

**American Bar Association
29th Annual Forum on Franchising**

**EMBRACING DIVERSITY IN FRANCHISE SYSTEMS – AND
MANAGING ASSOCIATED LEGAL RISKS**

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October 11 – 13, 2006
The Westin Copley Place
Boston, MA

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I. INTRODUCTION^{††}

Emerging demographic trends make it imperative that franchisors and their leadership give attention to diversification of their systems. This paper addresses practical business and legal strategies that franchisors should consider in response to current demographic trends. It explores and considers in the context of legal restrictions and considerations: (a) implementing effective programs for identifying, recruiting and retaining diverse franchisees; (b) developing loan programs and financial incentives to expand the census of diverse franchisees; (c) instituting effective diversity audit programs to address real or perceived institutional obstacles to the placement and success of diverse franchisees; (d) understanding the framework of franchisor and franchisee certification as a minority-owned business enterprise; and (f) adopting minority supplier programs.

A. The Numbers

The numbers don't lie. America is changing and the changes are coming more quickly than one might imagine. Recent census information and demographic trends show that America's white majority is yielding to rapidly expanding population of minorities; minorities that are having, and will continue to have, a profound impact on American society and the American economy. What does this diversity mean for American business in general and franchise systems in particular?

As the numbers below indicate, the American marketplace and workforce are being changed by the three most prominent minorities: Hispanics, African-Americans and Asians. While some simple consumer trends reflect these changes (salsa recently surpassed ketchup as the number-one condiment; Corona[®] surpassed Heineken[®] as the number-one imported beer), demographic movement in executive suites and boardrooms seems to be lagging.¹ Does this matter? Can business adapt to the changing demographic landscape without adapting its workforce and leadership?

Some industry leaders already recognize the importance of making diversity an essential part of their everyday business life. Dave Sampson, Marriott International's senior vice-president of diversity initiatives, succinctly noted in April 2006, "We see diversity as a business issue."² Isn't that really the issue for the franchising community: diversity as a business issue? While social and moral imperatives may drive some change in business in general, and franchise systems in particular, there is no substitute for good, old-fashioned capitalism to propel change. If industry and business do not anticipate changes and recognize trends that affect their bottom lines, they are destined for failure. As the demographics of America change, the businesses and franchise systems that respond to the change are more likely to survive and succeed.

^{††}The authors wish to acknowledge gratefully the assistance of the following individuals in the preparation of this paper: Chevan Daniels, Diana Vilmenay and Ulrick Casseus, all of Nixon Peabody LLP.

¹Institutional Shareholder Services, *Board Diversity Increases Slowly*, <http://www.issproxy.com/governance/publications/2006archived/154.jsp> (of the 6,979 directorships reviewed in 2005, 706 were members of minority groups, representing a little over 10% of the total, about the same as in 2004).

²*Companies That Mirror Their Consumers Can Gain a Competitive Advantage*, The Wall Street Journal, Apr. 11, 2006, at B11.

The Past to the Present

- In 1950, 9 out of every 10 Americans were white;³
- In 2004, 1 out of every 2.5 Americans was a person of color⁴; and
- This number rises to 1 person of color out of every 1.5 Americans for children under the age of nine.⁵

The Present

- Minorities have become the *majority* in a significant portion of the largest 100 cities in the United States;⁶
- Hispanics are now the largest ethnic minority group in the United States, having surpassed African-Americans in 2003;⁷ and
- During 2005, 85% of those entering the workforce were women, people of color or immigrants.⁸

The Future

- African-Americans, Asian-Americans, Hispanic-Americans, and Native Americans will represent 90% of the projected population growth in the United States over the next 50 years;⁹
- The Hispanic population in the United States is expanding by more than 1.7 million people each year;¹⁰ and
- By 2050, nearly half of the population of the United States will be people of color.¹¹

Our consumer-service oriented marketplace is starting to adapt to these powerful trends:

- Minority purchasing power was \$1.3 trillion in 2000 and is expected to surpass \$2 trillion in 2015 and \$3 trillion in 2030;¹²
- From 1997 to 2002, the number of Hispanic-owned businesses increased 31%, the number of Asian-owned business increased 24% and the number of black-owned businesses grew by a whopping 45%;¹³
- By 2045, minority purchasing power may reach \$4.3 trillion (in 1998 dollars);¹⁴ and

³ Minority Business Development Agency, U.S. Department of Commerce, *Minority Population Growth: 1995 to 2050* (1999) [hereinafter MBDA, *Minority Population Growth*].

⁴ 2004 American Community Survey, U.S. Census Bureau, (2005), <http://factfinder.census.gov>.

⁵ *Id.*

⁶ Brookings Inst. Ctr. on Urban & Metro. Policy, *Census 2000 Matters Racial Change in Nation's Largest Cities: Evidence from the 2000 Census*, (2001), available at <http://www.brook.edu/es/urban/census/citygrowth.htm>.

⁷ Haya El Nassar, *39 Million Make Hispanics Largest U.S. Minority Group*. USA Today, June 18, 2003, available at http://www.usatoday.com/news/nation/census/2003-06-18-Census_x.htm.

⁸ C. Everett Wallace, *Learning the "Proper" Way to Embrace Diversity*, Franchising World, June 1, 2004, at 21.

⁹ MBDA, *Minority Population Growth*, *supra* note 3.

¹⁰ United States Hispanic Chamber of Commerce, Statistics, <http://www.usbcc.com/res-statistics.html> (last visited July 20, 2006).

¹¹ MBDA, *Minority Population Growth*, *supra* note 3.

¹² Minority Business Development Agency, U.S. Department of Commerce, *The Emerging Minority Marketplace, Minority Purchasing Power: 2000 to 2045* (2000) [hereinafter MBDA, *Minority Purchasing Power*].

¹³ Press Release, U.S. Census Bureau News, (July 28, 2005), http://www.census.gov/PressRelease/www/releases/archives/business_ownership/005477.html.

- There was a nearly 22% increase in the share of businesses owned by ethnic minorities from 1997 to 2002.¹⁵

What does this mean for the franchising community? Industry studies generally indicate that minorities own less than 10% and possibly as little as 6% of all United States franchises.¹⁶ If, as discussed below, organizational diversity is essential to continued success clearly the franchise community has a lot of new ground to cover. Understanding the meaning of “diversity” and “pluralism” is the starting point.

B. Diversity and Pluralism

Diversity is commonly defined as differences among people in age, class, ethnicity, gender, physical and mental ability, race, sexual orientation, spiritual practice and other characteristics. Although all these attributes are important aspects of diversity, this paper will concentrate on the racial and ethnic aspects of diversity.

Pluralism means an organizational culture that incorporates mutual respect, acceptance, teamwork, and productivity among people who are diverse. A multicultural organization is built on both diversity and pluralism. Such an organization:

- Values human differences as a competitive advantage;
- Has a pluralistic culture that reflects the interests, contributions, and values of members of diverse groups;
- Provides opportunity for full and influential participation by all organizational members in decisions and policies that shape the organization; and
- Works to eliminate discrimination throughout the organization.¹⁷

Diversity is no longer just a socially or politically correct imperative: it is a full-fledged business imperative. As the face of America’s consumers changes, so must the face of American business, meaning its workforce but especially its leadership and owners. Moreover, astute business leaders understand that diversity is the means to a pluralistic end. While dynamic, socially aware business organizations may begin with the recognition that a diverse workforce is desirable or even necessary in the new American milieu, achieving a pluralistic culture is the real endgame. The goal is to arrive at a business culture that is instinctively inclusive, seamlessly woven with human differences that are institutionally valued without the need to call specific attention to the accomplishment; in essence, a culture that mirrors the innate strength of diversity in American society.

Because franchise systems represent such a large and powerful economic force, especially in the consumer-service segment (food, lodging, automotive services, real estate, personal fitness), franchisors must quickly consider the role diversity and pluralism should play in their systems and act now to prepare for the effects of these business imperatives. Integral to any franchise system is its family of franchisees—the literal backbone of any franchise system. To

¹⁴ MBDA, *Minority Purchasing Power*, *supra* note 12.

¹⁵ Press Release, U.S. Census Bureau News, *supra* note 13.

¹⁶ “The reality is that, while minorities represent over 29% of the U.S. population, minorities collectively represent only 6 – 9% of the total franchisees.” IFA Educational Foundation, *Diversity and Minority Franchisee Development Guide (2006)*, available at <http://www.minorityfranchising.com>.

¹⁷ Strategic Planning Task Force on Diversity, ECOP, *Pathway to Diversity: Strategic Plan for the Cooperative Extension System* (Oct. 1991) (on file with authors).

capture diverse markets and thrive in them, franchise systems must have diverse franchisees. Similarly, to succeed in diverse markets, franchisees and franchisors must employ a diverse managerial workforce dedicated to developing a pluralistic culture.

One industry organization that recognizes the importance of the growth of diversity in franchise systems is the International Franchise Association (“IFA”), a national trade organization with the largest franchisor membership of any franchise trade organization. Since 2001, the IFA and its Educational Foundation have conducted a number of surveys and studies on diversity.¹⁸ The IFA has also created the Minorities in Franchising Committee, with the goal of increasing the number and success of minority franchisees, and the IFA Diversity Institute, established in 2005 to promote and foster diversity and inclusion within the IFA and the franchising community. In March 2006, the IFA launched “MinorityFran,” an initiative “designed to provide one convenient point where minority prospects can explore franchise offerings of companies actively looking to recruit minority franchisees.”¹⁹ Because its efforts are at the forefront of diversity in franchising, this paper includes frequent references to the IFA.

C. Information and Communication

In April, May and June 2006, the American Bar Association’s Forum on Franchising (the “Forum”) conducted an informal survey of its membership to develop statistical data on the current status of minority franchisee initiatives in franchise systems. Although the small number of responses makes the reported data statistically insignificant, the responses offer some interesting insights and may be generally representative of the state of minority involvement in franchise systems at present. The survey questions and responses are set forth in Attachment A.²⁰ It is worth mentioning that despite repeated efforts to obtain responses to the well-distributed survey,²¹ only 16 responses were obtained. This lackluster response may be indicative of more than just indolence or disinterest; it may point to a significant issue surrounding this topic: fear of communication or reporting on the status of diversity in franchise systems. For example, some franchisors apologized for not responding by indicating that they do not track these statistics, “do their embracing anonymously” or “do not publicly release these numbers.”

Are franchisors afraid to discuss the topic of diversity publicly, even when the responses are anonymous? More importantly, are franchisors concerned about discussing the matter of diversity within their own organizations? One survey question sought to determine if companies have discussed the topic of development of a minority-recruitment program or sales plan: only a third of the respondents indicated that they had discussed the idea. Are there barriers to a clear

¹⁸ The resulting reports have been of invaluable assistance to the authors who wish to acknowledge the IFA’s cooperation, especially that of Sonya Brathwaite, IFA Educational Foundation Director of Diversity and Emerging Markets. The reports are: IFA Educational Foundation, *Minority Outreach Programs in Franchising*, (2001), *Diversity Report and Case Studies* (2003), *Diversity and Minority Franchisee Development Guide* (2006).

¹⁹ IFA, Press Release, (March 8, 2006) (on file with authors). Started in 2006, MinorityFran helps franchising companies recruit in minority communities, encourages franchisors to buy supplies from minority-owned businesses, and encourages minorities to consider buying franchises. MinorityFran works with groups such as the National Urban League, U.S. Pan Asian American Chamber of Commerce, and the Minority Business Development Agency in its marketing and educational efforts. Jan Norman, *Small Business Notebook Column*, Orange County Reg. July 2, 2006, available at 20060702-OC-Small-Biz-Notes.

²⁰ In an effort to streamline the survey with the hope of securing an abundance of responses, it was limited to seven simple questions along with an area for optional comment.

²¹ The survey was e-mailed to all 2,150 Forum members and then separately again to the 318 members of the Forum’s Corporate Counsel Division with a number of follow-up reminders.

airing of this topic in the home offices of franchise systems? If so, what are the impediments and can or should they be overcome? Does the threat of legal challenges chill or, in some instances, completely freeze minority-recruitment initiatives and incentives; or do franchisors simply not know how to begin to implement effective programs?

Our exploration of this topic would be naïve and fruitless if we ignored the reality of its sensitivity. There is little question but that the discussion of “special programs” for minorities, even when socially or economically compelling, can create uncertainty, controversy and even fear; perhaps to the extent of believing it is better to avoid the topic altogether. One casual comment to the authors from a long-standing, knowledgeable and sensitive Forum member suggests the complicated factors involved in this issue: “To develop greater minority representation in franchise systems through incentive programs, you almost have to ignore the law.”

