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Minimizing Risks Associated with Franchisee Email and Social Media Communications

Email is dominating business communications, and social media is replacing much of what previously was done through print advertising. By all appearances, these and other electronic communication tools will increase in both usage and importance. As a result, franchisors should consider if, to what extent, and how they should control the use of these mediums by those associated with the brand. It is not uncommon, for instance, for franchisors to assign email addresses to their franchisees and require that those email accounts be used in the operation of the franchised unit. Franchisors may also permit or encourage franchisees to use social media in connection with the promotion and operation of their businesses. But control or oversight over franchisees' assigned email accounts and social media communications can expose franchisors to liability.

To avoid or minimize liability to franchisees or to third parties for the acts of its franchisees in these mediums, franchisors should carefully consider whether they:

- address franchisee use of assigned email accounts and social media in the operations manual or other form of written policy, such as an electronic communications or social media policy. Clear guidelines that address the franchisee's and the franchisor's respective rights as to the email or social media accounts and the content generated by such electronic communications are necessary.
- obtain written authorization from franchisees, unless the franchisor's electronic

communications policy clearly permits the franchisor to access franchisee accounts, before accessing or searching their assigned email accounts. Even though the email accounts may have been assigned by the franchisor, unauthorized access or search of franchisor-assigned email accounts can result in liability under the Stored Communications Act, for invasion of privacy, and other claims.

- use a separate domain name for issuing email addresses to franchisees.
- require that franchisees maintain business social media accounts separate from their personal accounts and that they not use the business accounts for personal activities nor reference the business, the franchisor's name, or any trademarks associated with the franchise on any personal social media accounts.
- retain administrative privileges over franchisees' email or social media accounts. Doing so can constitute sufficient control over the accounts and content and can expose the franchisor to liability for unlawful content on the franchisees' accounts. This may also mean that the franchisor is in "possession, custody, or control" over such franchisee accounts so as to trigger the duty to search and produce those communications in the general course of litigation.
- clearly disclaim any obligation to monitor email or social media activity of the franchisee or its employees.
- require franchisees to disclose in emails and business social media accounts that the franchisee operates an independent business and that any references to the franchisor's name and trademarks do not change the franchisee's independent operator status.
- require that franchisees comply with all applicable laws and regulations, including copyrights laws, and contractual obligations to protect the franchisor's confidential or proprietary information, in connection with their business social media accounts.
- encourage franchisees to adopt their own electronic communications and social media policies for their own organizations, and require franchisees to limit the number of people who have editing or posting privileges to the franchisee's social media accounts and access to business email accounts (particularly those assigned by the franchisor).

Michael Daigle will be moderating a program at the IFA Legal Symposium called "Accounting for Lawyers: Understanding the Franchisor's Financial Statements." The program will be presented at 3:30 on Monday, May 5 and again at 1:15 on Tuesday, May 6. If you plan on attending either session during the Legal Symposium, we encourage you to submit in advance the questions or issues that you'd like the panelists to address. Send your questions to Michael.Daigle@chengcohen.com prior to May 5.

For questions or more information regarding the issues discussed in this Alert, please contact us.

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<u>Contacts</u>	<u>Contact Information</u>
Amy Cheng	312-243-1716 or amy.cheng@chengcohen.com
Fredric A. Cohen	312-243-1717 or fredric.cohen@chengcohen.com
Michael R. Daigle	312-957-8366 or michael.daigle@chengcohen.com

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