



# Focus **on** Franchising

Published by the Franchise and Distribution Practice Group of Farrell Fritz, P.C., Attorneys at Law

## Welcome!

With winter drawing to a close, we look forward to much activity in the franchise community. The FTC Rule changes become effective July 1, 2007. Meanwhile, many companies are poised to grow. We hope that you all enjoy this issue, as we have some very timely and interesting articles for your reading pleasure.

As always, we encourage feedback from all our readers. Please contact us with your comments and suggestions about topics that are of particular concern or interest to you.

James M. Wicks, Esq.  
Harold L. Kestenbaum, Esq.

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## The Wait is Over: FTC Rule Changes and A More User-Friendly UFOC Are Here

By Harold L. Kestenbaum, Esq



It is finally here. In the last few issues of our newsletter, I have been saying that the final FTC Rule changes were finally going to be issued. Well, that time has come. On January 23, the FTC issued its final proposed changes to the FTC Rule.

While the changes are significant, for those franchisors who have been using the UFOC format over these many years, your documents will change, but thankfully will not have to be completely re-written. For those franchisors, however, who have been using the FTC version of the disclosure document, sorry to say, it will have to be trashed and a new document written.

The good news is that the FTC has given franchisors one full year to phase in the rule changes, commencing July 1, 2007. This means that companies can, if they wish, make the changes after that date, but a word of caution here. There is little chance that the registration states will have adopted the changes by then. So, a franchisor who elects to institute the FTC changes on July 1, 2007, would have to use two separate UFOCs: one to comply in the registration states and one to comply with the FTC Rule.

My recommendation is not to implement the new changes until after the end of your respective fiscal years, which in many cases is December 31. The hope is that the states will adopt the changes by the end of 2007. It may not, however, happen that quickly.

### Here are some of the highlights of the changes:

1. The FTC Rule will not be applicable to foreign transactions. (This has been the result of case law, but is now noted within the Rule).
2. The first personal meeting "trigger" for making disclosures will be gone. We will have to make disclosures 14 days before an agreement is signed or any fees are paid, unless the prospect requests the UFOC earlier; in which case, it would have to be provided. This will now permit discussions and preliminary negotiations before the UFOC has to be delivered. There is an additional seven-day rule that applies only if the franchisor has unilaterally made any changes to the form of franchise agreement (which almost never happens).



By Harold L. Kestenbaum, Esq.

**Franchising Activity Now Year-Round**  
As spring approaches, I have now truly realized the power of franchising as a force in our economy. Last summer franchisors were as active as they had been in the spring or fall, the more traditional selling seasons for franchises. The IFE attracted more buyers and more exhibitors to its June Expo than in years past and actively promoted the West Coast Show in November. It added a third show, IFE Expo South, in Miami this past January, which was also heavily promoted and very successful, considering it was the first show in the south for the IFE.

**FTC Revised Rule Arrives**  
On the legal side, the FTC has recently issued its final version of the FTC Revised Rule (UFOC). (See lead article.) There have been no dramatic court rulings since last spring; however, there is a rather significant case to watch. This relates to a ruling by the Supreme Court of New York County in *Emfore Corp. v. Blimpie Associates, Ltd.* (See Jim Wicks's article in the Litigation Notes section of this issue.)

## Kudos!

Congratulations to the following newly named partners: Lyle C. Mahler of our Franchise & Distribution and Corporate practice groups and Eric W. Penzer in the firm's Trusts & Estates practice group.

Congratulations to the following attorneys who have been promoted to counsel: Jodi L. Gladstone in the Real Estate practice group and Elaine R. Sammon in our Land Use, Zoning and Municipal Litigation practice group.



By James M. Wicks, Esq.

## Compliance Questionnaire Deflates Fraud Claim Against Blimpie

Under New York's Franchise Practices Act, it is unlawful for franchisors to require a franchisee to waive any duty or liability imposed on the franchisor under the Act. This would presumably include claims of fraud against the franchisor based upon stated earnings made in the pre-approval process. Recently, however, in *Emfore Corp. v. Blimpie Associates, Ltd.*, the Supreme Court of New York County held that a "compliance questionnaire" completed by the franchisee barred the fraud claim brought against the franchisor. This is a significant decision for franchisors and, unless reversed on appeal, gives some comfort and guidance to franchisors attempting to sell franchises.

