

January 4, 2022

NASAAComments@nasaa.org

cc: Section Chair, Andrea Seidt – Andrea.Seidt@com.state.oh.us
Project Group Chair, Dale Cantone – dcantone@oag.state.md.us

Re: Comments to Proposed Statement of Policy re: Use of Franchise Questionnaires and Acknowledgements dated December 6, 2021 (“Proposed Policy”)

Thank you for this opportunity to provide comments to the Proposed Policy. My comments express my own views, not the views of my law firm or our clients.

By way of background, I wrote my first franchise disclosure document and began practicing franchise law in 1979, the same year the original federal franchise disclosure rule took effect. Since then, I have dedicated my legal practice to franchise and distribution law. I primarily represent franchisors, suppliers and other brand owners that expand their business footprint by entering into contracts that allow independent operators to sell goods or services using the brand owner’s trademarks. However, I also represent prospective franchisees in their evaluation of franchise opportunities and, therefore, critically examine franchise disclosure documents (“FDDs”) written by others on a regular basis. I am a Certified Specialist in Franchise and Distribution Law by the Office of Legal Specialization of the State Bar of California, the only state that officially recognizes franchise and distribution law as an area of practice specialization, and the first woman to chair the American Bar Association’s Forum on Franchising, the preeminent organization for attorneys practicing franchise law. I regularly file applications and interact with state regulators in all registration states and believe that I have a deep understanding of the regulatory concerns addressed by the Proposed Policy.

* * * * *

Proposed Policy Section II.A. – Definitions:

One of the revelations of the FTC’s public hearing in November 2020 was the lack of any common understanding about what qualifies as a Disclaimer. The Proposed Policy makes no attempt to fix this.

The Proposed Policy does not need to define the terms *franchisee*, *franchise seller*, *franchisor* or *person* since these terms are already defined in NASAA’s 2008 Franchise Registration and Disclosure Guidelines (“NASAA Guidelines”). However, NASAA should add new definitions to the NASAA Guidelines for *Acknowledgement*, *Disclaimer*, and *Franchise Law*. This will improve the Proposed Policy’s clarity by providing consistency in the use of key terms and help all stakeholders – franchisors, franchisees, franchise regulators, courts and arbitrators ruling on cases involving Disclaimers – better understand NASAA’s regulatory objectives. I would propose these definitions:

DWT.COM

“Acknowledgement” means any type of statement that includes a Disclaimer that a franchisee must make as a condition to buying a franchise. An Acknowledgement may be in written or electronic format or recorded media and either separate from or in a franchise agreement.

“Disclaimer” means a statement by a franchisee that implies or suggests that (i) the franchisor is not responsible for or did not make statements to induce the franchisee to buy the franchise; (ii) the franchisee waives, relinquishes, renounces or repudiates any legal right or claim that the franchisee may have under a Franchise Law; or (iii) the franchisee denies that it is relying or has relied on statements made by a franchisor in deciding to buy the franchise. A statement is deemed to be made by a franchisor if it is made by the franchisor’s owners, management or employees, a franchise seller or another person acting on the franchisor’s behalf.

“Franchise Law” includes any federal or state law or regulation that governs the sale, termination, cancellation or non-renewal of a franchise or relationship between a franchisor and franchisee.

Proposed Policy Section II.B. – Attachments: The NASAA Guidelines currently require a franchisor to attach to its FDD a copy of all proposed agreements regarding the franchise offering. In my view, this includes written Acknowledgements and questionnaires separate from a franchise agreement. I have no objection to expanding the attachments to include a transcript of a recorded statement that a franchisor requires a franchisee to make before signing a binding agreement to buy a franchise when franchisors use recorded Acknowledgements instead of written Acknowledgements.

