law of the People's Republic of China (Advertising Law).

Here are several key factors in determining legality of prize promotions in China:

- **Information about the prize promotion shall be clear**. Business operators shall expressly and truthfully specify the prize type, winning probability, highest prize amount offered, terms for claiming prizes, the amounts of cash or the goods as prizes, or other related information that may affect the claiming of prizes. This information may not be altered after publication.
- **No fraudulent prize promotion**. Business operators shall not: (i) fraudulently claim that prizes are offered or falsely indicate the type, winning probability, highest prize amount offered, or the type, quantity, quality, methods of offering, and other matters; (ii) intentionally arrange internally designated persons to win prizes by improper means; (iii) intentionally fail to put the products or lottery tickets with prize-winning symbols in the market or fail to put them in the market together with the products and lottery tickets at the same time or intentionally put the products or lottery tickets with different amounts or prize symbols in the market at different times; or (iv) conduct other deceitful prize promotions.
- **Limitation of amount of prize**. The highest prize value for prize promotions with lucky draws shall not exceed around USD $8,000. Live Q&A challenges, which are popular in China (respondents have a few seconds to respond to trivia questions, and may share large prizes with others who correctly answer the questions) are basically treated as prize promotions, but they are not subject to the monetary cap that applies to prize promotions with lucky draws.
- **Abide by relevant rules from Advertising Law**, including articles 8, 9, etc. of Advertising Law.
- **Do not characterize prize promotion as lottery**. In China, only state authorities may offer a lottery.

Regulatory reporting is required for a retail store occupying a business area of more than 3,000 square meters that conducts prize promotions in relation to a store opening, festival celebration or store anniversary. The retail store must submit the promotion to the commerce department in the area where the business site is located (i.e., local Administration for Industry and Commerce) for recording purposes within 15 days after the end of the promotion. No bond or trust account is needed.

As to collection of personal information about entrants through the promotion, business operators shall: (i) keep the collected entrant information in strict confidence; (ii) abide

by “lawful, justifiable and necessary” principles; (iii) collect and use personal information by announcing rules for collection and use, expressly notifying the purpose, methods and scope of such collection and use; and (iv) obtain the consent of the entrant whose personal information is to be collected. When it comes to collection of personal sensitive information (such as ID, bank card information), business operators shall receive the explicit consent from the entrant. It is also necessary to have a privacy policy in place.

The local Administration for Industry and Commerce (AIC) is the supervising authority to investigate and penalize any unfair competition in the conduct of a prize promotion. If prize promotion is conducted via Internet, television etc., the Cyberspace Administration of China (CAC) and State Administration of Radio Film and Television also may review the promotion. If consumers question whether the number of winners is fabricated or other misinformation is provided, the relevant AIC may investigate misleading advertising and unfair competition. Also, promotions may be subject to content censorship. For example, the business operator of one of the most popular live Q&A challenges, Millionaire Fight, had to rectify itself under the supervision of the Beijing CAC because it listed Taiwan and Hong Kong as countries in its choices of questions, which violated the Cybersecurity Law.

Prizes won in prize promotions in China are taxed at a flat rate of 20%. Business operators should withhold this amount from prize awards, or may be subject to a substantial tax penalty.

PART II

IMPLEMENTING BRAND REPOSITIONING

Implementing Brand Repositioning[1]

All brands must periodically review their operations and assess whether they could benefit from repositioning their brand[2] to remain relevant and maximize their consumer base. Most franchise agreements are long-term agreements that remain effective for 15-20 years. During that time, franchisors may have several opportunities to adapt their brand position to maximize brand value. In the franchise context, the analysis of a brand repositioning decision centers on two factors: (1) what should be done to maximize the value of the brand from a *business* perspective; and (2) what may be done to maximize the value of the brand from a *legal* perspective (i.e. with respect to limitations in existing franchise relationships). This section will address how to evaluate the need for brand repositioning and the legal analysis that should be applied to each repositioning decision.

1. Planning

a. Evaluating Need for Brand Repositioning and Defining Scope

There are many reasons a franchisor may decide that brand repositioning is necessary: to reach a broader customer base, to focus its attention on a more profitable customer base, or simply to refresh a brand that has been overshadowed by new competition in the market. In a 2015 Harvard Business Review article, Niraj Dawar and Charan K. Bagga proposed a straightforward analysis for how companies can consider the impact of their branding using a two-factor analysis: (1) "centrality" (how representative a company is of an industry); and (2) "distinctiveness" (how much a company stands out from other brands).[3] These two factors are relevant to all brands and are mapped on a Centrality-Distinctiveness Map. The Centrality-Distinctiveness Map analysis may assist franchisors to determine how to effectively rebrand in relation to strengths, weaknesses and the positioning of a company's competitors. As an example, Coca-Cola is "central" in the soft drinks category while Tesla is "distinctive" in the car category. The aforementioned article concluded that companies that are more central have a higher sales volume, whereas companies that are more distinct may charge a higher price for their products. Each company that is considering repositioning its brand should evaluate its place relative to its competitors in terms of centrality and distinctiveness to determine the impact of a brand repositioning and the opportunity to increase brand value.

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[11] The author would like to thank Jake Heller, Thomas Woolsey III and Sarah Walters of Foley & Lardner LLP for their assistance in preparing Part II of this paper.

[2] This paper discussing modifications to a brand that extend beyond the upgrades to design and technology system upgrades common in franchise systems. "Brand repositioning" refers to a shift in the way the brand engages with its consumers, which may include marketing strategies, visual identity of the brand and adjustments to product and service offering to respond to evolving consumer preferences.

[3] A Better Way to Map Brand Strategy, Harvard Business Review. June 2015. Niraj Dawar and Charan K. Bagga.

b. Use of Data Analytics and Focus Groups

In order to understand how, when, and why to rebrand, it is essential to conduct focus groups and to analyze available data. A business decision based on objective data will result in a better understanding as to the type of brand repositioning that would best serve a franchisor and its business, as well as the viability of any brand repositioning efforts. Focus groups are generally a good way to concentrate objective data. There are two issues that the focus groups should always address: (1) consumers' opinions about the company relative to its competitors; and (2) consumers' opinions of the company's products. In addition to focus groups, management from the franchisor should take the time to visit franchisees and talk to employees and customers to identify issues that may be unique to specific markets and to discover inefficiencies and opportunities that may not been readily apparent through focus groups.[4] Direct communications and in-person meetings between a franchisor's management and franchisees will lead to valuable feedback that can supplement the work of the focus groups and data analytics, and sharpen the messaging that franchisors provide to franchisees. Once the franchisor has acquired and analyzed sufficient objective data regarding the existing operations of the business as a whole and the operations of the franchisor's competitors, it can move to the next stage and develop a Centrality-Distinctiveness Map.

A Centrality-Distinctive Map divides companies into four types of brands: aspirational, mainstream, peripheral, and unconventional.[5] Aspirational brands combine being central and distinctive and benefit from high sales volume as well as high pricing. Apple is a good example of an aspirational brand. Mainstream brands are central and well-known in their category, but less distinctive. These brands tend to track with customer tastes and maintain their position through advertising and avoiding big risks. Coca-Cola is a mainstream brand. Peripheral brands are not central or distinctive and are often purchased as substitutes for mainstream brands. The best examples of peripheral brands are generic drugs and generic "store brand" food products seen at grocery stores. Unconventional brands are distinctive, but not central. These brands are profitable despite their low volume because they can charge high prices. Burberry is an excellent example of an unconventional brand. Regardless of where a company sits on the Centrality-Distinctive Map, any brand repositioning effort must align with shifts in consumer tastes and preferences. It is not enough for a company to want to move to another category, what matters is whether moving to another category is worth the cost of doing so.

c. Franchisee Feedback and Buy-in

The final stage of the business planning process is to obtain franchisee feedback and buy-in in advance of a system-wide implementation of brand repositioning and new

[4] Focus Groups: Truly Useful in Brand Innovation?

[5] A Better Way to Map Brand Strategy, Harvard Business Review. June 2015. Niraj Dawar and Charan K. Bagga.

system standards. Advisory councils, focus groups with key franchisees, and surveys are often used to solicit feedback and increase franchisee cooperation. In many cases, several of these communication channels are used simultaneously to provide improved communication and to develop a more collaborative background to implement new changes. The success stories of Popeye's, OpenWorks, and Cinnabon illustrate the importance of franchisee feedback. Cheryl Bachelder, former CEO of Popeye's recognized that "no one has more skin in the game than our franchisees".[6] When Bachelder was appointed CEO of Popeye's, the company had been struggling for a decade and the relationship between the company and its franchisees was strained. In order to have the franchisees buy in to a new direction for Popeye's, Bachelder treated the franchisees as the customers and met with ten key franchisee leaders before rolling out proposed new changes.[7] The increased level of communication with franchisees served as the foundation from which Popeye's began to implement its national turn around.

Two additional franchise feedback success stories are OpenWorks and Cinnabon. OpenWorks is an integrated facility services franchise that solicited direct feedback from its franchisees before settling on a campaign to reach a new consumer base. The close relationship with OpenWorks franchisees mirrored the relationship that the franchisees had with their customers, and created a continuity of messaging from the top levels of the franchisor to the customer.[8] Cinnabon also used communication with its franchisees to assuage the franchisees' concerns that Cinnabon's decision to reposition its brand to launch a retail line of products that could potentially cannibalize franchisee profits.[9] After meeting with their franchisees, Cinnabon resolved the tension through an agreement with the franchisees that a portion of the license royalty payments would be contributed to a franchise advertising fund.[10] This type of collaboration with franchisees and creative thinking can be the difference between a successful brand repositioning effort and protracted conflict with franchisees that could involve legal challenges to the brand repositioning initiative.

Successful brand repositioning requires careful business planning and should be based on the best available objective data. Franchisors are best positioned to effectuate a brand repositioning when they take the time to understand their franchisees' concerns and unique business experiences and demonstrate to franchisees that brand repositioning strategies are based upon objective data and thoughtful planning. Communication with franchisees also helps to reduce the likelihood that franchisees will

[6] The CEO of Popeye's on Treating Franchisees as the Most Important Customers, Harvard Business Review, October 2016, Cheryl Bachelder.

[7] Id.

[8] OpenWorks Announces New "Improving Facilities and Pleasing People" Brand Identity. February 23, 2015.

[9] Brand Licensing Case Study: Cinnabon.

[10] Id.

object to brand repositioning initiatives and provides more objective data from which to make better brand related decisions.

d. Legal Considerations

In addition to the business considerations listed above, any company considering a brand repositioning must evaluate whether it has the legal authority to implement a brand repositioning strategy across its platform. In the franchising context, this analysis begins with a review of the franchise agreement.

Franchise agreements typically include three interrelated provisions: (1) a description of the franchisor's system and the standards applicable to the franchisor's business; (2) an acknowledgement whereby the franchisee agrees to comply with the franchisor's system standards; and (3) a reservation of rights that permits the franchisor to impose new system standards on franchisees directly through the franchise agreement, and/or through changes in supporting documentation such as a franchisor's operations manual. These three provisions serves as the contractual basis for franchisors to implement brand repositioning initiatives with their franchisees.

Franchisees can oppose changes to the system standards on many different grounds. Many claims are based on a franchisee's assertion that the new system standards would result in a loss of revenue or increased costs to the franchisee. Some system changes may be opposed on the grounds that they are anti-competitive in violation of state and federal law, especially where the new system standards seek to impose pricing controls. One of the most difficult challenges to overcome from a franchisor perspective is when franchisees allege that a brand repositioning effort does not constitute an evolutionary change to the brand, but instead the brand repositioning strategy is so transformative that the franchisees are asked to support a new concept in lieu of the original concept. In such case, franchisees may feel that the brand strategy is inconsistent with the concept they bought into when signing the franchise agreement.

A disconnect between franchisees and the franchisor with respect to brand repositioning can lead to relationship issues between a franchisor and the franchise system. When disputes between franchisors and franchisees result in a court proceeding, courts often begin their analysis by investigating if the brand repositioning activities were made in good faith – irrespective of whether the actions were expressly permitted in the franchise agreement. The "good faith" requirement has been applied creatively in many cases under both federal and state law. Some states, such as New Jersey, imply a covenant of good faith and fair dealing to all contracts and are receptive to arguments that a proposed brand repositioning initiative, and the corresponding modification of system standards, is subject to a good faith covenant.[11] Other courts rely instead on business judgement and impose a burden on a franchisee to prove that the franchisor's

[11] *See JOC, Inc. v. ExxonMobil Oil Corp.*, Case No. 08-5344 (FSH), 2010 WL 1380750 at *5 (D.J.J. Apr. 1, 2010), *dismissed as moot*, 507 Fed. App'x 208 (3d Cir. 2012) ((under New Jersey law, "a party's performance under a contract may breach [the] implied covenant even though that performance does not violate a pertinent express term") (citing *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 244 (N.J. 2001)).

business decision was not made in accordance with the requirements of the business judgement doctrine.[12] The application of the business judgement rule weighs heavily in favor of the franchisor as it requires the franchisee to establish three elements: (1) the franchisor did not perform its duties in good faith; (2) the franchisor did not use the level of care that a reasonable person would have made in making its decision; and (3) the franchisor acted in a way that it did not reasonably believe was in the best interest of the company (or franchise system) taken as a whole.

