

*Note: CarDay Inc., the franchisor featured in this paper, ceased doing business in October 2001.*

**Coordinated Franchise Review:  
One Franchisor's Perspective**

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### ***What is the Coordinated Franchise Review?***

For many years, franchisors had complained about the patchwork quilt of franchise regulation and the burden of inconsistent registration standards and requirements. In 1998, the Franchise and Business Opportunity Committee of the North American Securities Administrators Association, (NASAA) implemented the Coordinated Franchise Review process as a pilot program to address the inconsistencies of multistate franchise registrations. The program continues today. The Coordinated Franchise Review process gives a new franchisor the option of applying for franchise registration simultaneously in two or more states.

The following twelve states require franchise registration:

California	New York
Hawaii	North Dakota
Illinois	Rhode Island
Indiana	South Dakota
Maryland	Virginia
Minnesota	Washington

Other states, such as Wisconsin and Michigan, require a notice filing. Still others, such as Texas and Florida, may require a filing under their business opportunity law.

Eleven of the twelve registration states participate in the Coordinated Franchise Review process. Only California has not yet agreed to participate.

The Coordinated Franchise Review was modeled after NASAA's Coordinated Equity Review program for securities registrations in multiple states, instituted in 1997. That program was designed to cut costs and to bring greater speed and uniformity to blue sky registrations. Before that, in 1996, NASAA initiated the Coordinated Review of Investment Companies.

### ***What Is the Policy Behind the Coordinated Franchise Review?***

Coordinated Franchise Review is intended to do the following in connection with franchise offerings in multiple states:

- provide a cost-effective and time-saving procedure for franchisors
- provide a more comprehensive disclosure for prospective franchisees
- promote greater uniformity of state interpretation of the UFOC guidelines while continuing to allow the states to participate in the review process.

In other words, Coordinated Franchise Review seeks to provide (i) a simpler, faster and more efficient system of multistate franchise registration for the benefit of franchisors, (ii) a more complete review of a franchisor's UFOC for the benefit of franchisees, and (iii) better communication among the states to foster more uniform disclosure standards for the benefit of both franchisors and franchisees. It seeks to achieve these goals essentially by shifting the burden of dealing with multiple states to the Lead State and away from the franchisor.

## ***How Does the Coordinated Franchise Review Process Work?***

Coordinated Franchise Review is a voluntary program. A franchisor that has not registered its franchise offering in two or more of the participating franchise registration states can benefit from this program. The program applies only to initial franchise applications for registration, not to amendments or renewals. A franchisor that desires to participate in the program must do the following:

- select any two or more of the participating registration states;
- apply for registration in each of these states;
- request Coordinated Franchise Review prominently in the cover letter with the application;
- include the completed application with each state application (see attached Form FCR-1 – “Application for Coordinated Review of Franchise Registration”);
- pay the applicable state registration fee directly to each state with each application; and
- send a copy of the completed application to the state serving as the project administrator, even if that is not one of the states in which the franchisor seeks to register.

One state serves as project administrator for an extended period of time. Maryland served as the initial project administrator. When the project administrator receives the application for coordinated review, the project administrator designates a single state to coordinate the review process with all participating states in which the applicant seeks to register. The state that coordinates the review process is called the “Lead State”.

Each participating state reviews the application just as it would review any franchise registration application. However, rather than responding directly to the franchisor, the participating state submits its comments to the Lead State. As an incentive to franchisors, the participating states give these reviews priority over individual franchise applications.

After receiving comments from each state, the Lead State determines whether any of the participating states have made conflicting comments relating to the UFOC Guidelines (in contrast to state specific matters). If so, the Lead State seeks to resolve those inconsistencies by contacting those states. The Lead State then compiles and coordinates the comments from all the participating states and prepares and sends one coordinated review comment letter to the franchisor. According to the application form, the Lead State will send an initial comment letter within thirty business days after the applicant files its application materials with the last participating state. The comment letter contains a unified set of comments relating to the UFOC Guidelines as well as any comments relating to the specific statutory, regulatory or policy requirements of individual states.

From the franchisor’s point of view, the process proceeds like any other application for franchise registration, except that the franchisor deals with only one examiner (from the Lead State) who speaks for all of the participating states. The applicant sends to the examiner from the Lead State any UFOC revisions or additional documents that the examiner may require. If the applicant has questions or comments, the applicant can raise them with the examiner.

