

## **Notice of Request for Comment on Proposed Changes to Franchise Multi-Unit Commentary**

NASAA's Franchise and Business Opportunity Project Group (the "Franchise Project Group") is re-releasing for public comment additional revisions to NASAA's proposed Franchise Multi-Unit Commentary (the "Multi-Unit Commentary"). The 14 day public comment period is from June 16 to June 30, 2014. Accordingly, all comments should be submitted on or before June 30, 2014 by email or in writing and addressed to:

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**Downloads:** [proposed final Multi-Unit Commentary](#); [proposed black-lined copy of specific Items from Multi-Unit Commentary](#)

### Background

On April 15, 2014, NASAA authorized the re-release for public comment of a revised proposed Multi-Unit Commentary (the "Revised Commentary"). In response, NASAA received a total of 2 formal public comments and an additional informal comment. Some of the comments repeated suggested revisions the Franchise Project Group considered and rejected, and other comments suggested clarifying and improving specific items.

After reviewing all comments, the Franchise Project Group proposes to make some revisions to the Multi-Unit Commentary and we propose to add a new item (SF 20.3) that did not appear in the Revised Commentary, although a different version of SF 20.3 was included in the original Commentary. A black-lined copy of the specific items from the Revised Commentary the Franchise Project Group proposes to revise is attached, as well as a complete copy of the proposed final Multi-Unit Commentary

## MULTI-UNIT COMMENTARY

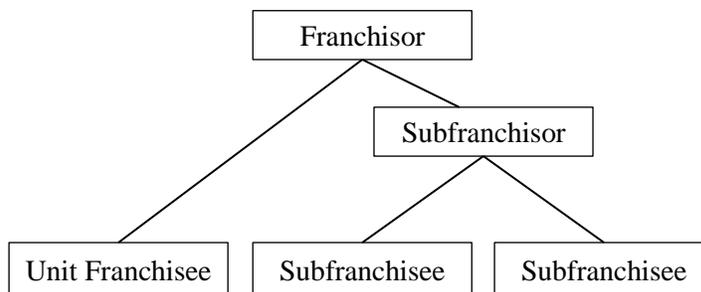
### INTRODUCTION

#### B. Subfranchise Rights

The second structure, called a **subfranchise** arrangement in this Commentary, involves a person that is granted, for consideration paid to the franchisor, ~~the right~~rights related to grant~~granting~~ unit franchises to third parties, generally within a delineated geographic area- (“subfranchise rights”). In this Commentary, a “**subfranchisor**” is the person granted ~~that right~~those rights. The subfranchisor generally is a party to a subfranchisor agreement, aka master franchise agreement, with the franchisor specifying the territory in which the subfranchisor may operate and a minimum opening schedule, and the subfranchisor is a party to unit franchise agreements, aka subfranchisee agreements, with third parties for unit franchises. The subfranchisor is typically obligated to provide support services to those third parties. In this Commentary, the third parties signing the subfranchisor’s unit franchise agreements are called “**subfranchisees**.” The franchisor and the subfranchisor usually each receive a portion of the initial franchise fee and the continuing fees paid by each subfranchisee. The subfranchisor may be a party to 1 or more unit franchise agreements with the franchisor for unit franchises. Outside the franchisor’s relationship with the subfranchisor, the franchisor also may be a party to unit franchise agreements with third parties for unit franchises, and those third parties are called “**unit franchisees**” in this Commentary.

Under this structure, the subfranchisor can be referred to by any number of other names, including area franchisor, regional franchisor, or master franchisee.

#### Subfranchise Rights



## AREA DEVELOPERS

[No Changes]

## SUBFRANCHISORS

### A. Franchisor Offer of Subfranchise Rights

#### **SF 0.1 Subfranchisor—Generally**

QUESTION: May a franchisor offer ~~subfranchises~~subfranchise rights in the same Franchise Disclosure Document as it offers unit franchises?

ANSWER: No. ~~A subfranchise~~An offering of subfranchise rights is different from a unit franchise offering. While there are some disclosure items that may be identical in the 2 Franchise Disclosure Documents (such as Items 1-4), the relationships and agreements for these offerings are very different,<sup>1</sup> and it would be confusing to combine disclosures for both unit franchises and subfranchises in the same Franchise Disclosure Document.

#### **SF 1.0 Subfranchisor—Item 1**

QUESTION: Must a franchisor's Franchise Disclosure Document for unit franchises disclose in Item 1 the availability of ~~subfranchises~~subfranchise rights, and vice versa?

ANSWER: Yes. Item 1 requires disclosure of the prior business experience of the franchisor and whether it has offered franchises in other lines of business. The ~~saleoffer~~ of ~~subfranchises~~subfranchise rights is a separate line of business from the ~~saleoffer~~ of unit franchises, and each offering must be disclosed in all Franchise Disclosure Documents issued by the franchisor.

#### **SF 20.0 Subfranchisor—Item 20**

QUESTION: Must Item 20 of a franchisor's Franchise Disclosure Document for subfranchises identify only current and former subfranchisors?

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<sup>1</sup>For example, the fees paid by subfranchisors and unit franchisees are different (Items 5 and 6), the investment for a subfranchisor's business has no bearing on the investment of a unit franchisee (Item 7), supplier relationships are different (Item 8), the contract terms are different (Items 9, 17 and 22), the obligations to the two types of franchisees are very different (Item 11), territories are much larger in the case of subfranchisors (Item 12), the restrictions on what the two types of franchisees sell are different (Item 16), and the tables of similar outlets are different (Item 20).

