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Leveraging Franchisee Associations and Advisory Councils to Strengthen Relationships

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I. INTRODUCTION

The franchisor-franchisee relationship involves two independent businesses bound by a common brand and a contract. Due to different incentives and evolving markets, conflict can result. This tension can be effectively managed through Franchise Advisory Councils (FACs) and/or Franchisee Associations.

This paper will provide an overview of FACs, their benefits and how they can be used. Also discussed will be who is on the FAC, other formational items, as well as issues to consider when initiating a FAC for the first time.

Then, this paper will explore the use of Franchisee Associations and how they differ from FACs. In order to understand associations, it's helpful to consider why franchisees form associations. Also discussed are state relationship laws protecting the rights of franchisees to form and maintain associations, and whether associations have standing to sue franchisors on behalf of their members.

There are common issues raised by franchisees through their association to their franchisor. We will examine these issues and what interactions between associations and franchisors look like, and how they can be used to strengthen franchisor-franchisee relationships. Unless otherwise noted, the information below is based on the experiences of one or more of the authors.

II. FRANCHISEE ADVISORY COUNCILS (FACs)

A Franchisee Advisory Council (FAC) is a council comprised of franchisee representatives who collaborate with the franchisor and provide feedback. Franchisors may use other names for FACs such as the Franchise Leadership Team (FLT) and, in some situations described below, the President's Council. FACs are organized and operated by franchisors, who retain control over the process, unlike Franchisee Associations. The purpose of a FAC is to foster open communication between the franchisor and franchisees. The FAC does not have decision-making authority; it is advisory only. The FAC provides feedback on existing system-wide issues, as well as input on potential new initiatives the franchisor is considering.

FACs discuss a variety of system-wide issues, including operations, technology, sourcing, products/services offered (e.g., menu offerings) and marketing. These issues may be addressed collectively in the FAC, via subcommittees or separate FACs. For example, due to its importance in achieving system-wide success, franchisors may have a separate Marketing Advisory Council (MAC) to address advertising, branding, and the use of advertising funds.

A. Benefits of a FAC

There are many benefits to establishing a FAC. Some of these benefits include:

Strengthening Relationships: Collaboration and open communication leads to better relationships between franchisors and franchisees, and hopefully happier

franchisees. Happy franchisees may increase their sales (and consequently pay more royalties to their franchisor), typically open up new territories, and provide good validation for new franchise sales. While there is a correlation between financially successful and happy franchisees, one does not automatically follow the other. For example, some franchise systems have financially successful franchisees, who may not trust the franchisor in areas such as ad fund expenditures and supply chain. Communication and transparency through a FAC can assist in developing better trust.

Franchisee Involvement: FACs allow franchisees to satisfy the human need to have control or at least input into their future.

Franchisor Decisions: Utilization of FACs allow franchisors to make better informed decisions with less second-guessing by franchisees after an initiative turns out to be not as successful as anticipated. Franchise systems strive to make the best decisions based on the information available to them at that time, recognizing that there is risk involved and not every initiative is successful. It is essential that the franchisor consult with the FAC and achieve buy-in (although not formal “approval”) prior to rolling out new initiatives such as new products, services, equipment, major vendors and processes. Buy-in may, for example, include positive feedback from FAC members or perhaps their endorsement of the new initiative.

Improving Operations and Training: FACs can provide feedback on day-to-day operational issues that will improve efficiencies and the customer experience. This is especially crucial for franchise systems that do not have corporate locations (or have very few) from which to gauge operations.

Marketing: Marketing is the most visible part of a franchise system. And as any franchisor Chief Marketing Officer will tell you, everyone has an opinion about marketing! Many of those opinions are strong convictions. Accordingly, it’s helpful to discuss these opinions as part of the FAC process. If not, those opinions will come out in less constructive ways.

Sourcing: Perhaps the largest area of franchisee distrust of franchisees is sourcing. Franchisees will say that they can buy products (much) cheaper from a supplier that is not approved by the franchisor. And, therefore, franchisees will conclude that the only possible explanation is that the franchisor is taking a gigantic rebate (or more likely characterized by franchisees as a “kick-back”). Franchisors will say that it’s not a fair comparison for numerous reasons, such as quality control, consistency, distribution and other factors. A detailed discussion of sourcing within a FAC can significantly reduce distrust related to sourcing.

Franchisee Compliance: The franchisor may also use the FAC as a vehicle to achieve higher levels of franchisee compliance. The franchisor may utilize the endorsement of the FAC to achieve franchisee compliance in areas such as product or service quality by discussing system-wide trends. Good franchisees will want non-compliant franchisees to improve and likely agree with the franchisor’s view that non-compliant franchisees should be “up, or out.”

Legal Benefit to Franchisor: If there is a later legal dispute against a franchisor by a franchisee challenging a system-wide change or new initiative, the franchisor may be able to argue that achieving buy-in of the FAC shows that the decision was reasonable when made and was not in violation of the implied covenant of good faith and fair dealing.[1]

B. Confidentiality

The FAC franchisees are representing their "constituents," like members of Congress. The FAC members may solicit views of other franchisees prior to FAC meetings, and may report back to other franchisees regarding what was discussed at FAC meetings. This helps ensure transparency and builds trust. Topics discussed at FAC meetings will be confidential within the franchise system, and may be generally okay to discuss with other franchisees since all franchisees are bound to the confidentiality provisions in the franchise agreement. As discussed below, there are typically minutes of FAC meetings, which may be distributed to franchisees.

Franchisors often develop extremely confidential innovations that have the potential to significantly advance their competitive edge. For example, a franchise system may be at the very early stages of developing new innovative technology, equipment or a product or service. At this point, the franchisor does not want to share this information with all franchisees for two reasons. First, the information should be shared with as few people as possible in order to reduce the risk that it falls into the hands of competitors. Second, because it's in the early stages and may not actually come to fruition, the franchisor doesn't want to get the hopes up of franchisees and to constantly field inquiries into the status of the project.

To solve this confidentiality problem, some franchise systems involve a select group of franchisees to advise on these confidential matters, which is typically in addition to a standard FAC. Sometimes referred to as the "President's Council," these franchisees are required to keep the information confidential, even from other franchisees. Often, franchisors will require President Council members to sign a special Non-Disclosure Agreement prior to these meetings to ensure confidentiality. Having franchisees provide input at the very early stages of development is helpful for franchisors to move the project forward to testing, and eventual roll-out to the entire system. In the communication of the new initiative roll-out, the franchisor will emphasize to the franchise system that the President's Council was consulted and provided valuable feedback. This will build trust and help facilitate the implementation.

C. Who is on the FAC?

A survey previously conducted by the IFA for its members showed that, of those who responded, 90% of FACs are elected by franchisees.[2] The other ten percent of FACs may include emerging brands that are just establishing their FAC and temporarily choose

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[1] *See, e.g., In re Sizzler Rests. Int'l, Inc.,* 225 B.R. 466 (Bankr. C.D. Cal. 1998)

[2] Erik B. Wulff, "Advisory Councils: Effective Two-Way Communications for Franchise Systems" IFA Franchise Relations Committee, at 4 (2005).

to appoint FAC members for ease of administration. Additionally, some franchise systems, smaller ones in particular, may have just enough volunteers to fill a FAC and, therefore, elections are unnecessary. President's Councils described above typically are appointed by franchisor management, rather than being elected. Appointing members has the benefit of allowing the franchisor to have a diversity of views on the FAC, such as size of franchisee, years in system, etc. But, in any event, having FAC elections may be seen by franchisees as being the most credible.