Are franchise systems and other major corporations between the proverbial rock and hard place? Is the fear expressed above well-founded²² or are there other reasons? One survey respondent noted: “These minority programs seem to have a lot of appeal to them and would make everyone feel good about providing much-needed assistance, but our experience is that it just doesn’t work, except in exceptional cases.” Is that the problem?

This paper is premised on the conviction that healthy discussion is the first step to illumination, even at the risk of being wrong.

Regardless of legal and psychological hurdles that may blunt discussion of diversity issues, the responses obtained from the Forum’s survey, responses to the IFA’s surveys and anecdotal information gathered by the IFA Educational Foundation generally indicate that there is a disconnect or divide between minority franchisee candidates and franchising companies. These results suggest that there are obstacles to connecting franchisors with qualified diverse candidates. Understanding why this divide exists and how it can be bridged is of critical importance to the future success of franchise systems.

The disconnect appears on both sides of the franchise equation: franchisors are not well-attuned to the positive, almost compelling, role diversity can play in their systems, while diverse franchise candidates may not have “franchising” on their radar screens as a viable business option. Thus, one source of the disconnect is simply lack of information and education. Another obstacle, as articulated by C. Everett Wallace, an IFA Education Foundation board member, is a “relationship gap.”²³ Although Mr. Wallace defines this barrier as a franchisee-related issue (minority-franchisee candidates may not have the familial or collegial relationships that naturally would lead to franchise opportunities, *i.e.*, friends and family in the business or working for franchise systems), it may also be a product of the fact that few franchisors have established

²² A June 14, 2006 article entitled *Attack Launched on Corporate America's Diversity Efforts* that appeared on DiversityInc.com reported that the Center for Equal Opportunity “known for trying to dismantle affirmative-action programs at the country’s colleges and universities now is taking aim at corporate America, warning that it will vigilantly monitor companies’ activities and report perceived discrimination to the Equal Employment Opportunity Commission (EEOC) and help employees take their cases to court.” Diversity Inc.com, <http://www.diversityinc.com/public/21656print.cfm>.

²³ Sara Wilson, Interview, *Pushing Forward*, Entrepreneur Mag. (Dec. 2005) available at <http://www.entrepreneur.com/mag/article/0,1539,324347,00.html>.

strong minority-community relationships and, thus, are just as “out-of-touch” as prospective minority candidates.²⁴ It appears that the “relationship gap” is a two-way street.

Another impediment that contributes to the disconnect is the number of minority franchisees who lack capital. Because many franchise systems pursue small business entrepreneurs, savings accounts, home-equity loans, retirement funds, and assistance from friends and relatives are common sources of franchisee capital. It does not take an economic report to understand that minority candidates in general are less likely to have access to the resources available to their white counterparts.²⁵ Lack of capital is an impediment to entry into a franchise system as well as to the economic stamina required for any small business to succeed in a competitive marketplace.

D. Bridging the Gap

Although we might arrive at a consensus about current demographic trends and what they signify for the United States economy, determining just how franchise systems can capitalize upon these trends is an entirely different matter. How do we go from concept to reality? What roadblocks exist? How can we manage the legal risks?

Some of the approaches that have been implemented by various franchisors include: public relations efforts, educational opportunities, participation in special programs developed by the IFA and offering special financial packages for diversity franchisee candidates. But simply figuring out how to connect with minority franchisee-candidates may require considerable time and effort.

So what can franchisee candidates and franchisors do to “connect”? Some strategies seem obvious, but execution of effective programs may prove elusive. The steps to an effective diversity program include: (1) implementing effective mechanisms for identifying, recruiting and retaining diverse franchisees; (2) developing financial incentives to expand the census of diverse franchisees; (3) instituting effective diversity audit programs to address real or perceived institutional obstacles to the placement and success of diverse franchisees and to evaluate program effectiveness; (4) understanding the framework of franchisor and franchisee

²⁴ Analysts point to the large proportion of Asian hotel franchisees to illustrate the importance of relationships in recruiting more minority franchisees. The analysts believe that the Asian franchisees tell family members and others in their community about the benefits of being a franchisee, which leads to more Asians becoming hotel franchisees. Some attribute the knowledge gap to the lack of minority franchisees. Since there are so few minority franchisees, there are few people in minority communities that can serve as mentors and inform other minorities about the opportunities franchising has to offer. One way to increase the number of minority franchisees is to encourage franchisors to actively seek out minority franchisees, who will, in turn, speak to others in their communities about becoming a franchisee. Franchisors are also urged to advertise in minority media outlets, sponsor conferences, and go to minority civic organizations to spread the word about the opportunities being a franchisee creates. Franchisors may also close the knowledge gap by involving minority employees in their efforts to reach minority communities. Sonya Brathwaite, *The Three Gaps in Minority Franchisee Recruitment* (Tackling the Lack of Information, Relationship Structure and Capital to Finance Franchise Growth Presents Opportunities as Well as Challenges), *Franchising World*, June 12, 2006, available at <http://www.franchise.org/article.asp?article=1466&paper=91&cat=364> (last visited July 20, 2006).

²⁵ One indicator is home-ownership. According to the United States Census Bureau, in 2004, 73% of whites owned homes, while only 49% of Blacks and 48% of Hispanics did. Housing and Household Economic Statistics Division, U.S. Census Bureau, *Annual Statistics: 2004 Table 20. Homeownership Rates by Race and Ethnicity of Householder: 1994 to 2004*, available at <http://www.census.gov/hhes/www/housing/hvs/annual04/ann04t20.html> (last revised Feb. 17, 2005).

certification as a minority-owned business enterprise; and (5) adopting minority supplier programs.

Before embarking on this road, franchisors must recognize the potential legal complications. Generally speaking, there are no bright-line case precedents in this area. Like many other areas of discrimination jurisprudence and matters involving race relations, the law is highly nuanced. Making the problem more complex is the fact that there is a relative dearth of case law on discrimination in the selection of franchisees and development of special minority economic incentives or assistance programs or preferences offered to develop or maintain a diverse franchisee community within a franchise system. Guidance and judgment in these areas can be gained mainly by extrapolation from cases dealing with employment discrimination. Decisions like *Gratz v. Bollinger*, 539 U.S. 244 (2003)²⁶ (ruling that the University of Michigan's diversity admissions program was unconstitutional) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) (ruling that the University of Michigan Law School's use of race in admissions was constitutional) may also offer some insight to designing minority recruitment and diversity programs.

II. LEGAL FRAMEWORK AND ITS IMPLICATIONS

A. Introduction

Given the broad body of legal analysis existing discussing discrimination in the employment context and the more limited, but thorough, analyses of discrimination in a franchising context,²⁷ this paper will not delve extensively into the laws and cases that must be considered by a franchisor when contemplating designing minority recruitment and maintenance programs. However, some basic discussion of the underlying laws and existing cases is necessary to provide an understanding of the legal risks of such programs.

B. Section 1981

Under federal law, consideration of race in the formation or performance of a contract is unlawful discrimination unless it is done pursuant to a valid affirmative action plan. 42 U.S.C. §1981, as amended by the 1991 Civil Rights Act, forbids discrimination in the "making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."²⁸ Franchisors are therefore prohibited not only from discriminating in the granting of franchises, but also in the ongoing application of the franchise terms, *i.e.*, providing assistance and training, providing non-

²⁶ The court expressly noted: "We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

²⁷ See, e.g., *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808 (10th Cir. 2000); *Hall v. Burger King Corp.*, 912 F. Supp. 1509 (S.D. Fla. 1995); *Baskin-Robbins Ice Cream Co. v. D&L Ice Cream Co.*, 576 F. Supp. 1055 (E.D.N.Y. 1983); *Sud v. Import Motors Ltd.*, 379 F. Supp. 1064 (W.D. Mich. 1974); See generally, Robert W. Emerson, *Franchise Selection and Retention: Discrimination Claims and Affirmative Action Programs*, 40 ARIZ. L. REV. 512 (1998); Robert W. Emerson, *Franchise Terminations: Legal Rights and Practical Effects When Franchisees Claim the Franchisor Discriminates*, 35 AM. BUS. L.J. 559 (1998).

²⁸ 42 U.S.C. §1981, as amended by the 1991 Civil Rights Act, Pub.L.No. 102-166, §101(2), 105 Stat. 1071, 1072.

contractual benefits to its franchisees, or even in terminating a franchise.²⁹ It is also understood that Section 1981 includes discrimination based on ethnicity and ancestry.³⁰

Under Section 1981, only intentional discrimination is prohibited – not the implementation of policies or practices by a franchisor that have a disparate racial impact.³¹ A franchisor is therefore potentially liable only for intentional race-conscious franchising decisions. Those officers, directors and employees of franchisors who are personally engaged in an intentional discriminatory action may also be held personally liable under Section 1981.³²

What about the argument that there are important commercial benefits attributed to greater diversity within a franchise organization? Can this be sufficient legal justification for minority recruitment or retention programs? Courts have not addressed this issue directly.³³ However, the federal appellate courts have held that no matter how good the intentions of the alleged discriminating party are, unless an affirmative action plan has a remedial purpose with a specific showing of prior discrimination, the affirmative action program is not constitutionally permitted.³⁴ Additionally, a “diversity is good for business” justification has no definitive end point, allowing racial balancing in perpetuity, a situation that has not met with the approval of the Supreme Court.³⁵

While Section 1981 was originally enacted to protect the rights of minorities, in today’s environment it is clear that a reverse discrimination claim is a very real risk to franchisors implementing minority recruitment or retention programs. Under Section 1981, no discrimination may occur against whites.³⁶ How, therefore, do minority franchising initiatives achieve their goals without discriminating against the white franchisees in each system? Given the negative impact to a franchisor company and its officers, directors and employees of violating Section 1981, how can a franchisor achieve its business goal of creating a diverse franchise community to strengthen its brand and achieve ultimate success? There have been few reported cases involving reverse discrimination lawsuits in the franchising context under

²⁹ State franchising statutes also prohibit discrimination against franchisees based on criteria such as race, color, national origin, religion, sex or disability. See, e.g., Cal. Civ. Code §51.8 (“No franchisor shall discriminate in the granting of franchises solely because of the race, color, religion, sex, national origin, or disability of the franchisee”); Iowa Code §537A.10(5)(f) (“A franchisor shall not discriminate against a proposed transferee of a franchise on the basis of race, color, national origin, religion, sex, or disability”). Many state civil rights statutes also prohibit discriminatory actions by a franchisor. Additionally, claims of failure to engage in good faith and fair dealing, tortious interference with an economic advantage, or outrageous conduct may arise as a result of discriminatory actions; e.g. *Chowdhury v. Marathon Oil Co.*, 949 F. Supp. 1353 (N.D. Ill. 1997); *Harper v. BP Oil Exploration & Oil Co.*, 896 F. Supp. 743 (M.D. Tenn. 1995).

³⁰ See, e.g. *St. Francis College v. Al-Kharzaji*, 481 U.S. 604 (1987).

³¹ *Gen. Bldg. Contractors Ass’n v. Penn*, 458 U.S. 375 (1982). By contrast, Title VII, 42 U.S.C. § 2000e et seq., of the Civil Rights Act of 1964, which governs the employment relationship, also prohibits the use of race-neutral policies that have a disparate statistical impact, absent a business justification.

³² See e.g., *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62 (2d Cir. 2000); *Al-Kharzaji v. Saint Francis College*, 784 F.2d 505 (3d Cir. 1986); *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975).

³³ See generally, David B. Wilkins, *Symposium: Brown at Fifty: From “Separate is Inherently Unequal” to “Diversity is Good for Business” – The Rise of Market Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

³⁴ See, *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996); *Messer v. Meno*, 130 F.3d 130 (5th Cir. 1997); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

³⁵ See, *Grueter v. Bollinger*, 539 U.S. 306 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

³⁶ *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976).

Section 1981.³⁷ This may be due to the fact that existing franchisees are reluctant to disrupt the relationship they have with their franchisor by bringing a lawsuit alleging reverse discrimination so long as the franchisee has hope that the franchise relationship can be improved. Additionally, franchisors that do face reverse discrimination claims may use early settlement of the claims to avoid negative publicity and customer loss.

The damages available to a franchisee or applicant for discrimination under Section 1981 include both equitable and legal relief, including compensatory and perhaps even punitive damages.³⁸ Compensatory damages include both lost profits and emotional distress damages. If the plaintiff can prove conduct by the franchisor evidencing “evil motive, or recklessness or callous indifference to a federally protected right,”³⁹ the plaintiff may be entitled to punitive damages for a violation of Section 1981. Because Section 1981 does not contain its own statute of limitations, courts will borrow from the most relevant state statute of limitations, typically from the state statute of limitations for personal injury actions. Although it is not clear in existing case law, there is some indication that the “continuing violations doctrine” applied to discrimination allegations in Title VII lawsuits may also apply to claims under Section 1981.⁴⁰ Under the continuing violations doctrine, a plaintiff may obtain relief for time-barred acts of discrimination if the acts can be linked to other acts that fall within the statutory limitations period.