ANSWER: Yes. Item 20 requires the disclosure of “outlets,” defined as outlets of a type substantially similar to that offered to the prospective franchisee. ~~A subfranchise is~~ Subfranchise rights are not substantially similar to ~~a~~ unit franchise rights. Thus, a franchisor's Franchise Disclosure Document for ~~subfranchises~~ subfranchise rights must only include in Item 20 information about current and former subfranchisors.

## **B. Subfranchisor Offer of Unit Franchise**

### **SF 0.2 Subfranchisor—Generally**

QUESTION: Must a subfranchisor's Franchise Disclosure Document for unit franchises disclose the financial arrangements between the franchisor and ~~its subfranchisor~~ the subfranchisor?

ANSWER: No. ~~The FTC Franchise Rule Although the subfranchisor may disclose in Item 6 that fees paid by subfranchisees will be shared by the franchisor and the subfranchisor, the FTC Franchise Rule does not~~ contemplate ~~require~~ the disclosure of the financial ~~arrangement~~ arrangements between the franchisor and its subfranchisors, ~~and the FTC Franchise Rule specifically prohibits franchisors and subfranchisors from including any information that is not required or expressly permitted.~~

### **SF 0.3 Subfranchisor—Updates and Amendments**

QUESTION: ~~Must~~ Are amendments and updates to a subfranchisor's Franchise Disclosure Document for unit franchises ~~be~~ triggered by material changes in information supplied by the franchisor as well as information supplied by the subfranchisor?

ANSWER: Yes. The amendment and updating requirements are triggered by material changes to any information disclosed in a subfranchisor's Franchise Disclosure Document for unit franchises, regardless of its source.

### **SF 8.0 Subfranchisor—Item 8**

QUESTION: Does the subfranchisor have an obligation to disclose in Item 8 of its Franchise Disclosure Document for unit franchises rebates received by the franchisor, the subfranchisor, or their affiliates on required purchases or leases made by the subfranchisor's subfranchisees?

ANSWER: Yes. Item 8 requires disclosure of all means by which a franchisor, a subfranchisor, and any affiliates may derive revenue as a result of required purchases or leases of goods and services by subfranchisees.

**SF 13.0 Subfranchisor—Item 13**

QUESTION: Must a subfranchisor disclose any limitations in its agreement with the franchisor on the subfranchisor's right to use or license the use of the franchisor's marks to a subfranchisee?

ANSWER: Yes. As required under Item 13, a subfranchisor must disclose, in its Franchise Disclosure Document for unit franchises, any currently effective agreements that limit the subfranchisor's rights to use or license the use of the marks. Thus, Item 13 of a subfranchisor's Franchise Disclosure Document for unit franchises must include a disclosure of the circumstances under which its subfranchise rights may be canceled, and the effect, if any, that cancellation may have on a subfranchisee's rights to continue to use the franchisor's marks. A subfranchisor also must disclose in Item 13 whether or not the subfranchisee can continue to use the marks if the subfranchisor agreement with the franchisor expires or is terminated, canceled, or not renewed.

**SF 20.1 Subfranchisor—Item 20**

QUESTION: Must Item 20 of a subfranchisor's Franchise Disclosure Document for unit franchises identify only current and former unit franchisees?

ANSWER: Yes. Item 20 requires the disclosure of “outlets,” defined as outlets of a type substantially similar to that offered to the prospective franchisee. A unit franchise is not substantially similar to ~~a~~ subfranchise rights. Thus, a subfranchisor's Franchise Disclosure Document for unit franchises must only include in Item 20 information about current and former unit franchisees.

**SF 20.2 Subfranchisor—Item 20**

QUESTION: In Item 20, must a subfranchisor's Franchise Disclosure Document for unit franchises include Tables 1-5 for the subfranchisor's franchised outlets as well as the entire franchise system?

ANSWER: Yes. In a subfranchisor's Franchise Disclosure Document for unit franchises, Item 20 must include information for all franchised outlets in the entire franchise system. The first set of Tables 1-5 must include information for the subfranchisor, and the second set of Tables 1-5 must include information for the franchisor, entire franchise system.

**SF 20.3 Subfranchisor—Item 20 (Lists of Current Franchisees)**

QUESTION: In Item 20, must a subfranchisor's Franchise Disclosure Document separately list its own current unit franchisees (aka subfranchisees) and the current unit franchisees of the franchisor and its other subfranchisors?

ANSWER: Yes. The subfranchisor's Franchise Disclosure Document must include two separate lists of current unit franchisees and the addresses and telephone numbers of their outlets in the following order: (1) a list of the subfranchisor's own current unit franchisees; and (2) a list of the current unit franchisees of the franchisor and its other subfranchisors operating under the same brand.

The subfranchisor may choose whether to list all of the unit franchisees in the franchise system, or only those in a state where it offers unit franchises. If a subfranchisor chooses to list only the unit franchisees in a state where it offers unit franchises, the subfranchisor must list its own unit franchisees in the state and, if there are other unit franchisees of the franchisor and its other subfranchisors in the state, separately list all of those unit franchisees.

If the subfranchisor's list of unit franchisees in the state includes fewer than 100 unit franchisees, the subfranchisor must expand its list to include its own unit franchisees in contiguous states, and then the next closest states, until its list includes at least 100 of its own unit franchisees or there are no more of its own unit franchisees to list. If the total of unit franchisees listed is still less than 100, the subfranchisor must separately list (or expand its existing list of) unit franchisees of the franchisor and the franchisor's other subfranchisors in the same manner, until the subfranchisor has listed at least 100 unit franchisees or there are no more unit franchisees to list.

## AREA REPRESENTATIVES

### **AR 2.0      Area Representative—Item 2**

QUESTION: Must a franchisor that uses area representatives disclose in Item 2 the business experience of individual area representatives?

