

# **NASAA STATEMENT OF POLICY REGARDING THE USE OF FRANCHISE QUESTIONNAIRES AND ACKNOWLEDGMENTS**

(Adopted September 18, 2022; Effective January 1, 2023)

## **I. Introduction**

This Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments was prepared by the Corporation Finance Section (“Section”) and the Franchise and Business Opportunities Project Group (“Project Group”) of the North American Securities Administrators Association, Inc. (“NASAA”) to set standards for the proper use of questionnaires and acknowledgments in franchise offerings.

### **Background**

Federal and applicable state franchise laws require a franchisor to make certain pre-sale disclosures to prospective franchisees. The disclosures are made with a Franchise Disclosure Document (“FDD”) consisting of 23 items of information, with applicable attachments, including the franchise and other related agreements.

Over at least the last 30 years, franchisors have included in their franchise agreements and FDDs language that they can later use as a disclaimer of liability. One type of disclaimer takes the form of a series of acknowledgments (“Acknowledgments”) in the franchise agreement regarding the franchise offering. In addition, many—but not all—franchisors require prospective franchisees, at or prior to signing a franchise agreement, to mark “yes” or “no” to a series of questions or agree to a series of representations about what purportedly occurred, or did not occur, in the franchise sales process (“Questionnaires”). Virtually all Questionnaires and Acknowledgments address whether a prospective franchisee received some type of financial performance information different from what the franchisor disclosed in Item 19 of its FDD.

Franchisors routinely seek to use Questionnaires, Acknowledgments, and other forms of contractually required disclaimers to insulate themselves from potential liability by franchisees alleging fraud or misrepresentations in the offer and sale of a franchise.<sup>1</sup> Some have been successful.<sup>2</sup>

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<sup>1</sup>See, e.g., *Martrano v. Quizno’s Franchise Co.*, No. 08-cv-0932, 2009 WL 1704469, at \*5 (W.D. Pa. June 15, 2009) (“Defendants pointedly assert, in their December 2008 Motion before this Court, that ‘Each Plaintiff was asked directly to disclose any representation he had received other than those contained in the UFOC. In the space provided, each and every one of the plaintiffs wrote ‘None.’”); *Siemer v. Quizno’s Franchise Co.*, No. 07-cv-2170, 2008 WL 904874 (N.D. Ill. Mar. 31, 2008) (franchisor’s defense based in part on disclosure acknowledgment statement through which franchisee was put on notice of potential business risks).

<sup>2</sup>E.g., *Governara v. 7 Eleven, Inc.*, No. 13-cv-6094, 2014 WL 4476534 (S.D.N.Y. Aug. 20, 2014) (granting franchisor’s motion to dismiss plaintiff’s claims under the anti-fraud provisions of the New York Franchise Act based in part on non-reliance disclaimers executed by the plaintiff).

## The Practical Effect of Acknowledgments and Questionnaires

By the time prospective franchisees are presented with a franchise agreement or Questionnaire to sign, many are emotionally and financially invested in completing the transaction. As one commenter has noted, “[N]obody buys a franchise in a vacuum. They typically do so after being convinced of the attractiveness of the brand, the strength and utility of the franchisor’s system, the support they will receive from the franchisor, and the enthusiasm they encountered at Discovery Day. None of these factors are the result of reading an FDD.”<sup>3</sup>

Questionnaires and Acknowledgments are not the most effective mechanisms for preventing fraud.<sup>4</sup> They are, however, powerful defense mechanisms that franchisors can use to defeat claims of fraud and misrepresentation regardless of what has occurred in the franchise sales process. As a result, Questionnaires and Acknowledgments can allow unscrupulous franchisors to avoid the consequences of franchise fraud. Although at least one court has opined that Questionnaires and Acknowledgments can be useful to help franchisors “root out dishonest sales personnel and avoid sales secured by fraud,”<sup>5</sup> they do so by shifting the compliance burden from franchisors to prospective franchisees. It should be the franchisor’s burden to police its own sales personnel and agents; franchisees should not have to confirm that no violations of law have occurred during their own sales process.

