

The North American Securities Administrators Association's Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments

Caroline B. Fichter & Frank J. Sciremammano*

I. Introduction

On September 18, 2022, the members of the North American Securities Administrators Association (NASAA) voted to adopt a Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments (the SOP).¹ Under the SOP, franchisors are not allowed to use questionnaires, acknowledgments, and similar documents that appear in a franchise disclosure document (FDD) and applicable attachments and exhibits used in the offer and sale of franchises where an anti-waiver provision or anti-fraud provision applies to the offer or sale. This article provides an overview on the historical use of contractual questionnaires and acknowledgments, including case law regarding their admissibility and use in various fraud and statutory claims. The article then discusses the comment and policy-making process of the SOP and then the terms of the SOP itself. The article then concludes with the authors' thoughts on the effect the SOP will have on the franchise industry, from both the perspective of franchisees and the perspective of franchisors.



Ms. Fichter



Mr. Sciremammano

1. See N. AM. SEC. ADM'R ASS'N., NASAA STATEMENT OF POLICY REGARDING THE USE OF FRANCHISE QUESTIONNAIRES AND ACKNOWLEDGMENTS (SEPT. 18, 2022), <https://www.nasaa.org/wp-content/uploads/2022/09/NASAA-Franchise-Questionnaires-and-Acknowledgments-Statement-of-Policy-9-18-2022.pdf> [hereinafter Statement of Policy].

*Caroline B. Fichter (fichter@myfranchiselawyer.com) is a Partner at Bundy & Fichter PLLC in Seattle, Washington. Frank J. Sciremammano (frank.sciremammano@lathropgpm.com) is a Partner at Lathrop GPM LLP in Washington, DC.

II. Background

A. Contractual Questionnaires and Acknowledgments

For many years, questionnaires or acknowledgments have been included in franchise agreements or in documents that accompany the signing of a franchise agreement.² Generally, these questionnaires or acknowledgments (whether included in the franchise agreement or accompanying it) may require the prospective franchisee to acknowledge certain facts that would be considered material to the purchase and sale of the franchise. For example, questionnaires or acknowledgments may ask a prospective franchisee to confirm that they have reviewed the FDD and franchise agreement; they understand the success or failure of the franchise will depend on their own skill and factors beyond the franchisor's control; and no representative of the franchisor made statements related to costs, sales, or profits that contradict or supplement information provided in the FDD.³

B. Questionnaires and Acknowledgments in Litigation

Questionnaires and acknowledgments arise regularly in franchise litigation involving fraud or negligent misrepresentation claims. When asserting a fraud or negligent misrepresentation claim, a party generally must establish that he/she/it received a fraudulent or misleading representation, relied on the representation, that the representation was made with the requisite level of intent or carelessness, and that the reliance was reasonable or justified.⁴ In such cases, unless the alleged misrepresentation is actually in the FDD, one of the most important issues is whether the alleged misrepresentation was actually—in fact—made or relied upon. A contemporaneous questionnaire response or acknowledgment denying that such a misrepresentation was made or relied upon has historically been considered a highly relevant and powerful piece of evidence. So, when faced with a claim of fraud or misrepresentation, litigants may seek to introduce into evidence questionnaire responses or acknowledgments to disprove the claimant's allegations, demonstrate a lack of reliance by the claimant on the allegedly fraudulent statements, or possibly to question the credibility of the claimant.

Some courts have relied, at least in part, upon answers in questionnaires or acknowledgments to grant summary judgment against fraud or misrepresentation claims. For example, in *Symes v. Bahama Joe's Inc.*, a federal district court in Massachusetts cited acknowledgments signed by a franchisee in granting summary judgment against the franchisee's fraud claim.⁵ There,

2. See, e.g., *id.* at 1 (“Over at least the last 30 years, franchisors” have used questionnaires and acknowledgments); *Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, 1152 (S.D.N.Y. 1989).

3. Kerry Olson, Robin M. Spencer, & Larry Weinberg, *The Annotated Franchise Agreement*, AM. BAR ASS'N 33RD ANNUAL FORUM ON FRANCHISING, W-3, at 102 (2010). This paper was the impetus for a later treatise of the same name. See *THE ANNOTATED FRANCHISE AGREEMENT* (Nina Greene, Dawn Newton & Kerry Olson eds., 2018).

4. See, e.g., *Rosenberg*, 718 F. Supp. at 1152.

5. *Symes v. Bahama Joe's Inc.*, 1988 WL 92462, at *4 (D. Mass. Aug. 12, 1988).

the franchisee alleged fraud based on a host of pre-contractual alleged misrepresentations and omissions.⁶ However, in granting summary judgment, the court noted the franchisee and its owners were “assisted by counsel” in the purchase of their franchises, “signed three separate agreements” with the franchisor over the course of nearly six years, and, in each agreement, they acknowledged, among other things, that for their “business risk, . . . they had undertaken an independent investigation in the [the franchisor’s] operations, and . . . they did not rely on representations as to future profit.”⁷ The court reasoned that their allegations, in light of the circumstances and the contractual acknowledgments they signed, amounted to “no more than the failure of a risky business venture, one entered into by them without any guarantees on the part of the defendants.”⁸

Courts in Alaska,⁹ California,¹⁰ Florida,¹¹ New York,¹² New Jersey,¹³ Indiana,¹⁴ and Louisiana¹⁵ have all relied, at least in part, on answers in questionnaires or acknowledgments to grant summary judgment against franchisees’ fraud or misrepresentation claims. At least two courts have granted motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) to dismiss franchisees’ fraud claims based on the pleadings and the contractual acknowledgments at issue.¹⁶ One court specifically concluded when ruling on a motion to dismiss that, as a matter of law, “it is simply unreasonable to continue to rely on representations after stating in writing that you are not so relying.”¹⁷

6. *Id.* at *2–3.