Typically, to be eligible to be a FAC member, franchisees are required to be in good standing with the franchisor (and good standing is perhaps also a requirement to vote for FAC members). Franchisors may have other criteria as well such as being the majority owner of the franchisee entity, a minimum amount of time in the system, and not actively seeking to sell their franchised business. Franchisees can often be nominated by someone else or nominate themselves. Franchisees volunteering for this service (there is no compensation) are willing to dedicate their time and energy to the FAC. Viewed from another angle, franchisees who are willing to join may have a passion that is fueled by negativity and, therefore, may be viewed by the franchisor as a rabble-rouser. FAC members may also be motivated to advocate for just one particular issue, or perhaps an issue specific to themselves rather than system-wide issues.

D. <u>Structure and Elections</u>

The structure of a FAC varies by the size of the franchise system. Larger franchise systems may have a number of regional FACs reporting into one national FAC, while others may have just one national FAC with representatives from the various geographic regions. If the FAC is to be elected by franchisees, one initial issue to resolve is whether each "franchisee" will have one vote or whether there is one vote for each territory (e.g., for each store or restaurant for those with brick-and-mortar retail locations).

Elections may be held once per year by the franchisor with FAC members serving terms typically between one and three years, often with staggered terms for those FAC members serving multiple year terms.

E. <u>Initiating FACs for the First Time</u>

Emerging franchisors or other franchisors starting a FAC for the first time should consider its purpose and carefully consider potential ramifications. This is especially relevant to highly driven entrepreneurs of emerging brands who are used to changing directions and implementing initiatives quickly. As noted above, one of the purposes of establishing a FAC is to receive input from franchisees prior to implementing initiatives impacting the franchise system. Although the bylaws will inevitably state that the FAC's role is advisory only, the franchisees' expectation is that the franchisor will seriously consider their input and take it into consideration before a decision is made. Accordingly, a FAC meeting to discuss the roll-out of a new initiative should not be the day before the planned roll out. There must be sufficient time for the franchisor to consider the input and adjust the strategy and tactics as may be needed. Once a FAC is established, franchisees will expect that they will be consulted prior to implementation of an initiative. Emerging

brands with newly established FACs have found themselves in the uncomfortable position of taking phone calls from angry FAC members who express their displeasure in hearing about implementation of a new initiative that was not discussed at the prior FAC meeting.

F. Additional Items in FAC Bylaws

FAC bylaws typically begin with stating the purpose of the FAC. It may state something like "to promote open and constructive communication between franchisees and management of the Franchisor." The bylaws will also state that the FAC is advisory only. Some bylaws then go on to make a representation that the franchisor will take into consideration recommendations from the FAC. This is, of course, the whole point of having a FAC, although some franchisors may be reluctant to make this representation in the bylaws. This representation strengthens the point made above that franchisors will need to properly plan enough time to discuss major issues with the FAC, consider their feedback and adjust as may be prudent prior to implementation of the project.

The bylaws will typically describe practical process items such as the number of FAC members and whether a member of management is formally a member of the FAC, selection of members (elections or appointed), qualifications of members, term of members, how a member could be removed, officers and committees, a description of expected decorum (respect, open and honest communication, etc.), meetings, agendas, whether the meetings are confidential, and expenses, which are typically paid for by the franchisor.

Bylaws sometimes include a provision that the bylaws may be amended by a majority (or perhaps supermajority) of its members. From the franchisor's perspective, this is not advisable. The bylaws are typically written by the franchisor with the understanding that the FAC is within the control of the franchisor. So, it doesn't seem to follow that the bylaws can then be modified by franchisees. Instead, a prudent franchisor lawyer would include a provision, either instead of or in addition to the above referenced provision, that the franchisor may amend, waive, or end the bylaws or the FAC itself at any time.

G. Meetings

The venue for FAC meetings run the gamut of everything from a table and chairs thrown together in an open area of the franchisor's headquarters to a big budget luxurious Caribbean resort. But their function is largely the same. The meeting will have a pre-set agenda. In attendance will be the members of the FAC, one or more of the members of Franchisor management that regularly attend, and special guests that may be presenting a topic. These guest presenters could include individuals from corporate departments such as marketing, technology, operations, supply chain and perhaps even in-house franchisor counsel presenting the new store inspection compliance program (as one of the authors has done). Typically, there will be minutes of these meetings and in larger franchise systems may be reviewed by in-house franchisor counsel prior to distribution.

III. FRANCHISEE ASSOCIATIONS

A franchisee association is an organization that is structurally independent of the franchisor, and is made up of franchisees, usually brand specific. Most often they form a non-profit corporation as a business structure. They may plan to operate it with board members taking on the administrative roles but are most effective when they are able to hire professional staff or an association management company. Franchisee associations have bylaws and those bylaws set forth how the board and officers of the association are named. Most associations have their franchisee members elect their board members, although in the formation stage there is likely an interim board that forms the association and writes the bylaws. The election process is key because franchisees will feel that the board members are their representatives, independent from any interference by the franchisor. It is also important to use a franchise lawyer and/or association management group to not only help properly form the association but to help with the bylaws.

Word of caution to franchisors from franchisees. Franchisees will have concerns if the franchisor intervenes with the formation and structure of an association. Asking for membership lists, copies of bylaws, etc. will be seen by franchisees as picking a fight and will not likely result in a good outcome. From the association's standpoint, the appearance of independence is critical to their success.

A. Why do Franchisee Associations Form?

Unfortunately, independent franchisee associations are often formed due to a conflict in the system. When franchisees were happy and the relationship was going well, there may not have been the push to form an association.

While franchisees often form associations out of conflict, that is not always true. They may form on a change of franchisor ownership, wanting to make sure they are organized to work with the new owner. They may form from the FAC, maturing into a stand-alone franchisee entity. This was the case of Subway in 2000 as the franchisees saw the added benefits of an independent organization. And of course, they may form because of a crisis or conflict. It is best for all to not need a crisis or conflict that demands the creation of an association, however even if that happens, it may help move toward resolution. Associations that are not formed as a result of conflict, may be viewed more positively by the franchisor. No matter why an association is formed, the association must always remember their goal is to best represent franchisees, working with the brand for a profitable and sustainable business model.

Franchise relationships are often a riddle that can only be understood and resolved by understanding the different incentives of franchisees and franchisors. In the best selling book *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything*, Levitt and Dubner (2005) made the point that "incentives are the cornerstone of modern life. And understanding them – or, often, ferreting them out – is the key to solving just about any riddle."

Franchisors are driven by top line revenue as typically they receive a percentage of the franchisee revenue in the form of a royalty. Franchisees, conversely, don't take top line revenue to the bank; but rather it's the profits that matter. For example, introducing a new product or service may increase revenue, but come with a high cost of goods sold or, if complicating operations, a high labor cost. This divergence in interests is important to understand, especially if the franchisor has no or few corporate locations. An association may be better equipped than a FAC to represent the franchisees' interests in their bottom line and, thereby, improve the relationship.