### The FTC Franchise Rule’s Position on Franchise Waivers, Disclaimers and Questionnaires

In 2007, the Federal Trade Commission (“FTC”) promulgated an amended FTC Franchise Rule that included a limited ban on disclaimers made in the FDD itself and its exhibits or attachments. When the FTC promulgated the FTC Franchise Rule, it did not specifically address a franchisor’s use of Questionnaires or the effect of Acknowledgments on franchisee fraud claims. In 2019, the FTC announced it was soliciting public comments on the FTC Franchise Rule. One issue the FTC raised related to the impact the FTC Franchise Rule has had on the flow of truthful information and on the flow of deceptive information to prospective franchisees.<sup>6</sup>

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<sup>3</sup> S. Dub, B. Napell, D. Oates, “Dueling Perspectives on Selected Franchise Agreement Provisions,” American Bar Association 43<sup>rd</sup> Annual Forum on Franchising, at 20 (October 27-30, 2020), available at <https://www.americanbar.org/content/dam/aba/events/franchising/2020/w18.pdf>.

<sup>4</sup> See, e.g., *Braatz v. Red Mango*, 2015 WL 1893194 (N. D. Tex. Apr. 27, 2015), aff’d sub nom. *Braatz, L.L.C. v. Red Mango FC, L.L.C.*, 642 F. App’x 406 (5<sup>th</sup> Cir. 2016) (Franchisees allege they changed their answers in Questionnaire about receiving financial information because the franchisor told them that they could not open the franchise without the Questionnaire being completed in the form the franchisor required); Comment of Anonymous, posted by the FTC on December 10, 2020 (“While I signed a questionnaire saying I didn’t rely on information outside of that disclosure document, that was not true, however, I knew that would preclude me from making the franchise purchase if I answered truthfully”), available at: <https://www.regulations.gov/comment/FTC-2020-0064-0042>.

<sup>5</sup> See *Emfore Corp. v. Blimpie Assocs., Ltd.*, 51 A.D.3d 434, 435 (N.Y. App. Div. 2008).

<sup>6</sup> See Disclosure Requirements and Prohibitions Concerning Franchising, Federal Trade Commission, 84 Fed. Reg. 49 (Mar. 13, 2019), available at: <https://www.govinfo.gov/content/pkg/FR-2019-03-13/pdf/2019-04466.pdf>.

In the years since the FTC promulgated the FTC Franchise Rule, Questionnaires and Acknowledgments have become commonplace in franchising, and some commenters have argued that the FTC should now address or even prohibit them. Those commenters point out that Questionnaires and Acknowledgments limit a franchisee's ability to hold a franchisor accountable for fraud and deceit, irrespective of the underlying facts of a franchisee's claims.<sup>7</sup>

Although the FTC held a public workshop in 2020 to explore issues related to both Questionnaires and Acknowledgments,<sup>8</sup> the FTC has not yet directly addressed whether or when those provisions violate the FTC Franchise Rule.

### The Impact of State Franchise Law Provisions

Several states have enacted franchise registration and disclosure laws that include protections for prospective franchisees that are not found in the FTC Franchise Rule.<sup>9</sup> Modeled on securities anti-fraud laws, these state franchise laws include provisions that prohibit any person from committing fraud, making untrue statements of material fact, or omitting to state a material fact regarding a franchise offering ("Anti-Fraud Provisions"). Most of those same states also include provisions ("Anti-Waiver Provisions") that prohibit or render void any provision or condition requiring a prospective franchisee to agree to a release, waiver or estoppel that would relieve a person from liability under that law.<sup>10</sup>

Although not all courts agree, many courts have concluded that franchise contractual disclaimers, including Questionnaires and Acknowledgments, violate state Anti-Waiver Provisions when they serve as a release or waiver of a franchisee's rights under a state franchise law.<sup>11</sup> For example, in *Randall v. Lady of America*, the franchisor argued in a motion for

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<sup>7</sup> See, e.g., Comment from Bundy Law Firm, PLLC, at pp 7-9, posted by the FTC on December 21, 2020, <https://www.regulations.gov/comment/FTC-2020-0064-0118>; comment from Lagarias, Napell & Dillon, LLP, at pp. 8-14, posted by the FTC on December 17, 2020, <https://www.regulations.gov/comment/FTC-2020-0064-0077>.

