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**Re: December 6, 2021, Request for Public Comment: Proposed Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments**

On behalf of the International Franchise Association ("IFA") and its members, we submit these comments in response to the "Request for Public Comment: Proposed Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments" (the "Policy") issued jointly on December 6, 2021, by the Corporation Finance Section and the Franchise and Business Opportunities Project Group of the North American Securities Administrators Association, Inc. ("NASAA").

The International Franchise Association (IFA) is the world's oldest and largest organization representing franchising worldwide. Founded in 1960, IFA's mission is to protect, enhance, and promote franchising through advocacy, education and networking. IFA members include more than 1,100 franchisors from over 300 different business-format categories, thousands of local franchise owners, as well as the product and service suppliers who support them. For the hundreds of thousands of franchise business owners, franchising is a pathway to individual opportunity such that (32%) said they would not own a business without the franchise business format. For the more than 8 million employees of franchise businesses, franchising offers workers higher wages and better benefits than its non-franchise business counterparts.

IFA and its multitude of members have, over the years, collaborated with public officials domestically and internationally to shape the laws and policies that govern franchising, with the goal of promoting franchise growth and protecting the critical interests of both franchisees and franchisors. As IFA's 60-year record of

accomplishments amply demonstrates, IFA has consistently supported regulatory policies designed to ensure that prospective franchisees receive relevant and material information about their proposed franchise investment sufficiently in advance to enable them to make informed and unpressured decisions about their business investment. IFA also has supported a proper balance between the legitimate disclosure and related needs of prospective franchisees and the compliance burdens and costs—borne by both franchisors and franchisees—that such disclosure inevitably entails.

IFA fully supports NASAA's efforts to:

- prohibit use of language in Questionnaires and Acknowledgments that can be used by franchisors as actual waivers or disclaimers of their legal liability for violations of franchise registration and disclosure laws and, therefore, would conflict with state franchise law anti-waiver provisions;[1]

- prohibit use of language in Questionnaires and Acknowledgments that requires prospective franchisees to confirm or concede that the franchisor has not violated the law;

- prohibit franchisors from requiring or counseling franchisees to change their original answers on their completed Questionnaires and Acknowledgments; and

- require franchisors to attach Questionnaires and Acknowledgments, and the scripts of videos of franchise-sale closings, to the Franchise Disclosure Document as exhibits—even if they do not constitute "agreements" subject to disclosure under Item 22 of NASAA's Disclosure Guidelines—perhaps with certain mandated, uniformly-worded admonitions placed appropriately in the Franchise Disclosure Document and on the Questionnaires and Acknowledgments themselves,

[1] While IFA supports the use of Questionnaires and Acknowledgments for the valuable purposes they serve, it does support banning any provisions whose sole purpose is to cause the franchisee to waive its legal rights, to permit the franchisor to disclaim legal liability despite unquestioned violations of law, or to disclaim specific provisions in the Franchise Disclosure Document, including all of its exhibits. IFA defers to franchisee and franchisor counsel to craft the specific provisions within Questionnaires and Acknowledgments that should be permitted or prohibited within the spirit of IFA's comments.

reinforcing to the franchisee the purposes served by Questionnaires and Acknowledgments, the importance of what such Questionnaires and Acknowledgments state and how and why they can protect both the franchisee and the franchisor when answered truthfully, and, more importantly, that the franchisee is advised not to proceed with the franchise transaction if it is unsure about or cannot answer any of the questions, at least not without first seeking legal advice.

While some ill-intentioned franchisors may seek to use some aspects of Questionnaires and Acknowledgments to shield themselves from legal liability for intentional or even unintentional violations of the franchise laws—a practice the IFA certainly does not condone—IFA does not believe that these Questionnaires and Acknowledgments are "routinely" used to "insulate" franchisors from potential liability to franchisees alleging fraud or misrepresentations in the franchise offer-and-sales process. To the contrary, Questionnaires and Acknowledgments benefit both franchisors and franchisees. IFA believes that it would be a disservice to the entire franchise community if the sweeping prohibitions in the current draft of the Policy eliminated the many beneficial provisions in Questionnaires and Acknowledgments that do not under any definition or interpretation of the terms rise to the level of a "waiver" or "disclaimer" of legal liability.