7. *Id.* at *12–13.

8. *Id.* at *4 (internal citation and quotation omitted).

9. *McDonald’s Corp. v. Barnes*, 1993 WL 358556, at *3 (9th Cir. 1993) (affirming summary judgment against franchisee’s misrepresentation claim because franchisee could not have reasonably relied upon statement that franchisor would renegotiate a contract term when he acknowledged that no promises or inducements had been made outside the franchise agreement).

10. *Cal. Bagel v. Am. Bagel Co.*, 2000 WL 35798199 (C.D. Cal. June 7, 2000).

11. *Barnes v. Burger King Corp.*, 932 F. Supp. 1420, 1427 (S.D. Fla. 1996) (granting summary judgment against franchisee’s fraud claims and holding that the franchisee’s purported reliance on representations contained in a letter concerning the franchisor’s encroachment policy was unreasonable “as [the letter] flatly contradicted the terms of the UFOC and the Franchise Agreement”).

12. *Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, 1152–53 (S.D.N.Y. 1989) (granting summary judgment against franchisee’s unauthorized financial performance representation claims and concluding that the franchisee’s reliance on the alleged financial performance representation was unreasonable because, inter alia, the offering circular stated that “[n]either franchisor’s sales personnel nor any employee or officer of the franchisor is authorized to make any claims or statements as to the earnings, sales, or profits or prospects or chances of success that any franchisee can expect or that past franchisees have had.”).

13. *Sangemino v. Money Mailer, Inc.*, 1997 WL 452208, at *4 (D.N.J. 1997) (granting summary judgment against franchisee’s fraud claim and concluding it was unreasonable as a matter of law for the franchisee to rely on the alleged financial performance representations when the FDD stated the franchisor did not authorize financial performance representations).

14. *Hardee’s of Maumelle, Inc. v. Hardee’s Food Sys.*, 31 F.3d 573 (7th Cir. 1994).

15. *Am.’s Favorite Chicken v. Cajun Enters. Inc.*, 1996 WL 306350 (E.D. La. June 5, 1996).

16. *Siemer v. Quizno’s Franchise Co. LLC*, 2008 WL 904874, at *5 (N.D. Ill. Mar. 31, 2008); *Sherman v. Ben & Jerry’s*, 2009 WL 2462539, at *3–6 (D. Vt. Aug. 10, 2009) (granting motion to dismiss franchisee’s fraud claims based on contractual acknowledgments).

17. *Siemer*, 2008 WL 904874, at *5.

Other courts, however, have allowed fraud claims to survive the summary judgment and the motion to dismiss stage even when faced with questionnaires and acknowledgments, ruling instead that the questionnaires and acknowledgments may be considered by the trier of fact on questions of fact about whether the fraud occurred or the reliance was reasonable.¹⁸ In *Long John Silver's, Inc. v. Nickleson*, a federal court in Kentucky denied a franchisor's motion to dismiss a franchisee's fraud claims based on acknowledgments within the franchise agreement.¹⁹ But the court cautioned that the acknowledgments "should suppress a franchisee's reliance on the purported misstatements" and "will no doubt influence a jury's determination of whether [the franchisee's] reliance on the alleged untrue statements was reasonable."²⁰ Similarly, in *A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, the district court denied the franchisor's motion for summary judgment on the franchisee's franchise act claims based on disclaimers and the franchisee's affirmation that "no employee or person speaking on [Defendant's] behalf made" any financial performance representation but "question[ed] whether reliance of any such earnings statement by [the franchisor] in the face of unambiguous disclaimers and its own certification of non-reliance could be considered reasonable."²¹

Other courts have held that questionnaires and acknowledgments may not impact the element of reliance on certain fraud and misrepresentation claims because the questionnaires and acknowledgments at issue violated (1) the applicable state franchise law,²² and/or (2) the common law principle that a party who induces another party to enter a contract through fraud "cannot protect himself from the legal effect" of his fraud by contractual disclaimers.²³ Finally, some courts have been more likely to afford greater weight to questionnaires and acknowledgments when the countervailing evidence of fraud is insubstantial.²⁴

18. *Hanley v. Doctors Express Franchising, LLC*, 2013 WL 690521, at *29 (D. Md. Feb. 25, 2013).

19. *Long John Silver's, Inc. v. Nickleson*, 923 F. Supp. 2d 1004, 1018 (W.D. Ky. 2013).

20. *Id.*

21. *A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, 70 F. Supp. 3d 376, 405 (D.D.C. 2014).