B. Umbrella Organizations

In addition to brand associations, umbrella organizations have formed that allow these brand franchisee associations to work together, learning from each others' experiences and having a stronger advocacy voice with legislatures and governmental agencies. Examples of these umbrella organization include the Coalition of Franchisee Associations (CFA) which consists of larger brand associations (McDonald's, Subway, Dunkin', 7-Eleven, Supercuts, etc.) and the American Association of Franchisees and Dealers (AAFD), which tends to consist of smaller brands. These umbrella organizations do not get involved directly in the relationship with the franchisor but can help with strategies that other associations may have found successful. These organizations also make it easier to bring in resources, such as lawyers, to provide guidance to associations, such as holding their own legal symposiums or roundtables.

C. Benefits of Franchisee Association

While franchisors at times become defensive with the creation of their franchisees forming an independent brand association, it is important for franchisors not to ignore the fact that the association may have many benefits for both the franchisor and franchisees. Here are some of the benefits:

- Sharpens the message from the franchisees - The association, through its member meetings or surveys, can narrow the focus in the messaging. Instead of the franchisor hearing from hundreds of franchisees, they can hear the message from a single association. It is the job of the association to take the messaging from all its members, prioritize the issues, and often look for some low hanging fruit and common ground to gain wins for all.

- Perception of true franchisee representation - Franchisees often feel the FAC is a rubber stamp for the franchisor as some franchisors handpick the members, the franchisor funds the FAC, and the franchisor sets the agenda for the meetings with the FAC. In other words, franchisees may view FAC members in the vernacular as "puppets" or "corporate stooges" of the franchisor. Even if the FAC members aren't a "rubber stamp," it is perception that often matters.

- Obtain independent legal opinions - While some franchisors may not want franchisees to receive legal opinions, this may actually benefit the franchisor. When franchisees get together, there are often those that claim a policy or practice

by the franchisor is illegal, perhaps throwing around terms like “illegal kickback” or “hidden royalty.” With legal counsel present, some of those claims are debunked. With that, the association can address the issue as a business issue once proper legal advice is obtained, and not with emotionally charged (and perhaps unsubstantiated) aggressive legal threats. On the other hand, maybe the counsel understands that a practice is illegal and can discuss it with the franchisor’s counsel to resolve, before it leads to litigation. For both franchisors and franchisees, lawsuits and arbitrations are expensive and often not productive. Good legal counsel, on both sides, can be productive in avoiding costly litigation.

- Provide buy-in of system changes - When the franchisor and association collaborate on system changes, the buy-in from franchisees is much greater as the franchisees feel represented in the process, and may have more credibility with franchisees than buy-in by the FAC. While this collaboration is not always easy, the association should ask the tough questions related to any investment and return on franchisee investment and therefore the outcome should be better for all involved.

- Providing franchisees with valuable resources. Associations may be able to negotiate services or products for association members that are not part of the core franchise and, consequently not offered by the franchisor. Examples include payroll services, pest control, professional development, insurance, etc. This allows the franchisees to become more productive businesspeople without tying up the resources of the franchisor that should be focusing on the core business of the franchise.

- From the franchisees’ perspective, the franchisor will benefit from having the association as a trusted advisor. That means the association is honest about the issues, sometimes brutally honest, but works towards solutions. Collaboration means success, but that doesn’t mean you don’t have tough conversations. It is not easy!

D. State Relationship Laws Protecting the Right of Association

At last count, only twelve state relationship laws or regulations directly address a franchisee’s right to associate. Some of these speak generally in terms of a “right to associate,” while others refer explicitly to a right to join an association. Three state laws explicitly protect both, and two of these prohibit retaliating against a franchisee for exercising such right. But these twelve laws or regulations provide little guidance, beyond proclaiming the right of association or the right to join an association, in terms of the extent of the right, or how it might be applied or enforced. It may simply be that the right of

association is so well accepted and understood by participants that there has been little occasion to test it.

1. The 'Right of Association' States

Arkansas, Connecticut, Minnesota, Nebraska, and New Jersey comprise the states that protect the general right of association. The Arkansas law[3] and Connecticut law[4] make it unlawful for a franchisor, through an officer, agent, or employee, to prohibit, directly or indirectly, "the right of free association among franchisees for a lawful purpose." Minnesota's law makes it "unfair and inequitable" for "any person" to "restrict or inhibit, directly or indirectly, the free association among franchisees for any lawful purpose."[5] And both Nebraska law and the New Jersey Franchise Practices Act provide that it is a violation to "prohibit directly or indirectly the right of free association among franchisees for any lawful purpose[.]"[6]

2. The 'Association or Trade Association' States

The Hawaii statute declares it to be "an unfair or deceptive act or practice" or "an unfair method of competition" for a franchisor to "restrict the right of the franchisees to join an association of franchisees."[7] The Illinois Franchise Disclosure Act declares it "an unfair franchise practice and a violation of" the IFDA for a franchisor to "in any way restrict any franchisee from joining or participating in any trade association."[8] Under the Michigan Franchise Investment Law, "[a] prohibition on the right of a franchisee to join an association of franchisees" contained in any document relating to a franchise is "void and unenforceable."[9] The Washington law prohibits restricting or inhibiting "the right of the franchisees to join an association of franchisees."[10]

3. The Belts-and-Suspenders States

Finally, three states address both the right to associate and the right to join an association. The California Franchise Relations Act makes it a violation of the Act for any

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[3] ARK. CODE ANN. § 4-72-206(a)(2).

[4] CONN. GEN. STAT. § 42-133l(f)(2).

[5] MINN. R. 2860.4400(A).

[6] NEB. REV. STAT. § 87-406(2); N.J. STAT. ANN. § 56:10-7.

[7] HAW. REV. STAT. § 482E-6(2)(A).

[8] 815 ILCS § 705/17. While there are few reported decisions involving right of association claims, one case discussing the IFDA's right to join an association highlights the importance of carefully reviewing these statutes' terms. In *Hashmi v. 7-Eleven, Inc.*, 2020 WL 586822 (N.D. Ill. Feb. 6, 2020), the franchisee alleged that his franchisor retaliated against him because of his involvement in a franchisee association by not renewing his lease and denying his requested transfer. Defendant moved to dismiss the claim pointing out that the private right of action section of the IFDA, § 26, did not include § 17 among the Act's provisions that might support a private right of action. The court never had an opportunity to decide the question.

[9] MICH. COMP. LAWS § 445.1527(a).

[10] WASH. REV. CODE § 19.100.180(2)(a).

franchisor to "restrict or inhibit the right of franchisees to join a trade association or to prohibit the right of free association among franchisees for any lawful purposes."[11] Iowa likewise prohibits restricting a franchisee "from associating with other franchisees or from participating in a trade association," but goes one step farther in prohibiting a franchisor from retaliating against a franchisee "for engaging in these activities."[12] And, Rhode Island's law[13] is identical to Iowa's.[14]

The more a franchisor fights the formation and existence of an association, regardless of whether the actions violate laws, the more it will damage the relationship. Franchisees want to be heard, and they are forming an association to accomplish that. Some franchisors may think franchisees forming an association will damage the brand, but from the franchisees' perspective, they want to work with the franchisor to optimize their success.