ANSWER: Yes, when the area representative exercises management responsibility ~~forrelating to~~ the sale or operation of ~~the franchise system~~ franchises. A franchisor that uses an area representative to provide service or support to unit franchisees generally grants the area representative some “management responsibility ~~forrelating to~~ the sale or operation of ~~the franchise system~~.” franchises.” When a franchisor does not grant an area representative any management responsibility ~~forrelating to~~ the sale or operation of ~~a franchise system so that disclosure~~ franchises and disclosures regarding the area representative ~~isare~~ not required in Item 2, the franchisor must disclose that fact in Item 1.

### **AR 3.0 and 4.0      Area Representative—Items 3 and 4**

QUESTION: Must a franchisor that uses area representatives disclose area representatives as having “management responsibility” for the sale or operation of ~~the franchise system~~ franchises, and accordingly, make appropriate disclosures under Items 3 and 4 regarding those individuals or entities?

ANSWER: Yes, when the area representative exercises ~~some~~ management responsibility ~~forrelating to~~ the sale or operation of ~~the franchise system~~ franchises. A franchisor that uses area representatives to provide service or support to unit franchisees generally grants the area representatives some “management responsibility ~~forrelating to~~ the sale or operation of ~~the franchise system~~” and therefore must make disclosures in Items 3 and 4 about the litigation and bankruptcy history of an area representative and, if an area representative is an entity, any of its directors, officers and employees or agents that have management responsibility ~~forrelating to~~ the sale or operation of ~~the franchise system~~ franchises. When a franchisor does not grant its area representatives ~~any~~ management responsibility ~~forrelating to~~ the sale or operation of ~~a franchise system so that~~ franchises and disclosures regarding the area representative are not required in Items 3 or 4, the franchisor must disclose that fact in Item 1.

## **MULTI-UNIT COMMENTARY**

### **INTRODUCTION**

The Franchise and Business Opportunity Project Group (“Project Group”)<sup>1</sup> of the North American Securities Administrators Association, Inc. (“NASAA”) has issued this Multi-Unit Commentary (“Commentary”) to provide practical guidance for disclosing certain multi-unit franchising arrangements that have become common in franchising but that are not specifically addressed under NASAA’s 2008 Franchise Registration and Disclosure Guidelines or the Federal Trade Commission’s (“FTC’s”) Franchise Rule. This Commentary addresses specific disclosure questions brought to the Project Group’s attention by franchise attorneys, our Industry Advisory Committee, and state examiners. The Project Group believes that a more uniform approach to disclosing multi-unit franchising arrangements benefits prospective franchise investors, franchisors, state franchise administrators, and franchising in general.

This Commentary describes 3 multi-unit franchising structures. These structures are not mutually exclusive; that is, a franchisor may use just 1 structure or may use a combination of 2 or 3 structures. There are no universally accepted terms for these structures within the franchise industry. The terms used to describe the structures in different franchise systems, and in different laws and regulations, vary widely. This Commentary adopts 3 terms that are commonly used. However, the principles discussed in this Commentary apply to each structure, regardless of the terms used by any particular franchisor.

The Project Group recommends that franchisors use the terms adopted in this Commentary. Use of these terms will facilitate review of Franchise Disclosure Documents by state franchise administrators. If a franchisor uses terms different from those adopted below, the Project Group recommends that the franchisor identify in cover letters sent to state franchise administrators how the terms the franchisor uses correlate to the terms adopted in this Commentary.

### **EFFECTIVE DATE**

The effective date of this Commentary is 180 days after the date of adoption by NASAA, but if the franchisor or subfranchisor has an effective Franchise Disclosure Document as of the date of adoption by NASAA, the franchisor or subfranchisor must comply with this Commentary 120 days after the franchisor’s or subfranchisor’s next fiscal year end.

Date of Adoption by NASAA: \_\_\_\_\_.

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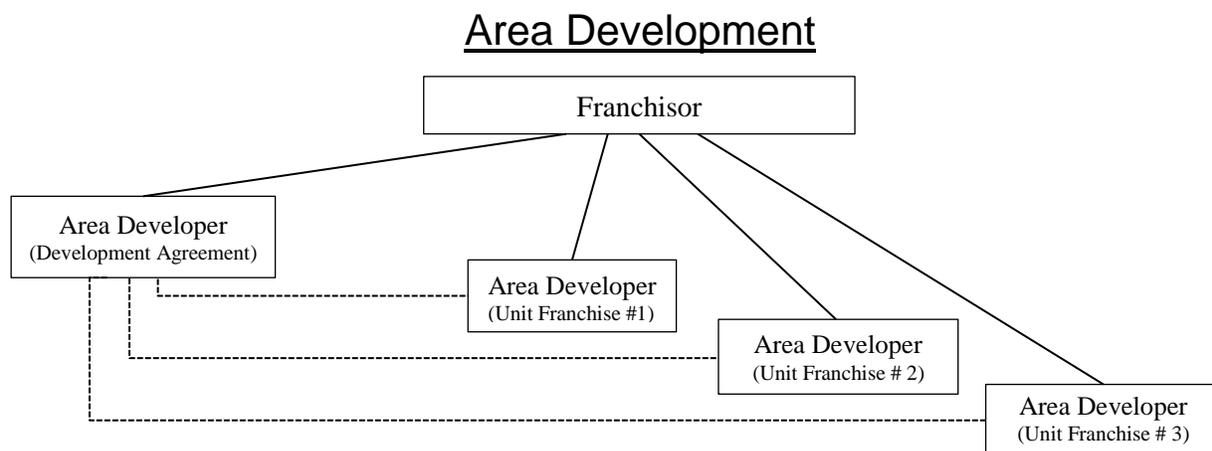
<sup>1</sup> The Project Group consulted with FTC staff before finalizing this Commentary.