At any time, the Lead State examiner may ask other states for guidance in evaluating responses to state-specific deficiencies. Likewise, any participating state may ask to review the applicant's responses to the state-specific comments.

When the Lead State is satisfied that the applicant has corrected all of the deficiencies, the Lead State approves the franchisor's application for Coordinated Franchise Review. It does so on behalf of all the participating states. After the Lead State sends out the letter, each participating state may send its own letter to the franchisor confirming the registration and providing additional information, such as the registration number, the expiration date, and specific state requirements.

### ***The CarDay Story***

CarDay Inc., a New York based company, registered its franchise offering through the Coordinated Franchise Review process in the year 2000. CarDay's experience in this process is described below. The author of this paper represented CarDay in this process. Before CarDay, at least three other companies made use of the Coordinated Franchise Review: Century Small Business; Ships and Trips; and Great Harvest.

CarDay is an online exchange ([www.carday.com](http://www.carday.com)) for the sale of mechanically certified, used vehicles carrying limited warranties. Franchised CarDay dealerships are called "CarDay Certification Centers". CarDay awards CarDay franchises to established, local, new car dealerships as an additional line of business for such dealerships. CarDay operates the web site and relies on its franchised dealerships to facilitate the sale transactions generated through the online exchange. The vehicle inventory on the CarDay web site comes from private (*i.e.*, individual) sellers and from the used car inventories of franchisees.

The franchisee catalogs and inspects each vehicle in accordance with CarDay's standards and takes digital photos of the vehicle and uploads them with the relevant information to the CarDay web site. For private sellers, the franchisee also makes an initial offer to buy the vehicle and helps the seller determine the asking price, which is posted on the web site. Also for private sellers, the franchisee offers to perform, for a fee, any servicing that may be required to bring the vehicle into compliance with CarDay's certification standards. The franchisee handles all communications with prospective buyers, so that the private seller and buyer never need to meet one another. Prospective buyers have the opportunity to visit the CarDay Certification Center to inspect and test drive the vehicle. The franchisee certifies each vehicle in accordance with CarDay's standards, orders a vehicle history report, closes the sale by handling all the paperwork, provides the CarDay warranty to the buyer, offers any service contract the buyer may request, and offers to assist the buyer in obtaining financing for the vehicle.

This system of coordinating vehicle dealerships, buyers and sellers through an online exchange allows buyers and sellers to share in the generally large spread between wholesale and retail prices of used vehicles while offering buyers information about the vehicles being sold, along with limited warranties and one-stop shopping for financing, extended warranties and other ancillary products and services.

CarDay was founded in 1999 by Joseph Shaker, a third generation auto retailer who also founded Hometown Auto Retailers, a Nasdaq company that owns and operates twelve automo-

bile dealerships in Connecticut, Massachusetts, New Jersey and Vermont. In January 2000, CarDay raised permanent financing of approximately twenty-five million dollars of equity capital through a private placement. The principal investors in CarDay's January 2000 financing were Sierra Ventures, Goldman Sachs, Odeon Capital Partners and Citigroup Investments.

CarDay sold its first franchises in New England during the initial months of the year 2000 from offices in Connecticut and Massachusetts. The company launched its online exchange on May 1, 2000. Shortly after that, the CarDay franchise was registered in New York and CarDay located its franchise sales office in New York. As of December 31, 2000, CarDay had 45 franchisees, although the company had been selling franchises for less than one year.

### ***Why Did CarDay Decide to Franchise and to Seek Coordinated Franchise Review?***

CarDay's business model calls for a close working relationship between CarDay and the CarDay Certification Centers. It also includes initial fees, monthly fees and transaction fees, and strong brand identification. From the outset, CarDay management understood that CarDay would be a franchise system. CarDay management saw the franchise approach as one that would distinguish CarDay from Internet vehicle referral services. The Franchise approach would raise the bar for competition and would create added value for investors.

