We are responding to the Competition Bureau's invitation for comments on the proposed *Enforcement Guidance on Wage-Fixing and No Poaching Agreements* ("Draft Guideline").

As legal counsel to hundreds of franchise systems across Canada, we strongly recommend two clarifications be introduced into the Draft Guideline. The rationale for each recommendation, and the proposed amendments, are set out further below.

I. Franchising Involves Unique Dynamics Between Franchisor and Franchisee

As general context, it is important to appreciate the dynamics of franchise systems and the businesses operating within them.

The Canadian franchise industry generates $96B per year, largely through small businesses[1]. Franchising is prevalent across multiple sectors; approximately 60% of franchises operate in non-food spheres[2]. Over 1.8 M Canadians are directly or indirectly employed by the franchise industry.[3] As such, franchising is a significant contributor to the Canadian economy, providing small and medium-sized businesses with viable opportunities to compete.

Franchises are contractual arrangements between franchisors and franchisees. Generally, the franchisor provides the franchisee with the right to use its trademarks, an operating system and know-how for the operation of a business. The franchisor may also provide ongoing support, and develop new products and services throughout the franchise term, to innovate and adapt to changes in consumer preferences. The franchisee is an independent, small business owner that agrees to pay the franchisor for the right to operate within the franchised system. The franchisee runs the day-to-day business operations with its own employees, hiring and managing its own staff. In its daily operations, the franchisee agrees to complying with the franchisor's policies, in order to gain the benefits of a recognized brand and established business system. Such arrangements deliver a consistently satisfying customer experience across the franchise chain. Consumers expect such consistency; they reward each of the businesses offering the positive experience that they expect (including product choices and pricing) with their patronage.

II. Franchise Dynamics May Affect Employees of the Franchisee

To collectively deliver the quality and recognizable experience of a franchise system, it is necessary for the franchisor to set out certain requirements that must be met by the franchisee. These may include requirements affecting the franchisee's employees, such as:

- Requirements to wear uniforms or other work gear;
- Mandatory employee training on, and use of, specialized software or equipment;
- Mandatory training for managers, bookkeepers and other key employees, on system standards;
- Obligations to stay informed about system policies and to comply with system manuals, including with respect to product and service standards that are emblematic of the franchisor's brand;

[1] https://cfa.ca//www/wp-content/uploads/2018/04/PolicyBriefing_2018_FED.pdf
[2] Ibid
[3] Ibid

- Confidentiality and non-compete obligations for employees who have been privy to proprietary/confidential system information; and
- Specific responsibilities and job descriptions for certain roles.

Furthermore, as part of the franchise agreement, the franchisor may well impose specific requirements that impact franchisee employees, such as the location where goods and services of the franchised business must be provided, and operating hours.

As part of a franchisor's ongoing services to franchisees, the franchisor may also assist the franchisee with budget development (including expenditures on wages and employee benefits) and coordinating pooled benefit plans for franchisees and their employees. The franchisor's know-how and processes, combined with group synergies, lead to efficiencies and economies of scale.

We emphasize that such requirements and activities are in keeping with the legitimate interests of all parties, to ensure that franchised brands operate to a consistently high quality; that franchise system operations are efficient; and that customers receive what they expect at acceptable rates.

III. Requested Clarifications to Draft Guideline Regarding Franchise Arrangements.

Given the context above, we note two aspects of the Draft Guideline that would benefit from clarification. This would avoid uncertainty and allow the participants in franchise arrangements to proceed with their legitimate business practices without concern or delay. Our recommendations are explained here:

1. Confirm that the Ancillary Restraints Defence Will Apply to Franchise Arrangements

(a) Rationale:

Paragraph 45(1.1)(a) of the Competition Act (the "Act") prohibits agreements between unaffiliated employers "*to fix, maintain, decrease or control salaries, wages or terms and conditions of employment*" (emphasis added).

The Draft Guideline states at Section 2.1 that, "*consequently, the following agreements between employers are prohibited under the provision: agreements to fix, maintain, decrease or control terms and conditions of employment, where "terms and conditions" include the responsibilities, benefits and policies associated with a job. This may include job descriptions, allowances such as per diem and mileage reimbursements, non-monetary compensation, working hours, location and non-compete clauses, or other directives that may restrict an individual's job opportunities. The Bureau's enforcement generally is limited to those "terms and conditions" that could affect a person's decision to enter into or remain in an employment contract.*"

The Draft Guideline also explains at Section 3.1 that subsection 45(4) of the Act provides a defence for ancillary restraints, which is available when:

a. "*the restraint is ancillary to, or flows from, a broader or separate agreement that includes the same parties;*
b. the restraint is directly related to and reasonably necessary for achieving the objective of the broader or separate agreement referred to in (a) above; and

c. *the broader or separate agreement referred to in (a) above, when considered without the restraint, does not violate subsection 45(1*.1)".