Given the extent of damages available to a plaintiff in a Section 1981 claim, the potential personal liability of employees and officers of franchisors who commit a violation of Section 1981 and the absence of an extensive body of case law dealing with Section 1981 claims in a franchising context, it is little wonder that franchisors are uncertain as to how, or even if, they should implement a minority franchisee initiative. Certainly the easiest solution is to avoid any type of program that may be deemed discriminatory. Yet, the prevalence today of articles, seminars and speeches about the positive benefits of diversity is a good indication of the importance of diversifying and of the continued, if not growing, public awareness of the need for diversity. These facts should continue to push franchisors at least to discuss, if not implement, minority franchisee initiatives.

C. Affirmative Action Programs

In this context, how do franchisors legally achieve pluralism in their organizations by recruiting and retaining minority franchisees while staying within the confines of the federal and state laws existing today? In certain limited circumstances, race-conscious action may survive judicial scrutiny if done pursuant to a valid affirmative action plan or program.⁴¹ Affirmative action

³⁷ See *Frost v. Chrysler Motor Corp.*, 826 F. Supp. 1290 (Dist. Ct. W. OK 1993) (in an action brought by a white potential dealer the Court ruled that Chrysler’s race-conscious affirmative action plan was invalid). *But see Wassel v. GMC*, U.S. Dist. LEXIS 8840 (S.D.N.Y. 1979) (the grant of a dealership to a black male instead of the white plaintiff was not reverse discrimination).

³⁸ *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

³⁹ *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000).

⁴⁰ *Simpson v. Borg-Warner Automotive, Inc.*, 196 F.3d 873 (7th Cir. 1999).

⁴¹ Affirmative action took hold in the United States after the passage of the civil rights acts of the mid-1960s. See Stephen R. McAllister, *Controversial Decisions of the 1994-95 Supreme Court Term: One Anglo-Irish American’s Observations on Affirmative Action*, 5 KAN. J.L. & PUB. POL’Y. 21, 22-23 (1996). President Johnson’s signing of Executive Order 11,246 in 1965 marked the first critical date for affirmative action. That order required federal contractors to take “affirmative action” to ensure that employees were treated without regard to their race, color, creed, or national origin. Pursuant to Executive Order 11,246 the original affirmative action plans were designed to ensure that federal contractors made good faith efforts to recruit, hire, train and promote qualified minorities and

programs are typically justified on the basis that race-conscious decision making is necessary to remedy an historical, significant under-representation of minorities or an historical, statistically significant difference in the benefits that minorities receive. This justification is based on two Supreme Court decisions: *United Steelworkers of America v. Weber*⁴² and *Johnson v. Transportation Agency*⁴³, in which affirmative action plans were upheld because they were implemented to remedy ‘a “manifest imbalance” in traditionally segregated job categories.’ In short, under current case law, franchisors may consider race in contracting only if three requirements are met: (1) there is a longstanding manifest imbalance in the terms, conditions, benefits, or privileges of contracting as between racial groups; (2) the race-conscious decision making does not unnecessarily trammel the rights of non-beneficiaries; and (3) the program to make race-conscious decisions has a reasonable termination point.⁴⁴ If franchisors are contemplating going beyond a program of education and awareness about their franchises to minorities and intend to make decisions regarding the grant of their franchises based on race or national origin, using an affirmative action program, they must carefully weigh the requirements of an affirmative action plan against any prior discrimination in their organization.

D. Diversity Initiatives and Potential Solutions

1. Diversity Initiatives

If an affirmative action plan is not a viable option for the franchisor, a diversity program may be an effective alternative means to effect change within a franchise system. The first step to implementation of a diversity program is to assess the franchise system itself. An initial analysis would include the following questions:

1. What is the franchisor’s perception and/or public image in diverse communities?
2. Is the franchisor a franchisor of choice? For whom?
3. What are the demographics of the franchisor’s current customers?
4. What are the demographics of the franchisor’s current franchisees? Why?
5. Who is the franchisor recruiting and hiring? How does the franchisor decide whom to target?
6. To whom does the franchisor market and sell its goods and services? Who does the franchisor’s marketing and selling?
7. Is diversity reflected in the franchisor’s advertisements?
8. What communities benefit from the franchisor’s philanthropy and charitable work? How does the franchisor decide whom to target?

women in order to remedy past discrimination against them. Consequently, affirmative action policies are based on legal directives for mandatory and voluntary programs intended to measure employment and other business practices and to develop a workforce that is reflective of its community. *Id.* According to the author, Johnson’s signing of the Executive Order was a critical event because federal administrative “used it as authority” for requiring race-based measures. The inception of the “Philadelphia Plan” by the Department of Labor, which required building contractors to hire a certain number of minorities, was the second important event. *Id.*

⁴² In *Weber*, the court held that Title VII’s prohibition against racial discrimination did not prohibit all private, voluntary, race-conscious decision making and affirmative action plans. *Weber*, 443 U.S. 193 at 206-08. The court did not define in general terms what constitutes permissible and impermissible affirmative action plans but found, on the facts, that the affirmative action plans in question did not contravene Title VII. The court held that the programs were designed to break down old patterns of racial discrimination and hierarchy, but did not “unnecessarily trammel” the interest of white employees or require the discharge of white employees and their replacement with blacks, nor did the programs create an absolute bar to the advancement of whites. *Id.* at 208. The programs were a temporary measure to eliminate a “manifest imbalance.” *Id.*

⁴³ *Johnson v. Transportation Agency*, 480 U.S. 616, 631 (1987) (reaffirming the *Weber* decision).

⁴⁴ *Weber*, 443 U.S. 193; *Johnson*, 480 U.S. 616.

9. What training and opportunities does the franchisor provide and to whom?
10. Who is leaving the franchise system? Who is staying?

2. Search for Solutions

With the results of the foregoing analysis in mind, the franchisor's next step is to effect programs and initiatives that will enhance diversity within its system within the bounds of the laws as discussed above. While no bright-line guide has emerged to govern the development of diversity initiatives, general guidance is available. The general guidelines are:

1. Be flexible and non-mechanical. Take care to avoid set-asides or quotas.
2. Adopt a holistic approach. In selecting franchisees, the franchisor should consider the total applicant. For example, a franchisor cannot focus on race as a sole determinant in the selection process.
3. Keep the selection process competitive.
4. Narrowly tailor the franchisor's objectives (no trammeling on the right of others).
5. Keep the initiative temporary (no more than 25 years).

It is left to the franchisor to devise creative means to work within the boundaries of the law while achieving its own goals of diversifying its system. Affirmative outreach and language preference are two examples of the creativity that the franchisor could employ.

a. Affirmative Outreach

Activities related to "affirmative outreach" include:

- identifying the target community,
- evaluating the target community,
- identifying the geographic area in which the target population lives, and
- developing relationships with people and organizations who can communicate the franchisor's recruiting objectives to the target community.

As more fully discussed in Section III below, specific activities could include advertising the franchise opportunity in publications geared toward minorities and appearing at conferences of minority professional organizations. This type of recruiting expands the diversity of the franchisor's applicant pool by distributing information about franchise opportunities in targeted diverse communities and in traditional non-diverse communities. This approach avoids legal challenge because it expands the applicant pool rather than mandating the consideration of race in any final decisions. To further insulate the franchisor from legal liability for reverse discrimination, the franchisor could make similar efforts to advertise opportunities in non-minority communities and also emphasize that race is not a consideration in the ultimate selection of franchisees.

b. Language Ability

The consideration of an individual's language ability is not *per se* racial or ethnic discrimination.⁴⁵ Fluent speakers of non-English languages may come from a wide array of

⁴⁵ See *Dalmau v. Vicao Aerea Rio-Grandense, SA.*, 337 F. Supp. 2d 1299, 1307-08 (S.D. Fla. 2004) (the court found that there was a reasonable explanation for the employer's decision to include the Portuguese language requirement and the plaintiff had failed to show that this was not an honest explanation); *Richardson v. Centrecare, Inc.* No. 02-

racial, ethnic and foreign populations. The ability to communicate with a diverse community or ethnic group may constitute a legitimate business interest. Extrapolating from the concept of using an individual's language abilities, familiarity with religious or cultural norms may also be legitimate criteria for selection, although no case law exists today to justify this criteria.

These are two examples of the ways in which a franchisor could use creative techniques to comply with the law and also attract minority candidates to its system. Following the guidelines set forth above, an innovative franchisor may find other additional methods of enhancing diversity in its system within the legal framework existing today.

III. RESOURCES AND METHODS FOR IDENTIFYING, RECRUITING AND RETAINING DIVERSE FRANCHISEES

A. Identifying and Recruiting Diverse Franchisees

Given the wide gaps in knowledge about franchising and the difficulty of raising capital needed to become a franchisee discussed in Section I above, what tools are available for a franchisor wanting to increase the number of diverse franchisees in the system? How do franchisors reach potential franchisees from diverse ethnic and racial backgrounds?

If one of the biggest gaps today is in knowledge and understanding by diversity candidates about the benefits of franchising, the initial remedial focus of the franchising community must be to impart information about franchising generally and about the opportunities particular franchisors provide to diverse franchisees. The goal of filling the knowledge gap is being addressed by the IFA's Education Foundation and its Minorities in Franchising Committee. The IFA's MinorityFran assists IFA member companies who are committed to expanding opportunities for minorities in franchising at all levels. The list of MinorityFran's Charter Member Franchise Companies includes 80 franchisors of various sizes from many different industries. According to IFA Diversity Institute Chairman Ronald Harrison, MinorityFran hopes not only to increase the number of minority franchisees, but also "to send the message to all communities that franchising is a smart and affordable way to realize the American Dream of small business ownership."⁴⁶ MinorityFran intends to partner with national organizations such as the National Urban League, the United States Pan Asian American Chamber of Commerce, and the Minority Business Development Agency to work with qualified minority applicants.

Civ.-9212LAP, 2004 WL 2196784, at n2 (S.D.N.Y. Sept. 30, 2004) (the court found that the preference of an employer to hire bilingual employees does not give rise to a constitutional or statutory discrimination claim); *Belian v. Tex. A & M Univ.*, 987 F. Supp. 517, 523 (S.D.Tex. 1997) (the court found that a preference for a person with bilingual ability is not direct evidence of discrimination on the basis of national origin); *Carino v. Univ. of Okla.*, No. CIV-78-1372-W, 1981 WL 211, at n6 (W.D.Okla. May 7, 1981) ("Courts have found that the Title VII prohibition of discrimination on the basis of national origin does not include discrimination.") (citing *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980)); *Velasquez v. Goldwater Mem'l Hosp.*, 88 F. Supp. 2d 257, 262 (S.D.N.Y. 2000) ("Classification on the basis of language does not itself 'identify members of a suspect class' and would not support an inference of intentional national origin discrimination") (quoting *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983)). *But cf. Hyman v. First Union Corp.*, 982 F. Supp. 14, 17 (D.D.C. 1997) (although no court has held that consideration of language ability is discriminatory, language requirements can be used indirectly as a means of ethnic discrimination).

⁴⁶ Press Release, IFA (March 28, 2006) (on file with authors).

The National Minority Franchising Initiative (NMFI) was formed in 2000 to meet the needs of an under-represented market of potential franchisees.⁴⁷ The NMFI “seeks to empower minorities and bring business ownership opportunities within their reach.”⁴⁸ NMFI’s mission is to provide information resources to minority applicants and to be a direct channel between franchisors and potential franchisees about franchising opportunities.⁴⁹ The NMFI’s annual Minority Franchising Guide contains more than 500 franchisors who are committed to increasing minority representation within their franchise systems and who support the objectives of the NMFI. The Guide is available through all major bookstores, the IFA, franchise tradeshows, seminars, minority outreach programs and the NMFI bookstore. Franchisors are listed free of charge in the Guide and the NMFI web-directory simply by completing the profile information and submitting it to the NMFI. In addition to providing these resources, NMFI holds franchise seminars in various cities across the United States throughout the year. These seminars are intended to educate minorities about franchising and to introduce participants to sponsoring franchisors.