## DEFINITIONS

### A. Area Development

The first structure, called an **area development** arrangement in this Commentary, involves a person that is granted, for consideration paid to the franchisor, the right to open and operate multiple unit franchises, generally within a delineated geographic area. In this Commentary, an “**area developer**” is the person granted that right. The area developer generally is a party to an “area development agreement” with the franchisor specifying the number of units to be developed and a development schedule, and the area developer or its affiliates generally are parties to separate unit franchise agreements with the franchisor. The area developer does not have the right to grant or sell unit franchises to third parties.

Under this structure, the area developer can have any number of other names, including area franchisee, multi-unit developer or regional developer.



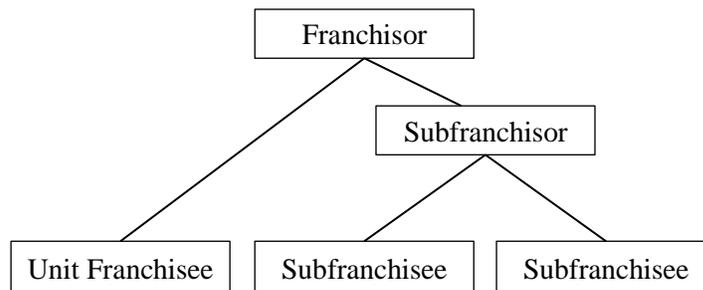
### B. Subfranchise Rights

The second structure, called a **subfranchise** arrangement in this Commentary, involves a person that is granted, for consideration paid to the franchisor, rights related to granting unit franchises to third parties, generally within a delineated geographic area (“subfranchise rights”). In this Commentary, a “**subfranchisor**” is the person granted those rights. The subfranchisor generally is a party to a subfranchisor agreement, aka master franchise agreement, with the franchisor specifying the territory in which the subfranchisor may operate and a minimum opening schedule, and the subfranchisor is a party to unit franchise agreements, aka subfranchisee agreements, with third parties for unit franchises. The subfranchisor is typically obligated to provide support services to those third parties. In this Commentary, the third parties signing the subfranchisor’s unit franchise agreements are called “**subfranchisees**.” The franchisor and the

subfranchisor usually each receive a portion of the initial franchise fee and the continuing fees paid by each subfranchisee. The subfranchisor may be a party to 1 or more unit franchise agreements with the franchisor for unit franchises. Outside the franchisor's relationship with the subfranchisor, the franchisor also may be a party to unit franchise agreements with third parties for unit franchises, and those third parties are called "**unit franchisees**" in this Commentary.

Under this structure, the subfranchisor can be referred to by any number of other names, including area franchisor, regional franchisor, or master franchisee.

### Subfranchise Rights



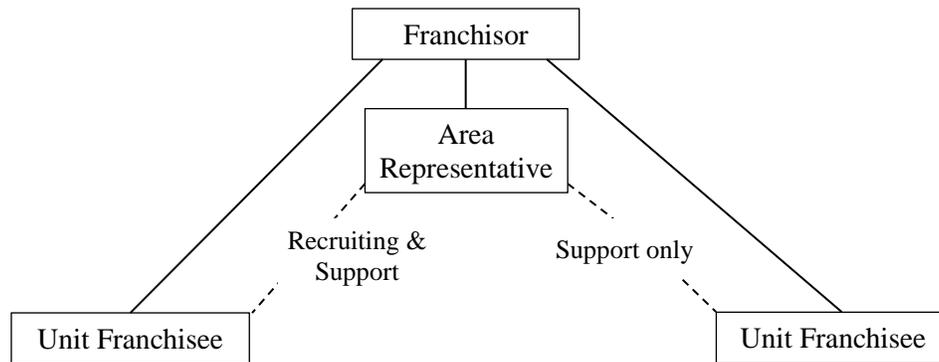
#### **C. Area Representation**

The third structure, called an **area representation** arrangement in this Commentary, involves a person that is granted, for consideration paid to the franchisor, the right to solicit or recruit third parties to enter into unit franchise agreements with the franchisor, and/or to provide support services to third parties entering into unit franchise agreements with the franchisor. The person granted these rights is a party to an "area representative agreement" but is not a party to the unit franchise agreements signed by the third parties. In this Commentary, an "**area representative**" is the person granted these rights, and the third parties signing the unit franchise agreements with the franchisor are called "**unit franchisees**." The area representative, like a subfranchisor, usually receives portions of the initial franchise fees and the continuing fees paid by unit franchisees, depending on the services the area representative provides. The area representative's payment of consideration to the franchisor for the right to recruit and/or provide support to unit franchisees is the element that makes the area representative different from a franchise broker or selling agent.

Under this structure, the area representative can have any number of other names, including development agent, area developer or regional developer. Under some state franchise laws, the area representative may be considered to be a subfranchisor if it provides support services to third parties with unit franchise

agreements, even though the area representative does not sign unit franchise agreements with third parties.<sup>2</sup> In general, an area representative is also a franchisee.

### Area Representation



#### **D. Franchise Brokers**

This Commentary does not address disclosure issues relating to “**franchise brokers**” because they are generally not parties to any franchise agreements. A franchise broker is an independent sales agent not employed by the franchisor that solicits prospective franchisees to purchase a franchise and receives a fee or commission from the franchisor or subfranchisor on the sale of the franchise. Unlike a subfranchisor or area representative, however, a franchise broker does not pay consideration to the franchisor for the right to recruit franchises and generally does not have the obligation to provide support services to franchisees. Under some state franchise laws, a franchise broker must register with the state regulatory agency.