CarDay did look at possible exclusions and exemptions from the franchise laws. For example, for purposes of the FTC Trade Regulation Rule on Franchising, CarDay could have taken the position that it is a "fractional franchise". In order to be a fractional franchise, the parties must anticipate "at the time the agreement establishing the franchise relationship was reached, that the sales arising from the relationship would represent no more than 20 percent of the sales in dollar volume of the franchisee." Although CarDay franchisees are established new car dealerships, CarDay management preferred not to assume that sales arising from the relationship with CarDay would represent no more than 20 percent of the dollar sales volume of the dealership.

In any event, the fractional franchise exemption does not exist under the state franchise laws. Although some states have exemptions for companies with a large net worth, CarDay was not able to take advantage of these exemptions because they generally require that the franchisor have had at least 25 franchisees for a full five-year period. CarDay was a new business.

Because CarDay wanted to be able to expand rapidly and to use a single franchise offering circular in all states, CarDay decided to apply for registration in all twelve registration states at the outset. Initially, CarDay applied for franchise registration only in New York so that CarDay could quickly locate its franchise sales office in New York and sell franchises in that state. Once CarDay was registered in New York, and with time before CarDay planned to expand beyond the Northeast, CarDay then applied for registration in California and for Coordinated Franchise Review in the ten remaining registration states.

Set forth below is a chronology that puts the CarDay Coordinated Franchise Review in perspective.

## *CarDay Chronology*

- January 21, 2000 CarDay raised permanent financing of approximately \$25 million of equity capital through a private placement.
- March 30, 2000 CarDay applied for franchise registration in New York.
- May 1, 2000 CarDay launched its online business in New England.
- May 23, 2000 New York approved CarDay's application for franchise registration with a one-page state specific addendum.
- June 12, 2000** CarDay applied for franchise registration in California and for coordinated franchise review in ten states.
- July 14, 2000 Illinois, the Lead State, sent CarDay a lengthy deficiency letter, copying the examiners in the other states in the coordinated review.
- July 18, 2000 California approved CarDay's application for franchise registration with a one-page state-specific addendum.
- September 19, 2000 CarDay submitted a revised franchise offering circular to Illinois. In addition to the requested changes, CarDay made a number of changes of its own. Some changes reflected improvements in CarDay's business model. For example, CarDay no longer charged dealers a listing fee for vehicles from the dealers' inventory. Also, dealer's were to pay a flat fee for each vehicle sold from their own inventory rather than a percentage of the spread between the wholesale price and the selling price. CarDay management also changed in part.
- October 5, 2000 CarDay submitted a revised franchise offering circular to Illinois. The purpose of this submission was to add more of CarDay's own changes to the offering circular. CarDay modified its business model and now called its method of sales an "online exchange" instead of an "internet-based auction".
- October 24, 2000 Illinois sent CarDay a letter outlining additional deficiencies.
- November 17, 2000 CarDay submitted a revised franchise offering circular to Illinois. In addition to the requested changes, CarDay made more changes of its own. The CarDay trademark was now registered. The patent application no longer had any relationship to the business model. The earnings claim (Item 19) and the list of franchisees were updated.
- November 27, 2000 Exchange of e-mail between CarDay and Illinois to work out the final revisions.
- November 28, 2000** CarDay's application for Coordinated Franchise Review was approved.

- December 6, 2000 CarDay submitted the revised franchise offering circular to California and New York to amend the registrations in those states.
- December 11, 2000 California approved the amendments without any requested changes.
- December 20, 2000 New York approved the amendments without any requested changes.

### ***Evaluation of the Coordinated Franchise Review in Light of the CarDay Experience***

#### *Why did the CarDay registration process take so long?*

CarDay initially applied for franchise registration in New York on March 30, 2000. This application was approved on May 23, 2000. CarDay applied for franchise registration in California on June 12, 2000. This application was approved on July 18, 2000. In both New York and California, CarDay was registered in a period of less than two months without using the Coordinated Franchise Review.

In contrast, CarDay's franchise registration in the remaining ten states pursuant to the Coordinated Franchise Review lasted from June 12, 2000, until November 28, 2000, or more than five months. Why did the Coordinated Franchise Review take so much more time than the registrations in New York and California?

At least two of the previous Coordinated Franchise Reviews took far less time. The Century Small Business application was received November 27, 1998, and approved January 12, 1999. The Ships and Trips application was received July 13, 1999, and approved September 23, 1999. The problem, then, does not appear to be with the Coordinated Franchise Review process itself.