Proposed Policy Section II.C.1 and 2 – Prohibited Provisions: Sections II.C.1 and 2 are written in language that is too indefinite and abstract to enable franchisors to know what they can or cannot do during the pre-sale process. Section II.C.1 would expose a franchisor to liability if a franchisee decides after buying a franchise that something it was asked about or told during the pre-sale process was “subjective” or to its taste “unreasonable.”¹ A legal standard that is based on a franchisee’s state of mind is too susceptible to abuse and too imprecise to be administered fairly or consistently across franchisors. The proposed legal standard strays from franchise sales laws’ roots in securities law and common law fraud, which consider the truthfulness and honesty of the franchisor’s statements, not the franchisee’s state of mind.

With Section II.C.1 written so obtusely followed by an 11-point laundry list of prohibited statements, Sections II.C.1 and 2 cast the impression that Acknowledgements, questionnaires and other types of Disclaimers are illegal as against public policy. This, in my view, goes too far.

Acknowledgements, questionnaires and contractually required Disclaimers (whether they are in stand-alone documents signed before or concurrently with the franchise agreement or included in the franchise agreement in the form of a no-reliance provision) serve many useful functions. Franchise sales laws impose joint and several liability on franchisors for fraud due to false or misleading statements by their sales brokers or representatives that induce a franchisee to buy a franchise. Questionnaires, Acknowledgements and the equivalent serve the useful purpose of helping a franchisor ferret this out and take steps to mitigate unauthorized or contradictory representations by its sales agents and employees.²

¹ Since “or” separates “*subjective or unreasonable*” in subpart Section II.C.1.a, the Proposed Policy makes each one an independent violation apart from the more specific prohibition in subpart Section II.C.1.b.

² In its Statement of Basis and Purpose concerning the FTC Rule, 72 Fed. Reg. 15,444, 15,534 (Mar. 30, 2007), the FTC recognized that a contract integration clause serves a valid purpose: “at the very least, integration clauses and waivers protect a franchisor from unauthorized statements or representations made by non-agent, third parties.” I am not aware of anything that makes this purpose less valid today.

Among other things, a franchisor can avoid violating a franchise or unfair trade practice statute or committing fraud by not closing the deal.³

I support adopting a policy that forbids the use of a franchisee's answers to a questionnaire and its execution of a contract with an Acknowledgement or no-reliance clause as prima facie evidence of the franchisee's release or waiver of a statutory claim as a matter of law. I also support a policy that says that the lack of an anti-waiver provision in a state franchise sales laws is not proof that the state's legislature considered and rejected an anti-waiver provision as a fundamental public policy of the state.⁴

Beyond this, however, the Proposed Policy should not condemn the legitimate use of Acknowledgements and questionnaires or raise suspicion that franchisors that use them are engaged in questionable or illegal practices. Despite recognizing the utility of Acknowledgements and questionnaires to "root out dishonest sales personnel and avoid sales secured by fraud," NASAA accuses franchisors of using these devices for an improper purpose, to shift "the compliance burden from franchisors to prospective franchisees." NASAA cites no authority for its remark and, frankly, it is not exactly clear how a franchisor could shift to a franchisee legal duties that statutes clearly only impose on a franchisor. Nonetheless, the unfounded allegation from the chief policymaker of state franchise sales laws insinuates that franchisors use these tools dishonestly and unfairly puts franchisors that use these tools honestly on the defensive.

I also believe that Sections II.C.1 and 2 overregulate Acknowledgements and questionnaires. In my opinion, there is no independent need for Sections II.C.1 and 2 and no regulatory benefit furthered by Sections II.C.1 and 2 that Section II.C.3 does not accomplish. I explain this in my comments about the proposed Prohibited Statements in **Appendix A** to this letter.

Micromanaging the specific wording of Acknowledgements, questionnaires and no-reliance clauses will lead to extraordinary application processing delays as regulators debate with filers over whether particular language means the same thing as one of the prohibited provisions. The registration application processing time is already too long and uneven in many states to warrant this added burden.⁵ Application

³ Christina Fugate et al., *Protecting Your Franchise Agreement: Understanding Exceptions to the Parol Evidence Rule*, 37 Franchise L.J. 507, 517, 522, 37-SPG Franchise L.J. 507, 517, 522 (Spring 2018) (closing Acknowledgements benefit both parties by bolstering the integration and merger clauses in a franchise agreement).