Although large franchise systems may be subject to inconsistent state law, franchisors are best positioned to prevail in any legal dispute if they can objectively show that they made an informed decision with respect to their business decisions, and that their decision making process was deliberative and based on a factual analysis.[13] In most cases where a franchise agreement expressly permits the franchisor to unilaterally implement new system standards, and the decision to implement the new standards was made in good faith, the franchisee will be bound by the new system standards.[14]

Of course an outcome that is superior to prevailing in a judicial proceeding is when the parties do not find themselves in court in the first place. The recommendations set forth in the "*Franchisee Feedback and Buy-in*" section of this article give franchisors the opportunity to communicate their objectives to franchisees and identify strategies to reduce the burden on franchisees to implement new system standards. Franchisors can further protect themselves by including mediation provisions in their franchise agreements and by integrating an arbitration provision to resolve any disputes between franchisors and franchisees.

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[12] *See In re Sizzler Restaurants International, Inc.*, 225 B.R. 466, 474 (C.D. Cal 1998) (finding that the inquiry under the business judgment rule 'is not an inquiry that looks to results, but more appropriately should examine the actual decision-making process to determine whether it was legitimate, i.e. honest or within accepted commercial practices' and, as applied in *In re Sizzler*, the business judgment rule bars the use of the implied duty of good faith and fair dealing to second-guess business decisions made by the franchisor or manufacturer); *see also Svela v. Union Oil Co. of Cal.*, 807 F.2d 1494, 1501 (9th Cir. 1987) (court cannot second-guess franchisor's economic decisions if made in good faith); *Burger King corp. v. Agad*, F. Supp. 1217, 1222 (N.D. Ga. 1996) (implied covenant of good faith cannot be used to second guess franchisor's legitimate business decisions.).

[13] Jeffrey E. Selman, "Applying the Business Judgment Rule to the Franchise Relationship," 19 *Franchise L.J.*, 111, 113-14 (2000) (application of the business judgment rule in distribution and franchising would have five key elements, as follows: "first, the rule would protect decisions made by the franchisor. Second, the rule would presume that a franchisor acted with disinterestedness and independence in making a decision that affects an individual franchisee or the franchise system as a whole. Third, under the rule, a franchisor's decision would presumably be made after a reasonable effort to become familiar with the relevant and available facts. Fourth, the rule presumes that a franchisor made the decision in good faith and with a reasonable belief that it was in the best interests of the franchise system. Finally, the rule would presume that a franchisor did not abuse discretion in making a decision.")

[14] *See Huang v. Holiday Inns, Inc.*, 594 F. Supp. 352 (C.D. Cal 1984) (where court denied franchisee's claim that termination was wrongful because Holiday Inn's modifications to its policies (which were not followed by franchisee and served as the basis of termination) were unenforceable); *Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.*, 662 F.Suppl 1499 (S.D.N.Y. 1987) (franchisee had no claim against the franchisor for changing the company's core product).

2. The Execution of a Successful Brand Repositioning Initiative

a. Execution of Brand Repositioning Initiatives from a Business Perspective

A franchisor should take the following actions prior to repositioning its brand: (1) identify several early adopters that are likely to experience success with the brand repositioning and/or new system standards and (2) communicate the advantages of the brand repositioning and/or new system standards to the franchise sales team, dealers, and distributors, as early communication can increase the likelihood that franchisees will embrace the brand repositioning initiative.

Once the franchisor has determined that brand repositioning is necessary, it must determine how to implement the changes throughout its system, typically in connection with the modifications and upgrades required in most forms of franchise agreement. A staggered implementation of a brand repositioning initiative affords the franchisor the opportunity to test its brand repositioning strategy in the marketplace and evaluate the success of the strategy in real time. A staggered implementation also provides the franchisor the ability to identify challenges early in the brand repositioning initiative and refine the process as necessary. The brand repositioning initiative implemented by Old Chicago serves as a good example of a phased brand repositioning strategy. In 2013, Old Chicago executed a successful rollout of their brand repositioning campaign through a phased test and retest campaign as opposed to a simultaneous and system-wide rollout.[15] The Old Chicago brand repositioning campaign was implemented over the course of two years, which allowed Old Chicago the opportunity to ensure that their brand repositioning efforts were having the desired effect before requiring that all franchisees to fund the brand repositioning initiatives at the store levels.[16] It therefore is advisable to take the time necessary to ensure that the brand repositioning campaign is successful and to provide objective data of the success to franchisees to reduce resistance from the franchisees.

Regardless of the timeline for the rollout, it is important the branding requirements are implemented strategically. Testing branding changes in the marketplace before a system-wide implementation will result in a better branding strategy and reduced franchisee opposition. Generally franchisors are best served by communicating a timeline for each phase of the brand repositioning initiative, particularly if the brand repositioning is staggered by geographic regions, to assuage concerns that the rebranded units will have an adverse impact on the sales of units that continue operating under the original brand until such time as the franchisees of those units have the opportunity to complete the rebrand. It is important that the marketing, purchasing, training, and operations of both the franchisor and each franchisee are aligned to maximize efficiency and to help ensure the franchisees do not believe that they are overburdened. It is also essential that the brand repositioning initiative is not perceived

[15] The New Old Chicago: Transforming a 37-Year-Old Brand.

[16] Id.

as the franchisor "playing favorites". Finally, some franchisors have found success with their brand repositioning initiatives by providing financial incentives to franchisees to reduce the financial burdens associated with the brand repositioning efforts.

b. Enforcement Strategy From a Business Perspective

The best strategy for enforcement of the brand repositioning initiative mirrors the best practices from the planning and feedback stages of the process. The franchisor should continue to communicate with franchisees after the brand repositioning efforts have been fully implemented across the system to establish a means to monitor the success of the brand repositioning initiative.

Advisory councils permit franchisors the ability to communicate to franchisees in a consistent manner and to respond to questions and disseminate information and opinions efficiently. Franchisors that have a franchise advisory council should continue to consult it after the brand repositioning initiative. Generally it is best practice for franchisors that do not have an advisory council to create one. The use of franchise councils allow franchisors an opportunity to learn whether the brand repositioning initiatives are having the intended consequences, and also serve as a basis for franchisees to discuss the challenges they have encountered with brand repositioning efforts. In addition, franchisors should consider the implementation of regular roundtables with groups of franchise owners. Roundtable sessions provide an opportunity for franchisees to share their best practices with each other and foster positive relationships within the system. Finally, franchisors should continue to invest in third party research and surveys to supplement the franchisor's market awareness and combine that information with franchisee's knowledge of what is happening at the business level.

Ultimately, franchisees need to comply with a brand repositioning initiative in order for it to be successful. Franchisees that refuse to comply with a brand repositioning initiative may need to be terminated. Termination can result in a loss of short-term and long-term revenue and make the system less appealing for new franchisees because the termination information will be provided to prospective franchisees in the franchise disclosure reports. As a result termination should be a last resort where other methods of dispute resolution are available and commercially reasonable.

c. Legal Considerations

A core element of a franchise is a license to use a trademark. The Trademark Act of 1946, 15 U.S.C. § 1051 *et seq*. (the "Lanham Act") grants trademark owners the right to control the quality and uniformity of the goods and services offered under a franchisor's marks. In addition, courts have held that the Lanham Act imposes a duty on franchisors (as licensors) to oversee the quality of a licensee's products and services.[17] Section 45

[17] "The Lanham Act requires supervision of trademark licensees at the expense of abandonment of the trademark." *Oberlin v. Marlin A. Corp.*, 596 F.2d 1322, 1327 (7th Cir. 1979); *see also Edwin K. Williams& Co. v. Edwin K. Williams & Co.-East*, 542 F.2d 1053, 1059-60 (9th Cir. 1976)*, cert. denied*, 433 U.S. 908

of the Lanham Act contains language that clarifies that the Lanham Act is intended to preempt inconsistent state law.[18] In Spartan Foods Sys., Inc. v. HFS Corp., the Fourth Circuit held that Section 45 of the Lanham Act preempted any provision of state law that would otherwise erode the trademark protection afforded by the Lanham Act.[19] Although franchisors have support in the existing statutory framework and well-established case law to impose their brand repositioning efforts on franchisees, franchisees may oppose brand repositioning efforts in a number of different ways.

Franchisors should be aware that in most cases, franchisees allege counter-claims against franchisors that may be costly to overcome when faced with termination notices or costly brand repositioning initiatives. Franchisees typically allege wrongful termination, a breach of the implied covenant of good faith and fair dealings, and violations of various state laws. However, some states including Arkansas, New Jersey, and Wisconsin have statutory guidelines that specifically provide that failure to conform to a franchisor's system standards constitutes good reason to terminate a franchise Agreement[20]. Notwithstanding the favorable federal and state laws to support a franchisor's decision to impose a brand repositioning initiative or terminate a franchise agreement, the best practice for any franchisor is to comply with the terms of the franchise agreement and well as applicable state laws. Specifically, states generally require franchisors to formally notify a franchisee that it is in default of the franchise agreement and provide a cure period before a franchisor may terminate the franchise agreement. As an alternative to termination of the franchise agreement, franchisors may elect not to renew the franchise agreement. An unpublished case decided by a California appellate court in 2012 held that Mail Boxes, Etc.'s and UPS' ability to require franchisees to sign a new franchise agreement which reflected a repositioning initiative and significantly revised system standards was appropriate.[21] In conclusion, while significant support is available to authorize a franchisor to impose new system standards and effectuate a repositioning of their brand, care should be taken to minimize the risk of a dispute with franchisees and where disputes occur, franchisors should follow the steps outlined in this section to increase the likelihood of a favorable decision.

(1977) ("A trademark licensor must maintain control over the quality of the finished product or service to guarantee to the public that the goods or services are of the same, pre-license quality.")

[18] 15 U.S.C. §§ 1051, 1055 (1999).

[19] *Spartan Foods Sys., Inc. v. HFS Corp.,* 813 F.2d 1279, 1284 (4th Cr 1987).

[20] *See* Ark. Code Ann. §4-72-202(7)(A); N.J. Stat. Ann. §56:10-5; and Wis. Stat. §135.02(4)(a).

[21] No. B226112, 2012 WL 90083 (Cal. Ct. App. Jan. 12, 2012), unpublished/non-citable (Jan. 12, 2012), *review denied* (Apr. 25, 2012).

3. Conclusion – Two Best Practices for Before and After brand repositioning

a. Succession Planning (Before)

Regardless of buy-in obtained by a franchisor prior to implementing its brand repositioning strategy, there likely will be franchisees that will still desire to exit the system. Having an established success plan to assist these franchisees is exiting the system is advisable to minimize the likelihood of disputes that may arise with such franchisees who may feel trapped in a franchise system that is evolving in a direction that the franchisee does not support. Succession planning can include financial planning techniques throughout the relationship which allow the franchisees to preserve value that they have created and can facilitate franchisees' transition of the business to a new owner. This approach fosters goodwill among franchisees and results in less disruptive transitions when franchisees leave the system.[22] In addition, joint ventures with franchisees and a selected key employee of franchisee are also a viable type of succession plan that franchisors use to ensure orderly succession of the franchisees' businesses. This type of arrangement allows a key employee to obtain "sweat equity" in the franchise and in comes cases, may provide the employee with the rights to acquire the franchise.[23] Transitions that result from franchisee-key employee joint ventures ensure that the franchisor has a well-trained franchisee ready to operate business from a current franchisee and reduces the risk profile associated with transition events.

b. FDD Considerations (Before)

Franchisors should take a close look at the initial investments required as a result of a brand repositioning strategy. If initial investment costs are precipitously higher due to a brand repositioning than the costs associated with the prior brand model or design, the franchisor could unwittingly walk into a situation where the Item 7 and Item 19 estimates used in the franchisor's Franchise Disclosure Document (FDD) are no longer applicable. The implication of this situation is that the old Item 7 and Item 19 estimates cannot be used by the franchisor to sell franchises under the repositioned brand model or design. The franchisor must determine and prove out new Item 7 and Item 19 numbers before those estimates can be used to sell franchises with the new model or design.

c. Update Trademarks and IP (Before)

Franchisors should consult an attorney to ensure that all intellectual property issues are properly addressed. Failure to properly execute the trademark clearance and registration process can forestall any brand repositioning initiative. It is also important to run searches for available domain names and confirm they are available since new website addresses may be utilized as part of a brand repositioning initiative.