The franchisor and franchisee are likely to be unaffiliated employers and, as explained above, their franchise arrangements often involve agreements to control "terms and conditions" of employment relating to a franchisee's employees, as described in the Draft Guideline. However, such restraints flow from a broader franchise agreement and are reasonably necessary to achieve the objectives of that franchise agreement, which does not otherwise violate subsection 45 (1.1.) of the Act.

We therefore recommend that the Bureau explicitly confirm that franchise arrangements are subject to the same approach as certain other transactions/arrangements, consistent with the Competitor Collaboration Guidelines (CCGs). We note, on this point, that Section 2.3.3 of the CCGs expressly addresses franchise arrangements.

(b) Proposed Amendment:

We strongly recommend that the following provision of the Draft Guideline be amended as set out here:

"Consistent with the approach outlined in the CCGs, it will generally not assess wage-fixing or no-poaching clauses that are ancillary to merger transactions, joint ventures, ~~or~~ strategic alliances, or franchise arrangements under the criminal track. An exception would be where those clauses are clearly broader than necessary in terms of covered employees, territories or duration, or where the merger, joint venture, ~~or~~ strategic alliance, or franchise arrangement is a sham."

2. Confirm that Agreements between Franchisees to Compensate Each other for Poached Employees is not a No-poach Agreement

(a) Rationale:

Paragraph 45(1.1(b)) of the Act prohibits agreements between unaffiliated employers to not solicit or hire each other's employees.

The Draft Guideline states at Section 2.2 that this provision "*prohibits all forms of agreements between employers that limit opportunities for their employees to be hired by each other. Examples of such limitations include restricting the communication of information related to job openings and adopting hiring mechanisms, such as point systems, designed to prevent employees from being poached or hired by another party to the agreement."* (emphasis added)

The Draft Guideline also explains at Section 2.2 that one-way no-poach agreements are not an offence, but that separate agreements that result in two or more employers agreeing to not poach each other's employees may be a transgression of the Act.

In franchise arrangements, it is unusual for franchisors to agree not to hire a franchisee's employees; such covenants are most often given by the franchisee alone. However, the network of franchise arrangements between one franchisor and numerous franchisees may well amount to a case of many unaffiliated employers (i.e. franchisees) agreeing not to poach each other's employees.

Accordingly, to comply with the Act and the Draft Guideline, franchisors and franchisees will need to be cognizant of the collective impact of numerous franchise agreements and ensure compliance.

That said, we do note that franchise arrangements may involve a high level of effort and expenditure on the part of franchisee employers, to onboard and train their employees as required by franchise system standards (including tuition, travel and accommodations, as mandated by the franchisor). This common circumstance is reflected in Example 4 of the Draft Guideline, noting that "… each franchisee spend[s] a lot of money and time training new employees".

Such franchisor-mandated costs usually increase over time. As a result, the franchisee whose employee is poached may well pay more to train a replacement employee than it paid to train the poached employee. In contrast, the poaching franchisee could gain a net benefit because, by hiring a fully-trained employee, it will avoid the need to incur any system training costs at all.

With this context in mind, it would be reasonable for franchisee-employers to agree with one another that, where one franchisee hires the employee of another franchisee, the new employer will compensate the former employer for costs incurred as mandated by the franchisor's training program and requirements to train a replacement employee. This would not be an additional payment or penalty of any kind for the new employer. If it had not poached a trained employee it would have needed to pay such training costs anyway. In such cases, the same amount would simply be paid to the previous employer for training a replacement, rather than to the franchisor for training a new employee. Given that such compensation would not be an additional expenditure for the poaching employer, it would not discourage hiring. In other words, it would not limit opportunities for franchisees' employees to be hired by other franchisees and violate Section 45(1.1(b)) of the Act, as explained in Section 2.2 of the Draft Guideline.

(b) Proposed Amendment:

We strongly recommend that "Example 4: No-poaching and franchise agreements" of the Draft Guideline be amended, to clarify that it is acceptable for franchisees to agree that a poaching franchisee will compensate the franchisee whose employee has been hired, for costs incurred as mandated by the franchisor's training program and requirements, in training a replacement employee to franchise system standards.