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January 5, 2022

**VIA E-MAIL AT NASAACOMMENTS@NASAA.ORG**

The Corporation Finance Section &  
The Franchise and Business Opportunities Project Group  
The North American Securities Administrators Association, Inc.

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

Ladies and Gentlemen:

Pursuant to your request for public comment on the proposed Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgements (“Proposed SOP”), below please find my comments on the Proposed SOP. The guidance that NASAA provides to franchisors and franchise practitioners is very valuable and consequently the opportunity to comment is appreciated.

If understood correctly, the Proposed SOP suggests that franchisors currently use questionnaires and agreement acknowledgements (“Q&As”) as a way to make unlawful financial performance representations (“FPRs”) and other misleading claims without any consequences. My practice consists mostly of representing franchisors in regulatory and transactional matters and not surprisingly my perspective on the Proposed SOP differs from that of the drafters. In my experience, Q&As serve a very different purpose than that suggested by the Proposed SOP – namely to make sure that the franchisee is entering into the franchise agreement with a clear understanding of the agreement and the franchise system, and to ensure that all parties are on the same page regarding the terms and that no misrepresentations (whether intentional or not) were made.

When my firm does franchise law compliance training with our franchisor clients, one of the things we stress is that unlawful FPRs cannot be undone, and that the franchisor may have to walk away from a deal altogether if unlawful FPRs have been made. We stress that while other misunderstandings and misstatements can be corrected, once made, an unlawful FPR cannot be undone. Q&As serve as a very useful last check to make sure that the franchisee is not misinterpreting information provided, or is not being misled.

While there may be individual salespeople benefiting from making misleading statements if it helps them close a deal and collect their compensation quickly, franchisors in general do not benefit from franchisees being misinformed. Buying a franchise – the undertaking to start a business – is by its nature complex. Both parties have an invested interest in working towards its success. A franchise agreement is a long-term commitment (often a decade or even longer) by both the franchisor and franchisee. Ensuring that the prospective franchisee understands what they are buying is important to both the prospective

franchisee and the franchisor. For a prospective franchisee having correct information to base their investment decision on is important. It may not be as obvious why this is also important to the franchisor, but unhappy and struggling franchisees are a big drain on the franchisor's finances and human resources—and the overall success of the franchise system. Instead of spending time and energy on developing the franchise system, the franchisor must spend its resources on solving issues that may never have arisen had the franchisee been correctly informed about the franchise to begin with. Q&As are an important tool used by franchisors to avoid mistakes being made. Restricting Q&As as suggested by the Proposed SOP robs the franchisor of an important opportunity to double-check the franchisee's understanding of the franchise system and that prospective franchisees' expectations are correctly aligned, and may in the long run result in more unhappy and failing franchisees.

### **Specific Comments on Section C. 2. Of the Proposed SOP**

While not an outright prohibition on Q&As, NASAA would deny franchisors the right to record the answers to important questions in a meaningful way. Many of the "Prohibited Statements" identified in the Proposed SOP serve a useful purpose as a conversation starter (the numbering below follows the numbering in Section C. 2. of the Proposed SOP):

(a) Q&As regarding whether the franchisee has read the entire FDD and understands it. The FDD is by its nature, even when written in plain English, a complex document and making sure that the prospective franchisee understands the document is not unreasonable.

(d) Q&As about the prospective franchisee not relying on other information than the FDD are likewise important. Whether this information relates to FPRs or other issues, if the franchisee is basing its investment decision on incorrect information, both the franchisee and franchisor will pay long-term.

(e) Q&As relating to unlawful FPRs are key for both franchisors and prospective franchisees. While the point in the introduction of the Proposed SOP about the prospective franchisee that is so carried away that they will sign anything in order to buy a franchise is well taken, this should not hinder franchisors and prospective franchisees from being able to discuss this matter before a franchise agreement is signed.

**Alternative proposal:** If NASAA believes that the misuse of Q&As is so rampant as to warrant regulation, I suggest that, instead of prohibiting franchisors from obtaining the prospective franchisee's recorded acknowledgement of these Q&As, franchisors be required to conspicuously state that the information is gathered only to ensure proper disclosures to the prospective franchisees of information by the franchisor.

### **Specific Comments on Section C. 3. Of the Proposed SOP**

While the suggested addition to the franchise agreement/state addenda in Section C. 3. of the Proposed SOP may accomplish its desired effect, it is so broad that it may also unintentionally cover much more. For example, the reference to statements not disclaiming reliance on statements made by persons outside of the franchise agreement seems to imply that the integration clause in franchise agreements is null and void. Integration clauses are a staple of U.S. agreements (and those in other countries) and serve a very important purpose, namely to ensure that the parties know what document(s) regulate their contractual relationship. The required statement is so broad that enterprising franchisees and their counsel may use it

to get out of clearly stated provisions in the franchise agreement. If this statement remains a requirement, I suggest that it be clarified in the statement that integration clauses in the franchise agreement and other agreements impacted are not subject to this statement.

Thank you for this opportunity to comment on the Proposed SOP. If you have any questions regarding the comments, please do not hesitate to contact me.

Very truly yours,

GREENSFELDER, HEMKER & GALE, P.C.



By:

Beata Krakus

Enclosures

cc: Section Chair, Andrea Seidt  
Project Group Chair, Dale Cantone