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[22] Planning for Franchise Succession, Asset Protection. Vol. 16 No 4. Edward A. Gramigna, Jr. and Kristen A. Curatolo.

[23] Id.

d. Legal (After)

Franchisors should ensure that their franchise documents and the associated document suites that they use in their business reflect current laws and afford them the maximum protections available under applicable law. Franchisors should maintain their market awareness throughout the brand repositioning process so that they have a justification to made additional changes to the brand and associated system standards and have an ability to overcome claims that a franchisor's decisions were not made in good faith and in accordance with the requirements of the business judgement rule. Finally, franchisors should seek to avoid disputes in front of a judge and jury when possible and seek to resolve disputes through informal councils as well as through alternative dispute resolution arrangements.

THE INITIAL PUBLIC OFFERING PROCESS

KEITH TOWNSEND, KING & SPALDING LLP

MAY 2018

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INTRODUCTION

When a company wishes to “go public”, it faces a complex and challenging process. The IPO requires significant preparation and planning among the issuer, its officers and key employees, the underwriters, the accounts and legal counsel. In order to properly executed, each of the participants must understand the time and effort necessary to fulfill their respective tasks and responsibilities. While no single outline or overview can fully cover the broad range of complex legal and other issues involved in the IPO process, set forth below is a high-level summary of some of the key decision-making and process considerations.

I. THE DECISION TO MOVE FORWARD

A. Why the IPO?

1. Access to capital, with more flexible terms
2. Enhanced corporate reputation and client recognition
3. Liquidity for investors
4. M&A currency
5. Additional incentives to executives and employees
6. Coming out party / branding event

B. Why Not?

1. Public company liability, scrutiny
2. Quarter-to-quarter performance expectations -- little room for error
3. SEC reporting burden / expense / significant public disclosure requirements
4. Sarbanes-Oxley burden / expense
    (a) Significant increase in board and committee responsibilities
    (b) CEO / CFO certifications required for quarterly and annual SEC reports
    (c) Internal control review and audit (subject to JOBS Act exceptions)
5. Reduced control: management / stockholders
6. Sales of company stock by insiders restricted

II. GETTING READY TO GO PUBLIC

A. Putting the Working Group Together

1. Company management

   (a) CEO

   (b) CFO and Principal Accounting Officer

   (c) Other working group personnel (e.g., “point person” to coordinate due diligence among underwriters, company counsel, and underwriters’ counsel)

2. Selecting the managing underwriter(s) - factors to consider:

   (a) Firm’s interest in your company

   (b) Firm’s knowledge and experience in your industry

   (c) Competitor relationships

   (d) Recent transactions / references for the proposed team

   (e) Research capability / research track record in industry

   (f) IPO track record

      - organizational meeting to submission / filing
      - submission / filing to pricing
      - post-IPO performance

   (g) Marketing plans

      - Institutional distribution capabilities
      - Retail distribution capabilities
      - Retail / institutional mix
      - Foreign distribution capabilities / expectations
      - Roadshow expectations
      - Specific target investors
      - Investment thesis; marketing “story”

- Investor concerns regarding IPO; response
- Risks in execution

(h) Valuation expectations

- Key metrics (e.g., Adjusted EBTTDA, Same-Store-Sales)
- Important comparable companies
- Company vs. comparable companies

(i) Thoughts on size of offering

(j) Thoughts on selling stockholders; amount; marketing impact

(k) Underwriting discount

(l) Thoughts on timing

(m) Discuss audit plans

(n) Support post-IPO

3. Company counsel
4. Independent accountants
5. Financial printer

B. Other Preliminary Tasks: Corporate Housecleaning

1. Bring in needed personnel

(a) Additional senior management

(b) Independent board members

(c) Audit committee members with financial expertise; at least one "audit committee financial expert"

(d) Others

2. Identify any accounting issues

(a) Availability of prior-year audits

(b) Acquisition financial statements

(c) Pro forma financial statements

(d) Consider preliminary communication with SEC

(e) Revenue recognition issues are critical to SEC

(f) Determine the company's "critical accounting policies"

(g) Identify any unusual accounting policies

(h) Tax issues

(i) Consider JOBS Act exemption

3. Evaluate Structure

(a) Potential Up-C Structure (See **Exhibit A**)

(b) Dual-class stock

4. Discuss issues with underwriters (see above)

5. Identify / discuss legal issues with company counsel

(a) "Gun-Jumping" -- SEC rules do not allow a company to "hype" itself in advance of an IPO. Company should review with counsel any recent advertising, press releases, trade show presentations, etc.

- See **Exhibit B**

(b) "Cheap Stock" -- Issuances of company stock within the 6 months preceding an IPO may raise "integration" issues. Sales within the preceding 12 months at prices substantially below the IPO price can raise other legal, accounting and marketing disclosure issues. Company should review with counsel any recent stock issuances.

(c) Amend corporate charter and bylaws to add "public company" provisions

(d) Confidential treatment of documents filed with SEC

(e) Consider / implement defensive mechanisms

(f) Stock option / benefit plans / employment contracts

(g) Capital structure

- Desirable for complex private company structures to fall away upon IPO

- Consider need for stock split

(h) D&O liability insurance

(i) General company insurance coverage

(j) Consents required under any contracts, loans, etc.

(k) Analyze any registration rights

(l) Review any pending / threatened claims *I* litigation

(m) Review related party transactions

(n) Establish appropriate board committees

(o) Environmental issues

(p) Governance documents / issues

6. Consider need for new or increased line of credit

III. THE IPO REGISTRATION PROCESS

A. Registration under the Securities Act of 1933

1. Securities Act is designed to ensure availability of adequate and reliable information about securities offered to the public

2. Generally, unlawful to offer or sell securities without registration under the '33 Act and delivery of prospectus, unless applicable exemption

3. To register under the '33 Act, a Registration Statement is filed with, and declared effective by, the SEC. It consists primarily of (1) the prospectus and (2) exhibits (such as the Company's material contracts).

B. Purposes of prospectus

1. Marketing document to attract investors

2. Disclosure document to avoid liability

C. Liability Considerations

1. Personal Liability -- In addition to liability of the company, directors and officers of the company can have personal liability in connection with the offering.

2. Basis of Liability -- Generally, there is potential liability for errors or omissions in the Registration Statement filed with the SEC and the Prospectus distributed to investors.

3. Due Diligence is the Best Defense -- Officers, directors, underwriters, accountants and controlling stockholders can avoid liability if they can show that they conducted a "due diligence" investigation meeting the standards set forth in the securities laws. The company, however, is strictly liable, thus heightening the need to ensure that no such errors or omissions exist.

D. What is "Due Diligence"?

1. Verifying that all information in the Registration Statement / Prospectus is correct

   (a) Back-up for all statements

   (b) Comfort Letter from accountants for financial information

   (c) Legal opinions

2. Making sure that there is no "material" information missing from the Registration Statement / Prospectus

   (a) Review of company documents

   (b) Visits to company facilities

   (c) Discussions with management

   (d) Officer and director questionnaires

3. Sample Due Diligence List—See **Exhibit** C

E. The Registration Timetable

1. Overview (typically *5* to 7 months process)

   (a) Drafting / due diligence (typically 2 to 3 months)

   (b) SEC review and comment (typically 2 to 3 months)

   (c) Marketing / Roadshow (two weeks)

   (d) Effectiveness / Pricing / Closing (one to two weeks)

   (e) Post-effective Period

2. Organizational Meeting; a one-day kick-off meeting to:

   (a) Introduce the IPO team

   (b) Conduct preliminary management interviews

   (c) Discuss marketing, legal and accounting issues

   (d) Set a proposed timetable for drafting and submitting / filing the Registration Statement

   (e) Set up due diligence interviews / site visits

   (f) Management presentation

   (g) Sample Organizational Meeting Agenda—See **Exhibit D**

3. Drafting the Registration Statement

   (a) Typically, approximately 6 "all-hands" drafting sessions prior to filing

   (b) Drafting process typically 2 to 3 months

4. Send the Registration Statement to Printer / Submit to SEC

   (a) Printer typesets Registration Statement

   (b) Company Counsel confidentially submits Registration Statement to the SEC via EDGAR (Emerging Growth Companies)

5. SEC Review

   (a) Virtually all IPOs are reviewed by the staff of the SEC

   (b) Typically 2 to 3 months from filing to completion of SEC review process

   (c) SEC ostensibly reviews only the adequacy of the disclosure, not the merits of the offering

      - Review of financial presentation
      - Review of compliance with form
      - Review of disclosure of insider transactions and other material points

   (d) Preliminary, or "red herring," prospectus may be distributed during SEC review

(e) Must file registration statement (and any previous amendments thereto) at least 15 days prior to launch of roadshow

6. SEC Comments

(a) Staff of SEC will provide written comments on Registration Statement

(b) Amendments to the Registration Statement will be submitted and ultimately filed in response to SEC comments until all outstanding disclosure issues are resolved

7. Roadshow

(a) Coordinated by underwriters

(b) Senior management presentations to potential investors

(c) Marketing process

8. Going Effective / Pricing / Closing

(a) When the SEC staff is satisfied that all issues have been resolved, it declares the Registration Statement "effective"

(b) Company and underwriters agree on a price per share

(c) The Underwriting Agreement is signed which formally commits the underwriters to buy the shares

(d) Final Prospectus is printed and sent to investors with confirmations

(e) Shares begin trading on stock market

(f) Closing: shares delivered / money wired

F. What is in the Registration Statement?

1. The Registration Statement consists of two parts:

(a) Part I consists of the Prospectus

(b) Part II consists of information not circulated as part of the Prospectus

2. Information in the Prospectus

(a) Summary

(b) Risk Factors

(c) History of Company

(d) Use of Proceeds

(e) Dividend Policy

(f) Dilution

(g) Capitalization

(h) Historical Financial Data (five years)

(i) Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A)

(j) Description of Business

(k) Management and Compensation (requires detailed disclosure of all compensation paid to executive officers, including perquisites), however disclosure requirements for emerging growth companies are much more limited

(l) Transactions with Insiders

(m) Share Ownership

(n) Description of the Offering and the Securities

(o) Audited Financial Statements (2 years for emerging growth company)

(p) Acquisition Financial Statements, if applicable

(q) Pro Forma Financial Statements, if applicable

G. Roles of the Members of the Working Group

1. Management

(a) Conduct their own due diligence investigation

- CEO, CFO and board of directors will sign Registration Statement with potential personal liability
- Review and comment on each draft of the Registration Statement and satisfy themselves, with the help of company counsel, that disclosure is adequate

(b) Participate in drafting sessions on Registration Statement and provide information necessary for disclosure

(c) Hold management interviews with underwriters, underwriters' counsel and company counsel

(d) Lead tours of company facilities for members of the working group

(e) Prepare for roadshow with underwriters

(f) Negotiate price and other terms of Underwriting Agreement

2. Company Counsel

(a) "Quarterback" in preparing the Registration Statement

- Prepare first draft of Registration Statement with help from company management
- Primary responsibility for non-financial portions of the Registration Statement
- Keep master draft of the Registration Statement and coordinate transfer to printer
- Help the company shape the disclosure in the Registration Statement to ensure that it satisfies dual purposes of an effective marketing and disclosure document
- Coordinate the due diligence efforts of all members of the working group to keep expenses down and keep the deal on schedule
- Conduct due diligence on the Company to prepare to deliver legal opinion to the underwriters at closing of the offering

(b) Chief intermediary with SEC

- Coordinate necessary submissions / filings with the SEC
- Draft / coordinate responses to SEC comments
- Speak to members of the SEC staff regarding particular disclosure issues
- Coordinate getting Registration Statement declared effective
- Prepare the company for post-IPO requirements of being a public company

(c) Advise company on corporate matters

- Reincorporation to new jurisdiction, if necessary
- Revise charter and bylaws to add "public company" provisions
- Prepare stock option plans or other compensation plans
- Housekeeping of corporate records
- Defensive measures
- Board resolutions
- Governance matters

(d) Miscellaneous

- Negotiate Underwriting Agreement on behalf of company
- Apply for stock market listing
- Render legal opinion to underwriters
- Coordinate with transfer agent
- Coordinate closing on behalf of company