E. <u>Acknowledging versus Recognition</u>

There is often the perception by franchisors that they aren't a legitimate or representative organization of the franchisees, but instead are a handful of disgruntled franchisees, that franchisors would prefer to not want to deal with. Does the franchisor have to recognize or even acknowledge the association? No, they don't, but that doesn't mean they shouldn't. Ignoring the association because in the franchisor's eyes, it is just that pesky handful of disgruntled franchisees, is a mistake many brands make. If they are disgruntled, it is likely there are many franchisees that support the association's efforts, but for fear of retaliation, they are not willing to publicly step forward. Fighting the association or retaliating against its leaders is unlikely to be a winning strategy. That said, the association should also recognize that providing constructive advice lends itself to a collaborative relationship with the franchisor.

F. <u>Interactions Between Association and Franchisor</u>

When an association first forms, it will reach out to the franchisor. Often the conversation will begin awkwardly. For example, here is a common initial interaction:

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[11] CAL. CORP. CODE § 31220.

[12] IOWA CODE §§ 523H.9 and 537A.10(10).

[13] R.I. GEN. LAWS § 19-28.1-16.

[14] As others have pointed out, since *McAlpine v. AAMCO Transmissions, Inc.*, 461 F. Supp. 1232 (S.D. Mich. 1978), decided nearly a half century ago, neither courts nor juries have had difficulty finding franchisors liable for retaliatory conduct taken against franchisees on account of their activism, whether or not the misconduct at issue was prohibited by an applicable 'right to associate' law. *See* Andrew Beilfuss, Ronald K. Gardner, Eric H. Karp, Brenda B. Trickey, & Kate B. Ward, *I-3: Multiple Voices at the Table—Effective Franchisee Associations and Franchise Advisory Councils*, ABA 47th ANNUAL FORUM ON FRANCHISING I-3, at 31–32 (2024). Because those several decisions were fully discussed there, they are not addressed here.

Association: Franchisees have formed an association, and we would like to discuss our issues.

Franchisor: How many franchisees do you represent?

Association: Most of them.

Franchisor: Let us know who they are so that we can confirm that you do in fact represent the majority of the system.

Association: We aren't willing to share this information as our members don't want retaliation. Do you recognize us?

Franchisor: We don't know what "recognize" means. We're talking to you, aren't we?

Clearly, a less-than-smooth start to a business relationship. Once these initial discussions are concluded, the association will present their issues to the franchisor. Often, the association will have one primary issue that was a catalyst to forming the association. Maybe it's marketing, maybe it's supply chain or maybe it's the franchise agreement.

Here is a possible scenario: A founder-run franchisor was recently purchased by a private equity backed company. The franchisor decides to have a complete re-write of the franchise agreement to include higher royalties, increased minimum royalties, and additional fees. While a franchisor may not necessarily say (out loud) that forming the association was a good thing, it may be inevitable and actually become much more efficient for the franchisor. This will ease the tensions between the franchisor and its franchisees since it will open up a line of communication as described below.

In this example, without an association, the franchisor may roll out the franchise renewals with each franchisee obtaining separate counsel to review, comment and attempt to negotiate the franchise agreement. This will be chaos. The franchisor's counsel will then have to respond to numerous letters from counsel, some of whom, let's just say, have not attended an IFA Legal Symposium nor are active in the ABA Forum on Franchising. This creates quite a challenge to the franchisor's lawyer in responding and keeping a consistent message. The many different and disconnected viewpoints will increase the strife in the franchise system. Accordingly, the association may be able to ease this tension.

While the franchisor could preview the new franchise agreement with the Franchise Advisory Council, the franchisees will likely want to organize separately through an association and retain experienced franchise counsel to advise, and perhaps negotiate, the franchise agreement on behalf of its members. This association counsel would have organized the comments from franchisees in a cohesive manner before presenting it to the franchisor, which may include eliminating superfluous requests. This will make the process smoother and preserve relationships; as well as making the workload manageable for the franchisor's counsel and management. Of course,

franchisees may still negotiate their own deal separately, but in this author's experience, franchisees typically follow along with what the association negotiates.

G. The FTC Rule and Franchisee Associations

When a franchisor is considering the appropriate response to an independent franchisee association, the franchisor must not only consider the ramifications to existing franchisees but also to potential franchisees in the franchise development pipeline. As is relevant to franchisee associations, the FTC Rule requires franchisors to disclose in Item 20 of their FDD certain information relating to certain "trademark-specific franchisee organization associated with the franchise system."[15] If the organization[16] (1) was "created, sponsored, or endorsed by the franchisor," or (2) is "organized under state law and asks the franchisor to be included in the franchisor's disclosure document during the next fiscal year," it must be disclosed.[17] With respect to the former type of organization, the franchisor must disclose as well its relationship with the organization. With respect to the latter, it must be remembered that the request for inclusion must be renewed annually. The FTC Rule requires further that, as to each such organization, the franchisor disclose—"to the extent known"[18]—the organization's name, address, telephone number, email address, and Web address.

The practical effect of the required disclosure is twofold. It ensures that a prospective franchisee will have the opportunity, should it choose, to contact the association or council as part of its due diligence. Indeed, this was precisely the FTC's intent.[19] And it would tend to imbue independent associations with a certain legitimacy.

During the franchise sales process, franchisee prospects will see reference to the independent franchisee association in the FDD. It's fairly effortless for a prospective franchisee to contact the association during the due diligence and validation process. Franchisors should consider how their relationship with the association could have an impact on franchise sales. Even if the franchisor believes that the association does not represent the interests of all franchisees or is a "fringe" group of franchisees, this association may have the opportunity to plead its case to these prospective franchisees.

H. Franchisee Association Standing to Sue on its Members' Behalf

Because federal courts are courts of limited jurisdiction, they have only the power authorized by the United States Constitution and federal statutes.[20] "One element of the

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[15] 16 C.F.R. § 436.5(t)(8) (2007).

[16] Note the use of the term "organization" rather than "association" would appear intended to make clear the Rule requires disclosure of a franchise advisory council.

[17] 16 C.F.R. § 436.5(t)(8) (2007).

[18] *Id.*

[19] *See* Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities; Final Rule, 72 Fed. Reg. 15444, 15507 (Mar. 30, 2007).

[20] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

case-or-controversy requirement" is that a litigant must have standing to invoke the power of a federal court.[21] Standing is a jurisdictional requirement that cannot be waived.[22]

Stated differently, "'[e]very party that comes before a federal court must establish that it has standing to pursue its claims.'"[23] The standing question concerns "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[24] Importantly, as *APFA Inc. v. UATP Management, LLC*, discussed at length below, shows, it has both constitutional *and prudential* components.[25] Constitutional standing requires a plaintiff to establish that it has suffered an injury in fact traceable to the defendant's actions that will be redressed by a favorable ruling.[26] Prudential concerns, by contrast, are judicially self-imposed limitations on the a court's authority to exercise subject matter jurisdiction.

Some disputes that arise from time to time within a franchise system impact many, if not all, franchisees, even if not in the same manner or to the same degree. It is unsurprising, therefore, that franchisee associations will, from time to time, seek to prosecute claims against franchisors on their members' behalf in a single action, as opposed to multiple actions brought by individual franchisees involving similar, if not identical, claims. From a franchisee's perspective, a single action brought by their association might afford significant perceived efficiencies and cost savings when compared with a multiplicity of actions brought by individual franchisee-members. On the other hand, a franchisee might be concerned about the extent of its control over the conduct of such action or its ability to influence the direction and execution of the effort. From a franchisor's perspective, the prospect of coordinated action among franchisees might be daunting. Still, in one of the authors' experience franchisors might very well be willing to litigate or arbitrate an issue common to many or even all of its franchisees in a single forum rather than numerous separate actions. And, from a systemic perspective, a single action resulting in a single ruling, decision, or judgment is inherently more efficient, can foreclose the possibility of inconsistent rulings across multiple actions, and might provide uniform guidance to all participants in the system.[27]

Franchisee associations can play an important role in facilitating the resolution of disputes that impact many or all the system's franchisees. But there are also institutional and legal challenges an association faces in seeking to act on behalf of its members in a

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[21] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

[22] *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996).

