



The Franchise Valuations Reporter



Our Expertise

Within the franchise, distribution and dealership context, we are experts in:



- Damages, Valuations & Expert Testimony
- Finance, Accounting and Tax
- Cyber Security and E-discovery of Electronically Stored Information

We offer a free initial consultation. If any readers have questions, you are welcome to email or phone us and we will provide our best answer as quickly as possible.

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We Write the Book

Franchise Regulation and Damages, the only treatise that covers valuations of franchises, is updated 3 times a year.

For more details, to see a Table of Contents or to place an order, go to the [CCH web page here](#).

Franchise Technology Risk Management



Our franchise law and computer forensics experts provide consulting and implementation of all aspects of cyber security, ESI management and e-discovery for franchise

Valuations: Lenders Must Do Stress Tests

OCC Calls For Use of Independent Third-Party Appraisers

A recent [Restaurant Research \(RR\) Think Piece](#) on the need for financial institutions to conduct periodic stress tests of loan portfolios caught our attention. The piece was prompted by the issuance of final guidance on leveraged lending issued by the Office of the Controller of the Currency (OCC) and other regulatory agencies. The guidance calls for financial institutions to conduct "periodic portfolio stress tests. . .to quantify the potential impact of changing economic and market conditions on its asset quality, earnings, liquidity, and capital."

The OCC noted the need for specialized knowledge to assess Enterprise Value (EV) and, furthermore, that banks need to avoid conflicts of interest. "Given the specialized knowledge needed for the development of a credible EV and the importance of EV in the underwriting and ongoing risk assessment processes, *enterprise valuations should be performed by qualified persons independent of an institution's origination function.*" [Emphasis added.]

In response to RR's inquiry as to whether banks must use an independent, third-party appraiser to determine EV, the OCC replied:

"Individuals tasked with providing an independent review of the EV should have the expertise and experience appropriate for the complexity of the EVs to be reviewed. The reviewer's independence from the leveraged loan origination and approval process should be well documented. Larger institutions may be able to have credible, independent reviews prepared by a separate internal unit. Institutions with more limited resources have been able to achieve independence in a variety of ways including the use of 3rd parties, qualified directors and senior officers, or individuals from other business lines or affiliates. For independence, the reviewer must not have any involvement in or interest in the transaction or development of the EV. The EV assumptions must be clearly documented, well supported, and understood by the lending decision makers and risk oversight units."

Franchise Valuations Ltd. is available to members of the financial community to provide valuations of franchise, dealership and distributorship loan portfolios as well as lender due diligence. Contact Bruce Schaeffer at (212) 689-0400 or Bruce@FranchiseValuations.com.

Tax Policy and Franchised Restaurants: Gratuities or Service Charges

Franchisees May Not Be Aware of the New Rules - Gratuities Added for Large Groups Will Be Taxed as Service Charges

The Internal Revenue Service has provided new administrative guidelines to examiners concerning Rev. Rul. 2012-18, under which the Service will re-characterize certain "tips" as "wages". Under Q&A 1 of Rev. Rul. 2012-18 the absence of any of the following factors creates a doubt as to whether a payment is a tip and indicates that the payment may be a "service charge":

- (1) The payment must be made free from compulsion;

systems - from preparation of cyber security and ESI-related policies and procedures manuals through collection, preservation, processing, production and presentation.

To inquire about our services, please e-mail Henry@FTRM.biz or call (212) 689-0400

DISCLAIMER

The information provided in this newsletter is for informational purposes only and should not be construed as legal or expert advice which can only be obtained from appropriate professionals. Franchise Valuations, Ltd. and Franchise Technology Risk Management provide such expert advice on the topics addressed herein.

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- (2) The customer must have the unrestricted right to determine the amount;
- (3) The payment should not be the subject of negotiation or dictated by employer policy; and,
- (4) Generally, the customer has the right to determine who receives the payment.

Although most franchisors are probably aware of the change, many franchisees may not follow the tax rules as closely and be ignorant of the impending changes. Many restaurants add automatic tips for certain size parties and they should be aware that such automatic additions will be classified as "service charges" - treated as regular wages subject to withholding of payroll taxes and employer contributions - instead of tips which are generally up to the employee to report. Under the new rule restaurants will be required to report to the IRS the tips received and will also be required to withhold income taxes and pay Medicare and Social Security taxes on those amounts.