3. Managing Underwriters

(a) Provide input on "marketing" side of Registration Statement

(b) Conduct due diligence

(c) Facilitate any "testing the waters" interactions

(d) Set up the roadshow; market the offering

(e) Manage the underwriting syndicate

(f) Negotiate pricing with company management

(g) Support stock through after-market stabilization and over-allotments

4. Independent Accountants

(a) Audit financial statements in the Registration Statement and ensure that financial statements comply with SEC requirements

(b) Respond to underwriters' due diligence inquiries

(c) Participate in drafting MD&A and presentation of financial information in Registration Statement

(d) Issue Comfort Letter

(e) Respond to SEC accounting comments

(f) Discuss specific accounting comments with SEC

(g) Assist company with post-IPO financial reporting obligations

5. Underwriters' Counsel

(a) Help the underwriters establish their due diligence defense

(b) Assist company counsel in drafting the Registration Statement and responding to SEC comments

(c) Prepare and negotiate the Underwriting Agreement and other underwriting documents

(d) Negotiate / coordinate accountants' Comfort Letter

(e) FINRA review of underwriting arrangements

(f) Compliance with applicable blue sky law

(g) Generally "shadow" company counsel

(h) Draft closing documents and coordinate closing

(i) Provide legal opinion to underwriters

6. Financial printer

(a) Run changes on Registration Statement in preparation for SEC submission / filing

(b) Coordinate all color work; assist in layout of inside cover of Prospectus

(c) Distribute interim drafts to working group

(d) Print / distribute preliminary and final Prospectuses

7. Sample IPO Checklist—See **Exhibit E**

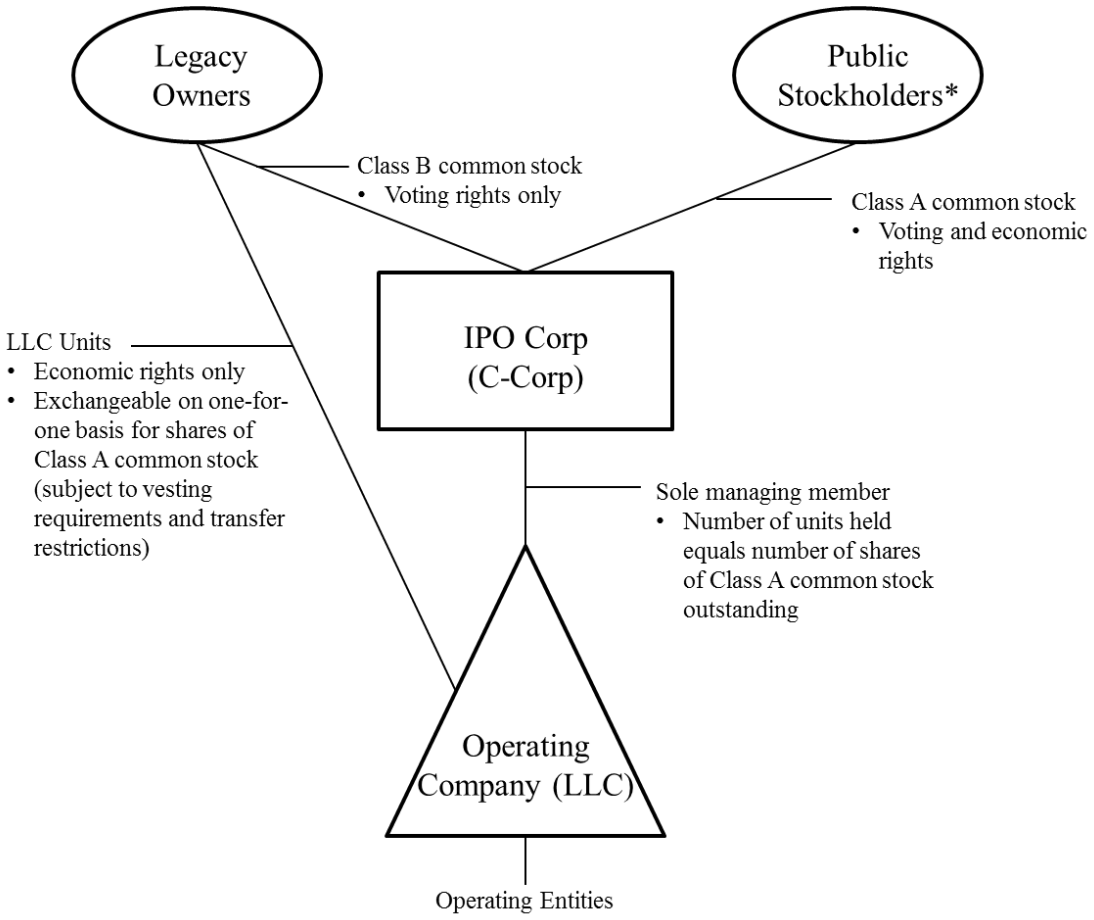
Exhibit A

Up-C Structure

Up-C IPO Structure Overview

Overview

In the Up-C structure, legacy owners continue to hold a direct interest in units in a legacy Operating Company LLC, which preserves pass-through tax treatment. A new public company is formed and sells common shares in an IPO. The proceeds are used by the public company to invest in a managing member interest in the LLC (which then uses the proceeds to invest in the business). Post-IPO, the LLC units are exchangeable on a 1-for-1 basis into public company common shares. The exchange is generally taxable, but exchanges typically only occur upon a disposition, allowing for deferral on the part of the legacy business owners. Any exchange will result in a proportional tax basis step-up for the public company, which would otherwise not be available in a more traditional full-on incorporation of the business pre-IPO. Through a negotiated tax receivable agreement, existing owners retain a portion of the benefits associated with the step up (generally ~85%) and receive cash payments from the public company following exchanges. Below is an illustrative graphical representation of the typical Up-C IPO structure:



- A new C corp is created (typically with at least two authorized classes of stock) and issues shares to the public ("IPO Corp."). A portion of the proceeds is used to purchase interests in the Operating Company from the legacy owners (and a portion may also be invested directly into the Operating Company).

- Legacy Owners will receive Class B shares (voting rights) in IPO Corp, and can flip-up and exchange their units (on a taxable basis) for Class A IPO Corp. shares when they desire liquidity.
    - In certain deals, IPO Corp. can deliver shares or cash (protects Section 382 trigger).
    - The exchange agreement may also contain a PTP restriction.
- Up-C has been used in well over 40 IPOs since 2011.
    - The Up-C structure may be the most efficient IPO structure whenever the operating business is conducted in pass-through form.
- Tax benefits relating to Up-C structure
    - Not all income of the Operating Company is subject to an entity level tax; legacy owners can continue to hold interests in the flow-through entity.
    - Flow-through of income character.
    - Allocated income will increase legacy owners' basis in their units, reducing gain on future sales.
    - As described below, legacy owners avoid upfront tax and ultimately can deliver a basis step-up to the IPO Corp. in connection with a taxable sale or exchange of their units with the IPO Corp.

Tax Receivable Agreements

- The tax basis step-up generated in the Up-C structure, and possibly certain other tax attributes, may be subject to a tax receivable agreement.
- These have become the key focus of IPOs employing the Up-C structure.
- For any year in which the partnership has a Section 754 election in effect, IPO Corp will obtain a basis step-up for the portion of the partnership assets it is treated as acquiring (Section 743(b)).
- Other attributes subject to the tax receivable agreement may include pre-IPO NOLs of any blocker corporations merged into the IPO Corp.
- If much of the value in the historic business is attributable to goodwill, then step-up will be reflected in Section 197 intangibles.
- Bankers believe that the public does not value these basis step-ups (and amortization) inside the IPO Corp (i.e., the public offering proceeds will not adequately reflect the present value of the tax benefits). Therefore, the corporation agrees to pay 85% of the resulting tax benefit to the selling partners under a "Tax Receivables Agreement" ("TRA").
    - Payments under the TRA are treated as additional purchase price (which creates additional basis) or imputed interest.
    - If business existed prior to August 10, 1993 need to consider anti-churning rules of Section 197(f).
    - 2007 legislation regarding character of income upon sale where a TRA is in place.
        - Some TRAs contained a provision allowing partners to terminate the TRA if such legislation were enacted.
- Benefits under the TRAs are generally computed on a "with and without" basis, with special provisions dealing with Change of Control transactions.
- Some TRAs pay the existing owners for "existing basis" with respect to intangible assets existing at the time of the IPO.
- Must ensure that debt agreements at the Operating Company level allow for payments under the TRA.
    - Explicitly allow for payments.
    - Draft the permitted tax distribution provision in a way that allows for sufficient payments – e.g., tax distributions computed without 743(b) adjustments.

Exhibit B

Publicity Guidelines

KING & SPALDING LLP

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Main: 404/572-4600
Fax: 404/572-5100
www.kslaw.com

MEMORANDUM

TO: [XYZ Corporation]

FROM: King & Spalding LLP

DATE: November 2016

PRIVILEGED AND CONFIDENTIAL: SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

RE: Initial Public Offering – Communications with the Public

As [XYZ Corporation] prepares for an initial public offering (the "Offering") of stock to be registered under the Securities Act of 1933, as amended (the "Securities Act"), it must be aware of certain restrictions against communications with the public. The Securities Act significantly limits publicity and communications that could impermissibly condition the market for a public offering. In this Memorandum, we discuss these restrictions and provide some guidelines for maintaining compliance with the limitations of the Securities Act.

We briefly summarize the legal restrictions placed on [XYZ Corporation]'s ability to engage in publicity and suggest guidelines for avoiding problems. In particular, the guidelines cover dealing with the press, customers, employees, financial analysts and others. As [XYZ Corporation] pursues the Offering, all corporate communications of [XYZ Corporation] must be considered in light of these guidelines.

We have set forth a summary of the guidelines in this memorandum recommended for implementation. In Exhibit A to this memorandum, we provide greater detail on the restrictions of the Securities Act and the guidelines.

Publicity Guidelines

Press Releases

- Keep press releases ordinary course; do not mention the Offering.
- Beginning at the organizational meeting, review drafts of each press release with us and counsel for the underwriters to confirm that an applicable safe harbor exists for the contents of such releases.
- Discuss any forward-looking statements with us.

Media Contacts

- Do not discuss the Offering with the media.
- Beginning at the organizational meeting, discuss with us and counsel for the underwriters before granting any interview requests.
- Take reasonable steps to ensure that any interview will not result in publication during the 30-day period prior to filing a registration statement.
- Do not discuss future operations or make predictions regarding [XYZ Corporation], especially with respect to business or financial performance.
- Do not discuss the attractiveness of [XYZ Corporation] as an investment.
- Maintain ordinary course contacts with the media; but use caution. Beginning at the organizational meeting, confirm with us and counsel for the underwriters that applicable safe harbors exist prior to engaging in such contacts.

Financial Analysts

- Do not independently initiate contact with financial analysts.
- All financial analyst contacts should be organized through the managing underwriters.

Employees

- Do not discuss the Offering with employees other than those in the "need-to-know" group.
- Do not suggest to anyone, including employees, that they might purchase the stock in the Offering.

Potential Investors

- Refer all incoming investor inquiries to the managing underwriters.

Website

- Review [XYZ Corporation]'s website to locate any potential "free writing prospectuses" (generally written offers to sell, broadly defined) (including hyperlinks), identify and archive historical information and comply with these guidelines.
- Discuss with us and counsel for the underwriters before making any substantive changes to [XYZ Corporation]'s website.

Significant Stockholders

- Actions by significant stockholders can be attributed to [XYZ Corporation].
    - Accordingly, representatives of significant stockholders should adhere to the same guidelines.

Every member of senior management, the [XYZ Corporation] team and every other spokesperson for [XYZ Corporation] should read this memorandum.

Exhibit A

THE THREE OFFERING PERIODS

The Offering will involve filing with the Securities and Exchange Commission (the "SEC") a registration statement on Form S-11. The registration statement will initially be filed with the SEC through its Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR") and will ultimately become public via EDGAR. Once the SEC has finished its public review of the registration statement, but prior to the pricing of the Offering, [XYZ Corporation] and the underwriters will request, and the SEC will declare, the registration statement "effective." This declaration of effectiveness will permit sales of the stock under the prospectus that forms a part of the registration statement.

The key events of filing and effectiveness permit the public offering process to be divided into three separate periods, each of which has its own considerations in terms of publicity as discussed in more detail below.

The Pre-Filing Period

As of the day [XYZ Corporation] begins preparing for the Offering, [XYZ Corporation] is in the pre-filing period. The key guideline at this stage is to avoid "gun-jumping" — publicity that has the purpose or effect of conditioning the market in advance of the Offering. We discuss below exceptions for certain communications more than 30 days before filing the registration statement.