22. *Randall v. Lady of Am. Franchise Corp.*, 532 F. Supp. 2d 1071, 1086 (D. Minn. 2007); *Solanki v. 7-Eleven, Inc.*, 2014 WL 320236 (S.D.N.Y. Jan. 29, 2014) (holding that disclaimers and acknowledgments did not bar franchisee's claims under New York Franchise Act); *Cluck-U Chicken v. Cluck-U Corp.*, 358 F. Supp. 3d 1295 (M.D. Fla. 2017) (holding that disclaimers did not make plaintiff-franchisee's reliance on misrepresentations unreasonable as a matter of law).

23. *Hanley*, 2013 WL 690521, at *30 (holding that disclaimers and acknowledgments in the FDD and franchise agreement did not bar franchisee's common law fraud or state franchise act claims related to financial performance representations and purportedly misleading information about the build out of the franchise) (quoting *Pease v. Wachovia SBA Lending, Inc.*, 6 A.3d 867, 888 (Md. 2010)).

24. See, e.g., *Yogo Factory Franchising, Inc. v. Ying*, 2014 WL 1783146 (D.N.J. May 5, 2014) (holding claim lacked merit and that a response to a questionnaire provided further evidence of that fact); *A Love of Food I, LLC v. Maoz Vegetarian USA, LLC*, 79 F. Supp. 3d 376, 405 (D.D.C. 2014) (dismissing fraud claim because the allegations of fraud were not stated with specificity and because in questionnaires franchisee denied receiving any financial representations).

III. NASAA and the SOP

A. Background on NASAA

NASAA is an organization that describes itself as a voluntary association of sixty-seven state, provincial, and territorial securities administrators in the United States, Canada, and Mexico.²⁵ It claims to be the “oldest international investor protection organization” and the “voice of state securities agencies responsible for efficient capital formation and grass-roots investor protection.”²⁶ NASAA’s self-professed goal is “protecting consumers who purchase securities or investment advice.”²⁷

As it relates to franchising, NASAA has established a Franchise and Business Opportunity Project Group—an advisory group made up of franchise practitioners representing state regulators, franchisee attorneys, and franchisor attorneys²⁸—and over the years NASAA and the Franchise and Business Opportunity Project Group have published various materials on franchising.²⁹ Some commentators, including several who sit on the Franchise and Business Opportunity Project Group, have described NASAA as having a “crucial role in the process of developing laws and regulations and interpreting those laws and regulations.”³⁰ Other commentators point out that “NASAA has no *direct* authority over franchising in the United States,” but that its “recommendations and policy initiatives have traditionally been given great weight by the states that regulate franchises.”³¹ Although the authors of this paper disagree as to the legal effect of NASAA policies and whether it is proper to look to NASAA’s policies for legal guidance, at least one state—Washington—has specifically directed its franchise regulators to “be guided” by the policies of NASAA when adopting guidelines for registration and disclosure of franchises.³²

25. WELCOME TO NASAA, <https://www.nasaa.org/about/> (last visited Apr. 21, 2023).

26. *Id.*

27. *Id.*

28. NASAA, ADVISORY COMM. TO THE NASAA FRANCHISE & BUS. OPPORTUNITY PROJECT GRP. CHARTER (effective Apr. 12, 2022), <https://www.nasaa.org/wp-content/uploads/2022/07/NASAA-Franchise-Advisory-Committee-Charter-4-12-2022.pdf>.

29. *See, e.g.*, NASAA, COMMENTARY ON 2008 FRANCHISE REGISTRATION & DISCLOSURE GUIDELINES, https://www.nasaa.org/wp-content/uploads/2011/08/FranchiseCommentary_final.pdf; NASAA, NASAA FRANCHISE COMMENTARY FINANCIAL PERFORMANCE REPRESENTATIONS (May 8, 2017), <https://www.nasaa.org/wp-content/uploads/2017/05/Financial-Performance-Representation-Commentary.pdf>.

30. Dale Cantone, Mark A. Kirsch & Theresa Leets, *The 2022 NASAA Statement of Policy and Other Regulatory Developments*, AM. BAR ASS’N 45TH ANNUAL FORUM ON FRANCHISING, W-13, at 9 (2022) (further stating that over the years, “states have followed and implemented the NASAA Statements of Policy in their review of Franchise Disclosure Documents without significant issues or problems”).

31. Mike Drumm, Matthew Kreutzer & John Moore, *Why Is the State Examiner Making Me Change That Disclosure? Dealing with the Unusual, Uncommon, or Atypical Comments that State Examiners Raise*, INT’L FRANCHISE ASS’N 52ND ANNUAL LEGAL SYMPOSIUM 1 (2019) (emphasis in original).

32. WASH. REV. CODE § 19.100.040(1).

B. Proposed SOP

In December 2021, NASAA and the Franchise and Business Opportunity Project Group invited public comment on a Proposed Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments (Proposed SOP).³³

i. Stated Justifications for the Proposed SOP

The Proposed SOP had the self-professed goal of seeking “to address the problem of inappropriate uses of franchise questionnaires and acknowledgments in franchise offerings.”³⁴ The Proposed SOP stated that “over the last 30 years, franchisors have included in their franchise agreements and FDDs language that they can use as a disclaimer of liability.”³⁵ The Proposed SOP further noted that “[f]ranchisors routinely seek to use Questionnaires, Acknowledgments, and other forms of contractually required disclaimers to insulate themselves from potential liability by franchisees alleging fraud or misrepresentations in the offer and sale of a franchise,” and that “some have been successful.”³⁶ The Proposed SOP alleged that “questionnaires and acknowledgments are not the most effective mechanisms for preventing fraud,” but they are “powerful mechanisms” to “defeat claims of fraud and misrepresentation regardless of what occurred in the franchise sales process” and allow “unscrupulous franchisors to avoid the consequences of franchise fraud.”³⁷ The Proposed SOP stated that some FDDs and franchise agreements contain questionnaires and acknowledgments that “serve no legitimate purpose,” are duplicative, “subjective [and] unreasonable,” or require the franchisee to state that they “understand specific disclosures,” and that such provisions “are inconsistent with ‘plain English standards’” and the legislative policies behind state franchise laws which “do not allow FDDs to be used as defense documents but serve to protect prospective franchis[ees].”³⁸