Many other organizations serving diverse populations are involved in educating their constituents about the benefits of franchising. The webpage www.HispanicBusiness.com offers information about franchising and directs readers to the IFA. The web page www.BlackEnterprise.com not only offers information about franchising in general, it offers numerous links to a wide variety of franchisors seeking potential minority candidates. *Black Enterprise* also offers franchising seminars across the United States throughout the year.⁵⁰

Increasingly, franchisors wishing to expand the diversity of their systems have reached out to publications that target diverse communities to advertise their franchises and work in conjunction with an organization to promote franchising. The April 2006 edition of *Black Enterprise Magazine* includes several pages of advertisements about various franchise systems, such as 1-800-Flowers®, Yum Brands, Inc., Jan-Pro, McDonald’s, and Choice Hotels, including stories from African-American franchisees from several of these systems. These and other franchisors also routinely advertise in other minority-directed publications such as *Ebony*, *Jet*, *Hispanic Business*, *Black Professional*, *Turning Point*, *Minority Business Entrepreneur*, *Korea Daily*, *Chinese Restaurant News* and others.

Franchisors have also developed specific information for their own websites informing potential franchise applicants of their commitment to diversity.⁵¹ Numerous organizations that serve

⁴⁷ NMFI was founded by Robert Bond and C. Everett Wallace. Robert Bond is a leading national authority on the franchise industry. C. Everett Wallace is a nationally recognized expert in the areas of franchise development, housing and small business finance and community economic development. Over the past decade, Mr. Wallace has been instrumental in establishing several of the nation’s largest minority businesses in the areas of franchising and product distribution.

⁴⁸ NMFI History, <http://www.minorityfranchise.com>.

⁴⁹ NMFI Overview of, *Id.*

⁵⁰ Both [BlackEnterprise.com](http://www.BlackEnterprise.com) and [HispanicBusiness.com](http://www.HispanicBusiness.com) are the online extensions of *Black Enterprise Magazine* and *Hispanic Business Magazine*.

⁵¹ Examples of franchisors including information on their website indicating their commitment to diversity include McDonald’s (“[McDonald’s has a] long-standing commitment to a workforce that is diverse. We believe in developing and maintaining a diverse workforce that will strengthen the McDonald’s system. Diversity at McDonald’s is understanding, recognizing and valuing the differences that make each person unique.”); Yum (“Diversity is more than a philosophy at Yum!, it is part of our founding How We Work Together principles. Our global culture is actively developing a workforce that is diverse in style and background, where everyone can make a difference. Building Yum’s diverse foundation at all of our brands gives us a competitive edge and helps drive Customer Mania.”), Wendy’s (“Guided by the principles of fairness and inclusiveness, we’re committed to building, supporting and empowering a truly diverse workforce.”), Popeye’s (“At Popeye’s we believe part of our success comes from our diverse franchisee background. Moving forward we hope to further expand our diverse franchisee base.”), Marriott

minority populations have developed awards recognizing diversity in franchise systems and the winners of those awards proudly tout them on their websites. The websites of these franchisors are easily accessed through links on the websites of IFA's MinorityFran or NMFI.

Minority outreach programs intended to educate potential franchisees have also been established by franchisors. As part of those programs, franchisors routinely attend and even speak at meetings of Rainbow Push, the Small Business Administration, NAACP, Urban League, Operation Push, historically black colleges and universities, diverse chambers of commerce, community church groups and African-American college fraternities.

Many franchisors also look to a diverse internal workforce to recruit potential franchisees. Recruiting a long-term diverse employee who understands the business of the franchise system, as well as the internal workings of the franchisor, can often result in a win-win situation for both franchisor and franchisee.

Diversification of franchise systems will not happen by accident; it takes a creative, concerted and focused effort by individuals who not only understand the franchisor's business, but also understand the culture and knowledge base of potential minority franchisee applicants. More and more, franchisors are discovering that it is critical to have resources dedicated to expanding the diversity of their systems. This awareness is reflected in the growing number of "diversity" officers, managers or committees employed by various franchisors whose responsibilities are to assist the organization in diversifying, not only at the employee level, but also throughout the franchisee ranks.⁵²

B. Retaining Diverse Franchisees

Once a franchisor has diversified its franchisee population, what steps can the franchisor take to retain the diverse franchisees? The information available today about programs or actions implemented by franchisors to maintain diversity is scarce. Some franchisors have programs that assist diverse franchisees with economic incentives, making it not only easier to purchase a franchise, but also more likely the franchisee will be successful in the system. Other systems provide non-economic support for their diverse franchisees. McDonald's USA, for example, recognizes and works closely with its franchisee diversity organizations, such as its National Black McDonald's Owner's Association, the McDonald's Hispanic Owner-Operator Association, and the Asian McDonald's Owner Association. These organizations were started over the past twenty years by members of each of the minority groups to affect changes for their constituents. They are comprised of existing franchisees belonging to each minority group and provide insight to the franchisor on its diverse customer base. They work closely with the franchisor to discuss ideas or issues specific to their respective groups.

("Marriott's commitment to diversity is absolute. It is the only way to attract, develop and retain the very best talent available.") and Cendant ("The Cendant Real Estate Franchise Group recognizes that many of the greatest areas of opportunity in real estate are among minority groups. By attracting real estate entrepreneurs who understand the unique needs of diverse populations, Cendant's real estate brands can better serve tomorrow's homebuyers and sellers.").

⁵² Marriott International's Senior Vice President of Diversity Initiatives; McDonald's Corporation's Vice President of Diversity; Country Inns & Suites' Vice President of Diversity; Choice Hotels Diversity Committee.

C. Redlining

If a compelling argument can be made that it is good for a franchise system to have franchisees that reflect the customer base of the franchisor, can a franchisor enhance its diversity structure by placing minority franchisees in locations populated predominantly by persons of the same race as the franchisee? Can it move existing diverse franchisees or grant new diverse franchisees locations within inner cities or other heavily minority populated areas? Can it recruit new diverse franchisees specifically for these types of locations? In other words, if a strong business justification exists, what is wrong with playing to this potentially profitable opportunity?

Practical considerations may complicate this approach. For instance, inner city locations may carry greater expense than suburban locations. Higher crime rates may result in higher costs for insurance, security and repairs. Knowledge of brand acceptance may be lacking. The profits of a franchisee in those areas may be lower than those of a franchisee in a suburban area. In sum, urban locations may carry greater risk. Conversely, there may still be concern from franchisors about placing whites in areas heavily populated by nonwhites or placing African-Americans in predominantly white areas, given the racial biases that still exist today.

But legal issues may override both practical and business justifications. Redlining—the practice of granting or denying a franchise in a particular location on the basis of race alone—is a real concern. Although it appears difficult to prove redlining in a franchise context under the existing case law, franchisees have attempted to allege this form of discrimination against their franchisors.⁵³ Franchisors must, therefore, be sensitive to redlining concerns as they make their franchising plans and choose the locations in which they place diverse franchisees. Placing only minority franchisees in minority neighborhoods with the justification that customers want to do business with people like themselves may result in the franchisor defending a discrimination claim brought by the minority franchisee.

⁵³ In *Howard v. BP Oil Co.*, 32 F.3d 520 (11th Cir. 1994), a suit was brought against BP Oil Co. (“BP”) under 42 U.S.C. Section 1981 asserting that BP had intentionally discriminated against the plaintiff, an African-American, based on his race, by giving white and Asian applicants preferential consideration in awarding BP stations in the predominantly white areas of Atlanta. *Id.* at 522. As evidence to support his claim, the plaintiff cited the fact that there were no black dealers in the predominantly white areas of northern Atlanta. *Id.* at 524. In this appeal from summary judgment in favor of BP, the court found that while the plaintiff had failed to conduct a sufficient statistical analysis to indicate that African-Americans were being steered away from predominantly white areas, there was sufficient evidence for a reasonable trier of fact to conclude that the defendant acted with discriminatory intent. *Id.* at 526. In *Harper v. BP Exploration & Oil Co.*, 896 F. Supp. 743 (M.D.Tenn. 1995), the plaintiff, an African-American gasoline dealer, brought a claim of race discrimination against BP, citing, among other things, “impact evidence”, including BP’s current racial composition, BP’s failure to hire minorities, BP’s policy of excluding black dealers from stations located in white neighborhoods and the absence of a minority recruitment policy, as evidence that BP had established a pattern and practice of racial discrimination against African-Americans. *Id.* at 751. The court found that although this “impact evidence” was insufficient on its own to establish a violation of Section 1981, when viewed with other facts presented by the plaintiff this evidence was probative in finding that discrimination was a motivating factor in BP’s transactions with Harper, including its decision not to relocate the plaintiff to another site. *Id.* See also Erik F. Dyhrkopp & Andrew H. Kim, *Prospecting the Last Frontier: Legal Considerations for Franchisors Expanding into Inner Cities*, 19 FRANCHISE L.J. 89 (2000).

IV. DEVELOPING FINANCIAL INCENTIVES TO EXPAND THE CENSUS OF DIVERSE FRANCHISEES

A. Introduction

Although there are a number of threshold barriers to minority entry into franchise systems, the most significant of these is “the bottom line.” Minority-group members, as a whole, are not as economically advantaged as non-minorities. Meeting minimum financial requirements is sometimes difficult even for non-minorities, especially in systems that require significant real estate investment, building construction or long-term leasing, let alone for generally more economically disadvantaged minorities. Thus, franchisors that wish to first attract and then “qualify” minority candidates for their systems may have to consider ways to lower the financial barriers.⁵⁴

There are a few pioneers who have blazed the trail with their own minority-franchisee recruitment and financial assistance programs. Following are some of the different models or approaches these systems have developed to address the acknowledged under-representation of minorities in the franchisee ranks.

B. Government-Business Initiatives

Not unlike other governmental initiatives to jump-start business in economically depressed areas, two programs, one in Chicago, the other in Detroit, have attempted to match franchisors with minority franchisee-candidates while addressing the lack of branded restaurants and businesses in inner city areas. The Chicago program, dubbed The Franchise Partnership, was formed in 2001 through a coalition of Connections for Community Ownership and the Latino Franchise Project. The Partnership’s mission was to bring branded companies into urban renewal areas. The Partnership matched interested franchisors with a pool of pre-screened candidates, mainly African-American and Hispanic-American. The effort involved local banks, foundations, the Federal Empowerment Zone and the Community Development Financial Institute Fund to establish a loan fund to assist with required financing. As part of the overall program, qualifying franchisees could obtain financial assistance if they had at least 15% of the initial funds needed to start a franchised business.

The Franchise Partnership also provided educational assistance to potential candidates. Seminars reviewed the various participating franchise opportunities and offered guidance for site selection, market analysis, marketing and other aspects of starting a franchise business. The Partnership was successful in recruiting 25 franchisors to participate which resulted in the establishment of 12 franchises, including PostNet, Sign-A-Rama, Charley’s Steakery and Coffee Beanery.

While The Franchise Partnership enjoyed some initial success, “the overall model did not work,” according to David Chandler, The Franchise Partnership’s former director.⁵⁵ Only six of the 12 franchises it enabled have survived. The Franchise Partnership continued until 2005 when it was re-engineered and adopted by the Women’s Business Development Center.

⁵⁴ See, Susan P. Kezios, *Women and Minorities in Franchising*, The Franchising Handbook 456 (Andrew J. Sherman, ed., 1993) (identifying financing suggestions to assist underfinanced minority franchisees).

⁵⁵ Telephone Interview with David Chandler, former director, The Franchise Partnership (May 10, 2006).

Experience revealed a number of flaws that derailed the ambitious effort:

- Recruitment process overwhelming – More than 4,000 candidates were interviewed and screened to produce a very small pool of eligible potential franchisees. A number of factors led to this result: (i) lack of sufficient assets (the program directors knew going in that typically a 30% income gap existed between minorities and non-minorities, but it was a complete surprise to learn that the gap in assets between the groups was almost 85%, with only one in every eight candidates having assets approaching those of non-minority counterparts), (ii) lack of family network with assets, and (iii) risk averseness (an unwillingness to accept personal liability for loans, leases etc.): “dozens of times” qualified candidates at the starting line decided not to proceed when faced with the reality of personal liability.
- Selected candidates thinly capitalized – Although candidates were initially believed to be financially qualified to commence the franchise programs, it became quickly apparent that the new franchisees did not have sufficient assets to weather the financial lulls that follow the honeymoon period. Nearly half of the start-ups needed additional capital within six months after opening. The Partnership was not prepared to prop up all the entrepreneurs with additional funding but did manage to arrange for additional funding in some instances.
- Inadequate planning for franchisor support – Director Chandler was quick to praise the efforts of all franchisors who participated in the program, indicating that he was certain each system provided training and assistance equal to or better than that offered to other franchisees in the system, but he noted that to make the Partnership’s franchisees successful “intense franchisor support” was likely required. That is, these franchisees needed more direct support with marketing, systems implementation, budgeting, forecasting and so forth to achieve break-even and ultimate success.⁵⁶

Although the Chicago effort did not produce the results for which the founders and participants had hoped, the experiment itself and the post-mortem provide guidance for future efforts.