Subject to the safe harbors discussed below, prior to filing the registration statement, the Securities Act prohibits any written or oral offer to sell securities. The concept of an "offer" is very broadly construed and could include almost any conversation with a prospective investor, customer, employee, financial analyst or member of the media about the stock or [XYZ Corporation] as an investment, or any activity that could be viewed as an attempt to stimulate advance market interest for the stock. For example, publicity about a company during the pre-filing period generated by press releases, product advertising or speeches by company executives has been found, on the basis of particular facts suggesting a market-conditioning purpose or effect, to constitute a prohibited "offer" for purposes of the Securities Act.

Safe Harbors — Rules 163A and 169

Rule 163A of the Securities Act is a non-exclusive safe harbor that permits communications made by or on behalf of [XYZ Corporation] more than 30 days prior to filing a registration statement, so long as such communications do not refer to the Offering and reasonable steps are taken to prevent further distribution or publication of such communications in the 30-day period prior to filing. Communications consistent with the safe harbor are permissible even if such communications might be interpreted as an offer or as "conditioning the market."

In addition, Rule 169 under the Securities Act also permits the regular release of ordinary course factual business information[1] regarding [XYZ Corporation], *but not forward-looking information*, during the pre-filing period and any other time in the Offering process, so long as:

- [XYZ Corporation] has previously released the same type of information in the ordinary course of its business;
- the timing, manner and form of communication is materially consistent with similar past communications;
- the information is released or disseminated for intended use by persons (such as customers and suppliers), other than in their capacity as investors or potential investors in the stock; and
- the communication is made by the same employees or agents who historically have provided such information.

This safe harbor will be most relevant after the Rule 163A safe harbor, discussed above, is no longer available (*i.e.*, beginning 30 days before filing the registration statement).

Safe Harbor — Rule 135

Rule 135 under the Securities Act allows [XYZ Corporation] to make a limited announcement of the proposed Offering prior to filing a registration statement. Rule 135 allows an announcement that contains no more than certain specified basic information, including:

- the name of the issuer;
- the title, amount and basic terms of the securities to be offered;
- the anticipated timing of the Offering, and
- whether [XYZ Corporation] is directing the Offering to only a particular class of purchasers.

The announcement also may include a brief statement of the manner and purpose of the Offering without naming the underwriters. The announcement *must* state that it is not an offer of any securities for sale. We would not expect a Rule 135 announcement in the Offering.

[1] Rule 169 defines "factual business information" as factual information about the issuer, its business or financial developments, or other aspects of its business, and advertisements of, or other information about, the issuer's products or services.

The Waiting Period

After the registration statement has been filed but before the SEC has declared it effective, offers may be made orally, or in writing by means of a prospectus that meets the requirements of the Securities Act. The term "prospectus" is also very broadly construed. It includes any notice, circular, advertisement, letter or communication, written or broadcast, that "offers" any security for sale or confirms the sale of any security.

Taken together, the broad definitions of "offer" and "prospectus" mean that information appearing in press releases or advertisements about [XYZ Corporation], in press reports based on information provided by [XYZ Corporation], or on its website — if viewed as having a market-conditioning purpose or effect — may be seen as an "offer" made pursuant to a "prospectus" that does not meet the requirements of the Securities Act. Except as described below under the heading *Free Writing Prospectuses*, the only "prospectus" that will constitute a permissible written offer during the waiting period is the preliminary prospectus contained in the registration statement.

Safe Harbor — Rule 134

Rule 134 under the Securities Act provides a safe harbor for press releases after the filing of the registration statement. [XYZ Corporation] will want to get input from the underwriter regarding any Rule 134 press release. Rule 134 press releases are restricted to certain specified information, including:

- the name of the issuer, the address, phone number and e-mail address of the issuer's principal offices and contact for investors, the issuer's country of organization, and the geographic areas in which it conducts business;
- the title of the security and the amount being offered;
- the anticipated schedule for the offering (including the approximate date sales will begin) and a description of marketing events (with times, locations and access procedures);
- the price of the security, or if the price is not known, the method of its determination or *bona fide* estimate of the price range as specified by the issuer or the managing underwriter or underwriters (but only if a price range is included in the prospectus contained in the registration statement);
- a brief description of the intended use of proceeds of the offering (if disclosed in the prospectus contained in the registration statement);
- a brief description of the issuer's business; and
- the names of all underwriters and their roles.

Rule 134 notices may take the form of press releases, e-mails or website postings, but their content must be appropriately limited and the notice must contain a legend indicating that a registration statement has been filed but is not yet effective and providing information about where a prospectus may be obtained.

Free Writing Prospectuses

The SEC's 2005 reforms to the registered securities offering process ("Securities Offering Reform") significantly expanded the scope of written communications that can occur during the waiting period by allowing for the first time written offers to be made that are other than by means of statutory prospectuses. These written offers are defined as "free writing prospectuses" [2] ("FWPs") and their use is governed by Rules 164 and 433 under the Securities Act. Rule 433 contains a number of conditions to the use of FWPs. In initial public offerings, use of a FWP must be accompanied or preceded by delivery of a statutory prospectus containing a price range. Other conditions include filing the FWP with the SEC and legending. A FWP is subject to both prospectus liability under Section 12(a)(2) of the Securities Act and general antifraud liability under Rule 10b-5 of the Securities Exchange Act. We would not expect FWPs to be used in connection with the Offering except in close coordination with the managing underwriter and in consultation with us and underwriter's counsel.

The Post-Effective Period

During the period following the SEC's declaration of effectiveness, sales of the stock may be made under the final prospectus, which the Securities Act will require the underwriters to deliver to investors. Dealers must continue to deliver current prospectuses during a 25-day period following the effective date. Under SEC rules, the final prospectus need not be physically delivered so long as it is accessible (filed with the SEC) and buyers receive required notice. Because the prospectus and FWPs will remain the only legally permitted disclosure documents during this time, the publicity restrictions described in this memorandum will apply until the end of the post-effective period.

[2] Rule 405 defines "free writing prospectus" as any written communication that constitutes an offer to sell or a solicitation of an offer to buy securities that is or will be the subject of a registration statement that does not otherwise satisfy the statutory prospectus requirements. A "written communication" is any communication that is written, printed, a radio or television broadcast, or a graphic communication. A "graphic communication" includes all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet web sites, substantially similar messages widely distributed on telephone answering or voicemail systems, computers, computer networks and other forms of computer data compilation. Graphic communication does not include communication that, at the time of communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means.

CONSEQUENCES OF VIOLATING PUBLICITY RESTRICTIONS

Gun-jumping violations can have serious consequences for the Offering, as follows:

- The SEC may impose a "cooling off" period. [XYZ Corporation] could incur a significant delay in pricing the Offering, while the effect of the publicity is allowed to cool off. Such a delay could be imposed either by the SEC — which could refuse to declare the registration statement effective — or on the advice of counsel and the underwriters.

- The SEC could insist that the registration statement be amended to include the information included in the impermissible publicity. As a result, [XYZ Corporation] would become strictly liable to investors for the accuracy of such information.

- Depending on the relevant circumstances, the SEC could pursue civil or even criminal sanctions.

- If a gun-jumping violation comes to light after sales have occurred, purchasers of securities may rescind their purchases, with no ability to cure a previous offense.

RECOMMENDATIONS

In order to help [XYZ Corporation] avoid the problems described above, we recommend as follows:

Press Releases

[XYZ Corporation] should not make statements on the investment merit of the stock. **Beginning at the organizational meeting, all press releases should be reviewed by us as well as counsel for the underwriters to confirm the availability of an applicable safe harbor.** As discussed above under the headings *Safe Harbors — Rule 135* and *Safe Harbor — Rule 134*, only very limited information about the Offering may be included in press releases and other communications.

Otherwise, [XYZ Corporation] press releases should not make any other statement about the Offering or the investment merits of the stock. Also, subject to any applicable safe harbor, press releases should not include any statements which may be construed as promoting [XYZ Corporation] or conditioning the market for the Offering.

[XYZ Corporation] should confirm with us and counsel for the underwriters, that any public announcements of factual business developments regarding [XYZ Corporation] (including historical results, planned developments, acquisition agreements or negotiations, etc.), will comply with the Securities Act's non-exclusive safe harbors in Rules 163A and 169 as discussed above.

No Projections or Predictions

Prior to the 30-day pre-filing period, [XYZ Corporation] should discuss with counsel the advisability of any forward-looking statements. Beginning 30 days prior to filing the registration statement and during the balance of the Offering process, [XYZ Corporation] should not make projections, predictions, forecasts or estimates regarding [XYZ Corporation]'s future earnings, revenues, acquisitions, development plans or growth. These statements could constitute illegal offers or FWPs with securities liability. In addition, [XYZ Corporation] should refrain from commenting on press reports and projections regarding [XYZ Corporation] and expressly disclaim approval or disapproval of any such projections.

Advertising

[XYZ Corporation] may continue advertising and marketing its products and services in the normal course of business, but no advertisements or marketing materials may mention the Offering (unless such advertisements are limited to only information that is permitted under Rules 134 and 135). **[XYZ Corporation] should consult with us and counsel for the underwriters before making any material changes in the substance or quantity of its advertisements or marketing materials.**

Media Relations

In all dealings with the media, you should remember that any statement attributable to [XYZ Corporation] that could be viewed as an attempt to arouse public interest in the stock or to pre-condition the market for its sale could significantly delay the Offering.

[XYZ Corporation] may continue to maintain ordinary contacts with the media consistent with past practice, but should not discuss the Offering with the media, either before or after filing the registration statement. [XYZ Corporation] may respond to media inquiries concerning matters not relating to the Offering or to the value of [XYZ Corporation]'s securities, by providing factual information about its current or past financial condition and business operations. If [XYZ Corporation] is contacted by representatives of the press, you should first try to determine the nature of the article the journalist is preparing and the timing of publication. The advisability of participating should be discussed with counsel. If the article relates to the Offering, you should say that you are not free to comment.

After the registration statement has been filed, [XYZ Corporation] should limit its statements about the Offering to the information contained in the prospectus. [XYZ Corporation] should under no circumstances discuss [XYZ Corporation]'s future operations or financial results, or make predictive statements to the media regarding [XYZ Corporation]. You should note that if an article concerning [XYZ Corporation] is published in the media and comes to the attention of the SEC staff (which follows the financial and trade press), the SEC may inquire as to the source of the information in the article. In that event, it will be extremely advantageous to be able to say that it did not come from [XYZ Corporation].

[XYZ Corporation]'s public relations firm, if it has one, should also follow these guidelines. [XYZ Corporation] may wish to designate one person to respond to media inquiries. If you do so, then all personnel should be instructed to direct all media inquiries to that person.

Customers

v may continue ordinary contacts with its customers and others with whom it maintains business relationships, but may not discuss the Offering before the registration statement is filed. After the registration statement is filed, general oral comments that seek to reassure customers or business partners as to the continued operation of [XYZ Corporation]'s business and explain the reasons for the Offering are appropriate, but [XYZ Corporation] should avoid commenting on [XYZ Corporation] as an investment opportunity or taking any other actions that could be viewed as an attempt to condition the market for the stock. In any event, [XYZ Corporation] should make sure that any oral discussions are limited solely to the information contained in the prospectus.

Financial Analysts

[XYZ Corporation] should not directly initiate contact with financial analysts. This type of contact should be coordinated through the managing underwriters or an ECM advisor. At the appropriate time in the process, there will be a formal "analyst day," but ad hoc communications with analysts should generally be avoided.

Potential Investors

[XYZ Corporation] should not engage with any potential investor, and all incoming inquiries should be referred to the managing underwriters.

Employees

The legal restrictions on publicity regarding the Offering also apply to communications with employees. Employees involved in the Offering process should be very careful not to suggest to others that any of the stock might be offered to employees, their families or friends. While it may be possible to offer the stock to employees pursuant to a directed share plan,[3] this would have to be strictly within the parameters of the Offering process — any possibility of an employee offering should be discussed thoroughly with the underwriters and counsel. Even a suggestion to employees that they might participate in the Offering could be scrutinized by the SEC and delay the Offering. Otherwise, any communications to employees about the Offering should be limited to the subject of assembling the required documents and information, and should involve only those employees who must be involved in helping [XYZ Corporation] prepare for the Offering.

[3] Through its Securities Offering Reform, the SEC expanded Rule 134 to allow issuer communications made after the registration statement has been filed to include, among other things, details regarding the procedural aspects of a directed share program.