The Proposed SOP stated that “many courts have concluded that franchise contractual disclaimers, including Questionnaires and Acknowledgments, violate state Anti-Waiver Provisions.”³⁹ The Proposed SOP stated that “[i]n the opinion of the Section and the Project Group, Questionnaires and Acknowledgments violate state Anti-Waiver Provisions when they are used as contractual disclaimers that release or waive a franchisee’s rights

33. NASAA, REQUEST FOR PUBLIC COMMENT: PROPOSED STATEMENT OF POLICY REGARDING THE USE OF FRANCHISE QUESTIONNAIRES AND ACKNOWLEDGMENTS (2021), <https://www.nasaa.org/wp-content/uploads/2021/12/Request-for-Public-Comment-SOP-on-Franchise-Questionnaires-12-6-2021.pdf> [hereinafter NASAA PROPOSED SOP].

34. *Id.* at 1.

35. *Id.* at 2.

36. *Id.*

37. *Id.* at 2–3.

38. *Id.* at 5–6.

39. *Id.* at 4.

under a state franchise law” and that “[c]ourts that have found otherwise have not recognized or appreciated the history and purpose of state franchise registration and disclosure laws.”⁴⁰

ii. Summary of the Proposed SOP

The Proposed SOP prohibited franchisors from requiring prospective franchisees to make any statement in any questionnaire, acknowledgment, or similar document that is “subjective or unreasonable” or that (a) would cause a reasonable prospective franchisee to surrender or believe that they have surrendered rights to which they are entitled under federal or state law; (b) would have the effect of shifting the franchisor’s disclosure duties under federal or state law to the prospective franchisee; or (c) are otherwise prohibited statements under the Proposed SOP or are similar to the prohibited statements.⁴¹

The Proposed SOP also provided a nonexclusive list of eleven specific statements that are “prohibited” from being included in questionnaires, acknowledgments, and similar documents:

1. That the prospective franchisee has read or understands the FDD or any attachments thereto, including the franchise or other agreement.
2. That the prospective franchisee understands or comprehends the risks associated with the purchase of the franchise.
3. That the prospective franchisee is qualified or suited to own and operate the franchise.
4. 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.
5. 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.
6. That the success or failure of the franchise is dependent solely or primarily on franchisee.
7. That the franchisor bears no liability or responsibility for franchisee’s success or failure.
8. That the statement reiterates or duplicates any representation or statement already made elsewhere in the FDD and attachments thereto.
9. That the prospective franchisee has had the opportunity to or has/has not actually consulted with professional advisors or consultants or other franchisees.

⁴⁰. *Id.* at 5.

⁴¹. *Id.* at 5, 7–8.

10. That the prospective franchisee agrees or understands that the franchisor is relying on the questionnaires, Acknowledgments, 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.
11. That the statement requires or suggests that the prospective franchisee must agree to any questionnaires, Acknowledgments, or similar documents prohibited by this Statement of Policy or provide false answers as a condition to the purchase of the franchise.⁴²

The Proposed SOP also required franchisors to include in their FDD and franchise agreement, or applicable state-specific addenda to the FDD and franchise agreement, the following:

No statement, questionnaire, or acknowledgment signed or agreed to by a franchisee in connection with the commencement of the franchise relationship shall have the effect of (i) waiving any claims under any applicable state franchise law, including fraud in the inducement, or (ii) disclaiming reliance on any statement made by any franchisor, franchise seller, or other person acting on behalf of the franchisor. This provision supersedes any other term of any document executed in connection with the franchise.⁴³

The Proposed SOP also provided that any questionnaires or acknowledgments (or “similar documents”) that a franchisor requires a prospective franchisee to sign before entering into a franchise agreement must be referenced in Item 22 of the FDD and attached as an exhibit.⁴⁴ Under the Proposed SOP, if a franchisor requires a prospective franchisee to verbally respond to questionnaires, acknowledgments, or similar statements on video or other electronic media recording before entering into a franchise agreement, a written script of the proposed form of the questionnaires, acknowledgments, or similar statements must be referenced in Item 22 of the FDD and attached as an exhibit.⁴⁵

C. Public Comment

During the one-month comment period, a total of thirty-nine comments were submitted to NASAA regarding the Proposed SOP. The comments were varied, detailed, and nuanced. Twenty-five comments were generally in favor of the Proposed SOP, thirteen comments were generally opposed to the Proposed SOP, and one comment was generally neutral on the Proposed SOP. A comprehensive discussion of each specific comment is beyond the scope of this paper, but several themes and commonalities emerged.

42. *Id.* at 7.

43. *Id.* at 8.