One factor that distinguished the CarDay Coordinated Franchise Review from prior ones was that CarDay was the first one in which a state other than Maryland acted as the Lead State. In CarDay's case, Illinois acted as the Lead State, represented by Shelley Harris-Horn. It is doubtful, though, that this change had a significant effect on the duration of the review.

One reason for the length of time of this coordinated review was the that that the Lead State in the Coordinated Franchise Review requested voluminous revisions that neither New York nor California had requested. CarDay needed time to respond to all of these deficiencies.

The more important reason for the long delay was the fact that CarDay was in the process of modifying its business model during the course of the Coordinated Franchise Review. The Lead State responded to the initial filing and subsequent revisions within thirty calendar days, well within the thirty-business-day guideline. The delay came later. Rather than endeavoring to complete the process quickly, CarDay preferred to wait until management had made certain decisions so that the franchise offering circular would not need to be modified immediately after it was approved. CarDay took more than two months to submit a revised offering circular in response to the Lead State's letter of July 14, 2000. Two weeks later, on September 19, 2000, CarDay submitted further revisions because of its own changes, not because the Lead State requested additional changes. CarDay went through one more round of revisions, in part because

its complicated and changing business model called for more clarification. Even at this point, CarDay was continuing to make changes of its own in the offering circular. Moreover, CarDay was not under pressure to complete the Coordinated Franchise Review quickly because CarDay was already registered in New York and had no plans to move into any of the ten participating states for some time.

CarDay has made even more changes in its business model since the Coordinated Franchise Review, but expects that the model will not change during the 2001 calendar year. CarDay plans to amend its registrations in all states to reflect these new changes, and to include its audited financial statements as of December 31, 2000.

*Did the CarDay Coordinated Franchise Review meet its policy objectives and the objectives of CarDay?*

From CarDay's point of view, the Coordinated Franchise Review was definitely a cost-effective way of applying for franchise registration in a number of states simultaneously. CarDay's counsel did not need to respond to duplicative and potentially conflicting comments from ten state examiners, but was able to deal with one examiner who represented all ten states. It is not so clear, though, that the process saved any time or that it resulted in the ideal state-specific addenda, as discussed below.

One of CarDay's purposes in using the Coordinated Franchise Review was to solicit an early response from all registration states so that the CarDay franchise offering circular might be as uniform as possible from the outset and that the need for later changes might be minimized. With several state examiners reviewing a UFOC, it was more likely that any errors, omissions or inconsistencies would be recognized early. A second goal was to enable CarDay to improve its franchise offering circular by receiving essentially editorial comments from experienced readers of franchise offering circulars. A third goal was to reduce the amount of time that CarDay's counsel would be required to spend dealing with the examiners of ten states. CarDay clearly achieved all of these goals. For CarDay, the process resulted in a better disclosure document because of the examiner's detailed comments. The offering circular is also uniform. Aside from the state specific addenda, CarDay can use the same franchise offering circular in all states.

Prospective franchisees will also receive the benefit of the reactions of the group of examiners to the CarDay franchise offering circular. In other words, the process brought about improved disclosure.

Based on conversations that this author had with the Lead State examiner, that examiner herself learned through the Coordinated Franchise Review process. It is not clear, however, that the other participating states learned anything from this process.

*What was the greatest shortcoming of CarDay's Coordinated Franchise Review?*

CarDay did have one difficulty through the Coordinated Franchise Review. Some states require a state specific addendum notifying the prospective franchisee that particular provisions of the franchise agreement may not be enforceable in that state. For example, the CarDay franchise agreement provides that New York law will apply. (The choice of law example is just one of several. Other state laws, for example, also prohibit or limit the applicability of clauses call-

ing for out-of-state litigation or arbitration.) California, which did not participate in CarDay's Coordinated Franchise Review, required that CarDay add a state specific addendum indicating that CarDay's choice of law provision may not be enforceable in California. California accepted CarDay's state-specific addendum that indicated, among other things, that a provision calling for the application of New York law "may not be enforceable under California law."