Website

The publicity restrictions imposed by the Securities Act also apply to the Internet. The SEC routinely examines the websites of new issuers. For these reasons, we should review [XYZ Corporation]'s website (including hyperlinks) with you to determine whether it complies with the Securities Act and, until the Offering has been completed, [XYZ Corporation] should consult with us before materially modifying its website.

The Securities Offering Reform also covers information on issuer websites. Rule 433(e) makes clear that an offer on [XYZ Corporation]'s website, or that is contained on a third party website hyperlinked from [XYZ Corporation]'s website, is considered a written offer made by [XYZ Corporation] and, unless otherwise exempt, will be a FWP. Accordingly, the requirements of Rule 433 will apply to these website FWPs. Historical [XYZ Corporation] information, however, that is identified as such, located in a separate section of the website containing historical [XYZ Corporation] information, that has not been incorporated by reference into or otherwise included in a prospectus and has not been used or referred to in connection with the Offering, will not be considered a FWP.[4]

The basic guidelines relating to [XYZ Corporation]'s website are as follows:

- [XYZ Corporation] should review its website with counsel to locate any potential FWPs (including hyperlinks) and identify and archive historical information.
- [XYZ Corporation] may continue to maintain its website but should avoid including information on the site that goes beyond the type customarily used in marketing its products and services or providing support and feedback to customers. During the Offering period, [XYZ Corporation]should not use its website to discuss the Offering, and should neither establish a new website nor materially expand or alter its current website.
- [XYZ Corporation] should not link its website to other websites containing investor-sensitive material, because the Securities Act views an offer on a third party website as an offer made by [XYZ Corporation]. The need to avoid hyperlinks is especially critical with respect to links to sites that could contain analyst reports or other forward-looking materials about [XYZ Corporation] or its industry, which could be deemed "adopted" by [XYZ Corporation] if hyperlinked to its website. Mere references to analysts' reports or other forward-looking materials could be construed as conditioning the market for the stock.

[4] The SEC has also indicated that other information located on or hyperlinked to an issuer's website might similarly not be considered an offer, and therefore, not a FWP, where it can be demonstrated that the information was published previously (*e.g.*, certain information that, while not contained in a separate section of [XYZ Corporation]'s website, is dated or otherwise identified as historical information and is not referred to in connection with the Offering).

- [XYZ Corporation] may wish to designate one person to be responsible for approving all modifications of its website. This person should discuss with counsel before approving any modification to the website that may raise questions under these guidelines.
- When the registration statement has been publicly filed (such that employees will know about the Offering), [XYZ Corporation]should warn all employees against discussing the Offering, or [XYZ Corporation]'s results or prospects, in any message boards or chat rooms.

Exhibit C

Sample Due Diligence Request List

KING & SPALDING LLP

1180 Peachtree Street
Atlanta, Georgia 30309
Main: 404/572-4600
Fax: 404/572-5100
www.kslaw.com

MEMORANDUM

TO:

FROM: King & Spalding LLP

DATE:

RE: Sample Due Diligence Request List

The following is a list of the documents that both the company's counsel and the underwriters' counsel would customarily request in connection with an initial public offering of [•] (the "Company"). Please note that such a list is typically considered a preliminary request, and that additional documents may be asked for in the future as other matters come to the attention of counsel. In addition, it is likely that some of the items listed do not exist or are not applicable to the Company, and whenever that is the case, the Company would only be asked to indicate that in its response to the request.

Each time a document is listed with respect to the Company, it would be expected that such document would also be furnished with respect to any subsidiaries, affiliates, predecessors or acquisition candidates of the Company that are or are expected to be otherwise significant. Furthermore, draft documents can be provided whenever final documents have not yet been executed. Unless otherwise indicated, documents will typically be requested to be provided from the Company's formation to present.

1. Governing Instruments; Minutes of Board and Stockholder Actions.

   a. Governing instruments of the Company, including the Certificate of Incorporation and Bylaws (or their equivalents) of the Company, as amended to date.

   b. Minutes of the Board of Directors, any committees of the Board of Directors and the stockholders of the Company including, to the extent available, all materials distributed to attendees of any such meetings.

   c. Charters or governance guidelines, if any, of the Board of Directors or of any committees thereof.

   d. Stock books, stock ledgers and other records of stock issuances of the Company.

e. A list of the states and other jurisdictions in which the Company is or is expected to be qualified to do business.

f. A corporate diagram or organizational chart that includes all predecessor entities and subsidiaries of the Company, including entities that the Company owns less than 100%.

g. Company management organization chart including title, function and responsibility.

h. A list of all contracts currently in effect with respect to directors or officers of the Company (including indemnification agreements and D&O insurance).

i. A list of subsidiaries, including, for each such subsidiary of the Company, a brief description of the business that it conducts and the assets that it holds and the name(s) of the entity or entities that own its capital stock.

j. All documents relating to any restructuring of the Company, including merger agreements, acquisition agreements and all correspondence with stockholders of any predecessor companies regarding such transactions.

2. Securities Matters; Stockholder Communications.

a. A statement of outstanding and treasury shares of capital stock of the Company and of other securities of the Company and a statement of shares of capital stock reserved for issuance.

b. A list of stockholders of the Company and each of its subsidiaries that gives the name and address of each stockholder and the number of shares owned by each such stockholder.

c. A list of holders of any options to purchase securities of the Company that gives the name of the optionee, number of options held, option prices, date of grant and number of shares owned, and any commitments with respect to the foregoing.

d. Copies of all stock option agreements and warrants and all other agreements relating to the purchase of securities of the Company or any of its subsidiaries.

e. All material agreements and any other documents relating to other outstanding equity securities (e.g., "quasi-equity" arrangements tied to equity performance and stock appreciation rights).

f. Any stockholder, voting, registration or other agreements with respect to the securities of the Company or any of its subsidiaries.

g. Any management or similar agreements in place with significant stockholders.

h. Private placement memoranda or offering documents, including applicable subscription agreements and closing documents, utilized in connection with any private placement of securities of the Company.

i. All legal opinions given in connection with the offer or sale of any securities of the Company, including issuances of securities in mergers and acquisitions.

j. All annual and interim reports to stockholders of the Company, and any other communications with security holders.

3. Present Indebtedness.

a. All documents evidencing, securing or otherwise relating to any outstanding or proposed indebtedness of the Company or any indebtedness of any person as to which the Company may be a surety or guarantor, or as to which it might otherwise become liable.

b. All agreements and letters confirming available or outstanding lines of credit.

c. All material correspondence with lenders, including all compliance reports submitted by the Company or its public accountants.

d. A schedule summarizing short-term and long-term debt (including inter-Company debt) and capital lease obligations of the Company (setting forth the obligor, the lender, principal amounts outstanding, interest rates and maturity dates, or, in the case of capital lease obligations, payment schedules, for each such item).

4. Contracts.

All material contracts, present or contemplated, to which the Company is, or will become, a party, including, but not limited to:

a. All agreements relating to acquisitions, dispositions or mergers that have been effected or proposed by the Company, including all diligence summaries, executive summaries and financial analyses prepared by the Company in connection with such acquisitions.

b. All documents relating to joint ventures, partnerships and consulting agreements to which the Company is currently a party or anticipates becoming a party.

c. All material leases of any material amount of personal property to which the Company, including equipment and computer leases.

d. All employment, consulting or severance agreements between the Company and members of the Board of Directors or management of the Company.

e. All material contracts with major suppliers, customers and consultants, including all contracts between the Company and any development partners and banks or other financial institutions.

f. A schedule of the 20 largest suppliers and the amount and percentage of business transacted with each.

g. All material agreements relating to the distribution and transportation of products.

h. All agreements for capital expenditures or the acquisition of depreciable property.

i. Any material agreements that define or limit the rights of stockholders, including any restrictions upon transfer or voting rights.

j. Any material agreements relating to the voting of shares, including any voting trusts or outstanding proxies.

k. All material agreements relating to restrictions upon competition or restricting or purporting to restrict the ability of the Company to engage in any type of business or to operate in any geographic area.

l. All material secrecy, confidentiality and nondisclosure agreements of the Company.

m. Contracts relating to the Company's securities to which the Company is a party, including stock option plans and forms of stock option agreements and registration rights.

n. A list of any material oral contracts or arrangements for the sale or purchase of goods or services.

o. Any other material contracts to which the Company is a party and any other documents containing any restrictions on financing, borrowing or the issuance or offering of any securities of the Company.

5. Insider Transactions.

a. All agreements or contracts and a description of any transaction or series of similar transactions between the Company and any officer, director or stockholder or affiliate or member of the immediate family (including spouse, parents, children, siblings and in-laws) of any officer, director or stockholder of the Company or any Company or other entity controlled by any officer, director or stockholder of the Company entered into, consummated or contemplated at any time, to the extent the subject matter of the contract or transaction(s) exceeds $120,000.

b. All documents relating to any loans made or contemplated by the Company to, or guarantees made by the Company on behalf of, any officer, director or stockholder or

affiliate or member of the immediate family of any officer, director or stockholder of the Company, or any Company or other entity controlled by any officer, director or stockholder of the Company.

6. Insurance.

a. A schedule or summary description of all insurance policies that the Company has in effect as of the date hereof or expects to be in effect in the future.

b. A schedule or summary description of the Company's policies regarding properties and operations for which the Company is self-insured.

c. All agreements or correspondence (including reservation of rights letters) with insurance carriers relating to defense costs and coverage matters with respect to any material litigation.

d. A summary of material claims under the Company's insurance policies.

7. Legal Proceedings and Compliance.

a. A list of all pending legal proceedings to which the Company is a party or which may affect its properties or business, together with the name of the court or agency in which the proceedings are pending, the date instituted, principal parties thereto, a description of the factual basis alleged to underlie the proceedings and the relief sought (including similar information as to any such proceedings or claims known to be contemplated or threatened by any private person or entity or governmental authority).

b. Consent decrees, judgments, settlements and other dispositions of legal proceedings pursuant to which the Company has continuing or contingent obligations of a material nature or requiring or prohibiting future activities.

c. Documentation relating to compliance with health, safety and civil rights laws.

d. All audit response letters from the Company's attorneys to the accountants regarding litigation in which the Company is or may be involved.

e. Opinions or other assessments (other than audit response letters) of the Company's attorneys as to any pending or threatened litigation against the Company.

f. All material correspondence and documents relating to customer complaints and grievances.

g. All agreements that indemnify the Company or in which the Company indemnifies another party for liability with respect to any pending or potential litigation, claim or dispute or regulatory action.

h. Correspondence, memoranda or notes concerning any existing material dispute with suppliers, competitors or customers.

i. All communications and documents relating to questions, allegations or issues raised by "whistleblowers" about the Company's accounting controls, audit issues, financial reporting and disclosure, other violations of law, and all correspondence between such whistleblowers and the Company, the Board of Directors or any committee of the Board of Directors.

8. Labor Relations.

a. All retirement plans or other benefit plans provided for employees of the Company, including any employee profit sharing, bonus, stock option, deferred compensation or other similar incentive plans.

b. Documentation related to the granting by the Company of options not pursuant to a plan to officers, directors and key employees.

c. The ERISA summary plan description for all employee benefit plans.

d. All audit reports covering pension, retirement or employee benefit plans of the Company.

e. Each favorable determination letter, opinion or ruling from the IRS for each benefit plan that is intended to satisfy the requirements of Section 401(k) or 501 of the Internal Revenue Code or that is dependent on such letter, ruling or opinion to avoid current federal income tax to the beneficiaries of such benefit plans.

f. All filings made with, correspondence to or from, and all notices received from the Internal Revenue Service, the Department of Labor or the Pension Benefit Guaranty Company with respect to all employee benefit plans, including IRS Form 5500's for each benefit plan.

g. All current written employee policies, guidelines and rules.

h. Copies of (i) all pending citations issued under the Occupational Safety and Health Act ("OSHA") or state plans; (ii) OSHA Form 200; (iii) pending charges filed with the Equal Employment Opportunity Commission or state/local deferral agencies; and (iv) pending charges filed with the National Labor Relations Board.

i. All collective bargaining contracts with any unions or other organizations representing employees of the Company.

j. A description of any and all strikes, lockouts, slow downs and other labor disruptions at any of the Company's facilities and any claim of unfair labor practices or petitions

filed with the National Labor Relations Board with respect to workers at the Company's facilities.

k. A list of the number of workers compensation claims made against the Company by employees each year, a description of the types of accidents giving rise to such claims and the approximate amount of payments made by the Company in respect of such claims.

l. A history or log of any internal investigations and findings by the Company relating to employee complaints of discrimination, harassment, retaliation, or wage and hour violations since January 1, 2013.