44. *Id.* at 6.

45. *Id.* at 6–7.

i. Comments in Support of the Proposed SOP

Franchisees, franchise brokers, the operator of a franchisee website, and franchise attorneys submitted comments in support of the policy. Most of the attorneys who submitted comments in support described themselves as representing franchisees, but several stressed that they represented both franchisee and franchisor clients. Several commentators described questionnaires and acknowledgments as a “get out of jail free card”⁴⁶ for franchisors. One franchise broker described questionnaires as “nothing more than anti-franchisee tools” and an “example of inequity in franchising . . . utilized by ethically absent franchisors.”⁴⁷ A former franchisee explained that, without a prohibition on questionnaires and acknowledgments, franchisors and their agents will continue to act with “tacit approval to circumvent the Franchise Rule” so long “as they can get their victims—before they realize [that] they are victims—to state that they aren’t victims.”⁴⁸

The themes that emerged from the comments in support of the Proposed SOP were that (1) the franchise industry is plagued by franchisors and franchisor affiliates such as brokers and public relations firms who make promises or financial performance representations outside the FDD; (2) many franchisors tell prospective franchisees how to answer the questionnaires; (3) the primary use of questionnaires and acknowledgments was to defend against franchise fraud claims; (4) questionnaires and disclaimers deprive franchisees of the protection of state franchise laws; and (5) the Proposed SOP would deter unethical franchisors and improve standards for the franchise industry.

Commentators argued the Proposed SOP was necessary because “far too . . . many franchisees receive financial data outside the FDD.”⁴⁹ One attorney noted that, in one survey of franchisees, “17% (nearly one in every five franchise sales!) . . . indicated the franchisor’s salesperson had made statements to them related to sales, costs, and profits that were not included

46. See NASAA, Comment Letters on NASAA Proposed SOP (Dec. 2021–Jan. 2022). The following letters, among others, are available through NASAA’s website: Eric Karp & Thomas Ayres, Comment Letter on NASAA Proposed SOP, at 2 (Dec. 21, 2021), <https://www.nasaa.org/wp-content/uploads/2021/12/2021-12-21-Karp-Ayres-Comment-to-NASAA-RE-Questionnaires-and-Acknowledgments.pdf>; Jeffery S. Haff, Comment Letter on NASAA Proposed SOP, at 3 (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/NASAA-JSH-Proposed-Statement-of-Policy-Comments.pdf>; Andrew Malzahn, Comment Letter on NASAA Proposed SOP, at 2 (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/NASAA-AMM-Proposed-Statement-of-Policy-Comments-002-002-002.pdf>.

47. Kim G. Perrotta, Comment Letter on NASAA Proposed SOP, at 2 (Jan. 2, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/REQUEST-FOR-PUBLIC-COMMENT-FRANCHISE-QUESTIONNAIRES.pdf>.

48. Jim Lager, Comment Letter on NASAA Proposed SOP, at 2 (Dec. 21, 2021), <https://www.nasaa.org/wp-content/uploads/2021/12/122121-Jim-Lager-NASAA-REV2.pdf>.

49. Keith Miller, Comment Letter on NASAA Proposed SOP, at 1 (Jan. 4, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/NASAA-Request-for-Comment-on-Franchise-Questionnaires-and-Acknowledgments-Keith-Miller.pdf>.

in the FDD.”⁵⁰ A franchise consultant explained that “approximately 35 percent” of franchise systems use “FDDs [that] contain no financial performance representation[s]” and argued that it is “not believable” that franchisees who purchase franchises from those systems “bought the franchise with no knowledge of revenues.”⁵¹ He speculated that some franchisors do not make Item 19 representations, but will make unlawful financial performance representations to prospects outside the FDD through visual displays at discovery day, trade magazine articles, and “sponsored” franchisees.⁵² One franchise attorney stressed that prospective franchisees “have no reason to distinguish between information in the FDD and any other information” provided by the franchisor and that information provided outside the FDD “is more user-friendly, eye-catching and exciting. He noted that the difference a FDD and the marketing materials a franchisor provides is similar to the difference between an advertisement for a big screen TV and a user’s manual.”⁵³

Several commentators argued that questionnaires do not accurately reflect the sales process because unethical franchisor employees tell prospective franchisees how to answer the questionnaire, regardless of what happened in the sales process.⁵⁴ One attorney explained that he knew of a franchise system that “uniformly instructed its sales representatives to tell prospective franchisees to write ‘none’” in response to a questionnaire asking if they had received financial performance representations outside the FDD, while “uniformly training its sales representatives” to make such financial performance representations.⁵⁵ When a prospective franchisee checked yes when asked if he received sales information outside the FDD he “was told to change their answer . . . so the deal could be finalized.”⁵⁶ The attorney argued that questionnaires are problematic “because they undermine the actual facts with a contrived ‘contractual commitment’ that bears little resemblance to ‘the actual facts.’”⁵⁷

50. Malzahn, *supra* note 46, at 3.

51. Miller, *supra* note 49, at 1.

52. *Id.*

53. Bruce Napell, Comment Letter on NASAA Proposed SOP, at 1 (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/Proposed-SOP-Regarding-the-use-of-Questionnaires-and-Acknowledgments.pdf>.

