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**VIA EMAIL**

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**Re:** Comments on NASAA's Proposed Statement of Policy Regarding Use of Franchise Questionnaires and Acknowledgments

Dear Ms. Seidt and Mr. Cantone:

As counsel experienced with representing both franchisors and franchisees (including prospects evaluating FDDs and franchise agreements), Polsinelli PC's Global Franchise and Supply Network Practice welcomes the opportunity to comment on NASAA's proposed Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments ("Statement of Policy"). Capitalized terms not defined herein have the meanings given in the Statement of Policy.

At the outset, we acknowledge and applaud NASAA's continuing efforts to ensure fairness in the franchise sales process. With this in mind and in the interest of a fair and meaningful franchise sales process, we offer the following comments:

1. Prohibiting the Solicitation of Factual Information Is Contrary to the Notion of Disclosure. We do not take issue with the concept of prohibiting waivers or requiring disclosure in the FDD of the form of Questionnaire, Acknowledgment, or similar written script. However, we believe it is improper and entirely inconsistent with the notion of disclosure for NASAA or any state franchise administrator to prohibit the exchange of factual information between a franchisor and a prospective franchisee (with the limited exception of information pertaining to unlawful discrimination). Indeed, the franchise disclosure laws are premised upon the notion that the exchange of factual information is necessary to ensure that a prospective franchisee makes an informed decision regarding the purchase of a franchise. The benefit of this information exchange is not limited to the franchisee. The franchisor is also making an important decision as to whether to admit a prospective franchisee into its system. Such an informed decision benefits not just the franchisor, but its

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stakeholders, including existing franchisees, customers of the system, and the general public.

It seems hypocritical to require franchisors to provide factual information to prospective franchisees, while at the same time prohibiting franchisors from seeking or obtaining factual information from prospective franchisees. The proposed Statement of Policy would, among other things, prohibit a franchisor from asking a prospective franchisee whether it has read and understands the FDD and franchise agreement. It would even prohibit the franchisor from asking whether the prospect has any questions regarding these documents. This prohibition is itself unreasonable in that it materially and unnecessarily compromises both parties' ability to make an important business decision. For the franchisor, it is important to confirm that the franchisee understands its rights and obligations. Knowing whether the prospective franchisee wishes to enter into a franchise agreement without having read or understood the FDD and franchise agreement is also indicative of the prospect's judgment, soundness, and business aptitude.

Moreover, we question the legality of prohibiting franchisors from eliciting factual information from prospective franchisees. To our knowledge, none of the state franchise sales laws nor the FTC Rule prohibits a franchisor from doing so. As a result, such a prohibition would make new law, while avoiding the legislative process and, potentially, depriving franchisors of their constitutional due process and free speech rights.

2. Facilitating the Discovery and Avoidance of Franchise Sales Law Violations Benefits Both Franchisors and Prospective Franchisees. Among the justifications cited by NASAA are that "questionnaires and acknowledgements are . . . powerful defense mechanisms that franchisors can use and defeat claims of fraud and misrepresentation regardless of what has occurred in the franchise process." (Statement of Policy at 3.) Similarly, footnote 4 cites a franchisee who claimed it would have been precluded from purchasing the franchise if it did not sign a questionnaire containing an untrue statement. (*Id.* at 3 n.4.) Such purported justifications turn on its head the notion of a free exchange of information. Indeed, most franchisors would not proceed with a franchise sale if they discovered that inaccurate information had been given to a prospective franchisee or that the franchisor had otherwise failed to comply with the franchise sales laws (e.g., failure to wait the full 14 calendar days between delivery of disclosure document and executing the franchise agreement). This is a decision that franchisors should be, and are, incentivized to make. The current franchise sales laws create such

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incentives by imposing penalties and other criminal and civil liability for franchisors who consummate franchise sales in violation of the law.

Further, we believe that NASAA's position may be based on an information bias upon which it is unaware. Specifically, while some franchisees may complain they executed a false questionnaire (as noted in the Statement of Policy's footnote 4), far more prospective franchisees are likely denied the opportunity to enter into a franchise agreement because an accurate questionnaire identified a potential franchise sales law violation. These prospective franchisees (who never entered into a franchise agreement) do not bring actions against franchisors or otherwise file complaints with state or federal franchise administrators because they suffered no harm. In such instances, the questionnaires work exactly as intended. That is, by facilitating the discovery and avoidance of potential franchise sales law violations, the current status quo regarding Acknowledgments and Questionnaires benefits prospective franchisees. As a result, the Statement of Policy would have the effect of trading a lesser harm for a greater harm.

3. Section II.C.1's Prohibition on "Subjective" or "Unreasonable" Statements is Vague, Confusing, and Itself Unreasonable. Section II.C.1. of the proposed Statement of Policy would make it unlawful for a franchisor to require a prospective franchisee to make any statement that is "subjective or unreasonable." These terms are vague and undefined, therefore, subject to confusion and misinterpretation. In addition, there are valid purposes for a franchisor's solicitation of "subjective" information. For example, many franchisors, through their franchisee applications and other communications with prospective franchisees, seek to elicit a prospective franchisee's interests, beliefs, and comfort levels through subjective questions to assess the compatibility of the prospect with the franchise system and its mission statement.

The franchisor of a pet grooming franchise may ask a prospect if he or she likes pets. The franchisor of a children's day care center franchise may ask its prospects whether they view themselves as patient and caring. The franchisor of a steakhouse concept may inquire whether a prospect has a moral objection to serving or eating meat. The franchisor of a home health care franchise may ask the subjective questions of whether a prospect is comfortable being alone in a patient's home or comfortable providing personal care to the elderly or disabled.

Though "subjective," such questions are reasonable and serve a critical function in helping both the franchisor and prospective franchisee assess whether entering into the franchise agreement makes sense for both parties.

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4. The Statement Required by Section II.C.3 Could Harm Prospective Franchisees.  
The proposed requirement that franchisors include in their FDDs a provision indicating that a statement by a franchisee will not have the effect of “disclaiming reliance on any statement made by any franchisor, franchise seller, or other person acting on behalf of the franchisor” is also troubling. (Statement of Policy § II.C.3.) This would have the effect of harming prospective franchisees, by making it impossible for a franchisor to remedy a sales violation and proceed with the sale.

Thank you for your consideration. Please contact us with any questions.

For Polsinelli PC,



Jess A. Dance

On behalf of Polsinelli PC’s Global Franchise and Supply Network Group (Joyce Mazero, Len MacPhee, Jan Gilbert, Jess Dance, Diana Vilmenay, and Emily Doan)