⁴ I believe the only state without an express anti-waiver law is Florida. *Supra*, note 3 at 518. If the Proposed Policy adopts the revised version of Section II.C.3 that I propose, this should plug the gap in a state like Florida where the Florida Franchise Law forbids fraud in connection with franchise sales but lacks an anti-waiver provision.

⁵ Those of us who regularly file FDDs can attest to inconsistent experiences across registration states as to what qualifies as an impermissible Disclaimer when it comes to disclosures regarding a franchisee's initial investment (Item 7) and a franchisor's financial performance representations ("FPRs") (Item 19). In the case of Item 7, the FTC Rule's Compliance Guide illustrates an Item 7 disclosure with the following caveat:

"This estimates your start-up expenses. These expenses include payroll costs. These figures are estimates and we cannot guarantee that you will not have additional expenses starting the business. Your costs will depend on factors such as: how much you follow our methods and procedures; your management skill, experience and business acumen; local economic conditions; the local market for our product; the prevailing wage rate; competition; and the sales level reached during the initial period."

In my experience, some state regulators disallow the FTC's caveat language entirely, claiming the caveat is nothing but a Disclaimer, while others allow it in its entirety, while others limit the caveat to the third sentence (on the basis that the first sentence is redundant of Item 7 in its entirety). In the case of Item 19, NASAA's 2017 FPR Commentary

processing delays will only get worse if eleven new prohibited statements are added to the regulator watch list.

As a whole, the prohibited statements in Sections II.C.1 and 2 are unduly protective of franchisees, practically denying that buying a franchise presents risk. Every transaction presents risk. Furthermore, franchisees bear responsibility for being informed buyers.⁶ I believe NASAA would do a greater service to franchisees by amplifying the FTC’s message about the complexity of a franchise investment and the importance of reading the FDD and obtaining independent legal advice before signing a franchise agreement instead of focusing on attempting to manage the specific language in questionnaires, Acknowledgements and no-reliance clauses. My proposal for revising Section II.C.3 would amplify this message.

Proposed Policy Section II.C.3 – New Mandatory Disclosure: I do not object to adding a disclosure to the FDD along the lines of proposed Section II.C.3 because I believe the intent of proposed Section II.C.3 reflects current law anyway. A disclosure affirming current law should help to eliminate the risk that a court will incorrectly rule that statements that amount to a Disclaimer (as I propose defining this term) do not violate a state anti-waiver provision or fundamental public policy, or that a contractual integration or no-reliance clause bars evidence of pre-sale fraud. In my view, the potential that courts will continue to rule inconsistently on these subjects is a legitimate concern and a valid reason for adopting a policy along the lines of Section II.C.3.

However, I believe the language in proposed Section II.C.3 should be fine-tuned. Furthermore, the Proposed Policy offers no guidance as to where the proposed new disclosure should appear in the FDD. I would rephrase Section II.C.3 as shown below (incorporating the proposed definitions suggested earlier) and add the following disclosure to the Item 17 table:

x.	Acknowledgements and Disclaimers	No Acknowledgement that you are asked to sign or make before or when you buy a franchise and no provision in a franchise agreement shall operate as a Disclaimer. An Acknowledgement or provision in a franchise agreement operates as a Disclaimer if, as a condition of buying the franchise, you must (i) agree that the franchisor is not responsible for or did not make statements that you relied on in buying the franchise; or (ii) waive, relinquish, renounce or repudiate any right or claim under a Franchise Law. No provision in an Acknowledgement or franchise agreement may be used to bar evidence of a Disclaimer.
----	----------------------------------	--

requires a franchisor to explain the facts supporting the requisite “reasonable basis” to make the FPR while acknowledging that substantiating information “is fact-specific and varies from case to case, depending on the representation made.” But with no official guidance as to what is and is not a Disclaimer, state regulators disagree over what they will allow as an explanatory statement versus what they consider to be a Disclaimer. All of this cries out for the need to define “Disclaimer” in the context of FDD disclosures, Acknowledgements and questionnaires so that franchise stakeholders are not left guessing.