The provisions in Questionnaires and Acknowledgments that IFA considers beneficial serve multiple purposes:

- they protect franchisees from relying on inaccurate or false information;

- they halt or delay transactions and investments— potentially harmful to both franchisees and franchisors—if inaccurate or unlawful information is revealed to have been given to the franchisee, whether intentionally or not;

- they allow franchisors to better understand what franchisees are thinking on the eve of their transactions and, if needed, to address outstanding questions;

- they enable franchisors to (1) uncover dishonest sales practices based on the franchisee's simple recitation or confirmation of certain facts, (2) seek to rectify those practices and their

consequences before the subject franchise sale and future franchise sales are completed, and, as a result, (3) avoid fraudulent sales;

- they facilitate a truer meeting of the minds, which is the foundation of all contract formation;
- they emphasize to the franchisee the importance of reading and understanding the franchise documents and seeking the advice of counsel; and
- they enable the franchisor to confirm that the franchisee has truthfully represented its own background, experience, and financial qualifications.

IFA understands the Policy's underpinnings, appreciates NASAA's desire to stop certain marketplace behavior that NASAA believes endangers prospective franchisees, and supports sensible, well-reasoned regulations as described above. However, IFA believes NASAA's approach—as articulated in the current draft of the Policy—requires further analysis and a slight re-balancing because it appears broader than necessary to accomplish NASAA's stated objectives. IFA interprets the current iteration of the Policy to:

- prohibit some business practices that really are not at the root of NASAA's concerns;
- inhibit legitimate due diligence by both franchisees and franchisors before they commit to long-term relationships;
- interfere unduly with the franchisor's and franchisee's freedom to contract on terms to which they agree;
- potentially harm the very franchisees whom NASAA seeks to protect;
- reflect an outdated view of franchisee experience and sophistication; and, of considerable concern,
- create a standard for evaluation that cannot, as a practical matter, be administered by state franchise regulators consistently, objectively, or timely because each regulator necessarily will be

called upon to view—through her or his own prism and with her or his own biases—nuanced language in Questionnaires and Acknowledgments used by franchisors operating in myriad industries and then subjectively judge whether or not that language complies with the Policy. Based on years of experience by numerous and varied-sized franchisors in myriad industries, state franchise regulators already subjectively and inconsistently interpret franchisor compliance with the objective disclosure requirements under NASAA's Disclosure Guidelines.

Franchisors do not "shift the compliance burden" to franchisees—and do not abdicate their responsibility to police their own sales personnel and agents—simply by using Questionnaires and Acknowledgments. Legal compliance remains the franchisor's responsibility, as it should. However, regardless of all the franchise legal compliance training in the world, both experienced and inexperienced franchise executives and sales personnel make honest mistakes or "slip up" from time to time. Questionnaires and Acknowledgments help franchisors detect those mistakes and slip-ups—and satisfy their legal-compliance obligations—before they metastasize into more grievous harm to franchisees.

Those within a franchise organization who are responsible for legal compliance are not privy to every discussion, email, Zoom call, and other communication between a franchise salesperson and the prospective franchisee. The language traditionally appearing in Questionnaires and Acknowledgments should be accepted short of its (1) improperly asking the franchisee to confirm that the franchisor has not violated the law, (2) relieving the franchisor from responsibility for all representations and commitments made in the franchise documents delivered to the franchisee pre-sale, (3) placing the franchise's potential success or failure solely on the franchisee's shoulders, or (4) condoning clearly-violative conduct. And to state the obvious, if a franchisee can demonstrate that franchisor misconduct actually occurred, no disclaimer, however worded, will or should save the franchisor.[2]

[2] NASAA avers that franchisees routinely make ***false*** acknowledgements because they fear that franchisors will ***not*** proceed with the transaction if the franchisees actually tell the truth. Even if true, it seems counter-intuitive to reward the untruthful, disingenuous franchisee that improperly induces a franchisor to enter into the franchise agreement rather than to allow that franchisor to seek factual information about that franchisee's actual sales process.