For the Lead State examiner in the CarDay Coordinated Franchise Review, the language that CarDay used for the California addendum would not suffice for Illinois and the other states participating in the Coordinated Franchise Review. The examiner required that the franchise offering circular contain actual language amending the franchise agreement itself, and that this amendment be countersigned by the franchisor. On the question of governing law, the Lead State examiner stated that Illinois required CarDay to indicate that Illinois law dictates that a franchise agreement may not include a choice of law provision calling for the application of the law of any state other than Illinois.

CarDay had sought to use the same approach to state specific matters in Illinois and other participating states as CarDay used in California. The proposed offering circular contained a state-specific addendum stating that a provision calling for the application of New York law "may not be enforceable" under Illinois law. This was not acceptable to the examiner. CarDay proposed dealing with this "deficiency" by including a state-specific addendum that would indicate as follows: "For agreements that come within the scope of Illinois law, these provisions will be revised to comply with Illinois law." This was also not acceptable to the examiner.

The examiner required that franchisor signature and date lines be added to the addenda and that the amendment to the franchise agreement provide that the laws of the franchisee's state will apply for all affected states that have such a provision in their law. This seemed to leave no room for the possibility that the franchise law of the franchisee's state would apply to matters within the scope of the law, while New York law might apply to matters of contract interpretation that are outside the scope of the franchise law. The examiner required that the Illinois addendum contain a statement to the effect that Illinois law dictates that a franchise agreement may not include a choice of law provision calling for the application of the law of any state other than Illinois, and that notwithstanding anything to the contrary in the agreement, the choice of law provision will be deemed to provide for the application of Illinois law.

The examiner further stated that "the addenda technically amend the agreements which must comply with the various state franchising laws." Long discussions with the examiner failed to persuade the examiner that an addendum signed at the time for making disclosure would not function as an amendment to an agreement that was not yet signed. CarDay questioned the examiner at length on how to accomplish the desired end in a way that would make sense. In her letter of October 24<sup>th</sup>, the examiner outlined three possible approaches to amend both the franchise offering circular and the franchise agreement:

1. "a single addendum to the Circular and franchise agreements amending both the Circular and the agreements."
2. "different addendums with one applicable to the circular and the other applicable to the agreements."
3. "on the Receipt Page with Individual Receipt Pages for each of the applicable states."

The first approach made no sense to CarDay, because an addendum cannot amend an agreement that has not yet been signed. The second approach made sense to CarDay, but it would have made for a very long franchise offering circular.

In the end, CarDay decided to follow the third approach. This meant that CarDay would have a standard form of receipt along with additional forms of receipt for each state that required a state specific addendum that would amend the franchise agreement. The examiner also required that each addendum appear in duplicate in the offering circular. This meant that CarDay was required to have forty pages of receipts. CarDay went along with this requirement simply to bring the Coordinated Review Process to an end.

In practice, CarDay intends to amend its filings so that only the relevant addendum would be used for the particular state. In this way, CarDay can propose different addenda for each state. The addenda would call for the application of local law (or other local matters) only to the extent required by the examiner of the relevant state, and would require a countersignature by the franchisor only in those states that truly require such countersignature. Also, for those states such as Illinois that require the franchisor to countersign the receipt amending the franchise agreement and offering circular, CarDay intends to countersign the receipts only at the time that CarDay signs the franchise agreement. This would be consistent with contract law and reduce the number of signatures required.

*How might one improve the Coordinated Franchise Review?*

One problem with the Coordinated Franchise Review is the fact that a franchisor may be required to comply with an objectionable requirement in all states, not just one. It is not at all clear whether or the extent to which the Lead State examiner discusses his or her decisions with the other states, or whether the examiner consults with any other examiners when the franchisor raises objections. Better communication among the examiners during the review process might have the benefits of (a) leading to an even better result, (b) educating examiners in the states other than the Lead State, and (c) serving as a check on the power of the Lead State examiner.

In fairness, paragraph 2 of the franchisor's agreement on page 2 of the Form FRC-1 (attached) allows for the possibility that comments can be resolved through direct contact between the applicant and the state with the unresolved comment, rather than only the Lead State. However, the Lead State must agree with this direct contact, and to some extent such direct dealings would defeat the purpose of the coordinated review. Consultations among the states along the way might also slow down the coordinated review process.