⁶ NASAA’s final policy should underscore that franchisees have responsibility for being informed purchasers when they buy a franchise. See Erin E. Conway, *No Fair! Finding an Equitable Balance in Enforcement of Disclaimer Provisions in Franchise Agreements and Franchise Disclosure Documents*, 33 Franchise L. J. 323, 337 (Winter 2014) (proposing a balancing test for enforcing Disclaimers in franchise agreements and other types of documents signed as part of the franchise sales process that would require franchisees to “conduct their own due diligence and ... be informed purchasers when entering into franchise agreements”).

I would also recommend that NASAA add a new section to the FDD state cover pages to communicate basic information about the franchisee’s legal rights in a Q&A format like the “How to Use This Franchise Disclosure Document” disclosures. A shortcoming that I find with the current NASAA Guidelines is that the FDD imparts very little information to a franchisee about their legal rights under state franchise laws. My proposal would educate a franchisee about what qualifies as an impermissible Disclaimer (as I proposed defining the term) in everyday language.

Before You Buy This Franchise

QUESTION	ANSWER
As a condition of selling a franchise to me, may the franchisor require that I waive any claims that I may have under a Franchise Law?	No. A franchisor may not ask you to waive your legal rights arising out of the franchise sales process.
As a condition of selling a franchise to me, may the franchisor require that I agree not to rely on statements that a franchisor made to me that contradict information in the FDD?	No. A franchisor may not ask you not to rely on statements that the franchisor (or a franchise seller or another person acting on the franchisor’s behalf) did in fact make that contradicts information in the FDD. An example of a contradiction is if a franchisor shares information with you about how much you may earn from the franchise when FDD Item 19 says the franchisor does not provide financial performance information. If you are unsure if something you have been told contradicts the FDD, ask a lawyer who is experienced in franchise matters.
The franchise agreement includes a provision that says that I am not relying on any statement made to me by the franchisor except for statements in the franchise agreement. In fact, I am relying on other statements that are not in the franchise agreement. Should I sign the franchise agreement anyway?	No. If in deciding to buy the franchise you are relying on promises that are not in the franchise agreement, ask the franchisor to add these promises to the franchise agreement. If the franchisor refuses to do so, you should not buy the franchise. Otherwise, the franchisor may dispute that it made these promises to you.
If a franchisor threatens not to sell a franchise to me unless I give false answers about the information I am relying on in buying the franchise, is it OK to give false answers?	No. You should not buy a franchise from a franchisor that suggests or coaches you not to tell the truth.
If I decide to buy a franchise and rely on statements that a franchisor makes that turn out to be false, do I have recourse?	Maybe. Your rights depend on the laws in the state where you operate the franchise. Contact a lawyer who is experienced in franchise matters to evaluate your claim.
The franchisor says I am qualified to buy the franchise, but I have my doubts about whether I am suited for this franchise. What should I do?	A franchise is a complex investment. Do not buy a franchise unless you believe the franchise is right for you. Contact a lawyer or business advisor who can help you evaluate if the franchise opportunity is right for you.

Finally, I have the following additional comments to proposed Section II.C.3:

1. Section II.C.3(ii) as written in the Proposed Policy is overbroad inasmuch as it would forbid a franchisee's reliance on *any statement – even truthful statements*. The Proposed Policy should not stifle the free flow of information during a prospective franchisee's due diligence. In the course of discussing an investment opportunity, questions get asked and answered about the franchise. A franchisor and its sales team naturally impart information about the franchise opportunity that the FDD does not address. A franchisee does not benefit from regulations that stifle honest conversation. The public policy underlying any pre-sale disclosure regime is to encourage the free flow of all *truthful* information. The final policy should not imply that a franchisor is providing contradictory information if it supplies honest information about a subject not in the FDD because the NASAA Guidelines do not require disclosure.
2. The last sentence in the proposed Section II.C.3 (“*This provision supersedes any other term of any document executed in connection with the franchise.*”) may throw into doubt the legitimate purpose of a contract integration clause. A contract integration clause fixes the parties' mutual understanding of their agreement. Although I believe that well-settled legal principles forbid a contract integration clause from being used to bar evidence of fraud, to the extent that courts may get this wrong, my proposed Item 17 disclosure would clarify this point.⁷
3. It is unclear if one of NASAA's objectives with the Proposed Policy is to influence state legislatures and courts to change the burden of proof for statutory fraud. As the chief policymaker of state franchise sales laws, NASAA should not leave its intentions ambiguous.