The Detroit program, spearheaded by BLIMPIE in response to an initial effort of the City of Detroit and developed with the assistance of the United States Department of Housing and Urban Development (“HUD”), much like the Chicago initiative, sought to establish new businesses in urban areas.⁵⁷ Begun in 1998, the BUILD program (BLIMPIE Urban Initiative Leadership Development) focused on Detroit’s empowerment zones and qualified candidates through a steering committee comprised of BLIMPIE managers, volunteers from local banks, colleges and urban/business development groups as well as officials with the U.S. Small Business Administration (“SBA”) and other government agencies.

BLIMPIE provided assistance with initial business planning, site selection and training. The program fostered relationships with local financial institutions through the SBA and HUD. Franchisees had to satisfy all of the other financial requirements of the standard BLIMPIE franchise agreement but the \$18,000 initial franchise fee was waived.

The first BUILD store opened in March 2001. As of the end of 2001, three additional BLIMPIE franchises were reportedly granted as a result of the program and other cities had expressed

⁵⁶ *Id.*

⁵⁷ IFA Educational Foundation, *Minority Outreach Programs in Franchising*, *supra* note 18.

interest in the program.⁵⁸ But an inquiry made to BLIMPIE's Atlanta headquarters in May 2006 revealed that the program seemed to have fizzled. No one at the company was aware of any surviving franchises nor was anyone able to report on any aspect of the program. Because the system was recently acquired, there appeared to be no current plan to revive the program or establish a new initiative.⁵⁹

C. Business-Banking Partnerships

A franchisor's pursuit of lending partners for franchisee candidates is not a novel concept. But few franchise systems have established minority financing-partnership programs.

One notable exception is Pizza Patrón, the carry-out pizza franchise that directs its marketing exclusively to Hispanic-Americans. Pizza Patrón founder, Antonio Swad, has been working with various lenders to establish special programs for qualified candidates.⁶⁰ One of Swad's stated goals is to have a majority of Pizza Patrón's franchisees come from the Hispanic-American community. According to the Pizza Patrón website, "[t]hird-party financing is available to open your own Pizza Patrón location. Most lenders require 25-30% of the total project as a down payment. The government SBA program participates with Pizza Patrón [*sic*] and we are on the SBA registry."⁶¹

The Registry is a national online listing of franchise systems whose franchisees receive expedited loan processing when applying for loan assistance from the SBA. Under the program, all SBA District Offices are authorized to accept a single nationwide review of a participating franchisor's franchise agreement.⁶² By centralizing the review process, the Franchise Registry allows the SBA to make consistent eligibility decisions regarding franchise systems, cut red tape in the system and speed access to SBA financial assistance. Administered by FRANdata, the Franchise Registry is a working partnership between the SBA, franchise lenders, franchisors and franchisees designed to speed the lending process.

The SBA Registry website indicates that the "SBA has been working with franchisors, franchisees and lenders for two years to streamline SBA's franchise review loan process. With their help, SBA has revised its franchise eligibility guidelines and operating procedures, and has implemented a streamlined review process to help it serve its small business customers better."⁶³ The Registry, among other resources, lists franchise companies generally eligible for SBA-guaranteed loans as well as streamlined processing.⁶⁴ No mention is made, however, of special lending programs for minority candidates.

Whether franchisors join the SBA Registry or attempt to establish special lending programs, this approach may aid the process of qualifying under-capitalized minority franchise candidates.

⁵⁸ *Id.*

⁵⁹ Telephone interview with Ron Laundry, BLIMPIE Marketing Department (May 17, 2006).

⁶⁰ IFA Educational Foundation, *Diversity and Minority Franchisee Development Guide*, *supra* note 18.

⁶¹ Pizza Patrón, <http://www.pizzapatron.com>.

⁶² *SBA Franchise Registry Activity for June Includes 9 New Listings and 39 Renewals*, FranchiseWire, July 12, 2006, (list available at http://www.frandata.com/newsletters/Franchise_Registry-6-1-2006.pdf) (last visited July 20, 2006).

⁶³ The Franchise Registry, <http://www.franchiseregistry.com>.

⁶⁴ *Id.*

D. IFA Programs and Initiatives

The IFA Diversity Institute and its MinorityFran initiative are the culmination of efforts of the IFA Educational Foundation and Minorities in Franchising Committee to increase minority involvement in franchising. Drawing from government-business initiatives and business-banking partnership experiences, the Diversity Institute and MinorityFran incorporate the best attributes of these forerunners into one program, supported by a broad coalition of business, minority and government organizations.

Established in 2005, the Diversity Institute is directed by the Institute's board which includes representatives from the IFA board of directors, the Foundation's board of trustees, and the IFA's Minorities in Franchising Committee. An advisory council is comprised of representatives from the Association of Small Business Development Centers, Community Wealth Ventures, Esperanza, the Executive Leadership Council of the Hispanic Association on Corporate Responsibility, La Raza, the Minority Business Development Agency's Multicultural Foodservice and Hospitality Alliance, the National Association for Equal Opportunity in Higher Education, the National Black Chamber of Commerce, the National Urban League, SCORE and the United States Pan Asian Chamber of Commerce.

Although the Institute has just begun its work, its efforts have already spawned the MinorityFran program. The program is designed to provide a single resource point where minority franchise candidates can explore franchise opportunities while assisting IFA-member companies with all aspects of diversification: education, employment, and franchisee recruitment, as well as minority-supplier relations. The bold initiative is actively recruiting IFA-member companies to participate through a sign-up page on the IFA website. Participating companies include charter members and new participants. (For a current list of participating companies, visit the IFA's website).⁶⁵

E. Individual Franchisor Efforts

The hotel industry is the clear leader when it comes to minority recruitment programs and financial incentives for minority franchisee candidates.⁶⁶ Choice Hotels International, InterContinental Hotels, Marriott International, Carlson Hotels Worldwide, and Cendant (Ramada, Howard Johnson's, Days Inn, etc.) all have established minority-franchisee recruitment programs that also offer financial assistance. This effort can be attributed in large part to the high financial thresholds inherent in the real-estate intensive hotel industry, but many in the industry insist that it is just good business to develop franchise organizations that reflect the communities where they do business. Taking a different angle, Accor Economy Lodging (Motel 6, Studio 6, and Red Roof Inns) sponsors "several minority organizations" that provide access to potential qualified minority candidates.

If the hotel industry is the franchise leader, Choice Hotels International is the decided leader of the pack, and the most successful to date; however, even its success has been concentrated in

⁶⁵ IFA, <http://franchise.timberlakepublishing.com>; in PDF available at <http://franchise.timberlakepublishing.com/files/MinorityFran%20Members.doc>.

⁶⁶ As an example of the trend in minority franchisee recruitment in the hotel industry, in 1999 there were no branded hotels owned by African Americans in the United States. Today, there are between 50 and 100 hotels owned by African Americans. See *Hotel Companies Focus on Opportunities Through Diversity Initiatives*, Reed Business Information, Oct. 1, 2005.

one minority group: Asian-Americans (comprised mostly of individuals of East Indian descent), which comprises nearly 40% of all Choice franchise-owners.

A general overview of the various programs, highlighting the various financial incentives offered in the hotel industry is instructive:

- Choice Hotels – as noted, almost 40% of Choice’s franchisees are minorities. But because its minority franchisee body is presently so heavily concentrated in Asian-American owners, Choice is aggressively seeking qualified African-American, Hispanic and Native American candidates.⁶⁷ Indeed, the Choice website is one of the few that boasts about the franchisor’s minority program. Visit <http://www.choicehotelsfranchise.com/> to review Choice’s Minority Incentive Programs firsthand.

The basic elements of the Choice incentive program include: (i) 51% ownership must be in eligible African-American, Hispanic-American and Native-American entrepreneurs; (ii) a forgivable loan of up to \$125,000 is available for approved applicants who open a mid-scale Choice brand (Comfort Inn, Comfort Suites, Quality Inn or MainStay Suites); (iii) a forgivable loan of up to \$50,000 is available for approved applicants who open an economy Choice brand (Sleep Inn, Rodeway Inn, Econo Lodge); (iv) loan forgiveness is amortized over 10 years; (v) applicants must meet Choice’s then-current qualifications for new franchisees; and (vi) the loan is payable upon official opening of hotel. Choice also launched a Sleep Inn incentive program, offering up to \$155,000 in value to qualified minority entrepreneurs.⁶⁸ In addition, Choice launched a website to educate minority franchisees about the franchising and lodging industries that includes tools that entrepreneurs can use to decide whether hotel franchising is the right business for them, information on the lodging business cycle, hotel development, and the benefits offered by hotel franchisors.⁶⁹ Choice also established the Choice Hotels African American Owners Alliance and the Choice Hotels Hispanic Owners and Managers Alliance to provide networking opportunities for minorities and a forum through which to recruit minority franchisees.⁷⁰

- InterContinental Hotels – permits minority franchisees to forgo the 5% royalty in the first year of operation. For the typical Holiday Inn brand owner with revenue of \$3 million, that is a savings of \$150,000. InterContinental also waives the application fee, typically \$500 per room, and provides on-site training for one year.⁷¹
- Cendant – The Keys to Success – the Building Wealth through Hotel Ownership Program was created as a result of the company’s recognition of the under-representation of African-American, Hispanic, and Native American owners in the hotel industry.⁷² The Cendant program offers a development allowance to franchisees with at least 51% minority

⁶⁷ Choice Hotels’ board of directors created their diversity committee to oversee the promotion of diversity in its business practices with special emphasis placed on the work force, franchises, and vendor bases. Staff and Wire Reports, *Choice Hotels International Board of Directors Creates Diversity Committee*, The Daily Record (Balt., Md.), Nov. 19, 2002, at News.

⁶⁸ Reed Business Information, *supra* note 66; *see also* *Chains Chase Minority Franchisees*, Lodging Hospitality, Sep. 15, 2005, at 14.

⁶⁹ *Silver Spring-Based Choice Hotels Wants More Minorities to Check into Ownership*, The Daily Record, (Balt., Md.), Mar. 8, 2006; *see also* Lodging Hospitality, *supra* note 68.

⁷⁰ Daily Record, *supra* note 67; *see also*, Lodging Hospitality, *supra* note 68.

⁷¹ Roger Yu, *Hotels Offer Minorities Incentives to Buy*, USA Today, July 25, 2005, at 03B.

⁷² As reported on the National Association of Black Hotel Owners, Operators and Developers’ Web site, <http://nabhood.com/franchise.cfm>.

ownership (African-American, Hispanic and/or Native American) of \$1,000 per room for properties with up to 74 guest rooms, and \$1,500 per room for each room in excess of 74 guest rooms, capped at \$150,000. The allowance is payable to the franchisee upon official opening provided it has met all opening requirements. In addition, The Keys to Success program provides financing referrals, mentoring and a dedicated single point of contact.

- Marriott International⁷³ – The Diversity Ownership Initiative, Marriott's minority recruitment program launched in 2005, "is committed to doubling the number of hotels by Marriott® minority owners and franchisees in the next five years."⁷⁴ Elements of the Marriott initiative include additional operational support, flexible application fee terms, royalty fee support, key money and various forms of credit enhancement. Marriott conducts Education Summits to review how prospective sites are evaluated, financed, built and operated. Through its Diversity Ownership Initiative, Marriott identifies and educates potential minority owners by presenting seminars on the economics of the hotel business, where experts speak on topics such as underwriting for securing loans, hotel construction, refurbishing and operations.⁷⁵ When Marriott began its Diversity Ownership Initiative during 1995, about 250 of its 2,700 lodging programs were owned or under development by minorities.⁷⁶ By the end of 2005, 300 of its 2,800 lodging properties were owned, operated or under development by minorities.⁷⁷ Marriott's diversity initiatives are reported to a subcommittee of its Board of Directors, the "Committee for Excellence."⁷⁸ This subcommittee, comprised of four board members and six senior executives, deals with minority issues related to ownership, workforce, markets and customers and supplier diversity.⁷⁹
- Hilton – Hilton provides free "Hospitality 101" seminars to educate minorities about how to run hotels. Hilton also works with black colleges to improve their hospitality programs and to build hotels on their own land.⁸⁰
- Starwood Hotel and Resorts – During the latter part of 2005, Starwood launched its hotel developer and owner program which is aimed at increasing the number of women and minority owned hotel properties.⁸¹ This program provides minority developers access to services and benefits usually reserved for developers involved in multiple Starwood projects.