54. Joseph S. Goode Comment Letter on NASAA Proposed SOP, at 2 (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/Goode-Letter-to-NASAA-final1-5-22.pdf>; Peter Greenfeld, Comment Letter on NASAA Proposed SOP, at 1 (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/Public-Comment-Policy-on-Questionnaires-and-Acknowledgments.pdf>; Robert Einhorn, Comment Letter on NASAA Proposed SOP, at 1 (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/NASAA-Statement-of-Policy-Regarding-the-Use-of-Franchise-Questionnaires-and-Acknowledgments.pdf>; Bruce Napell, Comment Letter on NASAA Proposed SOP, at 1 (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/Proposed-SOP-Regarding-the-use-of-Questionnaires-and-Acknowledgments.pdf>.

55. Goode, *supra* note 54, at 2.

56. *Id.*

57. *Id.*

Attorneys and franchisee advocates argued the primary purpose of franchise questionnaires and disclaimers are to “insulate franchisors from liability”⁵⁸ and “prevent legitimate instances of fraud from reaching a judge or jury.”⁵⁹ One attorney explained that questionnaires bar even legitimate fraud claims because “courts are predisposed to enforce contracts” and tend to “enforce disclaimers and accept questionnaires at face value”⁶⁰ Another franchisee attorney described a case where a franchisor made “as many as ten separate unlawful financial performance representations” to a prospective franchisee, who made “contemporaneous notes” of the majority of the financial performance representations, and the franchisor salesperson’s comments that the prospective franchisees “did not need to speak to a lawyer to review the FDD.”⁶¹ Despite what the attorney described as “the most well-documented fraud and financial performance representations I have seen in my career,” he stressed that “the franchisor (and/or its lawyers) were completely unfazed” because of the “countless acknowledgments . . . and disclaimers” in the FDD and the separate questionnaire signed by the franchisees.⁶²

Commentators in support of the Proposed SOP argued that, without it, the use of questionnaires in litigation would “void state franchise protection.”⁶³ They argue that “state legislatures have decided that certain false, misleading, and/or deceptive acts should be actionable,” but the pervasive use of questionnaires and acknowledgments “insulate (and maybe even indemnify) the franchisor” from liability for violating those laws. Another commentator stressed franchisors are not entitled to contravene public policy statutes by fine print contract terms.”⁶⁴

Finally, several commentators in support of the Proposed SOP emphasized that ethical franchisors had little to fear from the prohibition of certain statements in questionnaires and acknowledgments. In fact, they argued, the Proposed SOP would benefit ethical franchisors by making it harder for unethical franchisors to operate. Bruce Napell, a franchisee attorney, explained that “franchisors who play by the rules have no need of prophylactic questionnaires or disclaimers” and may include them in their FDDs because “their less scrupulous competitors use them to lower their cost of doing business.”⁶⁵ The Proposed SOP would end this “race to the bottom” in drafting FDDs.⁶⁶ John Gordon, a restaurant analyst and management consultant, put it more succinctly, noting that “top tier franchise operators

58. Einhorn, *supra* note 54, at 1.

59. Sean Kelly, Comment Letter on NASAA Proposed SOP, at 2 (Dec. 21, 2021), <https://www.nasaa.org/wp-content/uploads/2021/12/Sean-Kelly-Ltr-to-NASAA-010222.pdf>.

60. Napell, *supra* note 53, at 2.

61. Malzahn, *supra* note 46, at 1.

62. *Id.* at 2.

63. Haff, *supra* note 46, at 3.

64. Peter Lagarias, Comment Letter on NASAA Proposed SOP, at 4 (Jan. 4, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/sop-1-4-21.pdf>.

65. Napell, *supra* note 53, at 2.

66. *Id.*

don't need these clauses.”⁶⁷ Franchisee attorney Peter Greenfeld emphasized: “The franchise industry as a whole suffers [by] allowing bad apples to be a blight on franchising. Legitimate franchisors with legitimate sales techniques do not need . . . questionnaires and acknowledgments.”⁶⁸

ii. Comments in Opposition to the Proposed SOP

Twelve law firms, a franchise consultant, and a trade association submitted comments in opposition to the Proposed SOP.⁶⁹ The commentors generally raised objections related to the foundational assumptions underlying the Proposed SOP, including the stated justifications for the Proposed SOP, and the case law and evidence cited in support of the Proposed SOP; the language used in the Proposed SOP; and the likely practical effect of the Proposed SOP.

First, many commentors pointed out that, contrary to the justifications set forth in the Proposed SOP, questionnaires and acknowledgments are beneficial for franchisors and franchisees in a number of ways, such as to (1) root out and identify problematic franchise sales practices which can then be rectified both as to the transaction at issue and on a go-forward

67. John Gordon, Comment Letter on NASAA Proposed SOP (Jan. 4, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/NASAA-Dec-6-Support-Jan-4-2022-final.pdf>.