Without glossing over the subtle differences in what courts across registration states require to establish statutory fraud, the common elements may be summarized as: (i) the franchisor's statement at issue may not be puffery, opinion or a prediction about the future, but must pertain to past or present material facts; (ii) the franchisor either must know or should know that the statement it is accused of making was false or misleading when made; (iii) the statement must be made for the purpose of inducing a franchisee to buy a franchise; (iv) the franchisee must rely on the statement and its reliance must be reasonable or justifiable under the circumstances; and (v) the misstatement must cause the franchisee some damage, i.e., business losses.

The most controversial of these elements is the reliance element. Franchisee advocates argue that the law is unsettled as to whether proof of a franchisee's *justifiable or reasonable* reliance on a franchisor's misrepresentations is a necessary element of statutory fraud.⁸ They point out that virtually none of the statutes expressly require *justified or reasonable* reliance and advocate that even unjustified or unreasonable reliance on pre-sale misstatements is enough to support a statutory fraud claim.⁹

⁷ Restatement of Contracts 2d § 214 recognizes that a contract integration clause does not bar evidence establishing the contract's invalidity including evidence that fraud induced the contract's formation.

⁸ See discussion of the role of reliance in statutory franchise sales law claims in Dennis R. LaFiura, Peter Lagarias, and Victor Vital, *Comparison of the Trilogy: Common Law Fraud, Franchise Investment Laws, and Little FTC Laws: Remedies for Misrepresentations and Omissions in the Offer and Sale of Franchises*, American Bar Association 34th Annual Forum on Franchising, Tab W-24 (2011).

⁹ See Peter C. Lagarias and Bruce J. Napell, *Lessons from Thucydides on Distinguishing Statutory from Common Law Fraud in Franchise Disclosure Cases*, 35 Franchise L. J. 601, 621 (Spring 2016) (advocating that statutory fraud should be interpreted much more broadly than common law fraud and allow recovery for damages even when reliance on a franchisor's misstatement is unreasonable or not justified).

NASAA may be sympathetic to this argument. A revelation of the FTC's public hearing in November 2020 is the widespread problem of franchisees that sign franchise agreements without reading the FDD or engaging legal counsel to advise them about the legal significance of what they are being asked to sign.¹⁰ NASAA may realize that franchisees that fall into this category will face difficulty establishing their *reasonable or justified* reliance if they later sue a franchisor for pre-sale fraud.¹¹

However, courts do not interpret the civil liability provisions in state franchise sales laws to eliminate reliance. Courts repeatedly require proof of *reasonable or justifiable* reliance on statements that are misleading in order to establish statutory fraud.¹² The *Hanley v. Doctors Express* decision, which NASAA discusses in Section I of the Proposed Policy, makes the point that while an Acknowledgement cannot be construed to be a waiver of statutory rights that would compel a court to dismiss a franchisee's fraud claim based solely on the franchisee's execution of the Acknowledgement, the Acknowledgement provision remains factually relevant and "might be persuasive to a fact finder with respect to the *materiality* of the alleged misrepresentations and omissions and the *reasonableness* of plaintiffs' reliance on them." [*emphasis added*].¹³