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<sup>2</sup> States have differed and may continue to differ on the issue of whether a person described in this Commentary as an “area representative” is required to register with state franchise authorities as a subfranchisor. Franchisors should check with state franchise regulatory authorities for their interpretation of state registration requirements. To the extent that a state franchise regulatory authority defines or specifically interprets a multi-unit arrangement in a way that differs from this Commentary, the state’s interpretation controls.

## AREA DEVELOPERS

### **AD 0.1**      *Area Developer—Generally*

QUESTION: May a franchisor offer area development franchises in the same Franchise Disclosure Document as it offers unit franchises?

ANSWER: Yes. An area developer essentially is a unit franchisee with the right to operate more than one unit franchise. It is not confusing to prospects for an area development agreement and related disclosures to be included in the same Franchise Disclosure Document as a unit franchise agreement and related disclosures.

### **AD 1.0**      *Area Developer—Item 1*

QUESTION: Is a franchisor required to state in the Franchise Disclosure Document that an area developer will be required to sign the franchisor's "then-current form of franchise agreement," if that will be the case, when the area developer decides or is required to open each future unit franchise?

ANSWER: Yes. In Item 1, when describing the franchise being offered, the franchisor must disclose that, for each future unit franchise, the area developer may be required to sign a form of franchise agreement that is different from the form of franchise agreement included in the Franchise Disclosure Document being used to offer the area development franchise, if that will be the case. Conversely, in Item 1, the franchisor may state that the area developer will have the right to sign the same form of franchise agreement for each future unit franchise, if that will be the case or that the Area Development Agreement contains the operational terms for operating a unit franchise.

### **AD 11.0 and 12.0**      *Area Developer— Items 11 and 12*

QUESTION: If the locations and territories of franchise units to be developed are not set forth in an area development agreement, is a franchisor required to state in the Franchise Disclosure Document that the franchisor will determine or approve the locations of future units and any territories for those unit franchises?

ANSWER: Yes. In Items 11 and 12, when describing the franchisor's approval of the sites and any territories of unit franchises, the franchisor must disclose, if applicable, that the franchisor will determine or approve the location of future units and any territories for those units, and that its then-current standards for sites and territories will apply.

**AD 17.0 Area Developer—Item 17**

QUESTION: Is a franchisor required to state in the Franchise Disclosure Document that termination of the area development agreement could permit the franchisor to terminate the area developer's unit franchise agreement(s), or vice versa?

ANSWER: Yes. Any cross-default provision in the area development agreement, or in the unit franchise agreement, must be described in the Summary described in the table for that agreement included in Item 17, in the Summaries for (e), (f), (g) and (h), as applicable.

**AD 20.0 Area Developer—Item 20**

QUESTION: Is a franchisor required or permitted to include in the Franchise Disclosure Document the number of franchised outlets that area developers have agreed to open?

ANSWER: No. This information is not required or permitted to be disclosed because it could be misleading. Item 20 primarily focuses on the numbers of outlets actually opened and closed in the past 3 years, which gives a more reliable picture of the health and future prospects of a franchise system than the numbers of outlets that area developers or others have contractually committed to open.

**AD 20.1 Area Developer—Item 20**

QUESTION: Is a franchisor required or permitted to include separate tables in Item 20 for area developers?

ANSWER: No. Tables Nos. 1-4 in Item 20 focus on outlets actually opened and closed. Table No. 5 in Item 20 focuses on unit franchise agreements actually signed and franchised outlets actually expected to be opened in the upcoming year. The tables are not structured to cover area development agreements signed, or area developers entering or leaving a franchise system.

**AD 20.2 Area Developer—Item 20**

QUESTION: Must information on area developers be separately stated in Item 20?

ANSWER: No. "Area developers" simply receive the right to open multiple unit franchises. Item 20 does not permit separate charts or lists of outlets of area developers to be disclosed, including in Table No. 5, Column 2 "Franchise Agreements Signed But Outlet Not Opened." See Commentary 20.2 of NASAA's Commentary on the 2008 Franchise Registration and Disclosure Guidelines.

**AD 20.3      *Area Developer—Item 20***

QUESTION: Is a franchisor required to identify area developers in the Item 20 lists of current and former franchisees?

ANSWER: Yes. An area developer that is a current owner of a franchised outlet must be listed in Item 20 as a current franchisee. Area developers must be identified by placing a footnote or symbol next to their names in each list with an accompanying “Area Developer” notation in a footnote.

An area developer that has paid for and signed an area development agreement must be included in the list of current franchisees and identified as a current area developer, even if the area developer does not yet have, or never had, an existing franchise outlet. If a franchisor offers area development agreements but had no area developers at the close of its last fiscal year, that fact must be disclosed in a footnote. If an area developer loses its area development rights without ever having signed a unit franchise agreement or opened a franchise outlet, then that area developer must be disclosed as a former franchisee.

## **SUBFRANCHISORS**

### **A. Franchisor Offer of Subfranchise Rights**

#### **SF 0.1 Subfranchisor—Generally**

QUESTION: May a franchisor offer subfranchise rights in the same Franchise Disclosure Document as it offers unit franchises?

ANSWER: No. An offering of subfranchise rights is different from a unit franchise offering. While there are some disclosure items that may be identical in the 2 Franchise Disclosure Documents (such as Items 1-4), the relationships and agreements for these offerings are very different,<sup>3</sup> and it would be confusing to combine disclosures for both unit franchises and subfranchises in the same Franchise Disclosure Document.

#### **SF 1.0 Subfranchisor—Item 1**

QUESTION: Must a franchisor's Franchise Disclosure Document for unit franchises disclose in Item 1 the availability of subfranchise rights, and vice versa?

ANSWER: Yes. Item 1 requires disclosure of the prior business experience of the franchisor and whether it has offered franchises in other lines of business. The offer of subfranchise rights is a separate line of business from the offer of unit franchises, and each offering must be disclosed in all Franchise Disclosure Documents issued by the franchisor.

