

# Kent Franchise Law Group

A STEVENS & LEE COMPANY

620 Freedom Business Center Drive, Suite 200  
King of Prussia, PA 19406

Direct Dial: (484) 751-4271  
Email: [TJK@kentfranchiselaw.com](mailto:TJK@kentfranchiselaw.com)  
Direct Fax: (484) 872-8491

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## **VIA EMAIL**

North American Securities Administrators Association (“NASAA”)  
Mr. Vince Martinez, NASAA Counsel  
Ms. Andrea Seidt, Section Chair  
Mr. Dale Cantone, Project Group Chair

**Re: Comments on the December 6, 2021 Proposed Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgements**

Dear Mr. Martinez, Ms. Seidt, and Mr. Cantone,

This letter is being submitted by Kent Franchise Law Group, LLC (“KFLG”) in response to the request of NASAA’s Corporate Finance Section and the Franchise and Business Opportunities Project Group for comments on its December 6, 2021 Proposed Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgements (“Proposed Statement”).

We appreciate the opportunity to provide comments on the Proposed Statement. As discussed herein, we believe that Franchise Questionnaires are an important part of a proper sales and disclosure process and are most effective when they include statements to confirm that a prospective franchisee fully understands the business they are purchasing and the agreement they will be bound by.

### **I. Who we Are**

KFLG is a practice group of lawyers specializing in franchise law and was founded by Thomas J. Kent, Jr., who has over 25 years of industry experience. We represent numerous established franchise brands. Our group is passionate about issues that impact franchising and maintains an active role in various franchise trade associations. In particular, Amanda Dempsey is an active member of the International Franchise Association (“IFA”)’s Women’s Franchise Committee, and Jarina Duffy is a committee member of the 2022 IFA Legal Symposium Task Force. Our experience provides a solid understanding of franchise industry issues.

### **II. General Comments Regarding the Use of Questionnaires and Acknowledgements**

KFLG recognizes that NASAA has carefully analyzed the use of franchise questionnaires and acknowledgements and has concerns regarding both the practical effect of such tools and the

conflict between these tools and certain state laws. Apart from the issue of whether franchise questionnaires can be used as legal waivers in certain states with Anti-Waiver laws, questionnaires play a critical role in ensuring the integrity of the franchise sales process. Franchise systems that engage many sales people and/or brokers rely on waivers as a final backstop to ensure there were no violations or improper disclosures in the sales process.

KFLG further recognizes that the onus should not be solely on the prospective franchisee to confirm that no violations have occurred. However, prospective franchisees can and should be expected to confirm that they have reviewed the franchise disclosure document (“FDD”) describing the business offering they are considering purchasing and the contractual agreement they are considering executing. Only by confirming a prospect’s careful review and complete understanding of the FDD, can a franchisor fully ensure the integrity of the sales process and ensure the prospect understands the contract it is executing. The purpose of the FDD is to disclose information that is material to the prospect’s decision of whether or not to purchase the franchise. Accordingly, it is imperative that a franchisor have tools in place to confirm the FDD was actually read and understood, by asking the prospect to confirm specific facts about the sales and disclosure process.

### **III. Specific Comments to Proposed Statement**

For the reasons explained below, franchisors should not be prohibited from including the following statements in a questionnaire or acknowledgement.

#### **a. Section II.C.2.d.**

This section of the policy would prohibit franchisors from including in a questionnaire or acknowledgment a statement *“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.”*

Confirmation that a prospect did not receive information in addition to or contrary to the FDD is paramount to ensuring that improper, unauthorized information has not been provided to the prospect. Asking a prospect this question does not place any additional burden on the prospect, but rather is a fact-finding measure, aimed at finding information necessary to determine whether an improper disclosure took place. A franchisor must be able to confirm whether or not a sales person or broker made an improper representation to the prospect on which the prospect is now relying. If such a representation *was* made, franchisor can investigate the situation and determine whether the sales process with such prospect should be stopped.

#### **b. Section II.C.2.a.**

This section of the policy would prohibit franchisors from including in a questionnaire or acknowledgment a statement *“That the Prospective franchisee has read or understands the FDD or any attachments thereto, including the franchise or other agreement.”*

It is critical for a franchisor to confirm that the prospective franchisee read and understood the FDD and the franchise agreement that will govern the relationship between franchisor and franchisee. If the prospect did not read the entire FDD or did not understand a part of the FDD, his/her answer to this question provides the franchisor with an opportunity to pause the sales process and encourage the franchisee to review the contract with a trusted business advisor before making such a significant investment of money and time. Franchisors also have an interest in ensuring that a franchisee that it will be entering into a long-time business arrangement with fully understand the terms of such relationship.

**c. Section II.C.2.i**

This section of the policy would prohibit franchisors from including in a questionnaire or acknowledgment a statement *“That the Prospective franchisee has had the opportunity to or has/has not actually consulted with professional advisors or consultants or other franchisees.”*

A statement such as this is for the prospect’s benefit because it confirms that the prospect engaged an unbiased professional to help them to review the FDD, or had the opportunity to do so, and decided not to. If a prospect answers no to this statement, the franchisor can provide additional time to consult with an advisor if the prospect wishes to do so. Without confirmation provided by this statement, Franchisor cannot be sure that the prospect fully understood and evaluated the purchase of the franchise.

**a. Section II.C.2.f.**

This section of the policy would prohibit franchisors from including in a questionnaire or acknowledgment a statement *“That the success or failure of the franchise is dependent solely or primarily on Franchisee.”*

Inclusion of this statement on a questionnaire enables a franchisor to ensure the prospect understands he/she is purchasing the right to own and operate an independent business and that he/she will not be a business partner or affiliate of franchisor. This statement helps to avoid any confusion as to the ownership of the business and/or the party that undertakes the obligations and liabilities—an understanding of the independent relationship between franchisor and franchisee is vital to the success of both parties to a franchise agreement.

**IV. Conclusion**

We appreciate the opportunity to provide comments to NASAA’s Proposed Statement. We respectfully submit that franchise questionnaires are critical to ensuring a proper sales process and in order for questionnaires to fulfill such purpose, franchisors must be able to include statements to discover any possible issues that occurred in the sales process.

Thank you for your time and consideration.

Sincerely,

**Kent Franchise Law Group, LLC**

By: /Thomas J. Kent, Jr./

Thomas J. Kent, Jr., Esq.