The ambiguity over NASAA's intentions regarding the proper burden of proof for statutory fraud arises from NASAA's discussion of the *Randall* case in Section I of the Proposed Policy.¹⁴ NASAA correctly notes that *Randall* held that the Minnesota Franchise Act's anti-waiver provision voided a Disclaimer in the franchisor's disclosure document and franchise agreement. However, NASAA omits mentioning that *Randall* also held that *reasonable or justified* reliance was *not* an essential element of a statutory claim for fraud under the Minnesota Franchise Act. The portion of the *Randall* holding addressing reliance was subsequently questioned if not effectively overruled. See *Moxie Venture L.L.C. v. UPS Store, Inc.*, 156 F.Supp.3d 967, 969 (D. Minn., 2016) (citing *Ellering v. Sellstate Realty Systems Network, Inc.*, 801 F.Supp.2d 834 (D. Minn. 2011) and other cases that declined to follow *Randall*). NASAA's incomplete discussion of *Randall* creates uncertainty over whether the Proposed Policy supports removing *reasonable or justified* reliance from a franchisee's burden of proof.

To eliminate any doubt over NASAA's intentions, the final policy should expressly clarify that it does not propose changing existing law regarding the elements of proof for statutory fraud or the defenses to statutory fraud available to franchisors. While I support the position that an Acknowledgement,

¹⁰ https://www.ftc.gov/system/files/documents/videos/reviewing-franchise-rule-workshop-pros-cons-current-fdd-format/franchise_rule_workshop_transcript_-_current_fdd_format.pdf.

¹¹ See *MTR Capital, LLC v. LaVida Massage Franchise Development, Inc.*, 2020 WL 6536954, at *8 (E.D. Mich., 2020). In a case alleging statutory fraud under Florida's Franchise Act, the court found a lack of reliance by the franchisee on pre-sale statements by the franchisor. Despite adding its initials next to the franchise agreement's integration clause before signing the franchise agreement, the franchisee argued that the integration clause should be given less weight because the franchisee did not bother to consult an attorney before signing the franchise agreement and did not understand the clause's legal significance. Quoting Florida precedent, the court reminded the franchisee that the law "presumes that parties to a contract have read and understood its contents" ... and "respect the gravity inherent in the contracting process and carefully review a contract to ensure that material representations are expressed in the instrument." [omitting citation] ... "Plaintiff admittedly did no such thing and seeks to avoid the consequences of his inattention to detail."

¹² See supra note 8 (cases discussed in Section IV B). See also, the discussion of reliance in Section III of Scott E. Korzenowski and William L. Killion, *Litigating Claims of Fraud in Connection With the Sale of a Franchise*, American Bar Association, 32nd Annual Forum on Franchising, Tab 18 (2009).

¹³ *Hanley v. Doctors Express*, 2013 WL 690521, at *29 (D. Md. 2013).

¹⁴ *Randall v. Lady of America*, 532 F. Supp. 2d 1071, 1089 (D. Minn. 2007).

questionnaire or equivalent type of document and an integration clause or no-reliance Disclaimer in a franchise agreement should not remove from judicial review any statements, misrepresentations or actions made by a franchisor that may violate a state franchise sales law, when it comes to establishing if a franchisor's pre-sale statements, misrepresentations or actions amount to statutory fraud, the final policy should leave no doubt that a franchisee must still establish that an alleged misstatement is *actionable fraud* as interpreted by courts in the registration state.

* * * *

If NASAA's policy clearly states that Acknowledgements and questionnaires may not be used as a basis for dismissing statutory fraud claims, I see no need to complicate their use. If NASAA believes that franchisors tell their franchisees to give false answers on questionnaires or not to worry about signing a franchise agreement acknowledging facts that the franchisee knows are untrue, NASAA should enhance the FDD state cover page disclosures to alert franchisees not to fall for this practice. Finally, NASAA's policy should leave no doubt that it does not propose changing existing law regarding the elements of proof for statutory fraud.

Overall, I believe the proposed definitions and disclosures that I offer get to the heart of the matter in a measured way without burdening an already stressed franchise application review process or denying franchisors the well-recognized benefits that Acknowledgements and questionnaires accomplish.