#### **SF 20.0 Subfranchisor—Item 20**

QUESTION: Must Item 20 of a franchisor's Franchise Disclosure Document for subfranchises identify only current and former subfranchisors?

ANSWER: Yes. Item 20 requires the disclosure of "outlets," defined as outlets of a type substantially similar to that offered to the prospective franchisee. Subfranchise rights are not substantially similar to unit franchise rights. Thus, a franchisor's Franchise Disclosure Document for subfranchise rights must only include in Item 20 information about current and former subfranchisors.

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<sup>3</sup>For example, the fees paid by subfranchisors and unit franchisees are different (Items 5 and 6), the investment for a subfranchisor's business has no bearing on the investment of a unit franchisee (Item 7), supplier relationships are different (Item 8), the contract terms are different (Items 9, 17 and 22), the obligations to the two types of franchisees are very different (Item 11), territories are much larger in the case of subfranchisors (Item 12), the restrictions on what the two types of franchisees sell are different (Item 16), and the tables of similar outlets are different (Item 20).

**SF 22.0      *Subfranchisor—Item 22***

QUESTION: If a franchisor requires its subfranchisors to use the franchisor's form of franchise agreement in the sale of unit franchises, must the franchisor's then-current form of franchise agreement be included in a Franchise Disclosure Document for subfranchises?

ANSWER: Yes. Item 22 requires attachment of all proposed "agreements" regarding the franchise offering, and the FTC Compliance Guide, at p. 116, confirms that this requirement includes all proposed agreements "that the franchisor provides." If the franchisor requires the use of an agreement in a form prescribed by the franchisor (even if subject to some modification by the subfranchisor), then the franchisor's then-current form as of the date of the Franchise Disclosure Document must be attached either: (i) as an exhibit to Item 22; or (ii) as an attachment to the agreement between the franchisor and subfranchisor with its location cross-referenced in Item 22.

**SF 22.1      *Subfranchisor—Item 22***

QUESTION: If a franchisor requires its subfranchisors to use the franchisor's form of Franchise Disclosure Document in the sale of unit franchises, must the franchisor's then-current form be included as an exhibit to a Franchise Disclosure Document for subfranchises?

ANSWER: No. A Franchise Disclosure Document is not an "agreement" and therefore is not required to be included in a franchisor's Franchise Disclosure Document for subfranchises. Including a form Franchise Disclosure Document within another Franchise Disclosure Document would be both impractical and potentially confusing. If a franchisor requires its subfranchisors to use the franchisor's form of Franchise Disclosure Document for unit franchises, however, the franchisor must disclose that requirement to prospective subfranchisors.

**B. Subfranchisor Offer of Unit Franchise**

**SF 0.2      *Subfranchisor—Generally***

QUESTION: Must a subfranchisor's Franchise Disclosure Document for unit franchises disclose the financial arrangements between the franchisor and the subfranchisor?

ANSWER: No. Although the subfranchisor may disclose in Item 6 that fees paid by subfranchisees will be shared by the franchisor and the subfranchisor, the FTC Franchise Rule does not require the disclosure of the financial arrangements between the franchisor and its subfranchisors.

**SF 0.3      *Subfranchisor—Updates and Amendments***

QUESTION: Are amendments and updates to a subfranchisor's Franchise Disclosure Document for unit franchises triggered by material changes in information supplied by the franchisor as well as information supplied by the subfranchisor?

ANSWER: Yes. The amendment and updating requirements are triggered by material changes to any information disclosed in a subfranchisor's Franchise Disclosure Document for unit franchises, regardless of its source.

**SF 3.0      *Subfranchisor—Item 3***

QUESTION: Must a subfranchisor's Franchise Disclosure Document for unit franchises disclose in Item 3 lawsuits against the franchisor and individuals associated with the franchisor identified in Item 2, even though the subfranchisees will deal with the subfranchisor and not with the franchisor?

ANSWER: Yes. The FTC Compliance Guide, at p. 18, specifies that a subfranchisor's Franchise Disclosure Document for unit franchises must include litigation information for both the franchisor and the subfranchisor. The information must be presented first for the subfranchisor and then for the franchisor.

**SF 4.0      *Subfranchisor—Item 4***

QUESTION: Must a subfranchisor's Franchise Disclosure Document for unit franchises disclose in Item 4 any bankruptcies of the franchisor and individuals associated with the franchisor identified in Item 2, even though the subfranchisees will deal with the subfranchisor and not with the franchisor?

ANSWER: Yes. The FTC Compliance Guide, at p. 18, specifies that a subfranchisor's Franchise Disclosure Document for unit franchises must include bankruptcy information from both the franchisor and the subfranchisor. The information must be presented first for the subfranchisor and then for the franchisor.

**SF 8.0      *Subfranchisor—Item 8***

QUESTION: Does the subfranchisor have an obligation to disclose in Item 8 of its Franchise Disclosure Document for unit franchises rebates received by the franchisor, the subfranchisor, or their affiliates on required purchases or leases made by the subfranchisor's subfranchisees?

ANSWER: Yes. Item 8 requires disclosure of all means by which a franchisor, a subfranchisor, and any affiliates may derive revenue as a result of required purchases or leases of goods and services by subfranchisees.

**SF 13.0 Subfranchisor—Item 13**

QUESTION: Must a subfranchisor disclose any limitations in its agreement with the franchisor on the subfranchisor's right to use or license the use of the franchisor's marks to a subfranchisee?