[23] *APFA Inc. v. UAPT Mgmt., LLC*, 537 F. Supp. 3d 897, 903 (N.D. Tex. 2021) (citing *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013)).

[24] *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

[25] *Id.* (standing "contain[s] two strands: Article III standing . . . and prudential standing").

[26] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

[27] There are several class, mass, or collective judicial and arbitral mechanisms (like that alluded to in the prior paragraph) for addressing or resolving disputes impacting many or all franchisees within a franchised system, whether in litigation or arbitration, that are beyond the scope of this article.

single action brought in the association's name. The principal one of these is the question of an association's standing to prosecute in its name claims belonging to its members, at least in the federal courts. This so-called 'associational standing' inquiry examines whether an association that seeks to litigate in its membership's stead is a proper party plaintiff or claimant, and, where the action is to be brought in a federal court, satisfies the requirements of federal subject matter jurisdiction.

An association may have standing to sue in its own right to seek judicial relief from an injury to itself and to enforce or vindicate whatever rights the association itself may have.[28] But beyond that, "an association may have standing solely as the representative of its members."[29] To bring suit on behalf of its members, the association must meet the so-called *Hunt* test by showing that "[1] its member(s) would otherwise have standing to sue in his own right; [2] the interests it seeks to protect are germane to the organization's purpose; and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[30] As observed by the *APFA* court, "[c]ourts across the country have diverged on the application of the *Hunt* associational standing test to franchisee associations seeking to vindicate the rights of their members against a franchisor."[31]

APFA Inc. v. UATP Management, LLC, is perhaps the most recent decision on point. In that case, an association representing more than fifty Urban Air franchisees sued their franchisor, asserting contract and disclosure claims. After the case was transferred from the New Jersey federal court consistent with a mandatory venue provision, the franchisor moved to dismiss the case, claiming the plaintiff lacked associational standing. The court granted the motion.

Applying the three-pronged *Hunt* test, the court ruled that the first prong, requiring at least one member of the association have standing to sue in his own right, was satisfied. The first prong requires "'specific allegations establishing that at least one identified member ha[s] suffered or would suffer harm.'"[32] The court found the pleadings sufficient to show that the association's members would have standing to sue in their own right because they adequately identified several franchisees (or representatives of a franchisee) who, as franchisees, "have suffered and continue to risk suffering an alleged economic injury in the form of increased fees and vendor payments, allegedly outside the scope of the Franchise Agreement and not properly disclosed in the FDD."[33] For this reason, the court concluded that "a Plaintiff-member-franchisee's alleged economic injury

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[28] *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

[29] *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010).

[30] *See Hunt v. Wash. State Apple Advert. Comm'n,* 432 U.S. 333, 343 (1977).

[31] *APFA*, 537 F. Supp. 3d 897, 905 (citations omitted).

[32] *Id.* at 906.

[33] *Id.*

is a sufficiently concrete injury, traceable to Defendant and redressable by the Court, which would give Plaintiff's members standing to sue Defendant in their own right."[34]

Skipping the second *Hunt* prong, which presumably was uncontested (and which rarely is, although see the discussion *infra* of *Great White North Franchisee Association-USA, Inc. v. Tim Hortons USA, Inc.*), the court next considered the third, namely, whether the claims asserted, or the relief requested, require individual members' participation in the action. It began by noting that, "[f]or the few courts that have addressed a franchisee association's standing to sue on behalf of its members, the hang-up often occurs at this third prong."

The defendant argued the court would be required to consider numerous franchisee-specific factors, such as which franchisees signed which of the several amendments and authorizations at issue in the case, which of them was defrauded into signing them, which franchisor representations made to which franchisees violated the statutes at issue or constituted other torts, and which franchisees were bound by arbitration provisions of certain of the several agreements at issue. In response, the association argued, first, that it sought only declaratory and injunctive relief (eliminating any franchisee-specific damages questions); second, that discovery alone might lead to resolution without the need for any franchisee participation; third, that the association's claims center on defendant's "uniformly and in bad faith" actions; and, finally, that the franchisees are "substantially similarly . . . affected by" defendant's actions.[35]

The court began its analysis of this third *Hunt* prong by observing that it is "prudential," meaning it is a "judicially self-imposed limit on the exercise of federal jurisdiction, not a constitutional mandate."[36] Thus, this third prong required the association to demonstrate that "the nature of the case does not require the participation of the individual affected members as plaintiffs to resolve the claims or prayers for relief at issue."[37]

The court pointed out that the prudential concerns noted by many other courts considering the standing of franchisee associations included "conflicting state laws in multiple interested jurisdictions; claims of tortious conduct and breach of contract instead of discrete legal issues like challenges to statutes and regulations; a party to a contract not present to litigate that contract; the risk of divergences in individual franchisee's franchise agreements; declaratory relief only framing the controversy between the parties instead of resolving the controversy; and the inherently individualized nature of some underlying legal standards like 'bad faith' and 'unreasonableness'."[38] Only two prior courts, the court noted, "concluded a franchisee association could proceed under a theory of associational standing," and even those courts did so "largely" because the issue arose

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[34] *Id.*

[35] *Id.* at 907.

[36] *Id.*

[37] *Id.* (quoting *Prison Just. League v. Bailey*, 697 F. App'x 362, 363 (5th Cir. 2017)).

[38] *Id.* at 908 (internal citations omitted).

at the pleading stage, the "narrowness of the declaratory relief based on purely legal remedies, the uniformity of the franchise agreements, and the expectation of later class certification."[39]

In this case, the court found the association's fourteen declaratory relief requests raised virtually all the prudential concerns earlier courts had raised, and none of the safeguards found by the two departing courts. For this reason, the court concluded the association was simply "not in the best position to present the subtleties of the franchisees' individualized contract and tort claims proffered as declarations,"[40] and the association therefore had failed to show that neither the claims asserted nor the relief sought required individualized participation of its member franchisees.

The several, earlier on point decisions reviewed by the court in *APFA* were thoroughly summarized only months ago in an excellent paper that the authors highly commend, and will not be reviewed again here.[41] One case the *APFA* court did not address is *Great White North Franchisee Association-USA, Inc. v. Tim Hortons USA, Inc.*[42] In that case the court considered a franchisee association's standing to assert claims for declaratory and injunctive relief under Florida's Deceptive and Unfair Trade Practices Act. The first claim asserted a *per se* violation of the Act based on alleged representations contained in defendant's franchise disclosure document and was based on asserted violations of the FTC's Franchise Rule. The second was based on defendants' alleged "predatory business schemes."[43]

The court found the association lacked standing to assert the claim based on alleged FTC Franchise Rule violations. That claim was based on alleged misrepresentations contained in the franchisor's *then-current* disclosure document. But as *existing* franchisees, the court noted, the association's members would not have received that document.[44] For the same reason, the court also found that the interests sought to be protected by the first claim were not germane to the association's purpose to "provide a common interest organization for [existing] . . . franchisees. . .."[45]

The association's second claim fared much better, at least on the standing issue. The court found the first prong satisfied because the claim was based on alleged misconduct impacting existing franchisees, like the association's members. The claim was also germane to the association's purpose to benefit existing franchisees. Moreover, the claim for injunctive relief under the Act required only that the plaintiff allege it was

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[39] *Id.* at 908–09.