<sup>8</sup> A transcript of the November 20, 2020, workshop is available at: [https://www.ftc.gov/system/files/documents/videos/reviewing-franchise-rule-workshop-discussion-disclaimers-waivers-questionnaires/franchise\\_rule\\_workshop\\_transcript\\_-\\_discussion\\_of\\_disclaimers.pdf](https://www.ftc.gov/system/files/documents/videos/reviewing-franchise-rule-workshop-discussion-disclaimers-waivers-questionnaires/franchise_rule_workshop_transcript_-_discussion_of_disclaimers.pdf).

<sup>9</sup> See Cal. Corp. Code §§ 31000 through 31516; Haw. Rev. Stat. § 482E-1 through § 482E-12; 815 Ill. Comp. Stat. §§ 705/1 through 705/44; Ind. Code §§ 23-2-2.5; Md. Bus. Reg. Code §§ 14-201 through 14-232; Mich. Comp. Laws §§ 445.1501 through 445.1546; Minn. Stat. §§ 80C.01 through 30C.22; N.Y. Gen. Bus. Law Art. 331 §§ 680, et seq.; N.D. Cent. Code §§ 51-19-01 through 51-19-17; R.I. Gen. Laws §§ 19-28.1-1 through 19-28.1-34; S.D. Codified Laws §§ 37-5B-1 through 37-5B-53; Va. Code Ann. §§ 13.1-557 through 13.1-574; Wash. Rev. Code §§ 19.100.010 through 19.100.940; Wis. Stat. §§ 553.01 through 553.78.

<sup>10</sup> See Cal. Corp Code § 31512; Haw. Rev. Stat. § 482E-6; 815 Ill. Comp. Stat § 705/41; Ind. Code § 23-2-2.7-1; Md. Bus. Reg. Code § 14-226; Mich. Comp. Laws § 445.1527(b); Minn. Stat. § 80C.21; N.Y. Gen. Bus. Law Art. 33 § 687(4); R.I. Gen. Laws § 19-28.1-15; S.D. Codified Laws § 37-5B-26(8); N.D. Code § 51-19-16(7); Va. Code Ann. § 13.1-571(c); Wash. Rev. Code § 19.100.180(2); Wis. Stat. § 553.76.

<sup>11</sup> See *Coraud LLC v. Kidville Franchise Co., LLC*, 109 F. Supp. 3d 615, 621 (S.D.N.Y. 2015) ("[New York's anti-waiver statute] bars anticipatory waivers of compliance with the NYSFA's anti-fraud provisions."); *Hanley v. Doctors Express Franchising, LLC*, No. 12-cv-794, 2013 WL 690521, at \*29 (D. Md. Feb. 25, 2013) ("Construed as waivers of plaintiffs' misrepresentation claims under the Maryland Fraud Law, the disclaimers are legally void."); *Randall v. Lady of Am. Franchise Corp.*, 532 F. Supp. 2d 1071, 1089 (D. Minn. 2007) (holding that a disclaimer that

summary judgment that a contractual integration clause and certain disclaimers were sufficient to defeat a franchisee's claims under Minnesota's Franchise Act. The court disagreed, holding that the Anti-Waiver Provision of the Minnesota Franchise Act invalidated the contractual disclaimers. The court reasoned that the historical truth of a franchisor's misconduct (in this case, that the franchisor made unlawful earnings claims) could not be negated by a contractual disclaimer without violating the Anti-Waiver Provision. The court explained:

The disclaimer cannot change the historical facts; if the dishonest franchisor made misrepresentations, then he made misrepresentations, no matter what the franchise agreement says. Thus, the disclaimer can only be an attempt to change the *legal effect* of those misrepresentations. That is precisely what [the Minnesota] anti-waiver language forbids.<sup>12</sup>