ANSWER: Yes. As required under Item 13, a subfranchisor must disclose, in its Franchise Disclosure Document for unit franchises, any currently effective agreements that limit the subfranchisor's rights to use or license the use of the marks. Thus, Item 13 of a subfranchisor's Franchise Disclosure Document for unit franchises must include a disclosure of the circumstances under which its subfranchise rights may be canceled, and the effect, if any, that cancellation may have on a subfranchisee's rights to continue to use the franchisor's marks. A subfranchisor also must disclose in Item 13 whether or not the subfranchisee can continue to use the marks if the subfranchisor agreement with the franchisor expires or is terminated, canceled, or not renewed.

**SF 20.1 Subfranchisor—Item 20**

QUESTION: Must Item 20 of a subfranchisor's Franchise Disclosure Document for unit franchises identify only current and former unit franchisees?

ANSWER: Yes. Item 20 requires the disclosure of "outlets," defined as outlets of a type substantially similar to that offered to the prospective franchisee. A unit franchise is not substantially similar to subfranchise rights. Thus, a subfranchisor's Franchise Disclosure Document for unit franchises must only include in Item 20 information about current and former unit franchisees.

**SF 20.2 Subfranchisor—Item 20**

QUESTION: In Item 20, must a subfranchisor's Franchise Disclosure Document for unit franchises include Tables 1-5 for the subfranchisor's franchised outlets as well as the entire franchise system?

ANSWER: Yes. In a subfranchisor's Franchise Disclosure Document for unit franchises, Item 20 must include information for all franchised outlets in the entire franchise system. The first set of Tables 1-5 must include information for the subfranchisor, and the second set of Tables 1-5 must include information for the entire franchise system.

**SF 20.3      *Subfranchisor—Item 20 (Lists of Current Franchisees)***

QUESTION: In Item 20, must a subfranchisor's Franchise Disclosure Document separately list its own current unit franchisees (aka subfranchisees) and the current unit franchisees of the franchisor and its other subfranchisors?

ANSWER: Yes. The subfranchisor's Franchise Disclosure Document must include two separate lists of current unit franchisees and the addresses and telephone numbers of their outlets in the following order: (1) a list of the subfranchisor's own current unit franchisees; and (2) a list of the current unit franchisees of the franchisor and its other subfranchisors operating under the same brand.

The subfranchisor may choose whether to list all of the unit franchisees in the franchise system, or only those in a state where it offers unit franchises. If a subfranchisor chooses to list only the unit franchisees in a state where it offers unit franchises, the subfranchisor must list its own unit franchisees in the state and, if there are other unit franchisees of the franchisor and its other subfranchisors in the state, separately list all of those unit franchisees.

If the subfranchisor's list of unit franchisees in the state includes fewer than 100 unit franchisees, the subfranchisor must expand its list to include its own unit franchisees in contiguous states, and then the next closest states, until its list includes at least 100 of its own unit franchisees or there are no more of its own unit franchisees to list. If the total of unit franchisees listed is still less than 100, the subfranchisor must separately list (or expand its existing list of) unit franchisees of the franchisor and the franchisor's other subfranchisors in the same manner, until the subfranchisor has listed at least 100 unit franchisees or there are no more unit franchisees to list.

**SF 21.0      *Subfranchisor—Item 21***

QUESTION: Must a subfranchisor's Franchise Disclosure Document for unit franchises include the financial statements required by law of both the franchisor and the subfranchisor?

ANSWER: Yes. The purchaser of a unit franchise from a subfranchisor relies on both the franchisor and the subfranchisor, and, as required under the FTC Franchise Rule, the financial statements of both entities must be included in Item 21 of the subfranchisor's Franchise Disclosure Document for unit franchises. This requirement does not change the phase-in provision for audited financial statements for start-up franchisors, which could apply separately to the franchisor or the subfranchisor (to the extent permitted by state law).

**SF 21.1 Subfranchisor—Item 21**

**QUESTION:** If a franchisor and a subfranchisor have different fiscal years, when must the subfranchisor's Franchise Disclosure Document for unit franchises be updated?

**ANSWER:** Since a subfranchisor acts as the franchisor for its subfranchisees (and is the entity that registers its offering with state franchise authorities, where required), the subfranchisor must prepare an annual update of the information in its Franchise Disclosure Document for unit franchises within 120 days after the end of its fiscal year. If the franchisor's fiscal year differs from the subfranchisor's, the subfranchisor's annual update must include any required information from the franchisor's quarterly updates or amendments, if any, reflecting material changes since the franchisor's last annual update. In addition, when the franchisor prepares its annual update, the subfranchisor must prepare a quarterly update that incorporates any material changes in the franchisor's updated information.<sup>4</sup>

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<sup>4</sup> Under the FTC Franchise Rule, quarterly updates must be prepared within a reasonable time after the end of the subfranchisor's current calendar quarter. Under state franchise laws, an update may be required sooner, such as "immediately," "promptly," or within a specified number of days after a material change occurs in the information required to be disclosed in the subfranchisor's Franchise Disclosure Document.

## AREA REPRESENTATIVES

### **AR 0.1      *Area Representative—Generally***

QUESTION: May a franchisor offer area representative franchises in the same Franchise Disclosure Document as it offers unit franchises?

ANSWER: No. An area representative franchise offering is different from a unit franchise offering. While there are some disclosure items that may be identical in the 2 Franchise Disclosure Documents (such as Items 1-4), the relationships and agreements for these offerings are very different, and it can be confusing to combine disclosures for both area representative franchises and unit franchises in the same Franchise Disclosure Document.

### **AR 0.2      *Area Representative—Generally***

QUESTION: Must a franchisor's Franchise Disclosure Document for unit franchises disclose the financial arrangements between the franchisor and its area representatives?

ANSWER: No. The FTC Franchise Rule does not contemplate the disclosure of the financial arrangements between the franchisor and its area representatives, and the FTC Franchise Rule specifically prohibits franchisors from including any information that is not required or expressly permitted.