⁷³ In 2006, for the third year in a row, DiversityInc. Magazine named Marriott one of the "Top 50 Companies for Diversity." Marriott was ranked number 22, making it the leading lodging company on the list. See *Marriott Ranks in Top 25 of Top 50 Companies for Diversity*, PR Newswire US, Apr. 19, 2006. Marriott also received the 2006 Ronald E. Harrison Award, by the IFA, for its contribution to minorities in franchising. See *Marriott Receives Top Honors for Diversity Franchising Initiatives*, PR Newswire US, Mar. 16, 2006 [hereinafter PR Newswire, *Marriott Receives Top Honors*].

⁷⁴ Marriott hopes to increase the number of its minority and women owned franchisees to 500 by 2010. See PR Newswire, *Marriott Receives Top Honors*, *supra* note 73. See also Reed Business Information, *supra* note 66; Lodging Hospitality, *supra* note 68.

⁷⁵ *Marriott's Diversity Program*, Wash. Post, May 1, 2006, at D1, D10; See also PR Newswire, *Marriott Receives Top Honors*, *supra* note 73; Reed Business Information, *supra* note 66.

⁷⁶ Wash. Post, *supra* note 75; See also PR Newswire, *Marriott Receives Top Honors*, *supra* note 73; Reed Business Information, *supra* note 66.

⁷⁷ Marriott recently announced that RLJ Development, owned by Black Entertainment Television founder Robert L. Johnson, expects to purchase 90 Marriott International Hotels from White Lodging Services Corporation, which, upon completion of the transaction, will make RLJ Development one of Marriott's largest franchisees. See PR Newswire, *Marriott Receives Top Honors*, *supra* note 73; *The 40 Best Companies for Diversity*, Black Enterprise, July 2006, at 100.

⁷⁸ PR Newswire, *Marriott Receives Top Honors*, *supra* note 73; Black Enterprise, *supra* note 77.

⁷⁹ Black Enterprise, *supra* note 77.

⁸⁰ *Taking Minority Owned Businesses Under Their Wing*, N.Y. Times, Sep. 20, 2005, at G1.

⁸¹ Black Enterprise, *supra* note 77.

Qualified minorities receive assistance with site selection, are assigned a Starwood development consultant for each project and are offered senior and mezzanine or subordinated financing at attractive rates and terms.⁸²

- Accor Hotels – As noted above, Accor is a sponsor of the IFA’s Minorities in Franchising Committee and the Asian American Hotel Owners Association as well as the National Association of Black Hotel Owners, Operators and Developers. Accor reports that these sponsorships lead to the successful recruitment of qualified minority candidates. In addition, using an educational approach, the Ambassador Program, Accor offers a hands-on experience directed primarily at minority and women candidates. Accor says, “the program’s first objective is to provide a glimpse of the possibilities in hospitality to those who have little or no experience or understanding of the economy lodging industry. A potential franchisee can experience what it might be like to be a franchisee before actually making that commitment. ‘Try it before you buy it.’ Our goal is to give you the ability to assess whether owning a motel is the right business for you. The Ambassador Program is an avenue for individuals interested in additional experience and education in the development and operation of an economy lodging property. This program is aimed at minorities and women – those groups that have not historically been in ownership positions within the hospitality industry. Additionally, Accor provides assistance for program participants in the areas of site selection, construction or renovation and on-going marketing and training.”⁸³ Accor also makes experienced managers available to run new minority-owned hotels for up to five years.⁸⁴

Other segments of the franchise community appear to be trailing the hotel industry but some are in the early running:

- Coverall Cleaning Concepts – provides in-house financing to franchise owners, regardless of the package size purchased. With as little as \$1,500 down, individuals can become entrepreneurs with Coverall Cleaning Concepts Franchise Program. Coverall Cleaning Concepts prides itself on providing business opportunities to minority entrepreneurs. In its efforts to raise awareness of their business ownership opportunities in minority communities, Coverall Cleaning Concepts advertises in minority-based publications such as *Black Enterprise* magazine and *Latin Trade* magazine. For the past eleven years, *Black Enterprise* magazine has consistently named Coverall Cleaning Concepts as one of the top affordable franchises and home-based businesses for African-Americans and, in 2005, ranked Coverall in the magazine’s Honor Roll. Coverall Cleaning Concepts has also featured many of its minority franchise owners in various advertisements and press releases to encourage diversity within the company’s business owners. Coverall Cleaning Concepts was voted as a finalist in the “Diversity Works” competition by the *South Florida Business Journal* in 2004 for its continuous efforts in increasing diversification among its franchisees. Coverall Cleaning Concepts is focused and determined to be a leader in encouraging diversity and assisting minorities in their quest to become successful entrepreneurs. In an effort to minimize the complications that may result from language barriers, Coverall Cleaning Concepts provides Franchise Owner Fact Sheets, which contain pertinent information for franchise owners relative to their new Coverall business, in various languages including English, Spanish, Somalia, Russian, Korean, Hmong, Portuguese,

⁸² Lodging Hospitality, *supra* note 68.

⁸³ Accor’s Ambassador Program, <http://www.minorityfranchising.com/articles/Accor.htm> (last visited July 20, 2006).

⁸⁴ Yu, *supra* note 71.

Croatian, Romanian, and Polish. Additionally, Coverall Cleaning Concepts provides initial and ongoing training to franchise owners in Spanish in certain discreet markets. Coverall Cleaning Concepts also makes its UFOC available in Spanish.⁸⁵

- ServiceMaster – ServiceMaster offers a 15% discount on the initial franchise fee for its janitorial franchise to ethnic minorities and women-owned franchisee candidates. ServiceMaster’s website highlights government contracts available to women and minorities for cleaning services and describes how it can assist in obtaining those contracts. This approach demonstrates an approach other franchisors could consider: development of business opportunities specifically for minority-owned businesses (as discussed in Section V below). Here is an excerpt from the ServiceMaster site:

“Every year, the U.S. government and businesses throughout the private sector award millions of dollars in contracts to certified minority and women-owned businesses in the commercial cleaning industry. The Federal Government, through the Office of Government Contracting, has long had a goal of purchasing from small companies owned by ethnic minorities and women-owned businesses 20% of its \$200 billion in total annual small business purchases.

“Despite continued growth in the number and economic impact of minority and women-owned firms, this goal has never been reached. The Federal Government, through the Small Business Administration, offers special assistance to minority businesses through its 8(a) Small Disadvantaged Business Program. In addition, many businesses have developed Diversity Plans and have specific goals for purchasing service and products from minority or women-owned businesses. Some of these businesses offer incentives to these suppliers on contracts or competitive bids.

“ServiceMaster Clean can help you tap into the Federal Government and business opportunities for cleaning services if you are an ethnic minority or a woman who wants to start your own business in the Commercial cleaning field. In addition to providing you national brand awareness and name recognition, ServiceMaster Clean has a National Sales Team to help you capitalize on these opportunities.”⁸⁶

- Subway – some years ago Subway developed a program that offered special financing to first-time minority buyers or to buyers applying to open a franchise in a highly populated urban area. Under that program, qualified applicants were eligible to obtain a five-year loan from Subway that covered \$10,000 of the \$12,500 franchise fee. Subway still offers the loan program to qualified minority franchisees but has dropped the portion of the program directed to highly-populated urban areas. In its present form, qualified candidates may receive a five-year loan of \$10,000 towards the now \$15,000 franchisee fee with repayment starting at the time of store opening. Similar to Service Master’s approach reported above, Subway also experimented with a program intended to capitalize on the SBA’s Disadvantaged Business Enterprise (8(a) Small Disadvantaged Business Program) by offering reduced fees to qualified minority candidates who secured locations available to minorities in federally-funded facilities. However, after having offered the program from April 2005 until April 2006 with no takers, the company did not believe it worthwhile to continue the effort.⁸⁷

⁸⁵ As reported to the authors by Coverall Cleaning Concepts in response to the ABA Diversity Survey, reported with the permission of Coverall Cleaning Concepts.

⁸⁶ OwnAFranchise.com, <http://www.ownafranchise.com/minority.html>.

⁸⁷ Telephone Interview with Don Fertman, Vice-President of Franchise Sales, Subway (Jun. 16, 2006).

- PostNet International – formerly identified minority candidates by working with The Franchise Partnership, the business development group in Chicago described above whose purpose was to get qualified minorities into business. As noted above, the program no longer exists.
- Denny’s – During the mid-90’s, Denny’s launched an aggressive program recruiting minority managers and executives from historically black colleges, and sold franchises to minorities in an effort to overcome a negative public perception that resulted from several anti-discrimination lawsuits filed against the company in the early 1990’s.⁸⁸ By 2000, more than 45% of Denny’s locations were minority-owned and the company was ranked at the top of Fortune Magazine’s 50 best companies for minorities.⁸⁹
- Spherion Corp. – Spherion, a staffing and recruitment agency, implemented its diversity initiative this year. It advertises in magazines and at trade shows and conferences aimed at minorities. Spherion also established a diversity council to help implement its diversity policies and provides minorities with a 25 percent discount on its \$10,000 license fee.⁹⁰
- Papa John’s International, Inc. – Papa John’s recently engaged a consultant to assist it with increasing the diversity of its franchise group in order to enable it to penetrate markets in areas such as Chicago, Detroit and Los Angeles.⁹¹

F. Legal Considerations for Implementing Financial Incentives for Minority Franchisees

Franchisors considering implementing financial incentives to attract and retain minority franchisees must ensure that the financial programs are race-neutral. Development of a race-neutral program requires that the franchisor first analyze the financial obstacles prohibiting minority or other qualified applicants from obtaining and/or succeeding within the franchise system. The franchisor must then craft its financial incentive program so that the program is offered to a group of qualified individuals that likely will include a significant proportion of minority franchisees or applicants. As mentioned above, there are no reported cases involving financial incentives offered to minorities within a franchise system and, therefore, no legal guidelines available to assist a franchisor in developing these programs. Attention must be given to make sure the programs do not intentionally favor one racial group of franchisees over others.

Any financial incentive programs should be disclosed in item 10 of the franchisor’s offering circular. The parameters of the program should be clearly defined and described to prospective franchisees in the offering circular.

⁸⁸ Black Enterprise, *supra* note 77.

⁸⁹ *King Award Given to Denny’s Executive*, The Capital (Annapolis, MD), Jan. 15, 2006.

⁹⁰ *A Helping Hand* Asbury Park Press (New Jersey), June 25, 2006 at 1B.

⁹¹ *Papa John’s International, Inc. Earning Conference Call – Final* FD (Fair Disclosure) Wire, Mar. 1, 2006.

V. MINORITY- OWNED BUSINESS ENTERPRISES

Today, in virtually every area of public contracting, there is a requirement that some portion of the overall contracts awarded by public entities be granted to minority- or women-owned businesses. Additionally, many private corporations have developed minority supplier programs that are discussed in Section VI of this paper. These programs may represent an otherwise overlooked business opportunity for franchise systems while providing motivation to develop a more diverse franchisee base. As noted above, ServiceMaster currently employs this strategy in recruiting minority candidates.

In the public contracting arena, an eligible minority entity is known as a Minority-Owned Business Enterprise (“MBE”). While there are many definitions of an MBE, a typically accepted definition by federal and state agencies is (i) a for-profit enterprise, (ii) physically located in the United States or its trust territories, and (iii) owned, operated and controlled by United States citizens who are Asian, Black, Hispanic or Native American. To qualify as an MBE, it is not sufficient for a business merely to be owned by an Asian, Black, Hispanic or Native American. Rather, 51% of the stock or ownership interest must be held by minority owners, and the management and daily operations of the business must be controlled by those minority owners.⁹²

The MBE certification process is a review process designed to ensure that a business is in fact owned, operated and controlled by minority applicants. As explained above, depending upon the entity from which the business is seeking certification, the required certifications vary. Similarly, the certifying entities can also vary. A business can become MBE certified at a national, state, county, municipal and department level. At a state level, virtually every state’s Department of Transportation certifies MBEs, as well as various Minority Business Development Councils or Minority Supplier Development Councils.⁹³

Both franchisors and franchisees should be cognizant of these opportunities. Franchisors may be able to expand their systems by placing eligible minority franchisees in locations available only to MBEs (*e.g.*, airports and tollways) or by expanding their business opportunities as suppliers to various public works or private corporations. Potential minority applicants may be in a position to present prime expansion opportunities to franchisors available only to MBE-certified businesses. Thus, it may be beneficial for franchisors to recruit franchisees into their systems franchisees that are or can be qualified as MBEs. The franchisor itself may be certified as an MBE if it meets the criteria set forth above.