68. Greenfeld, *supra* note 54, at 1.

69. Lathrop GPM LLP Franchise Group, Comment Letter on NASAA Proposed SOP (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/Lathrop-GPMs-Response-to-NASAA-Acknowledgment-Policy-01-05-2022.pdf>; Michael H. Seid, Comment Letter on NASAA Proposed SOP (Dec. 20, 2021), <https://www.nasaa.org/wp-content/uploads/2021/12/Request-for-Public-Comment.pdf>; Cheng Cohen LLC, Comment Letter on NASAA Proposed SOP (July 13, 2018), <https://www.nasaa.org/wp-content/uploads/2018/07/Cheng-Cohen-LLC-Comments-on-Cover-Sheets-Proposal-c.pdf>; Plave Koch PLC Comment Letter on NASAA Proposed SOP (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/Plave-Koch-PLC-Comment-to-NASAA-re-proposed-policy-on-franchise-questionnaires.pdf>; Rochelle B. Spandorf, Comment Letter on NASAA Proposed SOP (Jan. 4, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/NASAA-Policy-on-Disclaimers-12-06-2021-Span-dorf-Public-Comments.pdf>; Jess A. Dance, Comment Letter on NASAA Proposed SOP (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/2022-01-05-Comments-on-NASAA-Proposal-re-Franchise-Questionnaires-and-Acknowledgments-c.pdf>; Thomas J. Kent, Jr. Comment Letter on NASAA Proposed SOP (Jan. 5, 2022), https://www.nasaa.org/wp-content/uploads/2021/12/4236_1.pdf; Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Comment Letter on NASAA Proposed SOP (Jan. 4, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/4872-3403-6232-v-3-NASAA-Proposal-on-Questionnaires-Comments.pdf>; Beata Krakus, Greensfelder, Hemker, & Gale, P.C., Comment Letter on NASAA Proposed SOP (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/Beata-Krakus-Response-NASAA-QA-Proposed-Statement-of-Policy.pdf>; Faegre Drinker Biddle & Reath LLP, Comment Letter on NASAA Proposed SOP (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/Comments-FaegreDrinker-BiddleReathLLP-NASAA-Proposed-Statement-of-Policy-Regarding-the-Use-of-Franchise-Questionnaires-and-Acknowledgements.pdf>; DLA Piper, LLP, Comment Letter on NASAA Proposed SOP (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/DLA-response-to-Request-for-Public-Comment-187361807.6.pdf>; Larkin Hoffman Daly & Lindgren Ltd., Comment Letter on NASAA Proposed SOP (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/Larkin-Hoffman-Comments-to-NASAAs-Proposed-Policy-Regarding-the-Use-of-Franchise-Questionnaires-and-Acknowledgments.pdf>; William Sentell, Comment Letter on NASAA Proposed SOP (Jan. 5, 2022), <https://www.nasaa.org/wp-content/uploads/2021/12/NASAA-Response-to-Request-for-Public-Comment-Akerman-1.pdf>. Mr. Sciremammano is a partner at Lathrop GPM, LLP, one of the entities that submitted a comment letter cited in this footnote.

basis; (2) identify prospective franchisees who have not done sufficient diligence, who may not understand the franchise offer, or who may be relying on inaccurate or false information; (3) confirm both parties' mutual understanding of the transaction and the underlying facts and assumptions at issue, which facilitates a truer meeting of the minds; and (4) provide material information and disclosures that are not otherwise identified in the FDD.⁷⁰ Indeed, one commentor opined that "[t]he primary reason Questionnaires and Acknowledgements are used by franchisors is to help 'unearth' either bad practices in the franchise sales process or to correct an innocent misunderstanding between the franchisor and franchisee before the franchisee makes a decision to purchase a franchise," and that "in both cases, Questionnaires and Acknowledgements serve goals that are consistent with the purposes of" franchise disclosure laws.⁷¹ The International Franchise Association likewise commented that "Questionnaires and Acknowledgments benefit both franchisors and franchisees," and that "it would be a disservice to the entire franchise community if the sweeping prohibitions in the [Proposed SOP] eliminated the many beneficial provisions in Questionnaires and Acknowledgments."⁷²

Many commentors expressed concern that acknowledgments and representations, like those prohibited under the Proposed SOP, are a common feature in numerous commercial transactions.⁷³ Indeed, in many commercial transactions, like franchising, the relationship between the parties is based on contract, and factual representations and acknowledgments by each contracting party is the foundation of the parties' relationship and an essential aspect of the parties' pre-sale due diligence. They ensure the parties' mutual understanding of the relevant facts and circumstances supporting their decisions to enter into and proceed with the transaction. Commentors further observed that questionnaires and acknowledgments are a standard practice in mergers and acquisition transactions and regulatory compliance schemes, and they are further routinely used in a multitude of circumstances involving small businesses and individual consumers, like residential and commercial real estate financing and leasing.⁷⁴ Commentors in support of the Proposed SOP uniformly argued that prohibiting these common provisions is contrary

70. Faegre Drinker, *supra* note 69, at 4; Int'l Franchise Ass'n, Comment Letter on NASAA Proposed SOP (Dec. 6, 2021), at 3–4, <https://www.nasaa.org/wp-content/uploads/2021/12/IFA-Response-to-NASAA-Request-for-Comment-on-Acknowledgments-and-Questionnaires.pdf>; Lathrop, *supra* note 69, at 7–10; Dance, *supra* note 69, at 2–3; DLA Piper, *supra* note 69, at 1–2; Greensfelder, *supra* note 69, at 1; Larkin Hoffman, *supra* note 69, at 3–4; Seid, *supra* note 69, at 1; Plave Koch, *supra* note 69, at 2; Baker, Donelson, *supra* note 69, at 2, 4; Spandorf, *supra* note 69, at 2–3.