### **AR 0.3      *Area Representative—Disclosures in an Exhibit***

QUESTION: If a franchisor's area representatives operate in geographic territories that are located in one (or more) states, may the franchisor include disclosures applicable to the area representatives in state specific addenda to the franchisor's Franchise Disclosure Document for unit franchises?

ANSWER: Yes. A franchisor with area representatives operating only in specific states may make required disclosures regarding the individual area representatives (including disclosures required in Items 2, 3, 4, and 11) either in the body of the Franchise Disclosure Document or in Addenda attached to the Franchise Disclosure Document. The Addenda may be state specific or may include all area representatives in the franchise system. The franchisor may not, however, include some of this required disclosure in the body of the Franchise Disclosure Document and some in the Addenda, but, rather must choose to include the disclosures in one or the other location. The fact that litigation against a specific area representative may be included in the Addenda does not change the requirement to disclose the litigation in the body of the Franchise

Disclosure Document if the franchisor is named as a party, and the claim against the franchisor is of a type required to be disclosed in Item 3.

**AR 1.0      *Area Representative—Item 1***

QUESTION: Must a franchisor's Franchise Disclosure Document for unit franchises disclose in Item 1 the availability of area representative franchises, and vice-versa?

ANSWER: Yes. Item 1 requires disclosure of the prior business experience of the franchisor and whether it has offered franchises in other lines of business. The sale of area representative franchises is a separate line of business from the sale of unit franchises, and each offering must be disclosed in all Franchise Disclosure Documents issued by the franchisor.

**AR 2.0      *Area Representative—Item 2***

QUESTION: Must a franchisor that uses area representatives disclose in Item 2 the business experience of individual area representatives?

ANSWER: Yes, when the area representative exercises management responsibility relating to the sale or operation of franchises. A franchisor that uses an area representative to provide service or support to unit franchisees generally grants the area representative some "management responsibility relating to the sale or operation of franchises." When a franchisor does not grant an area representative any management responsibility relating to the sale or operation of franchises and disclosures regarding the area representative are not required in Item 2, the franchisor must disclose that fact in Item 1.

**AR 3.0 and 4.0      *Area Representative—Items 3 and 4***

QUESTION: Must a franchisor that uses area representatives disclose area representatives as having "management responsibility" for the sale or operation of franchises, and accordingly, make appropriate disclosures under Items 3 and 4 regarding those individuals or entities?

ANSWER: Yes, when the area representative exercises management responsibility relating to the sale or operation of franchises. A franchisor that uses area representatives to provide service or support to unit franchisees generally grants the area representatives some "management responsibility relating to the sale or operation of franchises" and therefore must make disclosures in Items 3 and 4 about the litigation and bankruptcy history of an area representative and, if an area representative is an entity, any of its directors, officers and employees or agents that have management responsibility relating to the sale or operation of franchises. When a franchisor does not

grant its area representatives any management responsibility relating to the sale or operation of franchises and disclosures regarding the area representative are not required in Items 3 or 4, the franchisor must disclose that fact in Item 1.

**AR 8.0      *Area Representative—Item 8***

QUESTION: Does the franchisor have an obligation to disclose in Item 8 of its Franchise Disclosure Document for unit franchises rebates received by the franchisor, the area representative, and their respective affiliates on required purchases made by the franchisor's unit franchisees?

ANSWER: Yes, but with respect to rebates received by the area representative or its affiliates, only to the extent the franchisor is aware of the rebates. Item 8 requires disclosure of whether a franchisor or its affiliates may derive revenue as a result of required purchases or leases of goods and services by its unit franchisees. That includes any revenue the franchisor has arranged for its area representatives (or their affiliates) to receive based on required purchases by unit franchisees and any revenue the franchisor knows the area representatives or their affiliates are receiving.

**AR 11.1      *Area Representative—Item 11***

QUESTION: When the area representative or someone acting on behalf of the area representative provides training to unit franchisees, must the franchisor disclose the experience of the instructors providing that training?

ANSWER: Yes. The requirement in Item 11 that the franchisor disclose the experience of instructors applies to instructors provided by the area representative. Consistent with AR 0.3, a franchisor with area representatives operating only in specific states may make required disclosures regarding the training instructors and training provided to unit franchisees either in the body of the Franchise Disclosure Document or in Addenda attached to the Franchise Disclosure Document.

**AR 20.0      *Area Representative—Item 20***

QUESTION: Must Item 20 of a franchisor's Franchise Disclosure Document for area representative franchises identify only current and former area representatives?

ANSWER: Yes. Item 20 requires the disclosure of "outlets," defined as outlets of a type substantially similar to that offered to the prospective franchisee. An area representative franchise is not substantially similar to a unit franchise. Thus, a franchisor's Franchise Disclosure Document for area representative franchises must only include in Item 20 information about current and former area representatives.

**AR 20.1      *Area Representative—Item 20***

QUESTION: Must the existence of area representative franchises that have been sold, transferred or terminated be disclosed in Item 20 of a franchisor's Franchise Disclosure Document for unit franchises?

ANSWER: No. However, if an area representative owns a unit franchise, information about the ownership and/or statistics related to that unit franchise must be disclosed in Item 20.

**AR 23.0      *Area Representative—Receipt***

QUESTION: Must individuals associated with area representatives be listed as "sellers" on the receipt in a franchisor's Franchise Disclosure Document for unit franchises?

ANSWER: Yes. Individuals who participate in a franchise sale on behalf of an area representative, including any employees and officers of the area representative (if an entity), must be disclosed as "sellers" on the receipt in a franchisor's Franchise Disclosure Document for unit franchises.