The Coordinated Franchise Review might also be improved by instituting a mechanism for coordinated reviews of amendment applications. The fact that amendments cannot be coordinated means that, over the course of time, the offering circular can become less uniform. One obstacle to coordinated amendments is the fact that expiration dates vary from state to state. In some states, the registration expires within a specified number of days (*e.g.*, 120) after the end of the franchisor's fiscal year, while in other states, the registration expires twelve months after its effective date.

Even if NASAA decides at some point to allow for coordinated review of amendments, the use of coordinated amendments should be left to the discretion of the franchisor. The fact

that the franchisor can seek individual amendments after the coordinated review is a safety valve. While the main portion of the offering circular can remain uniform from state to state, the franchisor might be able to negotiate the specific state addenda more easily with the individual state examiners than with one Lead State examiner.

### ***Sources***

“Advanced Registration and Disclosure” by Kim A. Goodhard, Andrew F. Perrin and Joseph J. Punturo (in ABA Forum on Franchising, October 1998).

“Coordinated Franchise Review”, by Joseph J. Punturo (in Franchise and Distribution Law in New York, NYSBA, May 2000).

“Coordinated Review: The Franchisor’s Perspective”, by Warren L. Lewis (NASAA Franchise Examiner Training Program, March 1999).

# Application for Coordinated Review of Franchise Registration

## (Form FCR-1)

Applicant; Please attach this Form FCR-1 to the front of the franchisor's Uniform Franchise Registration Application Page. Include a copy of the franchisor's Uniform Franchise Offering Circular and all supporting registration documents (collectively the "Coordinated Review Application"). State in bold type in a cover letter accompanying the package that you are filing a request for coordinated review.

### Eligibility:

- (A) Coordinated review is available only if the franchisor files in two or more participating states;
- (B) The franchisor's registration application must be accompanied by audited financial statements;
- (C) The franchisor must be filing an **initial registration application** in each participating state.

Indicate below those states participating in the coordinated review project where you intend to file for registration:

- |             |                |
|-------------|----------------|
| " Hawaii    | " New York     |
| " Illinois  | " North Dakota |
| " Indiana   | " South Dakota |
| " Maryland  | " Rhode Island |
| " Minnesota | " Virginia     |
|             | " Washington   |

The state of Maryland is acting as the Administrative State for the coordinated review project. Please file a copy of this form and a Coordinated Review Application with Maryland even if the franchisor does not intend to register its franchise offering in Maryland.

There is no additional fee for coordinated review. Do not send fees to Maryland unless the franchisor intends to register its franchise offering in Maryland. Please file the applicable registration fee with the participating state.

A Lead State will be chosen to coordinate your application. The Lead State will send an initial comment letter in response to your Coordinated Review Application within **30** business days after you file that application with the last participating state.



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Mr. Pitegoff's publications include the following:

- *Franchise Law in Cyberspace* (New York State Bar Assoc. Program on Franchising, May 2000)
- *Conflicts of Law in Cyberspace* (Pike & Fischer, January 2000)
- *International Franchise Agreements* (New York State Bar Assoc. Program on International Agreements, 1998)
- *The Inadvertent CyberFranchisor*, CYBERSPACE LAWYER (April 1998)
- *Negotiating a Computer Software License*, THE FRANCHISE UPDATE REPORT (April 1998)
- *Franchisors as Web Developers*, Forum Newsletter (The Franchise Lawyer, Spring 1997)
- *Franchise Relationship Laws: A Minefield for Franchisors*, 45 BUS. LAW. 289 (1989), reprinted in the American Bar Association's BUILDING FRANCHISE RELATIONSHIPS (1996)
- *Choice of Law in Franchise Relationships: Staying Within Bounds*, 14 FRANCHISE L. J. 89 (Spring 1995)
- *Avoiding the Long Arm of the Law in International Franchising*, (ABA Forum on Franchising, October 1995) (co-authored with Andrew Loewinger)
- *The Content of International Franchise Agreements*, Fundamentals of International Franchising Program, ABA Annual Meeting (August 1994)
- *Laying the Keel: Drafting Effective Franchise Agreements* (ABA Forum on Franchising, October 1992) (co-authored with Kim A. Lambert)
- *Ways to Avoid Being a Franchise*, FRANCHISE L.J. (Fall 1992)

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