Nexus Roundup

Economic Presence Standard for Income Tax Nexus

Although many have disagreed with me, I have been arguing for decades, since the *Geoffrey* case in 1993, that economic presence (i.e. receiving income from a franchisee) creates income tax nexus with the jurisdiction where the franchisee operates. In *Franchise Regulation and Damages*, the CCH treatise I write, I have long provided charts giving the various rules in the states. Now, CCH has updated its tax service (State Tax Review) with a new chart covering the 50 states and the District of Columbia to show that all jurisdictions have adopted an economic nexus standard but for the following: Alaska, Connecticut (but only for tax years prior to 2010), Delaware, District of Columbia, Maryland, Oklahoma, Pennsylvania, and Texas. IN ALL OTHER JURISDICTIONS ECONOMIC PRESENCE YIELDS INCOME TAX NEXUS!

Florida -- Sales and Use Tax: Click-Through and Affiliate Nexus Legislation Dies in Committee

According to CCH, Florida legislation that would have amended the definition of "mail order sale" to add click-through and affiliate nexus provisions died in the House Appropriations Committee.

Kansas -- Sales and Use Tax: Guidance Provided on Click-Through and Affiliate Nexus Requirements

Also according to CCH, the Kansas Department of Revenue has issued guidance on recent changes to state law that impose a duty on certain remote retailers to register with the department as retailers and to collect and remit Kansas retailers' sales tax or use tax on taxable sales of tangible personal property for use, consumption, or storage in Kansas. The click-through nexus provisions take effect on October 1, 2013, and the affiliate nexus provisions and various amendments to the definition of "retailer doing business in this state" took effect on July 1, 2013.

The department also emphasizes that under Kansas law, each retailer doing business in Kansas who makes taxable sales of tangible personal property for use, storage, or consumption in Kansas has a duty to collect from customers the Kansas state and local use tax due and to timely report and remit the taxes. *Notice 13-05*, Kansas Department of Revenue, May 10, 2013

Vicarious Liability for Owners of Franchise

Companies

Craig O's Pizza Principal Held to Be Employer of Franchisee's Employee

In [Orozco v. Plackis](#), the federal district court for the Western District of Texas upheld a jury's finding that the principal of the Craig O's Pizza chain was liable as the employer of a former franchisee's employee, a kitchen worker, who sued the company's owner under the Fair Labor Standards Act for not paying him minimum wage and overtime.

Awuah v. Coverall, Continued

In the District Court for Massachusetts, on September 16, the Court issued a Final Amended Judgment on behalf of 128 members of the class in the amount of \$3,145,345.54 with added statutory interest at 12% per annum in the amount of \$1,419,991.46 for a total of \$4,405,977.68.

Private Equity Fund a "Trade or Business" for Purposes of ERISA Withdrawal Liability

The U.S. Court of Appeals for the First Circuit has determined that a private equity fund can be held jointly liable for Employee Retirement Income Security Act (ERISA) multiemployer pension withdrawal liability incurred by the fund's portfolio companies. [*Sun Capital Partners III, LP et al. v. New England Teamsters & Trucking Industry Pension Fund et al.*, No. 12-2312 (1st Cir. 2013) (Doc 2013-18003)]

Baby Boomers in Franchising: Our Article in Franchise World

August Issue Spotlights the Growing Demographics

Our [article on exit and succession planning for baby boomer franchise owners](#) outlines the many choices these folks will have to make.

We are also pleased to announce that Bruce Schaeffer has been selected to speak on this timely subject at the IFA's annual convention to be held in February 2014 in New Orleans.

EBITDA Multiples in Franchising: Our Analysis Featured by Restaurant Research

Pitfalls of Reliance on Multiples Noted

This week's [Think Piece](#) sent out to RR's subscribers spotlights the potential weaknesses in EBITDA valuations and links to our July issue.

The Franchise Valuations Reporter Gets An Unsolicited Testimonial

Comments Are Always Appreciated!

Here is what one reader wrote about last month's issue:

Good Morning, Bruce!

The Franchise Valuations Reporter hit my Inbox a half-hour ago. I have already found three articles of value to me. I want to again thank you and your team for continuing to publish this terrific resource.

I hope you are enjoying your summer, and look forward to seeing

you at the ABA Forum in Orlando this October.

Ken

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