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Important Developments in International Franchising

For those of you who are currently franchising internationally or are contemplating doing so, we want to alert you to several recent developments in Australia, Canada and South Africa. To discuss these developments in greater detail or your current activities or plans, please don't hesitate to contact us.

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Australia

Effective July 1, 2010, the Australian Franchising Code of Conduct was amended in several important respects. While some of the amendments merely clarify existing language in the Code, others either require additional disclosures (many that US franchisors won't be accustomed to disclosing) or impact how franchisors must conduct themselves. The Australian disclosure document must now include additional financial disclosures, including details of payments franchisees will be required to make to third parties and any "unforeseen" significant capital expenditures you've not previously disclosed. Franchisors will also have to start preparing to disclose any unilateral changes previously made in franchise agreements. And probably most significant is the requirement to go into much greater detail regarding end-of-term arrangements (required amendments on transfer, exit payments, disposition of unsold items, whether and how any significant capital expenditures undertaken by the franchisee will factor into end-of-term arrangements and whether you've previously taken such expenditures into consideration for that purpose).

The amendments also affect the substantive arrangements with franchisees in several key respects. For example, Franchisors will now have a duty to provide the franchisee with 6 months' notice of your decision to renew or not renew the franchise agreement; there's recognition of the parties' obligation to act in good faith; and the parties must attempt to resolve disputes in a reconciliatory manner through mediation.

Finally, the Amendments give the Australian Competition and Consumer Commission (ACCC) broader powers to initiate actions on behalf of aggrieved franchisees (similar to class actions with the ACCC as the class representative), to investigate and conduct random audits of franchisors, and to issue public warnings about suspect franchisors (so-called "name and shame" notices).

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Canada

Two Canadian provinces have taken notable action. New Brunswick has finally passed the regulations to effectuate its 2007 Franchises Act, and Manitoba has taken steps to become the 5th Canadian province to regulate franchising.

New Brunswick. As of February 1, 2011, disclosure documents will be required in New Brunswick. In general, the regulations contain many provisions that are similar to the franchise legislation already enacted in Alberta, Ontario and Prince Edward Island, including pre-sale disclosure (at least 14 calendar days). Franchisors will need to add certain information to their current Alberta, Ontario and Prince Edward Island disclosure document so that it complies with New Brunswick's requirements, but these additions should not prove cumbersome for franchisors already accustomed to selling franchises in the other provinces. Similar to the requirements of the other provinces, the disclosure document must include a certificate, signed by the franchisor, confirming that the disclosure document complies with the Act. Notably, the regulations set forth the framework for a mandatory mediation process.

Manitoba. In April 2010 new franchise disclosure legislation was introduced in Manitoba. If passed, the legislation will make Manitoba the fifth Canadian province to enact a franchise disclosure act. Updates will be provided when the legislation is passed.

South Africa

Last year, South Africa passed a fairly sweeping amendment to its consumer protection act, as a result of which, franchisees will be considered consumers and entitled to certain consumer protections. The act becomes fully effective on October 24, 2010, and more information about the act's requirements will be provided in a later bulletin. However, note that a drafting ambiguity arguably caused a portion of the act to become effective as of April 24, 2010. We suggest that, if you intend to franchise in South Africa prior to October 24, 2010, you should be sure that the franchise agreement is in writing and that you provide the franchisee with a 10-day

"cooling off" period after the agreement is signed. If the franchisee elects to withdraw from the agreement during the cooling off period, it may do so without penalty. You should wait until the end of the cooling off period before providing the franchisee with access to your system (including your confidential information and training program).

Other Developments

Michael Daigle will be speaking on "Control vs. Freedom? Negotiating International Franchise Agreements" at the Fall Meeting of the American Bar Association's Section of International Law in Paris, France, in November. Also, look for Michael's article on "Avoiding and Managing System-Wide Litigation in International Franchising" slated for the September 2010 issue of Franchising World Magazine.



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