9. Financial Matters.

a. Audited financial statements of the Company and its subsidiaries for the last five fiscal years. If audited financial statements are unavailable, please supply unaudited financial statements.

b. All letters from the Company's accountants to the Company regarding control systems, methods of accounting, etc. of the Company and any management replies thereto.

c. Accountants' reports to management and related correspondence and attorneys' responses to audit inquiries.

d. Copies of materials distributed to the audit committee.

e. Identify and describe any (a) contingent liabilities, off-balance sheet arrangements and contractual obligations not reflected in the Company's financial statements, (b) monetary reserves established for specific risk situations and (c) disagreements with the Company's outside auditors concerning the Company's financial reporting.

f. Any current internal financial (profit and loss, capital expenditures, etc.) projections.

g. Any current reports or plans with respect to the Company's acquisition or growth strategy.

h. Internal or external appraisals or valuations of the Company, its assets, properties, financial position or future prospectus, including presentations given to lenders, potential lenders or other parties.

10. Intellectual Property.

a. A list of all licenses, permits, franchises, patents, patent applications, trademarks, service marks, trade names, brand names, logos, other trade designations (including unregistered names and marks), trademark and service mark registrations or

applications, copyrights, copyright registrations or applications, protected formulae, process, method and other intellectual property rights of which the Company is an owner or licensee.

b. A list of all proprietary hardware and software developed by or for the Company. A description of the Company's efforts to protect its rights in and to such software. If any proprietary software is licensed to a third party, a copy of the relevant license agreement.

c. Copies of all of the Company's contracts or license agreements for hardware, software, network, and telecommunications and all related maintenance agreements, including fees, termination dates and service provided, with the exception of "shrink wrap" license agreements.

d. Description of all of the Company's active and planned IT projects and planned upgrades, upgrade cost and status.

e. Description of all of the Company's material relationships with IT vendors, consultants or contractors.

f. Description of documents relating to any present and pending claims related to the intellectual property rights.

11. Real Property.

a. A schedule describing all real property owned or leased by the Company.

b. All deeds and related documents for real property owned by the Company and all significant leases of real property to which the Company is a party, either as lessor or lessee.

c. All leases and rental agreements not included in (a) above, including subleases and concession agreements, if any, consents granted, estoppel letters and all amendments, in respect of real property owned or leased by the Company.

d. Itemized list of all easements, liens, restrictions, violations, covenants and agreements of any kind affecting any property owned or leased by the Company, together with copies thereof.

e. All deeds, title policies, surveys and other real property title documents.

f. All agreements relating to the purchase or sale by the Company of any real property and all options held by the Company to acquire or dispose of real property.

12. Franchises.

a. Each version of franchise agreement currently in effect and the number of franchise

units that have signed each different version.

b. Each type of material agreement between the Company and franchisees, including without limitation, area development agreements, franchise broker agreements, agreements for exclusive territories, master franchise agreements, subfranchise agreements, lease and sublease agreements, and area franchise agreements.

c. A list of franchise agreements currently in effect, including length of each franchise agreement.

d. A list of all other agreements with a franchisee currently in effect.

e. Consent decrees, judgments, settlements and other disposition of legal proceedings, or otherwise, that involved a dispute between a franchisee and the Company whether or not the Company has continuing or contingent obligations of a material nature thereunder.

f. A list of franchisees with delinquent fee payments.

g. A list of franchisees who have breached franchise or other agreements with the Company.

h. All manuals or policies relating to the operation of the franchised units.

i. All agreements, policies, or written understandings relating to the franchisees.

j. All significant communication with franchisees or franchisee groups over the past three years, including without limitation all default notices sent by the Company or received by the Company.

k. A list of unit openings and closings (if applicable).

l. Franchisee audit files, including without limitation, status reports.

m. Correspondence with state franchise regulators, including without limitation franchise registration and effectiveness orders.

n. Encroachment policy.

13. Governmental/Regulatory/Compliance.

a. List of all material authorizations, permits, licenses, registrations and certificates.

b. All material reports, financial statements and other information filed or submitted with any federal, state or local regulatory agencies, including the Food and Drug Administration, the Federal Trade Commission and the U.S. Department of Agriculture.

c. All material communications and correspondence between or to/from any federal, state or local regulatory agency, including the Food and Drug Administration, the Federal Trade Commission and the U.S. Department of Agriculture, and the Company relating to the products, labeling, practices, properties, facilities or operations of the Company.

d. Any material citations, notices of violations, fines or penalties imposed or threatened to be imposed by any federal, state, local or foreign regulatory authorities, including any state or local health department.

14. Marketing and Labeling.

a. Any policies outlining the Company's approach to labeling products.

b. Copies of any material licensing, advertising, affiliation or marketing agreements to which the Company is or will be a party.

c. Samples of marketing and sales literature currently used by the Company, including coupons and advertisements.

d. A summary of any customer loyalty programs.

15. Environmental and Health and Safety Matters.

a. All material environmental and health and safety reports and any other memoranda, letters or documentation relating to compliance with environmental and health and safety laws.

b. Copies or descriptions, as appropriate, of (i) air filings, reports, permits or approvals; waste water filings, reports, permits or approvals; storm water filings, reports, permits or approvals; hazardous waste and solid waste disposal registrations, filings, reports, permits or approvals, including construction permits and special use permits and copies of all applications and supporting documentation submitted as part of the permitting or approval process; (ii) any Superfund notices of demand letters; (iii) any ongoing or past (A) violations of environmental permits, statutes or regulations or (B) soil or ground water contamination problems; and (iv) underground storage tanks, registrations, closures, assessments and any corrective actions relating to such tanks.

c. Copies of material safety data sheets required to be provided to employees as part of OSHA hazard communication standard.

d. Copies of asbestos surveys performed.

e. Copies, reports, studies, assessments, surveys, orders, notices, correspondence, or other documents, information and materials relating to contamination or remedial actions or the existence or presence of chemicals on or under the property. This

includes, but is not limited to, used oil, spills and releases, radon, recycled and/or recovered materials, asbestos containing materials, polychlorinated biphenyls and lead-based paints.

16. Miscellaneous.

a. Any internal operations manuals currently in use.

b. Any Code of Ethics or Code of Business Conduct.

c. Federal and state tax returns of the Company.

d. Information concerning any pending changes in accounting or tax treatment.

e. All correspondence from any governmental agency regarding federal, state or local income, property and other taxes.

f. A list of any plans for any acquisitions, dispositions, mergers or consolidations, including previous negotiations or discussions held with respect thereto.

g. Analyses of the Company or its industry prepared by investment bankers, management consultants, engineers, accountants or others, including other types of reports or memoranda relating to broad aspects of the business, operations or products of the Company, and any written presentations to securities analysts.

h. Any material reports filed with governmental agencies not identified above.

i. Any analysis of the main competitors of the Company.

j. Industry or trade publications indicating or suggesting market shares or general conditions of the industry and the Company's position within the industry.

k. Description of any backlog of orders for products or services.

l. Any other documents or information which, in your judgment, are significant with respect to the business of the Company or which should be considered and reviewed in making disclosures to prospective investors regarding the business and financial condition of the Company.

* * *

Exhibit D

Sample Organizational Meeting Agenda

SAMPLE ORGANIZATIONAL MEETING
Proposed Initial Public Offering

I. Offering Structure

- Size of Offering
- Primary / Secondary
- Over-Allotment Option (Green Shoe)
- Stock Split
- Changes in Capitalization
- Use of Proceeds
- Lock-Up Provisions
- Listing (NYSE / Nasdaq)
- Selection of Ticker Symbol
- Registration and/or Participation Rights
- Existing Shareholders / Rule 144 Stock
- Directed Share Program

II. Preliminary Time Schedule

- Review Suggested Timetable
- Draft S-1
- Drafting Sessions
- Due Diligence
- Research Analyst Diligence
- Availability of Audited Financials
- Important Events / Announcements
- Filing Target Date
- SEC Review
- Salesforce Presentations
- Roadshow Schedule
- Pricing / Closing

III. Legal Issues

- Outstanding Litigation and Claims
- Required Shareholder Approvals
- Necessary Third Party Consents
- Blue Sky Matters
- FINRA Matters
- Board of Director Issues
- Disclosure Items / Requests for Confidential Treatment
- Related Party Transactions
- Additional Disclosure Items

- Confidentiality Agreements
- Expert Opinions
- Charter and Bylaws / Anti-takeover Provisions
- Sarbanes-Oxley Issues
- Corporate Governance Listing Requirements
- Underwriting Agreement

IV. Interaction with Public

- Publicity Practices Generally
- Press Releases
- Media Contacts
- Financial Analysts
- Employees
- Communications with Shareholders
- Website Policy
- Investor Relations Firm

V. Accounting and Financial Issues

- Presentation of Financial Statements
- Critical Accounting Policies / Estimates
- Identify Any Unusual Items
- Required Audits
- Comfort Letter
- Review of Management Letters
- Availability of Projections
- Cheap Stock
- Option Programs / Stock Purchase Programs
- Dividend Policy
- Tax Issues / Industry-specific Accounting Issues
- Auditor Independence Issues
- SOX 404 Compliance Readiness

VI. Employee and Board-related Matters

- Executive Compensation Plans
- Stock Option Plans
- Recent Option Grants
- Employee Agreements
- Composition of Board / Outside Directors
- Meeting Dates
- Resolutions and Authorizations
- D&O Insurance

- D&O Questionnaires
- Pricing Committee

VII. Other Matters

- Financial Printer
- Retail Roadshow / Other Roadshow Internet Host
- Artwork for Prospectus
- Selection of Registrar / Transfer Agent
- Working Group List

VIII. Due Diligence

- Preliminary Legal Due Diligence List
- Business Due Diligence List
- References for Banker Customer / Other Calls
- Research Analyst Due Diligence
- Accounting Due Diligence

IX. Management Presentations

Exhibit E

Sample IPO Checklist

IPO Checklist

Abbreviations

Company	—	(IPO Entity)
CC	—	Company Counsel
A	—	Auditors
UWC	—	Underwriters' Counsel
UW	—	Underwriters
P	—	Printer

Task	Responsibility	Notes	Timing	Status
1. Gun Jumping Review	Company; CC	• Complete website review	Pre-filing	
2. Obtain EDGAR codes for Company	CC	• Company already an EDGAR filer; send codes to printer	Pre-filing	
3. Offering Structure	All			
a. Size of Offering	Company; ; UW	• Company and to determine with UW	Pre-launch	
b. Price and Share Information	Company; ; UW	• Determine price range (must be no greater than $2 if range is under $20; must be no greater than 10% if range is above $20)	Pre-launch	
c. Use of Proceeds	Company; ; UW	• To be determined	Pre-filing	
d. Lock Up Agreements	Company; ; UWC; CC	• To be collected from directors, officers and major stockholders	Pre-filing	
e. Directed Share Program	Company; ; UW	• To be determined	Pre-filing	
f. Underwriting group	Company;	• To be determined	Pre-launch	
4. Form S-1				
a. SEC matters	Company; CC	• Contact examiner after submission • Respond to SEC comments	Pre-launch	
b. Select financial printer	Company	• To be determined	Pre-filing	
c. Filing fee	Company	• Consider which rule utilized to calculate fee and impact on	Pre-filing	

Task	Responsibility	Notes	Timing	Status
		upsizing/downsizing • Must be paid in connection with first filing		
d. Signature pages	Company; ; CC	• Must be obtained prior to first filing	Pre-filing	
e. Accountant consents	A	• Must be obtained prior to first filing	Pre-filing	
f. Financial Statements	Company; A	• Company / A to add public company information / disclosures to footnotes • Also consider availability of quarterly financial information for required quarterly financial data • Also consider whether any completed or probable acquisitions require acquisition financial statements in S-1 (unlikely) • Finalize "blackline" financial statement presentation for selected financials (2011)	Pre-filing	
g. Third party consents	Company	• Obtain consents for use of any third party industry data in S-1 (e.g., Buxton, Technomic or Nielson)	Pre-filing	
h. New Directors / Changes to Existing Directors	Company;	• To be determined • Seek input from UWs • Obtain consent to being named in S-1 if not already on board • Complete independence review • Complete S-K 404 and ASC 850 disclosure review	Pre-filing	
i. Back-up	Company	• UWC to submit back-up request • Company to prepare response / provide back-up	Pre-filing	
j. Complete S-1	All		Pre-filing	