Prohibiting straightforward, non-legal provisions in Questionnaires and Acknowledgments, as does the Policy, appears to conflate two issues: (i) a waiver of legal rights versus (ii) factual investigation and the creation of evidence. Provisions in Questionnaires and Acknowledgments asking factual questions, including whether the franchisee understands the import of certain language in the franchise documents or certain aspects of the franchise program establish *evidentiary benchmarks* in the event the franchisee later alleges an entirely-different set of facts, asserts that it did not understand a particular provision after all, or claims that an oral statement was made when there was no earlier reference at all to any such statement. These provisions are a meaningful tool for franchisors to defeat specious franchisee claims—factual claims, not legal conclusions—that they received oral statements that were inconsistent with the language appearing in the actual written franchise documents they signed. Oral statements otherwise are difficult to disprove, creating a "he-said, she-said" situation.[3]

If NASAA's ultimate goal is to protect franchisees by preventing sales that violate state franchise statutes, then allowing Questionnaires and Acknowledgments that, in advance, weed out improprieties in the franchise-sales process and sensitize franchisees to the importance of understanding, and confirm that they understand, their prospective investments is a more-favorable outcome, than an approach that over-

[3] IFA does not understand NASAA's position that asking a franchisee to confirm its understanding of a particular provision is "inconsistent with plain English standards." That is not what the "plain English" standards were intended to address when added to the disclosure rules several decades ago. IFA interprets NASAA to be saying that franchisees do not have the capacity to read and understand a several-page long set of Questionnaires and Acknowledgments before signing a franchise agreement—in part because they are too "emotionally and financially invested" in completing their franchise transaction—yet, nonetheless, they do have the capacity to read and understand a complex, several-hundred-page long set of franchise documents and then to sign a lengthy "legally-binding" franchise agreement.

Moreover, NASAA's proposal to limit substantially and/or effectively eliminate franchisee pre-sale acknowledgments runs counter to the generally-accepted standards and practices found in other complex business transactions and even in routine consumer transactions.

IFA also finds troubling that NASAA eagerly cites cases that reach the "right" result—justifying its rationale for outlawing Questionnaires and Acknowledgments—but concomitantly concludes that courts reaching the opposite conclusion cannot have "recognized or appreciated the history and purpose of state franchise registration and disclosure laws."

regulates such sales, allows arguably-unlawful franchise sales to proceed, facilitates contrived arguments by franchisees with buyer's remorse about their investments, and invites expensive dispute resolution years later about what could have been easily prevented.

Questionnaires and Acknowledgments are not a burden-shifting mechanism. The Policy, as now drafted, would upend the bargained for agreement between franchisors and franchisees. A prospective franchisee could no longer make any representation about its understanding of the franchise documents, its qualifications, the information upon which it relied in entering the franchise agreement, or inconsistencies about the franchise opportunity that it learned along the way. A franchisor could not even ask a franchisee if it had the opportunity to be represented by counsel or to consult with other franchisees. That NASAA considers such a simple factual question to be a "waiver" or "disclaimer" of liability is hard to fathom. The franchisee makes its own conscious business decision whether or not to engage counsel, just like when that same franchisee buys a home or signs a mortgage.

The Policy, at Section II.C.3, proposes specific language to be added to each franchisor's Franchise Disclosure Document and franchise agreement or applicable state-specific addenda. IFA surmises that, at least in the states whose franchise laws contain anti-waiver provisions, this language (or something like it) should suffice to accomplish NASAA's desired objective without forcing franchisors and franchisees alike to forfeit the important benefits inuring to them from the use of Questionnaires and Acknowledgments.

Thank you for the opportunity of allowing us to comment on the Policy.