[40] *Id*.

[41] *See* Beilfuss et al., *supra* note 14, at 20–22.

[42] 2020 WL 8024349 (S.D. Fla. Dec. 21, 2020); opinion on remand 2021 WL 3168550 (S.D. Fla. Jul. 27, 2021).

[43] 2020 WL 8024349, at *4.

[44] *Id.* at *6.

[45] *Id.*

"aggrieved by a deceptive or unfair trade practice," which the association had adequately pled.[46]

In short, franchisee associations will be found to have associational standing to sue on behalf of its members where its members would otherwise have standing to sue in their own right, the interests at issue are germane to its purpose, and individualize participation of its members is unnecessary. But as *APFA* and its survey of prior caselaw on point demonstrate, the three-pronged *Hunt* test is not readily met and the prudential concerns raised in *APFA* and prior cases that franchisee association litigation often implicate can prove difficult to overcome.

IV. FTC REPORT ON RELATIONSHIP ISSUES

What are the items today that are causing relationship problems between franchisees and franchisors to be concerned with? Probably the best indication of the most important issues today comes from the FTC Request for Information[47] (RFI) which was made on March 10, 2023 with responses due by June 8, 2023. During this time, a total of 6,288 comments were received and 2789 were posted on the docket.[48] On July 12, 2024, the FTC made multiple announcements from the information obtained in the RFI.

First, the FTC issued a Policy Statement[49] that warned franchisors that the use of contract provisions that prohibit franchisees from communication with the government, "violate the law." These provisions are most often in the form of non-disparagement or confidentiality clauses. They further stated that any threats against franchisees for reporting potential law violations to the government "are unlawful." Any actions relating to franchisees contacting government agencies and related retaliation against those franchisees create more problems than they solve and quickly sour relations with franchisees.

Next, the FTC issued a Staff Guidance[50] that "makes it clear that it is illegal for franchisors to impose undisclosed junk fees – fees that raise costs and which may make the difference between a profitable franchise and an unsustainable one." The staff guidance discussed the requirement of the franchisor to disclose fees in the FDD so that prospective franchisees understand their obligations. They further discussed that "if a franchisor imposes a new fee, through its operating manual or otherwise, that was not disclosed in the FDD and included in the franchise agreement, the franchisor may be engaging in an unfair act or practice in violation of Section 5 of the FTC Act."[51] It is

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[46] *Id.* at *7–8. The court went on to dismiss the second claim with prejudice for failure to state a claim.

[47] https://www.ftc.gov/system/files/ftc_gov/pdf/Franchise-RFI.pdf

[48] https://www.regulations.gov/docket/FTC-2023-0026

[49] https://www.ftc.gov/legal-library/browse/policy-statement-of-the-ftc-on-franchisors-use-of-contract-provisions

[50] https://www.ftc.gov/system/files/ftc_gov/pdf/Franchise-Staff-Guidance.pdf

[51] https://www.ftc.gov/system/files/ftc_gov/pdf/Franchise-Staff-Guidance.pdf

understood that times, and certainly technology, advance during the franchise agreement term. This is an opportunity for franchisors to take advantage of franchisee associations or FACs to discuss proposed new fees. It would be helpful to identify the new requirement, build a business case, test the business case if possible, and gain support for the added fee from the association or FAC. Franchisees would like the issues to be fully transparent, including the revenue made via the fee and the expenses to the identified fee purpose. Franchisees will have concerns where the new fee becomes a profit center for the franchisor and/or not used for its intended purpose.

Finally, the FTC released an Issue Spotlight[52] identifying the top 12 concerns from franchisees from the 2023 Request for Information. These concerns came from thousands of comments by franchisees. Listed below are these items. Note: The items listed are from the Issue Spotlight, the discussion includes authors' opinions.

1. Unilateral changes to franchise operating manuals. This was the top concern raised to the FTC by franchisees. Items flagged included new add-on services, extending operating hours, even adding a liquidated damages clause. The use of the operating manual often goes beyond normal operations for many franchises, where the operating manual is used to change the terms of the contract. If a major change is needed, the association or FAC should be involved, as the franchisees are often the most impacted. Engaging the franchisees before they see it inserted into the operating manual builds the relationship.

2. Franchisor misrepresentation and deception. Many franchisees reported that they felt the franchisor misrepresented the franchise during the sales process, including start-up costs and sales, revenue, and profit data. Franchisees not only use this data in their decision to purchase the franchise, but also to finance the franchise. These misrepresentations and deceptions can be catastrophic financially to the franchisee. Unfortunately, this is not something that can be solved with associations or FACs; it is too late. But it highlights the importance of complete and truthful disclosure because without it, the relationship is doomed from the start.

3. Fees and royalties. In this section, the FTC discussed that excessively high fees may make the franchise unsustainable for the franchisee. This also reiterates the issue with new or undisclosed fees as previously discussed in the staff guidance on undisclosed junk fees.

4. Franchise supply restrictions and vendor rebates (sometimes referred to by franchisees as "kickbacks"). This has become a huge issue with franchisees, who often see this as franchisors seeking to increase revenue at their expense. When buying a franchise, one of the key benefits often discussed is the group purchasing power the franchisee will receive. But in practice suppliers are often limited, and franchisors are often receiving revenue from vendors based on franchisee purchases, which franchisees may claim inflates the costs of goods and services above free market prices. Transparency is key here, rebates are not necessarily

[52] https://www.ftc.gov/system/files/ftc_gov/pdf/Franchise-Issue-Spotlight.pdf

bad from the franchisees' perspective, but in their view should not drive up the cost of a product or service above an open market rate. There are costs associated with handling the purchasing duties, and franchisees recognize that the franchisor should be able to recover those direct costs. Many franchisors will make the point that a product is proprietary, and it is true, many brands do have proprietary items, but franchisees become cynical if a franchisor adds a logo on a box of toilet paper and claims it's proprietary. Franchisees will be concerned if the franchisor profits from the supply chain at the expense of franchisees, and expect transparency.

5. Actual and feared retaliation. Simply, franchisees are often afraid to speak out about their problems with their franchisor. Non-disparagement and confidentiality clauses have a chilling effect on franchisees speaking out, even when speaking with the government. This was also discussed above in the Policy Statement. It is key to keep open lines of communication between franchisor and their associations and FACs. It is beneficial for franchisors to hear what franchisees are thinking, no matter how painful. Not keeping those lines open is why franchisees go to the government with complaints, or worse yet, air them in the press. If franchisors are not listening, franchisees will find a way to be heard.

6. Non-competes and no-poach clauses. Non-compete clauses can restrict the rights of a franchisee approaching the end of their franchise term. While these clauses have their place and purpose, franchisees consider them overreaching and as handcuffs at renewal if a franchisor is offering renewal terms significantly different than the franchisee's original franchise agreement. Franchisees often see this as a choice between signing the new onerous contract or be restricted from making a living in their field of expertise for often 2 years. On February 10, 2025, the North American Securities Administrators Association (NASAA) issued a Franchise Advisory on Post-Term Non-Competes advising the provisions should be reasonable and NASAA provided guidelines for non-compete clauses.[53]

7. Franchise renewal problems, as described in the prior paragraph. The FTC, in this section, discussed how renewals may differ greatly from the original business model the franchisee bought into. How a change in leadership, including a private equity buyout, can cause the business model to be fundamentally changed. As one commenter stated, "I have 2 very bad choices: 1) Sign the agreement or 2) refuse to sign the agreement and lose my business altogether."