The facts of the case are simple: Franchisee claims that Blimpie's sales representatives made misrepresentations about earnings during the sales process. Allegedly lured by these inflated numbers, the franchisee quickly signed up. Six months later, however, after sales figures didn't come close to the promised ones, the franchisee shuts down and sues claiming fraud and violation of the Act.

Fatal to the franchisee's claim were two critical facts: an "integration" clause contained in the franchise agreement (which states that the agreement is the complete understanding of the parties and that there was no reliance on prior representations), and the "compliance questionnaire." The former is not unique to Blimpie's agreements and appears in most franchise agreements today. The latter, although seeing more and more use today, is what made this decision significant. The Court held that together, these two considerations made it clear that the franchisee did not "rely" on the statements made by the sales representatives; thus there was no fraud.

Compliance questionnaires are completed before the franchisee signs the franchise agreement. Typically the questionnaire would ask questions such as: Who did you work with during the sales process? Did anyone make any statements to you about sales or gross revenues or earnings? Did anyone make any statements to you about the costs of running the franchise?, etc.

It is significant that a New York court has now ruled that such questionnaires and disclaimers do not violate New York's Franchise Practices Act. Stay tuned to see if that decision is overturned or affirmed. In the interim, franchisors should strongly consider a carefully worded compliance questionnaire to be used by their sales force. It may help shield franchisors in the defense of a fraud claim brought by a disgruntled franchisee.

# How To Successfully Brand, Market & Sell Your Franchise

By Ben Cerrone

(This is part 2 of a two-part series.)

Last issue, we covered some sales basics for new and existing franchise companies, such as ways to stretch your ad dollars and the need to get professional advice. Here are a few more advanced tips. . .

## Should you use a broker to sell your franchise?

Yes, says Ken Stein, President of Kensington Co. and Affiliates in Roslyn Heights, NY ([www.kensingtoncompany.com](http://www.kensingtoncompany.com)), which represents over 150 different national franchises. Ken's method eliminates unqualified prospects and matches the right prospect for the right business. "We try to match opportunities that meet the goals, lifestyle and skills of the potential franchisee," he says. "Everyone asks me what's the best franchise, what's the hot new franchise? The real question is: What's the best franchise for you?"

## Spending media dollars . . . advice from two seasoned franchisors:

"We've used a number of traditional methods to sell franchises over the years, including the traditional methods of print advertising in The Wall Street Journal, PR activities, as well as paid media commercials."

– Marc Shuman, President, Garage Tek, Inc.

"With over 1,700 current franchisees, we use all means to promote our franchise, including websites, The Wall Street Journal, USA Today and trade shows."

– Scott Arbuckle, Director of Franchise Development, Liberty Tax Service

Here are a few different advertising and promotional ideas that can help you expand both nationally and internationally:

### Infomercial

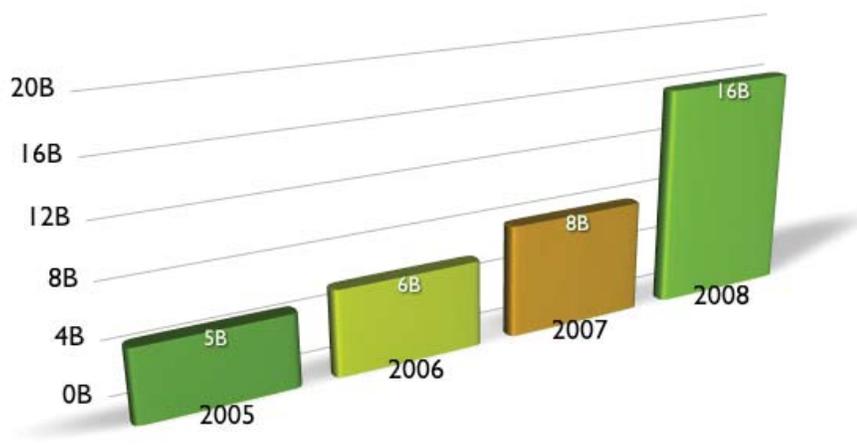
A short-form, professionally produced infomercial (usually about two minutes) educating and talking about your franchise. This format usually runs as a TV commercial on either local or national television.

### Video news release

This is a 2 to 3 minute professionally produced message, highlighting a newsworthy or unique aspect of your franchise, which is sent to multiple TV stations.

### National franchise television show

A national TV show exclusively profiling franchise companies and their franchise opportunities – for example, "Let's Talk



Franchise," which airs nationally on Spike, Fox News and other market specific networks. "Our show enables franchisors to present their concepts with a controlled message," says Co-Producer James T. Powers. "We provide insight into their support structure, and the principals of the company detail their franchise opportunity." For more information, visit [www.letstalkfranchise.com](http://www.letstalkfranchise.com).

