



STATE OF WASHINGTON  
**DEPARTMENT OF FINANCIAL INSTITUTIONS**

SECURITIES DIVISION

P.O. Box 9033 • Olympia, Washington 98507-9033

Telephone (360) 902-8760 • TDD (360) 664-8126 • FAX (360) 902-0524 • Web Site: [www.dfi.wa.gov/sd](http://www.dfi.wa.gov/sd)

**Notice Regarding the Disclosure of Assurances of Discontinuance**

**September 19, 2019**

The Securities Division is issuing this notice to inform franchisors and their counsel of the Division's position regarding whether franchisors must disclose assurances of discontinuance in their Franchise Disclosure Documents.

In early 2018, the Washington State Attorney General's Office, Antitrust Division launched an investigation into so-called "no-poach" provisions in franchise agreements. Generally, these provisions prohibit a franchisee from soliciting or hiring the employees of another system franchisee, a company-owned location, or the franchisor itself. The Attorney General's Office asserts that the inclusion of a "no-poach" provision in a franchise agreement constitutes a contract, combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act, RCW 19.86.030.

Since then, pursuant to RCW 19.86.100, the Attorney General's Office has negotiated agreements, known as assurances of discontinuance, whereby franchisors have agreed to no longer include "no-poach" provisions in future franchise agreements and agreed to endeavor to remove all "no-poach" provisions from existing agreements in order to avoid the initiation of a lawsuit by the Attorney General's Office. A list of the franchisors that have entered into agreements to remove "no-poach" provisions from their franchise agreements can be found at: <https://www.atg.wa.gov/no-poach-company-list>.<sup>1</sup>

The Securities Division has received several inquiries from franchisors and their counsel requesting guidance on whether franchisors must disclose these assurances of discontinuance in their Franchise Disclosure Documents. The Division believes that while franchisors may not be expressly required to disclose assurances of discontinuance pursuant to the FTC Rule and the NASAA Guidelines, franchisors may be required to disclose assurances of discontinuance pursuant to RCW 19.100.170. RCW 19.100.170, also known as the anti-fraud provision of the Franchise Investment Protection Act, renders it unlawful to sell or offer to sell a franchise by means of any communication which "omits to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made not misleading." As a result, if an assurance of discontinuance is material, then it must be disclosed to prospective franchisees. The Division notes that whether an assurance of discontinuance is material requires an analysis of the facts and circumstances.

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<sup>1</sup> The Securities Division does not maintain this list and the Division is unsure how often this list is updated.