Similarly, in *Hanley v. Doctors Express*, the court held that disclaimers and acknowledgments contained in a franchise agreement and FDD were legally inoperative to bar a franchisee's claims under the Maryland Franchise Law based on the Anti-Waiver Provision of that law to the extent that they would operate as a release, waiver, or estoppel.<sup>13</sup> The court relied, in part, on the statement of purpose for the Maryland Franchise Law, which was enacted in response to substantial losses suffered by franchisees when the franchisor or its representatives had not given complete information. The court noted that, given the Maryland General Assembly's clear statement of intent, waivers and releases of a plaintiff's rights under the Maryland franchise laws are void as such clauses violate a fundamental policy of the state.<sup>14</sup>

In the opinion of the Section and the Project Group, Questionnaires and Acknowledgments violate state Anti-Waiver Provisions when they are used as contractual disclaimers that release or waive a franchisee's rights under a state franchise law. Courts that have found otherwise have not recognized or appreciated the history and purpose of state franchise registration and disclosure laws. The state legislatures that enacted these franchise laws intended to protect franchisees from the effect of contractual disclaimers, including those that may take the form of Questionnaires and Acknowledgments. The prospective franchisee who signs a Questionnaire or series of Acknowledgments and later denies the accuracy of what was signed would have to explain such a discrepancy, but they should have that opportunity before a factfinder, rather than have their claims dismissed based solely on having signed a Questionnaire or series of Acknowledgments.

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has the effect of waiving compliance with the anti-fraud statute's prohibition of material false statements is void under the anti-waiver statute); *but see Governara*, 2014 WL 4476534, at \*6-7 (holding anti-waiver statute did not void contractual reliance disclaimer; declined to follow by *Coraud*).

<sup>12</sup> *Randall*, 532 F. Supp. 2d. at 1088-89.

<sup>13</sup> *Hanley*, 2013 WL 690521 at \*29 (the court noted that integration clauses and waivers are not necessarily wholly irrelevant, citing the issue of reliance).

<sup>14</sup> *Id.* (citations omitted).

## Inappropriate Questionnaire and Acknowledgment Provisions

State regulators have observed that Questionnaires and Acknowledgments currently found in some FDDs and franchise agreements are replete with questions and representations that serve no legitimate purpose. Many Questionnaires and Acknowledgments require a prospective franchisee to acknowledge or answer questions that are subjective, unreasonable, or repeat disclosures required to be stated in the FDD. In some cases, Questionnaires require the prospective franchisee to acknowledge identical facts and statements that the franchisee must acknowledge a second time in the franchisor's franchise agreement. In other cases, these Questionnaires and Acknowledgments require prospective franchisees to agree that they understand specific disclosures made in an FDD or the terms of the franchise relationship. These provisions are inconsistent with plain English standards and the legislative policies behind state franchise laws, which were passed to protect prospective franchisees by requiring presale disclosure. State franchise laws do not allow FDDs to be used as a defense documents that serve to protect franchisors who commit fraud or make misleading material disclosures or material omissions.

## **II. Application of the Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments**

This Statement of Policy applies to Questionnaires, Acknowledgments, and similar documents that appear in FDDs and applicable attachments and exhibits used in the offer and sale of franchises where an Anti-Waiver Provision or Anti-Fraud Provision applies to the offer or sale.

### **A. Definitions**

This Statement of Policy uses the following terms defined in the NASAA 2008 Franchise Registration and Disclosure Guidelines.

**Franchisee** - Franchisee means any person who is granted a franchise.

**Franchise seller** - Franchise seller means a person that offers for sale, sells, or arranges for the sale of a franchise. It includes the franchisor and the franchisor's employees, representatives, agents, subfranchisors, and third-party brokers who are involved in franchise sales activities. It does not include existing franchisees who sell only their own outlet and who are otherwise not engaged in franchise sales on behalf of the franchisor.