* * * *

I appreciate your consideration of the ideas expressed in this letter and am available to address any follow-up questions that you may have.

Very truly yours,



Rochelle B. Spandorf

APPENDIX A

COMMENTS TO THE LIST OF PROHIBITED PROVISIONS IN SECTION II.C.2

LIST OF PROHIBITED STATEMENTS IN THE PROPOSED POLICY	COMMENTS
<p>That the Prospective franchisee has read or understands the FDD or any attachments thereto, including the franchise or other agreement.</p>	<p>The FTC tells a franchisee to read the FDD. A franchisee that chooses not to heed this advice will have difficulty establishing later that they relied on misstatements in the FDD that contributed to their business losses. The fact that a franchisor asks if the franchisee read or understands the FDD does not turn the franchisee's answer into an impermissible Disclaimer.</p>
<p>That the Prospective franchisee understands or comprehends the risks associated with the purchase of the franchise.</p>	<p>There is nothing wrong in asking a franchisee if they understand that there are business risks associated with buying a franchise. As noted, every transaction presents risks. The fact that a franchisee may not know what risks to expect is itself part of the risk of being a business owner.</p>
<p>That the Prospective Franchisee is qualified or suited to own and operate the franchise.</p>	<p>Rather than prohibit the statement, I believe the concern is better addressed in the proposed new Q&A disclosures to the state cover pages. Any potential harm with the prohibited disclosure is addressed by my proposed version of Section II.C.3.</p>
<p>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.</p>	<p>The Prohibited Statement does not address the real source of harm. There is no harm in a franchisee relying on other information about the franchise opportunity that is not in the FDD. Harm arises when the additional information that the prospect relies on (i) expressly contradicts information in the FDD, or (ii) is false or misleading. The natural process of investigating a franchise typically results in information being exchanged outside of what must be addressed in the FDD. This is not illegal if the information is truthful. Providing additional information about a subject on which the FDD is silent does not necessarily conflict with information in the FDD.</p>
<p>That neither franchisor nor franchise seller has made any representation, including any financial performance representation, outside of or different from the FDD and attachments thereto.</p>	<p>Rather than prohibit the statement, I believe the concern is better addressed in the proposed new Q&A disclosures to the state cover pages. Any potential harm with the prohibited disclosure is addressed by my proposed version of Section II.C.3.</p>

LIST OF PROHIBITED STATEMENTS IN THE PROPOSED POLICY	COMMENTS
That the success or failure of the franchise is dependent solely or primarily on franchisee.	Asking a franchisee to make this statement will not absolve the franchisor from its own fraud.
That the franchisor bears no liability or responsibility for franchisee's success or failure.	Similarly, asking a franchisee to make this statement will not absolve the franchisor from its own fraud.
That reiterates or duplicates any representation or statement already made elsewhere in the FDD and attachments thereto.	There is no harm caused by asking a franchisee to reiterate a representation in the FDD.
That the Prospective franchisee has had the opportunity to or has/has not actually consulted with professional advisors or consultants or other franchisees.	The FTC Cover Page tells the franchisee to speak with other franchisees and a lawyer or a business advisor. Asking the franchisee to acknowledge if they did reminds the franchisee of an important aspect of their due diligence. The reminder is harmless.
That the Prospective franchisee agrees or understands that the franchisor is relying on the Questionnaire, Acknowledgements, or similar documents, including to ensure that the sale of the franchise was made in compliance with state and federal law or that no unauthorized, inaccurate, or misleading statements were made.	Asking a franchisee to make this statement will not absolve the franchisor from its own fraud. Any potential harm with the prohibited disclosure is addressed by my proposed version of Section II.C.3.
That requires or suggests that the Prospective franchisees must agree to any Questionnaires, Acknowledgements, or similar documents prohibited by this Statement of Policy or provide false answers as a condition to the purchase of the franchise.	Rather than prohibit the statement, I believe the concern is better addressed in the proposed new Q&A disclosures to the state cover pages.