Task	Responsibility	Notes	Timing	Status
k. Exhibits	CC; Company	• Company / CC to complete material contracts analysis • Collect and edgarize exhibits • Be sure to include all schedules and exhibits to the filed documents (SEC focus) • Consider necessity for confidential treatment	Pre-launch	
l. Timing of filing	All			
5. Board and Pricing Committee Approvals (Exhibit A)	Company; ; CC	• Confirm members of Pricing Committee	Some pre-filing; others pre-launch	
6. Stockholder Approvals (Exhibit B)	Company; ; CC		Some pre-filing; others pre-launch	
7. Equity Analyst Meetings	Company; ; UW	• Date to be determined • Company to prepare forecasts for meetings • Company / UWs to prepare presentation for meeting	Pre-launch	
8. Credit Rating Agency Presentation	Company; ; UW	• To be determined if necessary	Pre-launch	
9. Comfort Letters	UWC; A	• Negotiate pre-filing	Pricing	
10. Corporate Governance / Structure				
a. Consider reorganization / restructuring	Company;		Ongoing	
b. Prepare corporate governance documents (Exhibit C)	CC; Company	• Use of "controlled company" exemptions to be discussed	Pre-launch	
c. Evaluate and approve Board of Directors composition, including determination of independent directors	Company; CC	See 4.h.	Pre-launch	
d. D&O / FINRA Questionnaires (5% holders)—existing directors and stockholders	CC; Company;		Pre-launch	

Task	Responsibility	Notes	Timing	Status
e. Certificate of Incorporation	Company; ; CC	• Anti-takeover protections to be discussed • Review 2018 ISS Voting Guidelines	Pre-launch	
f. Bylaws	Company; CC	• Anti-takeover protections to be discussed	Pre-launch	
g. Presentation to directors and officers regarding SEC and governance / fiduciary duties as a public company	Company; CC		Post-closing	
11. Stock Exchange				
a. Listing Analysis and Selection	Company;		Pre-filing	
b. Exchange pre-clearance	Exchange		Pre-launch	
c. Reserve / Select symbol	UW; Company;		Pre-launch	
d. Listing application	Company; CC		Pre-launch	
e. Exchange certification to SEC	CC		Pricing	
12. Employee benefits matters				
a. Approve director compensation program	Company;		Pre-launch	
b. New Equity Incentive Plan	CC; Company;		Closing	
c. 162(m) Plan	CC; Company;		Pre-launch	
d. Compensation Consultant	Company;	• To be determined	Pre-launch	
e. Employee Stock Puhase Plan	Company;	• To be determined	Pre-launch	
13. Form S-8	CC; Company	• CC to provide drafts	Closing	
a. Opinions	Company; CC		Closing	
b. Accountant Consents	Company; A		Closing	
c. New Board Signatures and Company signature	Company; ; CC		Closing	
d. Pay Filing Fee	Company		Closing	
14. Legal diligence				
a. Provide diligence request list	UWC	• UWC to provide	Pre-filing	

Task	Responsibility	Notes	Timing	Status
b. Collect diligence materials	Company		Pre-filing	
c. Populate virtual data room	Company		Pre-filing	
d. Complete legal diligence	CC; UWC		Pre-launch	
e. Opinion diligence (capitalization, etc.)	CC; UWC		Pre-launch	
15. Business diligence	CC; UWC; UW		Pre-launch	
a. Vender diligence	CC; UWC; UW		Pre-launch	
b. Supplier calls	CC; UWC; UW		Pre-launch	
c. Franchisee calls	CC; UWC; UW		Pre-launch	
16. Other matters				
a. Determine whether to pursue pre-IPO dividend recap	Company; ; CC		Pre-launch	
b. Evaluate significant corporate developments (e.g., acquisitions, new material agreements) for timing and materiality	Company; ; CC		Ongoing	
c. D&O insurance	Company; ; Broker	• D&O insurance to be updated/revised for public company provisions • Company to contact broker	Closing	
d. Director resignations / appointments, if necessary	Company;	• To be determined	Ongoing	
e. D&O indemnification agreements	Company; ; CC		Closing	
f. Blue Sky/FINRA	UWC; Company	• Make filing • Pay filing fee • Send SEC FINRA letter prior to effectiveness	Pre-launch	
g. Underwriting Agreement	UWC; CC; Company; ; UW	• File as an exhibit • To be executed at pricing	Pre-launch	
h. Roadshow	UW; Company	• Company to work with UW on draft	Pre-launch	
i. Prospectus artwork	UW; Company;		Pre-filing	

Task	Responsibility	Notes	Timing	Status
j. CUSIP number	UWC	• To be obtained	Pre-filing	
k. DTC	UWC; CC	• UWC and UW to contact DTC • Company to issue blanket letter of representations to DTC	Closing	
l. Discuss stock / option records transition to transfer agent	Company; CC		Pre-closing	
m. Engage Transfer Agent	Company; CC		Pre-launch	
n. Form 8-A	CC; UWC	• File prior to effectiveness	Before effectiveness	
o. Closing Form 8-K	CC; UWC	• To be determined if necessary	Closing	
p. Filing Press Release	CC; Company		Launch	
q. Pricing Press Release	CC; Company		Pricing	
r. Print Reds	P		Pre-launch	
s. Print Final	P		Pricing	

t. Post Corporate Governance Documents to Website	Company	• Post the following to website no later than the date of listing:
		  • Audit/comp/nom committee charters
		  • Corporate governance guidelines
		  • Code of business conduct and ethics
		  • Policy Regarding Interested Party Communications
		  • Policy on Stockholder Recommendations for Board of Director Candidates
			Pricing	

u. Annual meeting date	Company/ CC	• Disclose date of annual meeting and outside date for 14a-8 proposals prior to first annual meeting in 8-K and/or 10-Q	Post-Closing	

Task	Responsibility	Notes	Timing	Status
17. Section 16 Items		• Note: Section 16 applies to equity grants made pre-IPO -- grants within 6 mos. of IPO must be made in a manner consistent with an exemption under 16b-3 • Short swing profit rule applies to directed share program – Section 16 officers to avoid if follow-on inside of 180 days if possible		
a. Finalize executive officer/Section 16 list	Company;		Pre-filing	
b. Board approval for executive officers and Section 16 list	Company; ; CC		Pre-launch	
c. Confirm party responsible for filing for D&Os and 10% holders	Company			
d. Obtain Edgar Codes for Section 16 filers	Company; CC	• Determine which individuals need codes and obtain existing codes	Pre-launch	
e. Collect POAs and signed Form 3s and 4s	Company; CC	• Form 3s due at 1934 Act effectiveness • Form 4s due 2 days after closing (note, must include grants made in 6 months prior to effectiveness) • Update for DSP, as needed	Pre-Pricing	
f. Schedule 13D/G Analysis	CC		Closing / year following IPO	
18. Other Pricing Items				
a. SEC clearance	CC		Pre-Pricing	
b. Pricing Resolutions	Company; ; CC		Pricing	
c. Acceleration Requests	UWC; CC	• Two letters required (CC; UWC)	Pre-Pricing	

Task	Responsibility	Notes	Timing	Status
d. Reciulation issues	UWC; CC	• Consider issues related to materiality of pricing outside the range and recirculation / additional filing fee		
e. Pricing supplement	UWC; CC	• If necessary, be produced the night of pricing		
f. 424(b) Prospectus	Company; ; CC; UWC	• Update numbers for pricing		
g. Diligence call	UWC			
h. Good standings and foreign qualifications	Company; CC		Closing	
i. FINRA Rule 5131	UWC; UWs	• UWs to provide regular updates to the pricing committee or Board regarding indications of interest	Pre-pricing	
19. Other Closing Items			Closing	
a. Fill in charter effective time	CC			
b. Confirmation of no stop orders	CC; UWC	• CC and UWC to call SEC		
c. Bring-down good standings and foreign qualifications	Company; CC			
d. Officer's certificate	UWC	• UWC to draft		
e. Selling stockholders certificates	UWC	• UWC to draft		
f. Secretary's certificate	UWC	• Complete exhibits		
g. CC company opinion	CC			
h. UWC opinion	UWC			
i. Transfer Agent opinion	CC			
j. S-8 Validity opinion	CC			
k. Opinion Backup Certificate	CC			
l. Bring-down comfort letters	UWC; A	• UWC and accountants to coordinate		
m. CFO Certificate	UWC	• To be determined if necessary		

Task	Responsibility	Notes	Timing	Status
n. Transfer Agent Certificate	UWC			
o. Cross Receipt	UWC			
p. Wire transfer instructions	UWC; CC			
q. Instruction letter from Company to transfer agent	UWC			
r. Instruction letter from UW to transfer agent re: selling stockholders	UWC			
s. Blue Sky memorandum	UWC			
t. Send CUSIP Bureau final prospectus	CC		Within 10 days of pricing	

Exhibit A

Board and Pricing Committee Approvals

Pre-Filing Board Approvals

1. IPO
    a. Approve size, including over-allotment
    b. Form S-1 (amendments, 462(b))
    c. Power of attorney; agent for service
    d. Underwriters and negotiate underwriting agreement; Pricing Committee
    e. Fees; transfer agent; NYSE/Nasdaq; DTC; blue sky; Form 8-A
2. Prohibit loans to executives

Pre-Launch Board Approvals

1. Recommendations on Stockholder Consent Items
2. Amended and Restated Certificate of Incorporation
3. Amended and Restated Bylaws
4. Classified Board
5. Director independence standards
6. Director independence analysis
7. Director compensation - post IPO
8. Board committees
    a. Independence
    b. Audit committee financial expert
    c. Composition
    d. Chairman (anticipate appointing)
9. Governance Guidelines
10. New Equity Incentive Plan

11. Employee Stock Puhase Plan [if desired]

12. Annual Executive Bonus Program

13. Executive officer and Section 16 reporting persons

14. Stock Split [if necessary] / Reorganization

    a. Acknowledge impact to outstanding equity awards

15. Committee Charters

16. Audit Committee Pre-Approval for Non-Audit Services

17. Code of Business Conduct and Ethics

18. Insider Trading Policy

19. Whistleblower Policy

20. Policy on Related Party Transactions

21. Anti-Corruption Policy

22. Clawback Policy

23. Policy Regarding Interested Party Communications

24. Stockholder Recommendations for Director Nominees

25. Stock Certificate

26. S-8 Registration Statement

27. Disclosure Policy

28. Disclosure committee

29. Indemnification Agreements

Pricing Committee Approvals

1. Underwriting agreement

2. Pricing terms

Exhibit B

Stockholder Approvals

Pre-Launch Approvals

1. Amended and Restated Certificate of Incorporation
2. Amended and Restated Bylaws
3. New Equity Incentive Plan
4. Stock Split [if necessary] / Reorganization
5. New Directors [if necessary]
6. New Board of Directors Size [if necessary]
7. Treat as 2016 “Annual Meeting”

Exhibit C

Corporate Governance Items

Task	Responsibility	Timing	Status
Board and Committees			
• Prepare Board / Committee annual calendar	Company; ; CC	Post-close	
• Independence analysis / matrix	Company; ; CC	Pre-launch	
• Adopt director independence standards and process for maintaining	Company; ; CC	Pre-launch	
Audit Committee			
• Identify audit committee financial expert	Company; ; CC	Pre-filing	
• Charter (and implementation process)	Company; ; CC; A	Pre-launch	
• Whistleblower policy (process for receipt, review and retention)	Company; ; CC	Pre-launch	
• Calendar of duties and checklists	Company; ; CC	Post-close; to be included in master calendar	
• Audit committee policy for pre-approval of independent auditor services	Company; ; CC; A	Pre-launch	
• Internal audit function	Company;	Closing	
Compensation, Nominating and Corporate Governance Committee (or split out)			
• Charter	Company; ; CC	Pre-launch	

Task	Responsibility	Timing	Status
Executive Committee			
• Charter	Company; ; CC	Pre-launch	
Code of Business Conduct and Ethics (including senior financial officers)	Company; ; CC	Pre-launch	
Anti-Corruption Policy	Company; ; CC	Pre-launch	
Clawback Policy	Company; ; CC	Pre-launch	
Corporate Governance Guidelines (including stock ownership guidelines)	Company; ; CC	Pre-launch	
Insider Trading Policy	Company; ; CC	Pre-launch	
Disclosure Committee Charter	Company; ; CC	Pre-launch	
Disclosure Policy	Company; ; CC	Pre-launch	
Interested Party Communication Policy	Company; ; CC	Pre-launch	
Record Retention Policy and procedures	Company; ; CC	Post-closing	
Related Party Transactions Policy	Company; ; CC	Pre-launch	
Policy on consideration of director candidates recommended by stockholders	Company; ; CC	Pre-launch	
Standing authorizing resolution on board approval policies	Company; ; CC	Post-closing	
Website changes	Company	Pre-launch	