A franchisor or franchisee can become certified as an MBE in the same manner as any other small business or publicly-traded business owned, operated and controlled by United States citizens who are Asian, Black, Hispanic, or Native American. However, just as there is no formal definition of an MBE, there is no standard process for becoming certified as an MBE. Government and business entities differ as to the number of MBE certifications required to qualify as an MBE. Given these differences, the franchisor or franchisee must thoroughly research the requirements for certifications by the governmental entity or private entity with which it wishes to contract. For example, if a franchisor wanted to do business with the State of

⁹² MBE, <http://www.mwbe.com>.

⁹³ See <http://www.mwbe.com/cert/agencies>, for a list of certifying agencies by state.

California and a major corporation like Motorola, the franchisor would research the requirements for MBEs in both the State of California and by Motorola to determine which certifications are required. Federal and state government agencies typically have their own certification programs, but certain government contracts require additional certifications at the county or local levels.

To determine what certifications are required by a private entity, contact the entity to determine if it has a supplier diversity program, and if so, the types of certifications that are accepted. Once the types of certifications required to do business with a particular entity have been identified, the franchisor or franchisee must certify under each program. A number of organizations are available to assist franchisors and franchisees with the certification process.⁹⁴

Awareness of these programs is essential for a franchisor hoping to capitalize upon every opportunity to grow its system. Franchisees who qualify as MBEs can enhance the system overall by allowing the franchisor's brand to participate in opportunities that may not otherwise be available to the franchisor. For this reason alone, MBE-qualified franchisees or franchisee applicants may be superior candidates for granting a particular franchise.

VI. SUPPLIER DIVERSITY

A. Introduction

Supplier diversity programs aim to increase the number of minority- and women-owned enterprises ("MWBES") supplying goods and services to businesses, including franchisors.⁹⁵ Initially, the public sector was the driver for supplier diversity programs. The object of these programs was to open the marketplace to MBEs and facilitate wealth distribution by opening government contract bidding to these entities.⁹⁶ To this end, in 1968 the SBA implemented a program through which certain government purchase contracts were awarded to MBEs. A year later, in 1969, the Office of Minority Business was established within the U.S. Department of Commerce.⁹⁷ It was not long before corporate supplier diversity programs were established.

Although many corporations were initially motivated to implement supplier diversity programs because they believed it was a socially responsible course of action, many corporations now realize it is a matter of economic necessity.⁹⁸ Minority consumers have put pressure on corporations to enter into business arrangements with people in their communities. In addition, businesses recognize that supplier diversity programs offer benefits such as providing a broader pool of suppliers; increasing competition resulting in the development of better quality products and services; creating a competitive advantage when competing for government contracts; personalized service and increased flexibility because MBEs are smaller and more easily able to adjust to the customer's needs; and enhanced relations with minority communities.⁹⁹

⁹⁴ See <http://www.minoritycertifications.com>; <http://www.mwbe.com>; <http://www.sba.gov>.

⁹⁵ See Sonya Brathwaite, *Supplier Diversity: A Hidden Asset*, *Financing World*, May/June 2002, at 52.

⁹⁶ James Morgan, *How Well Are Supplier Diversity Programs Doing?*, *Purchasing*, Aug. 2002, at 29.

⁹⁷ *Id.*

⁹⁸ *Id.*; Brathwaite, *supra* note 95.

⁹⁹ Sonya Brathwaite & Bill Harris *Supplier Diversity Programs Proving Successful to Some: SUPERCOMM and the TIA Member Companies Challenge Industry to Do Even More*, *Headline News*, (accessed at <http://pulse.tiaonline.org> on 1/16/2006).

B. Measuring the Success of Supplier Diversity Programs

Determining the success of supplier diversity programs is often a complex exercise, depending on how “success” is measured. A common indicator, such as an increased number of MBEs, may mean one thing to those concerned with the public relations value of supplier diversity, but it may mean something completely different to businesses wanting to use supplier diversity as a means of obtaining a competitive advantage.¹⁰⁰ From the point of view of the minority supplier and the business customer, measuring the amount of money spent on minority suppliers may be indicative only of what is common knowledge: that businesses often buy unsophisticated goods and services from MBEs.¹⁰¹ Many businesses, as well as suppliers, interested in increasing the number of MBE suppliers providing sophisticated goods and services will need other measurements of success. Indeed, some companies, such as IBM and General Motors, use various means to measure the success of their supplier diversity initiatives over time.¹⁰²

C. Challenges and Opportunities Facing MBEs Suppliers

Probably the most pressing concern for MBEs is supplier downsizing by businesses. Downsizing makes it extremely hard for businesses to bring in new MBE suppliers because those suppliers typically do not have the capacity to deal with large volume contracts. As a result, there is a tendency to rely on established suppliers that have this capacity, most of which would not be MBEs.¹⁰³ Other problems facing MBE suppliers include: Just in Time delivery¹⁰⁴ – which results in an increased dependence on established suppliers and strains the capital reserves of those MBEs that are utilized; electronic ordering – which is problematic for small MBEs with insufficient capital to acquire state of the art software (although this problem is decreasing due to the influx of cheap software and the willingness of businesses to make software available to MBEs at cost or less); and quality standards – which can pose a challenge to small MBEs.¹⁰⁵

In addition to meeting these challenges, MBE suppliers must be aware of other long-term challenges that are not exclusive to MBEs, such as: ensuring the development of a good track record as a preferred supplier; developing management skills; overcoming a lack of financial skills; persevering in the face of adversity; reinforcing mid-level management; sufficiently funding staffing and development programs; allowing for slow buy-ins from industry; and lack of commitment from top management.¹⁰⁶

However, these obstacles are not insurmountable. Some of the suggested methods for overcoming them include: establishing mentorship programs; dividing larger contracts into smaller ones to allow MBEs to compete; revising payment terms or providing advance payments to MBE suppliers to ease cash flow problems; and requiring contractors to use MBEs as second tier suppliers.¹⁰⁷ Of course, this list is not exhaustive, and businesses are constantly devising new ways to increase the number of MBE suppliers.

¹⁰⁰ Morgan, *supra* note 96.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Brathwaite, *supra* note 95.

¹⁰⁴ Just in Time delivery is an inventory control system that replenishes and delivers products to a retailer just as a current supply is depleted.

¹⁰⁵ Morgan, *supra* note 96, at 34.

¹⁰⁶ *Id.*

¹⁰⁷ Brathwaite, *supra* note 95, at 54; *Id.* at 32-34.

An MBE can also increase its chances of obtaining lucrative contracts from businesses. Some mechanisms for doing that are: obtain certification as an MBE from the National Minority Supplier Development Council (and any other reputable organizations that offer certification); continuously update target businesses with information to use as selection criteria; know the diversity advocates in the business and ensure that they know the MBE's capabilities; be persistent; ensure that the MBE has all the industry and quality certifications and knows the business of its target customers; be e-business savvy; diversify the base of customers and suppliers; and build relationships with key personnel in the businesses with which the MBE wants to do business.¹⁰⁸

D. Attributes of a Good Supplier Diversity Program¹⁰⁹

The recommended attributes of a good supplier diversity program are as follows:

1. A well-defined scope:
 - The program should be in written form and must be defined. It must indicate why the program is important and how it affects the organization.
 - The program must originate at the senior management level and have meaningful commitment from senior management.
 - The program should incorporate all types of goods and services; included and excluded services must be clearly identified.
 - Measurable, realistic entity-wide or department-wide goals must be set by the business.
 - The program must be circulated throughout the entity to ensure that there is meaningful participation at all levels.
2. Linked with the goals of the business:
 - The goals of the supplier diversity program must be harmonized with the objectives, motivations and culture of the entity.
 - The business benefits of supplier diversity must be emphasized to obtain the support of senior management and other members of the entity.
3. Connected to a network of MBEs:
 - The corporation interested in establishing a supplier diversity program must begin contracting with MBE suppliers.
 - The program should classify the entire supplier base and outline the process of identifying and verifying MBE suppliers by certifying MBE suppliers either through self-certification or through a recognized, authorized body such as the National Minority Supplier Development Council ("NMSDC"). The implementing corporation should join the NMSDC.
 - The supplier diversity program coordinator should proactively seek out MBE suppliers that meet the entity's criteria.

¹⁰⁸ Brathwaite & Harris, *supra* note 99.

¹⁰⁹ See Akiva Lewis, *Supplier Diversity Best Practices – Part 1*, <http://www.diversitydtg.com/articles/supplier-diversity.htm>, *Supplier Diversity Best Practices – Part 2*, <http://www.diversitydtg.com/articles/supplier-diversity2.htm>,; Morgan, *supra* note 96; and *Moving Towards Greater Diversity*, Boston Business Journal, Dec. 13, 2004, (accessed at www.bizjournals.com on 11/10/2005). The program outlined herein combines the key attributes discussed by these authors, utilizing Lewis as the core structure for the program.

- The corporation should encourage second-tier supplier diversity by encouraging and providing incentives to current non-MBE suppliers.
- The program coordinator should set-up a MBE supplier database offering access to all purchases.
- The program should ensure a mechanism for feedback from MBE suppliers.
- The corporation must recognize outstanding performance by MBE suppliers.

4. Well-run operation:

- The program should coordinate personnel in the organization including procurement, contract, program managers, and senior leadership.
- The literature for the program should clarify the procedures/actions to ensure inclusion of MBEs.
- All employees must be trained and educated on a periodic basis.
- The corporation should select an internal MBE officer.
- The program should establish a performance monitor for the use of MBE suppliers.
- The corporation should require on-going reporting to senior management on how the supplier diversity program is being run.
- The corporation should conduct a benchmark study to determine the effectiveness of the program against industry standards.
- The diversity supplier program should be adequately funded.
- The sponsoring corporation should produce an MBE supplier program brochure for dissemination to the public and attend business fairs to promote the entity's program.

5. On-going development

- The program should ensure the continued supply of goods and services from MBEs and instill trust and confidence among MBEs, other suppliers and the entity's personnel.
- The program should include programs relating to mentoring and favorable financing terms. It should also host trade fairs; conduct site visits of MBEs; conduct seminars with MBEs and provide technical and managerial assistance.

E. Examples of Franchisor Supplier Diversity Programs

1. Marriott – Small business enterprises can register for work on Marriott's website. Each small business that registers with Marriott has its sales, capabilities and products assessed and Marriott tries to respond to the registrant within eight weeks. Marriott works with these registered businesses by explaining how its procurement system works and the kinds of products and services that it buys. The company keeps a MWBE database for use by hotel managers. Marriott recently implemented a system to monitor the goods and services bought from MWBEs by each hotel in its stable.¹¹⁰ During 2005, Marriott purchased more than \$347 million from 11,000 MWBEs, nearly 12 percent of its total spending.¹¹¹ Marriott's goal is to surpass \$1 billion in spending with MWBEs by 2009.¹¹²

¹¹⁰ Wash. Post, *supra* note 75.

¹¹¹ *Id.*

¹¹² *Id.*

2. McDonald's – McDonald's has already spent more than \$3 billion with MWBE suppliers.¹¹³ The mission of McDonald's Corporation Supplier Diversity is to deliver superior supplier performance through highly qualified minority- and women-owned, and small businesses that enhance the overall McDonald's Corporation Customer Experience; support continued economic growth in diverse communities; and increase global market share. Through McDonald's Corporation Supplier Diversity, McDonald's provides equal access to potential business opportunities for Small Businesses, Small Disadvantaged Businesses, Woman-owned Small Businesses, Veteran-owned Small Businesses, Minority and Women Business Enterprises, and HUBZone Businesses (Historically Underutilized Business Zone) to participate as suppliers of goods and services within the McDonald's supply chain.¹¹⁴

VII. Conclusion

As the demographics of America change and evolve so must franchisors. The challenge is to develop sound approaches to diversity initiatives that are legally permissible. Systems must find a way to recruit, train and secure diverse franchisees within the legal framework. Franchisors cannot simply sit back and expect diverse franchisees to knock on their doors. Proactive recruiting in minority communities and careful selection of diverse franchise candidates may lead to a more successful system today and in the future.

Diversity is the path to pluralism. Given the close connection that much of the franchising community has with society at large, forward-looking franchisors will tap the strength of diversity to build a pluralistic culture, not only because it improves society, but also because it will be highly profitable. These franchise organizations will value human differences as a competitive advantage, establish a culture that reflects the interests, contributions, and values of members of diverse groups, provide opportunity for full and influential participation by all organizational members in decisions and policies that shape the organization and work to eliminate discrimination throughout the organization.