8. Franchisor refusal to negotiate contract terms. For most franchisees, the franchise agreement is presented as a "take it or leave it." And while consistency is important, many franchisees aren't aware that they can negotiate their contract.

9. Franchise Disclosure Document issues. The FTC commented that "many franchisees complained of incomplete or misleading FDDs." This includes a lack of standardization of financial reporting in Item 19. Low buildout estimates and

[53] https://www.nasaa.org/wp-content/uploads/2025/02/NASAA_Franchise_Advisory_Noncompetes_2-21-2025.pdf

deceptive profitability numbers were mentioned. As discussed above, these issues are too late for the association or FAC to handle, but often sour the relationship past the point of return.

10. Private equity takeovers. The FTC noted many commenters talking about how the business model and the priorities have changed once private equity took over their franchise brand. These comments included statements regarding decreased levels of franchisor support and increased fees. Franchisees see this as a focus on maximizing revenue to increase royalties at the expense of franchisee profitability. When franchisees see services reduced and new fees for services previously provided within the royalty structure, they will be frustrated as it squeezes their margins.

11. Marketing fund transparency. Franchisees made comments on the use and transparency of marketing funds collected. These comments included statement that marketing funds are sometimes used to recruit new franchisees, not to market existing franchisees' businesses to consumers, or disproportionally being used to benefit corporate-owned locations. The FTC stated that "Several franchisees used the term 'slush fund' to describe the marketing fund." Comments also related to franchisors not providing promised marketing fund audits. This provides a great opportunity for franchisors to work with their associations and FACs on transparency of these funds. Additionally, achieving buy-in from franchisors' association or FAC on promotions and how the money is spent will go a long way to improve relationships.

12. Liquidated damages clauses and early termination fees. The FTC reported that several franchisees singled out liquidated damages clauses as trapping them in unprofitable franchise systems. Like non-competes, there are valid reasons to have liquidated damage clauses in contract. Unfortunately, franchisors of failing brands may still feel the need to hold franchisees accountable for failures of the franchised business by enforcing liquidated damages. From the franchisees' perspective, franchisors should instead figure out why the business is failing, and work with the franchisees to correct it, and not penalize them more.

Franchisors should consider these issues brought forward by thousands of franchisees and use their association or FAC to work on these issues. They will not go away by shying away from them.

V. ANTITRUST CONCERNS RAISED BY COOPERATION AND COORDINATION AMONG FRANCHISEES

Franchisee associations, like any trade association, exist primarily to provide a forum for mutual support, cooperation, education, and coordination among its membership. While it may be true that in the franchise context many associations are started in response to some conflict, challenge, or adversity,[54] over time, presumably, if

[54] *See* Beilfuss et al., *supra* note 14, at 20–22.

optimistically, their purpose will become more consistent with the more positive and productive reasons trade associations exist. Assuming that to be the case, and even if it is not, because franchisees are *horizontally situated competitors* in the eyes of antitrust law,[55] it is important that the association itself, its participants, and their counsel, be mindful of the antitrust considerations and concerns their activities, cooperation, and coordination implicate.

A good starting point in considering this topic, and a particularly timely one, is the positions and policies adopted by the Federal Trade Commission with respect to competitor cooperation generally, and trade associations in particular. For many years, trade associations and competitors more generally could look to the FTC and Department of Justice Antitrust Guidelines for Collaboration Among Competitors ("Collaboration Guidelines")[56] issued on April 7, 2000 for guidance. As the FTC and the DOJ's Antitrust Division explained in releasing that "first set of guidelines issued jointly by both federal antitrust agencies that address[ed] a broad range of horizontal agreements among competitors," the Collaboration Guidelines were prompted by "[c]ompetitive forces of globalization and technology" that were driving firms toward "complex collaborations[.]"[57] The Collaboration Guidelines were designed "to assist businesses in assessing the likelihood of an antitrust challenge to a collaboration with one or more competitors."[58] The 35-page policy statement described in detail the FTC's and DOJ's analytical approach to these collaborations, but even more importantly, because it acknowledged that "competitor collaborations are often procompetitive," it sketched out what it called "antitrust safety zones" competitors might rely on in pursuing such collaborations.

But on December 11, 2024, the FTC and DOJ withdrew the nearly quarter-century old guidelines, which had been updated only months earlier. In a press release issued that day,[59] the FTC and DOJ stated that the Collaboration Guidelines "no longer provide[d] reliable guidance about how enforcers assess the legality of collaborations involving competitors[.]"

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[55] *See* W. Barry Blum, Andrew C. Selden, & Romondous Stover, *Strategies for Effective Franchise Associations & Councils*, ABA 36th Annual Forum on Franchising W-12, at 18 (2013). Because franchisees are situated horizontally, their concerted activities that are deemed to restrain trade are prone to be deemed *per se* violations of the Sherman Act, without any scrutiny of the actual anticompetitive effect, if any, of their activities under the rule of reason test applicable to vertical restraints, or the so-called 'quick look' applied to patently anticompetitive arrangements. *See generally In re Papa John's Emp. and Franchisee Emp. Antitrust Litig.*, 2019 WL 5386484, *8 (W.D. Ky. Oct. 21, 2019).

[56] https://www.ftc.gov/legal-library/browse/policy-statement-ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors.

[57] https://www.ftc.gov/news-events/news/press-releases/2000/04/ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors.

[58] FTC Press Release, April 7, 2000, https://www.ftc.gov/news-events/news/press-releases/2000/04/ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors.

[59] https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-doj-withdraw-guidelines-collaboration-among-competitors.

The Collaboration Guidelines' withdrawal, however, did not leave a complete vacuum in terms of guidance. In fact, less than two months earlier (and only days before completion of this paper), on March 18, 2025, the FTC issued its updated Spotlight on Trade Associations ("Spotlight").[60] The updated Spotlight acknowledged that "[m]ost trade association activities are procompetitive or competitively neutral." It noted that when association activities are engaged in "with adequate safeguards, they need not pose an antitrust risk."[61] But it pointed out, nonetheless, that merely forming a trade association "does not shield joint activities from antitrust scrutiny." Illegal competitor collaboration is still illegal "even if … done through a trade association."[62]

Among the areas of concern competitor collaboration raise, the FTC stated,[63] are the exchange of pricing information or other sensitive business data, and current information pertaining to individual competitors. By contrast, it pointed out, cost or other nonprice data, and historical data rather than current or future data, "is less likely to raise antitrust concerns."[64] Importantly, especially in view of the FTC's and DOJ's withdrawal only weeks earlier of the Collaboration Guidelines, the FTC at least tacitly reaffirmed by reference its and DOJ's earlier Statement of Antitrust Enforcement Policy in Health ("Health Care Statement")[65] issued in August 1996, which, although designed specifically for "health care providers sharing price and cost data," nevertheless "are broadly applicable to other industries as well." As a result, those involved in the activities of franchisee association can find some guidance regarding their collaborative activities in these sources and statements of enforcement policy.