### Database

Create a database of every prospect that has ever shown an interest in your company. Use this to periodically follow up and make contact with them via newsletters, e-mail, telephone calls and direct mail. A helpful resource that provides this type of database support is [www.mybruno.com](http://www.mybruno.com)

### Minority market

Consider expanding your promotions to reach the ever-growing minority/ethnic market (with some groups reaching double digits in population percentage). You can tap into these lucrative markets by targeted promotions in minority/ethnic media and organizations, such as Spanish-language radio and television, Asian newspapers, and women's publications and organizations such as the National Organization of Women Business Owners (NOWBO).

Maintaining a comprehensive marketing/promotion program – including some of the above "outside the box" ideas – will help franchisors reach their sales goals. Best of luck in your business ventures. A final quote. . .

"Successful entrepreneurs, if there are enough of them, can completely wipe out unemployment, can change the dynamics of our economic system and open more opportunities and possibilities for more people than any other single thing that can be done in society." – Brian Tracy, motivational speaker and developer of the Focal Point Franchise ([www.briantracy.com](http://www.briantracy.com)).

Ben Cerrone is president of Multi-Mediagroup, Inc. and produces a national television show, "Let's Talk Franchise" ([www.letstalkfranchise.com](http://www.letstalkfranchise.com)), which profiles franchisors. Ben can be reached at 631-271-0037 or at [bencerrone@aol.com](mailto:bencerrone@aol.com).

Farrell Fritz is pleased to welcome the following new partners to our firm: Nancy D. Lieberman, Corporate practice group, and Christopher J. Kutner and Michael E. McDermott, Health Care practice group. We welcome as counsel Hon. Deborah E. Kooperstein, Real Estate and Trusts & Estates; Rochelle Laufer, Real Estate; and Susan F. Rothwell, Trusts & Estates. We are delighted to also have the following associates join the firm: Jaclene D'Agostino and Frank T. Santoro, Trusts & Estates; Chris Krimitsos, Corporate; Nina Petraro, Municipal Litigation and Real Estate; Andrea Rodriguez, Labor & Employment; and Jason W. Trigger and Aaron E. Zerykier, Litigation.

## Events Calendar

March 9

Farrell Fritz Quarterly  
Franchise Forum  
Uniondale, NY

To reserve a place, contact Helen Rajcooar:  
phone, 516-227-0641; email,  
[hrajcooar@farrellfritz.com](mailto:hrajcooar@farrellfritz.com)

March 30 - April 1

16th Annual International  
Franchise Expo, Washington, D.C.  
For further information, go to  
[www.franchiseexpo.com](http://www.franchiseexpo.com).

April 30

Farrell Fritz Franchise  
Forum - West Coast  
Irvine, CA

For further information, contact Harold  
Kestenbaum: phone,  
516-227-0642; or by email  
[hkestenbaum@farrellfritz.com](mailto:hkestenbaum@farrellfritz.com)

May 21

Farrell Fritz Franchise Forum - South  
Orlando, FL

For further information, contact Harold  
Kestenbaum: phone,  
516-227-0642; or by email  
[hkestenbaum@farrellfritz.com](mailto:hkestenbaum@farrellfritz.com)

June 22

Farrell Fritz Quarterly Franchise Forum  
Uniondale, NY

To reserve a place, contact  
Helen Rajcooar: phone,  
516-227-0641; or by email  
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3. Electronic disclosure will be permitted without having to jump through the hoops that now exist. But unless adopted by all registration states, this will apply only in California and Maryland.

4. Litigation initiated by the franchisor against its franchisees will have to be disclosed.

5. Earnings claims remain optional.

6. There have been additional exemptions added. These are for the big ticket franchises – investments exceeding \$1 million; for sales to selected officers of the franchisor; and for sales to sophisticated franchisees.

7. Franchise sales broker information no longer has to be disclosed.

8. If there are “trademark-specific” franchisee associations, these will have to be disclosed.

9. The biggest change will be the total makeover of Item 20. This means the current charts will be eliminated and will be replaced by totally new charts.

Overall, the changes are positive and will help to make the UFOC a more user-friendly document. The hope is that all the registration states will adopt these changes quickly, thus avoiding the necessity of using two separate disclosure documents. Stay tuned.



# Farrell Fritz, P.C.

## SETTING A HIGHER BAR

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