Franchise executives must begin discussing, considering and acting to develop diversity inside and outside franchise systems. Avoiding the issue will result in failure to break into new diverse markets and losing market share as the new society emerges. Implementing diversity initiatives will result in a more vibrant and pluralistic system that in turn will attract more business now and in the future. With increasing diversity within the United States, franchisors must work continually and concertedly to meet the challenge of modifying their systems to keep pace with the changing demographics of the nation, always mindful, however, of the legal framework within which they must operate.

¹¹³ Black Enterprise, *supra* note 77.

¹¹⁴ McDonald's, <http://www.mcdonalds.com/corp/values/diversity/supplierdiversity.html>.

Appendix A

REPORT ON DIVERSITY SURVEY

In April, May and June 2006 the presenters, with the permission of the Forum, conducted an informal survey of its membership to develop statistical data on the current status of minority franchisee initiatives in franchise systems. In an effort to streamline the survey with the hope of securing an abundance of responses, it was limited to seven simple questions along with an area for optional comment. Unfortunately, only 16 responses were obtained.

Although the small number of responses makes the reported data statistically insignificant, the responses offer some interesting insights and may be generally representative of the state of minority involvement in franchise systems at present.

We report the information in three parts:

1. A copy of the survey;
2. A table showing the survey responses;
3. Comments provided at the end of the survey.

We appreciate the time and effort of those who responded and in the future would encourage more participation in a survey of this nature as the same broadens our discussion of this very important topic.

Part 1: The Survey

THANK YOU FOR TAKING THE TIME TO COMPLETE THIS SURVEY!

PLEASE NOTE THAT YOUR RESPONSES WILL BE PROVIDED TO THE PROGRAM PRESENTERS WITHOUT IDENTIFICATION OF THE RESPONDENTS AND PRESENTED TO ABA FORUM ON FRANCHISING MEMBERS IN SUMMARY FASHION.

Survey Questions

- Please indicate the number of franchisees in your system: _____

- How many franchisees are:
 - Black _____
 - Hispanic _____
 - Asian or Pacific Islander _____
 - American Indian or Alaskan Native _____
 - Women _____

- Has your company DISCUSSED the development of a minority-recruitment program or sales plan?
 - Yes _____
 - No _____

- Has your company IMPLEMENTED a minority-recruitment program or sales plan?
 - Yes _____
 - No _____

- If you answered No, do you believe there are obstacles to implementation of a minority-recruitment program or sales plan?
 - Yes _____
 - No _____

If yes, please briefly describe them:

- Does your company offer any financial incentives or assistance to minority candidates?

Yes _____
No _____

If yes, please briefly describe them:

- Does your company have programs in place to provide additional assistance to minority franchisees once they enter the system (mentoring, additional field support, etc)?

Yes _____
No _____

If yes, please briefly describe them:

COMMENTS (Optional)

THANK YOU FOR TAKING THE TIME TO COMPLETE THIS SURVEY!

PLEASE NOTE THAT YOUR RESPONSES WILL BE PROVIDED TO THE PROGRAM PRESENTERS WITHOUT IDENTIFICATION OF THE RESPONDENTS AND PRESENTED TO ABA FORUM ON FRANCHISING MEMBERS IN SUMMARY FASHION.

Part 2: Table of Responses

Table Begins on next page

Please indicate the number of franchisees in your system	How many franchisees are: Black, Hispanic, Asian or Pacific Islander, American Indian or Alaskan Native, Women	Has your company DISCUSSED the development of a minority-recruitment program or sales plan	Has your company IMPLEMENTED a minority-recruitment program or sales plan	If you answered No, do you believe there are obstacles to implementation of a minority-recruitment program or sales plan?	Does your company offer any financial incentives or assistance to minority candidates	Does your company have programs in place to provide additional assistance to minority franchisees once they enter the system (mentoring, additional field support, etc)?
2	0	No	No	Yes	No	No
92	B - 1 H - 2 A - 24 AI - 0 W - 15	No	No	No	No	No
175	B - 0 H - 1 A - 10 AI - 0 W - 100	Yes	No	No Answer	No	No
60	B - 0 H - 1 A - 4 AI - 0 W - 8	No	No	Yes	No	No
16	B - 1 H - 1 A - 1 AI - 0 W - 2	Yes	No	No	No	No

Please indicate the number of franchisees in your system	How many franchisees are: Black, Hispanic, Asian or Pacific Islander, American Indian or Alaskan Native, Women	Has your company DISCUSSED the development of a minority-recruitment program or sales plan	Has your company IMPLEMENTED a minority-recruitment program or sales plan	If you answered No, do you believe there are obstacles to implementation of a minority-recruitment program or sales plan?	Does your company offer any financial incentives or assistance to minority candidates	Does your company have programs in place to provide additional assistance to minority franchisees once they enter the system (mentoring, additional field support, etc)?
11	B - 0 H - 1 A - 0 AI - 0 W - 2	No	No	No Answer	No Answer	No Answer
39	B - 1 H - 0 A - 0 AI - 0 W - 1	No	No	Yes	No Answer	No Answer
2	B - 0 H - 0 A - 1 AI - 0 W - 0	Yes	No	No	No	No
300	Do not track	Yes	Yes (but unsuccessful)	Yes	Yes	No
9	0	No	No	No	No	No
3100	Do not disclose - but claim over 40% minorities or women	Yes	No	No	No	No

Please indicate the number of franchisees in your system	How many franchisees are: Black, Hispanic, Asian or Pacific Islander, American Indian or Alaskan Native, Women	Has your company DISCUSSED the development of a minority-recruitment program or sales plan	Has your company IMPLEMENTED a minority-recruitment program or sales plan	If you answered No, do you believe there are obstacles to implementation of a minority-recruitment program or sales plan?	Does your company offer any financial incentives or assistance to minority candidates	Does your company have programs in place to provide additional assistance to minority franchisees once they enter the system (mentoring, additional field support, etc)?
50	B - 1 H - 1 A - 0 AI - 0 W - 0	No	No	No	No	No
40	0	No	No	No	No	No
0	0	Yes	No	Yes	No	No
1800	No Answer	No	No	Yes	No	No
8797	B - 37% H - 25% A - 9% AI - .7% W - 31%	Yes	Yes	No Answer	Yes	Yes

Part 3: Comments

Comments in Response to: *If you answered No, do you believe there are obstacles to implementation of a minority-recruitment program or sales plan?*

Time, Money, Logistics, Language

Difficulty with initial and continuing financing

If special terms were offered (relaxed payment terms, lower prices for franchises, lower rates of royalties, etc.), this would add to disclosure complexities, create concerns from other existing franchisees who might then seek similar concessions, and create concerns with selling of franchises since certain new applicants who did not get those same concessions might think this was unfair to them and might therefore balk at going further.

Society says we need such a plan. Business logic would support such plan.

We have approved such a plan.

In the real world, we can't find legitimate minority franchisees who are interested in the plan.

General Comments:

No problem so far in finding qualified minority candidates. Our policy is generally to treat any current or future franchisee as an individual and so particular help or mentoring would be case by case not race by race.

We have not had any inquire for this as a program, we do not discourage it nor turn it down if presented and we know little about it.

We sell to a more knowledgeable buyer, who has some connection to medicine. Most of our franchisees are involved in the health field. There is usually no build-out and the startup cost of approx. \$95,000 is to cover first year expenses.

We encourage all franchisees to seek out special incentive programs through the SBA.

Our company is a buying group of existing distributors in the carpet cleaning industry. We have no control over the diversity of the group.

The Company is exploring the possibility of franchising and has discussed the issue of diversity in franchising. If franchising is implemented, the Company expects that all franchisees will be given the same support and financial options.

Our system does sell franchises all over the world and in many third world countries, but we try to maintain consistent standards and therefore consistent expectations from all applicants and franchisees as well.

These minority programs seem to have a lot of appeal to them and would make everyone feel good about providing much needed assistance, but our experience is that it just doesn't work, except in exceptional cases.

The survey suffers from so many design defects that it is of little value. The survey designer(s) appear to have a grossly parochial view of what "persons" are franchisees. Moreover, critical terms are poorly used because they very ambiguous and may be interpreted in so many ways. What is a "minority?" Are legal entitles other than individuals minorities? Women, in the US are a majority. A white individual living and working in Detroit may be a minority in that community. If I were to grant a New Zealander of primarily English but some Maori heritage a franchise in Singapore (which is predominately populated by immigrants of Chinese heritage), is this a minority franchisee? The survey does not capture meaningful information and its results will be difficult to use for making conclusions. These may some of the reasons you have disappointing returns.

[Name of company removed by ABA] prides itself in providing business opportunities to minority entrepreneurs. In their efforts to raise awareness of their business ownership opportunities in minority communities, [Name of company removed by ABA] advertises in minority-based publications such as *Black Enterprise* magazine and *Latin Trade* magazine. For the past eleven years, *Black Enterprise* magazine has consistently named [Name of company removed by ABA] as one of the top affordable franchises and home based businesses for African Americans and in 2005 ranked [Name of company removed by ABA] in the magazine's Honor Roll. [Name of company removed by ABA] has also featured many of their minority Franchise Owners in various advertisements and press releases to encourage diversity within the company's business owners. These communication pieces enhance the [Name of company removed by ABA] mission: *We promote economic growth and independence for a culturally diverse group of prospective business owners through franchise ownership opportunities by providing customers, training, equipment, supplies, financing and support services.* [Name of company removed by ABA] was voted as a finalist in the "Diversity Works" competition by the *South Florida Business Journal* in 2004 for their continuous efforts in increasing diversification among their business owners. [Names of company removed by ABA] is focused and determined to be a leader in encouraging diversity and assisting minorities in their quest to become successful entrepreneurs. Once in the system, [Name of company removed by

ABA] provides initial and ongoing training to our Franchise Owners in Spanish as well as English in an effort to minimize the complications that may result from language barriers. In addition, [Name of company removed by ABA] provides Franchise Owner Fact Sheets, which contain pertinent information for Franchise Owners relative to their new [Name of company removed by ABA] business, in various languages including English, Spanish, Turkish, Somalian, Russian, French, Korean, Hmong, and Portuguese.

Biographies of the Authors

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Kathryn Kotel is Vice President, U. S. General Counsel for McDonald's Corporation. Ms. Kotel has worked for McDonald's Legal Department in various roles since 1995. Prior to joining McDonald's, she was a partner in Keck, Mahin & Cate practicing in its Franchise and Distribution Practice Group. She also served as in-house counsel for Convenient Food Mart. Ms. Kotel is licensed to practice in Illinois and Pennsylvania. She is a member of the American Bar Association's Forum on Franchising and serves on the Corporate Counsel Steering Committee for the Forum. Ms. Kotel received her B.S. in 1981 from the University of Illinois and her J.D., summa cum laude, in 1986 from The John Marshall Law School.

James A. Meaney

James A. Meaney, a frequent presenter on franchise topics, is a franchise attorney who has practiced in the area for nearly 25 years. Recently he became a WSI Internet Consultant focusing on Web-based e-learning for franchise systems and other businesses requiring remote training systems. Mr. Meaney has also developed a Web site/Search Engine devoted exclusively to business resources and information – www.deskrunner.com. During his franchising career, Mr. Meaney has held the following positions: General Counsel and Vice President of Franchise Development for Damon's Grill®, General Counsel of the Ohio Petroleum Retailers and Repair Association, Section Chief of the Ohio Attorney General's Consumer Protection Section (responsible for enforcement of Ohio's Business Opportunity Law), Chairman of the Columbus Bar Association's Franchise and Distribution Law Committee, and a member of the Board of Governors, Columbus Bar Association. He has also contributed numerous articles and presentations to various franchising publications, and is the author of *How to Buy a Franchise*. Mr. Meaney has been a member of The American Bar Association Forum on Franchising since 1989. Mr. Meaney presently resides with his family in Columbus, Ohio. Earlier this year, he published his first novel, *Courthouse*—a legal tale about a young lawyer taking on his first big case.

Kendal Tyre

Kendal Tyre is a partner in the Washington, D.C. office of Nixon Peabody LLP. He concentrates his practice on franchising. He has counseled franchisor clients regarding state and federal franchise laws, drafted franchise offering circulars and prepared and filed state franchise registration and exemption applications. He has also drafted and negotiated franchise agreements, supply agreements and area development agreements. Mr. Tyre has counseled franchisor clients with respect to various foreign country franchise laws including the laws of Canada, China, Indonesia, Mexico, South Africa, and Nigeria. Mr. Tyre is co-chair of the firm's Diversity Action Committee and leads the firm's International Team's efforts in Africa and Mexico. Mr. Tyre is a member of the National Bar Association and the American Bar Association's Forum on Franchising. Mr. Tyre received his B.A. from Brown University, with honors, and his J.D. from the University of Minnesota Law School.