Perhaps above all, the FTC's and DOJ's statements and policies are important and helpful as they create a so-called "safety zone" within which trade associations and their members might take some comfort their conduct is beyond antitrust scrutiny, much less enforcement. This safety zone is based on the premise that sharing of aggregated, nonprice historical data is less concerning than sharing of individualized, current pricing data. However, as the FTC and DOJ made clear in the Health Care Statement, safety zones do not "defin[e] the limits of joint conduct that is permissible under the antitrust laws."[66] They should instead be used only as guideposts in designing and planning association activities and collaboration among members.

As it might be applied to franchisees, the safety-zone the FTC's and DOJ's policy statements carve out is delineated by three requirements. The first requirement is that the information or data shared among franchisees be compiled and maintained by a third

[60] https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] https://www.ftc.gov/legal-library/browse/statements-antitrust-enforcement-policy-health-care.

[66] *Id.* at 5.

party. Obviously, this is one of the more important roles a franchisee association might play in facilitating franchisee collaboration. Second, the data or information shared must be historical rather than current, with three months being a rule of thumb differentiating the two.[67] Finally, the data or information shared must be that of no fewer than five franchisees, must be aggregated (so no one franchisee's data might be viewed in isolation), and no one franchisee's data may constitute more than 25% of the data aggregated.[68]

Sherman Act § 1 prohibits agreements to restrain trade, one of the most obvious and egregious of which is price fixing. One of the risks posed by franchisee (read, competitor) cooperation, especially when that cooperation involves sharing of individualized current or future pricing information—and franchisee associations present the perfect forum for such cooperation—is that the resulting alignment among their respective pricing may deemed a *per se* Sherman Act violation. And, importantly, this is but an example of how cooperation among franchisees facilitated by a franchisee association can result in potential antitrust scrutiny and even liability. For this reason, it is important that those establishing, leading, or participating in franchisee associations be mindful of these antitrust concerns, take advantage of available safety-zones, and plan association activities accordingly.

One other area of antitrust concern should be mentioned. While associations are generally permitted to control their memberships, the exclusion of would-be members may give rise to potential antitrust scrutiny or liability under a 'group-boycott' or 'refusal to deal' theory premised on a claim that exclusion foreclosed the would-be member from access to the advantages of membership, like information sharing.[69] These risks can be minimized through the development of membership criteria corresponding to the association's stated purpose and the consistent and even-handed implementation of these membership criteria.

VI. CONCLUSION

Franchise Advisory Councils and independent Franchisee Associations each offer distinct yet complementary avenues to foster productive franchisor-franchisee relationships. They both serve as pivotal instruments in managing the complex and often tension-filled dynamics inherent in the franchisor-franchisee relationship. While

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[67] https://www.ftc.gov/legal-library/browse/statements-antitrust-enforcement-policy-health-care.

[68] *See also,* "Information exchange: be reasonable," https://www.ftc.gov/enforcement/competition-matters/2014/12/information-exchange-be-reasonable. In this statement, last updated on March 12, 2025, the FTC reiterated or elaborated on the safety-zone elements outlined in its Health Care Statement. It stated again that sharing information related to "price, cost, output, customers, or strategic planning is more likely to be of competitive concern than the sharing of less competitively sensitive information"; the sharing of "current or future operating and business plans" is more concerning than the sharing of "historical information"; and the sharing of "company-specific data" is more concerning than the sharing of "aggregated data that does not permit identification of information by company."

[69] The few group-boycott/refusal to deal cases involving association membership disputes are addressed in Beilfuss et al., *supra* note 14, at 8–9.

structurally and functionally distinct, both vehicles offer meaningful frameworks to advance system cohesion, enhance governance, and mitigate legal and operational risks. FACs, when properly structured and utilized, provide a franchisor-led forum for collaboration and system-wide input, helping franchisors gather meaningful feedback, document franchisee engagement, and build buy-in, while improving both transparency and trust system-wide—factors which may serve as evidentiary support in future disputes implicating the covenant of good faith and fair dealing or the reasonableness of system-wide changes.

Franchisee Associations, by contrast, present an independent and potentially more credible vehicle for collective franchisee advocacy. Their ability to secure independent legal advice, coordinate feedback, advocate collectively on behalf of their members and engage in informed negotiation—particularly during franchise agreement renewal cycles or when systemic issues arise—can facilitate more orderly and legally sound resolution of disputes. While FACs often function within franchisor-defined parameters, Associations embody the franchisees' autonomy and can be powerful tools for systemic change, particularly when supported by legal protections and careful collaboration.

The evolving legal and regulatory landscape—highlighted by the FTC's growing scrutiny around franchise system practices, particularly as they relate to disclosure obligations, fee transparency, and non-disparagement provisions—has underscored the importance of transparency, trust, and two-way communication in franchise systems. Franchisors must be increasingly mindful of how their interactions with FACs and Associations are perceived not only by their franchise systems, but also by regulators and prospective franchisees. Proactive engagement with FACs and Associations can mitigate disputes, avoid litigation, and address franchisee concerns before they escalate. Disregarding or undermining these entities risks not only damaging relationships but inviting regulatory attention and litigation. Moreover, both entities, when used thoughtfully and in good faith, are critical mechanisms to bridge the incentive gap between franchisors and franchisees.

In sum, prudent franchisors and their counsel should view Franchisee Advisory Councils and Franchisee Associations not as threats, but as tools for system stewardship. When structured and leveraged effectively, these entities support sound risk management, compliance with evolving legal standards, and long-term brand sustainability. Fostering these relationships is not always easy, and tough conversations are inevitable—but when franchisors and franchisees lean into constructive dialogue, the entire system is better for it. Counsel advising either party would be well-served to prioritize engagement, transparency, and legal precision in shaping these relationships.

Author Biographies

Fredric Cohen is a partner at Cheng Cohen LLC. For more years than he cares to be reminded of, he has represented franchisors in state and federal courts and arbitrations across the country.

Brian Balconi is the principal of Balconi Mediation Services where he mediates franchise, business, and employment disputes. Prior to that role, Mr. Balconi was the Chief Legal Officer of Authority Brands and its affiliates, which includes the franchisors of sixteen home service brands. He has a diverse background that includes being General Counsel of Little Caesars and Legal Counsel with Dunkin' Brands, as well as business experience, having previously served as President of growth and turnaround franchisors. In private practice, Mr. Balconi represented franchisees and their association, which included disputes with their franchisors. He is active in industry associations, including the International Franchise Association and the American Bar Association Forum on Franchising, in which he served as Director of the Corporate Counsel Division. He received his Bachelor of Business Administration from the University of Notre Dame and his J.D. from the University of San Diego School of Law.

Keith Miller has been a Subway franchise owner since 1988, owning up to 6 stores in Nevada and California, and currently owns 3 stores in California. Keith was Chairman of the Coalition of Franchisee Associations (CFA) from January 2012 through January 2018 and remains on as a Director. He served on the North American Association of Subway Franchisees (NAASF) as a Director from 2000-2002 and 2005-2010, and served as NAASF's first President, CEO, and Chair in 2000-2001. In 2018, Keith founded Franchisee Advocacy Consulting, working to advance franchisee causes through engagement and advocacy. In 2019, he was named Director of Public Affairs and Engagement for the American Association of Franchisees and Dealers (AAFD).