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Filed at NASAAComments@nasaa.org

Andrea Seidt, Chair
Corporation Finance Section
Dale Cantone, Chair
Franchise and Business Opportunities Project Group
North American Securities Administrators Association

Re: Proposed Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgements

Dear Ms. Seidt and Mr. Cantone:

Thank you for this opportunity to provide comments in response to the Proposed Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgements (the "Policy").

We are franchise attorneys whose practice concentrates on the representation of national franchisee associations and individual franchisees, licensees, dealers, and distributors. We have acted as counsel to franchisee associations in many well-known franchise and distribution systems, including 7-Eleven, Hardee's, Popeyes, Jackson Hewitt, Dale Carnegie, Massage Envy, Remedy Staffing, The UPS Store, Save-A-Lot, Home Instead, Pure Barre, College Nannies and Tutors, Midas, BodyLogicMD, Flying Locksmiths, T.G.I. Friday's, Mood Music, Pillar to Post, Krystal Restaurants, and Long John Silver's.

In addition, Mr. Karp is a past Chair of the American Bar Association Forum on Franchising and has served on the NASAA Franchise and Business Opportunities Project Group since 1996. Mr. Ayres is a senior attorney with the firm whose practice focuses on resolution of franchising and distribution disputes. We request that any citation to these comments be referred to as the "Karp/Ayres Comments."

We make the following comments in no particular order of priority:

1. **Statement of Support for the Issuance of the Policy.** We concur with the Section's assessment that the purpose of Questionnaires and Acknowledgements is not, as franchisors claim, to help prevent fraudulent sales that violate franchise disclosure laws.

Rather, franchisors attempt to use Questionnaires and Acknowledgments as “Get-out-of-jail-free” cards to further tilt the playing field in their favor in dispute resolution forums. Questionnaires and Acknowledgements are additional devices found in typical franchise agreements that deny franchisees procedural and substantive rights enjoyed by other litigants in other contexts. Such franchisor-friendly provisions include without limitation, the waiver of jury trials, prohibitions on consolidated and class actions, waiver of multiple or punitive damages, shortened limitation periods, one-sided legal fee shifting provisions, and three arbitrator requirements. Each of these provisions are designed to make dispute resolution prohibitively difficult or expensive to an aggrieved franchisee.

Moreover, we consider the use of Questionnaires and Acknowledgements to be prohibited by the FTC Franchise Rule and anti-waiver provisions of state laws. 16 CFR 436.6(d) contains the following explicit instruction: “Do not include any materials or information other than those required or permitted by part 436 or by state law not preempted by part 436.” These disclosure rules do not permit the inclusion of extraneous documents not required under the Franchise Rule. Even if NASAA does not concur with this view, it provides additional impetus to seriously and substantively circumscribe the use of these devices that undermine the policy and goals of franchise disclosure laws generally.

2. **Section B.1.** The Policy should state that a Questionnaire or Acknowledgement that the Prospective franchisee is required to sign *be included* within Item 22, and not merely be *attached* to the FDD as an exhibit. The rationale for inclusion instead of attachment is that a Questionnaire or Acknowledgment should be prominently displayed and not buried near the end of what in many cases is a disclosure document spanning hundreds of pages.
3. **Section B.2.** If Franchisor requires the Prospective franchisee to verbally respond to a Questionnaire or Acknowledgement, the written script should be located in the FDD directly under Item 22 immediately preceding the actual Questionnaire or Acknowledgement. In addition, Franchisor should be required to provide a copy of the video or other electronic media recording to the Prospective franchisee and preserve those records and media until the expiration of the applicable state statute of limitations or the franchise agreement, whichever is later.
4. **Section C.3.** The proposed provision should include the following language added in italics:

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 *or federal* franchise law *or rule*, 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

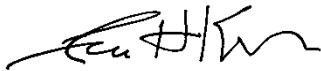
Questionnaire, Acknowledgments, or similar document executed in connection with the franchise investment.

Finally, this language should be placed within Item 22, immediately in front of both the written script and the Questionnaire or Acknowledgement.

5. **Section C.1.a.** The use of a standard that refers either to a *reasonable* Prospective franchisee or a *reasonable* person is not appropriate in this highly fact-intensive context. We recommend that this provision read as follows: “Would cause the Prospective franchisee to surrender or waive rights to which they are entitled under federal or state law or cause such Prospective franchisee to believe that they have done so.”
6. **Section C.2.** The Policy should make it clear that language that is similar to the prohibited statements listed is not allowed in order to prevent creative editing by franchisors that would undermine the purpose of prohibiting these statements.
7. **Consistent Use of Terminology.** Section B.1 refers to “the” franchise agreement, but Section B.2 refers to “a” franchise agreement. The reference in Section C.2.k should be to Prospective franchisee in the singular. The references to Franchisor should either be “Franchisor” or “the Franchisor” consistently throughout the document.

Please do not hesitate to contact us with any questions or comments regarding the above.

Very truly yours,



Eric H. Karp



Thomas R. Ayres