**Franchisor** - Franchisor means any person who grants a franchise and participates in the franchise relationship. Unless otherwise stated, it includes subfranchisors. For purposes of this definition, a "subfranchisor" means a person who functions as a franchisor by engaging in both pre-sale activities and post-sale performance.

**Person** - Person means any individual, group, association, limited or general partnership, corporation, or any other entity.

**Prospective franchisee** - Prospective franchisee means any person (including any agent, representative, or employee) who approaches or is approached by a franchise seller to discuss the possible establishment of a franchise relationship.

## **B. Attachment to FDD**

1. If the Franchisor requires the Prospective franchisee to sign any Questionnaires, Acknowledgments, or similar documents before entering into the franchise agreement, the proposed form of such Questionnaires, Acknowledgments or similar documents must be referenced in Item 22 of the FDD and attached as an exhibit.
2. If the Franchisor requires the Prospective franchisee to verbally respond to any Questionnaires, Acknowledgments, or similar statements on video or other electronic media recording before entering into the franchise agreement, a written script of the proposed form of such Questionnaires, Acknowledgments or similar statements must be referenced in Item 22 of the FDD and attached as an exhibit.

## **C. Prohibited Provisions in Questionnaires and Acknowledgments**

1. The Franchisor and its Franchise seller(s) shall not require the Prospective franchisee to make any statement in any Questionnaires, Acknowledgments, or similar documents that is subjective or unreasonable or that:
  - a. Would cause a reasonable Prospective franchisee to surrender or believe that they have surrendered rights to which they are entitled under federal or state law;
  - b. Would have the effect of shifting Franchisor's disclosure duties under federal or state law to the Prospective franchisee; or
  - c. Are otherwise Prohibited Statements under this Statement of Policy or are similar to the Prohibited Statements.<sup>15</sup>
2. Prohibited Statements in Questionnaires, Acknowledgments, and similar documents include, but are not limited to, the following:
  - a. That the Prospective franchisee has read or understands the FDD or any attachments thereto, including the franchise or other agreement.
  - b. That the Prospective franchisee understands or comprehends the risks associated with the purchase of the franchise.
  - c. That the Prospective Franchisee is qualified or suited to own and operate the franchise.
  - d. That, in deciding to purchase the franchise, the Prospective franchisee has relied solely on the FDD and not on any other information, representations, or statements from other Persons or sources.

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<sup>15</sup> This Statement of Policy is not intended to prohibit a Franchisor from conducting factfinding or asking Prospective franchisees questions about the sales process, but Franchisors may not require a Prospective franchisee to document and sign statements that act as waivers in violations of state law.

- e. That neither Franchisor nor Franchise seller has made any representation, including any financial performance representation, outside of or different from the FDD and attachments thereto.
  - f. That the success or failure of the franchise is dependent solely or primarily on Franchisee.
  - g. That the Franchisor bears no liability or responsibility for Franchisee's success or failure.
  - h. That reiterates or duplicates any representation or statement already made elsewhere in the FDD and attachments thereto.
  - i. That the Prospective franchisee has had the opportunity to or has/has not actually consulted with professional advisors or consultants or other franchisees.
  - j. That the Prospective franchisee agrees or understands that the Franchisor is relying on the Questionnaires, Acknowledgments, or similar documents, including to ensure that the sale of the franchise was made in compliance with state and federal law or that no unauthorized, inaccurate, or misleading statements were made.
  - k. That requires or suggests that the Prospective franchisee must agree to any Questionnaires, Acknowledgments, or similar documents prohibited by this Statement of Policy or provide false answers as a condition to the purchase of the franchise.
3. Franchisor must include in its FDD and franchise agreement, or applicable state-specific addenda to the FDD and franchise agreement, the following provision:

No statement, questionnaire, or acknowledgment signed or agreed to by a franchisee in connection with the commencement of the franchise relationship shall have the effect of (i) waiving any claims under any applicable state franchise law, including fraud in the inducement, or (ii) disclaiming reliance on any statement made by any franchisor, franchise seller, or other person acting on behalf of the franchisor. This provision supersedes any other term of any document executed in connection with the franchise.