71. DLA Piper, *supra* note 69, at 1.

72. Int'l Franchise Ass'n, *supra* note 70, at 3.

73. Lathrop, *supra* note 69, at 6–7; Seid, *supra* note 69, at 1–2; Plave Koch, *supra* note 69, at 3–4; Baker, Donelson, *supra* note 68, at 1–2; Int'l Franchise Ass'n, *supra* note 70, at 6 n.3 ("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.").

74. Plave Koch, *supra* note 69, at 3–4; Baker, Donelson, *supra* note 69, at 2.

to generally accepted standards and practices found in commercial transactions, and there is no compelling reason franchise transactions should be treated differently.

Commentors also observed that the Proposed SOP unfairly and without evidence “insinuates that franchisors use [questionnaires and acknowledgments] dishonestly.”⁷⁵ Indeed, one commentor stated that, based on his decades of franchise experience, “franchisors are not attempting to ‘defeat claims of fraud or misrepresentation’ during the franchise sales process by asking for an acknowledgment from franchise candidates. Rather, franchisors are trying to ensure the integrity of the recruitment process under the law.”⁷⁶ Indeed, commentors also took issue with the Proposed SOP’s apparent assumption of widespread fraud and misrepresentation in connection with the franchise sales process, with one describing that idea as “unsubstantiated and false.”⁷⁷ Commentors also objected to the Proposed SOP’s “implicit assumption” that assertions of fraud by failed franchisees are always meritorious and that “self-interested franchisee testimony in lawsuits is inherently more credible than contemporaneous responses to a questionnaire.”⁷⁸ Commentors further pointed out that the Proposed SOP relied on anonymous examples of bad franchisor conduct and questioned both (1) the extent of those examples and (2) whether they are representative of the franchise industry as a whole.⁷⁹ One commentor stated that it was not aware of “any evidence of pervasive franchise fraud.”⁸⁰ Another stated that “[o]ther than a limited number of court cases and anecdotal information provided by franchisee advocates, to my knowledge there has never been a study supporting” the notion that there is pervasive fraud in franchising.⁸¹

Many commentors also argued that the case law cited in the Proposed SOP was selectively chosen, did not support the Proposed SOP’s statements, and did not support the proposition that questionnaires and acknowledgments should not be used as evidence of reliance in litigation. To that end, the International Franchise Association found it “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.’”⁸² Other commentors observed that “none of the court opinions cited in the [Proposed SOP] states or holds that the statements in Questionnaires and Acknowledgments are unlawful or violate any of

75. Spandorf, *supra* note 69, at 3.

76. Seid, *supra* note 69, at 3.

77. Lathrop, *supra* note 69, at 23.

78. *Id.* at 14.

79. See, e.g., Int’l Franchise Ass’n, *supra* note 7-, at 3; Seid, *supra* note 69, at 3; Plave Koch, *supra* note 69, at 5 n.3.

80. Lathrop, *supra* note 69, at 23.

81. Seid, *supra* note 69, at 4.

82. Int’l Franchise Ass’n, *supra* note 70, at 6 n.3.

the state 'anti-waiver' laws," and that "[i]t does not appear that there is any extensive jurisprudence that supports banning or restricting Questionnaires and Acknowledgements."⁸³

Indeed, commentators posited that courts are skilled at evaluating the evidence provided by questionnaires and acknowledgments, and that, rather than giving dispositive weight to the answers given by a prospective franchisee to questionnaires and acknowledgments, courts actually take "a far more nuanced view, and ma[ke] assessments based upon the particular facts and circumstances of the claim."⁸⁴ Commentors pointed out that using a Questionnaire or Acknowledgment for the purpose of defending against a claim of fraud or misrepresentation to disprove the allegations—demonstrate a lack of reliance on an allegedly fraudulent statement, or to question the credibility of the franchisees—is "not a violation of law, but a legitimate exercise of a party's right to present relevant evidence and defend itself in court or other dispute resolution proceeding."⁸⁵ Commentors observed that courts "have been more likely to afford greater weight to Questionnaire and Acknowledgments when the countervailing evidence of fraud is insubstantial."⁸⁶

Commentors also pointed out that, on multiple occasions, the Federal Trade Commission (FTC) considered and rejected a prohibition of questionnaires and acknowledgments. Commentors reminded NASAA that, when preparing the 2007 Amended Franchise Rule, the FTC considered arguments related to whether "waivers and disclaimers" should be prohibited in franchise sales, and, after thorough analysis, the FTC decided only to prohibit disclaimers of information contained in FDDs and fully endorsed the idea of factual acknowledgments similar to those discussed in the Policy.⁸⁷ Thirteen years later, when the FTC conducted its decennial review of the FTC Rule and public workshop, the FTC again considered arguments regarding the use of acknowledgments and questionnaires and, again, did not take any action to prohibit them.⁸⁸

Many commentators also expressed concern that the proposed statement of policy was replete with imprecise language that makes it vague and ambiguous. Commentors pointed out that "questionnaires" and "acknowledgments" are not "disclaimers," "waivers," or "releases" as those terms are commonly defined. Indeed, as one commentator noted, one of the key takeaways from the FTC's decennial review of the Franchise Rule in 2020 was the complete

83. Lathrop, *supra* note 69, at 10–12.

84. *Id.* at 12.

85. *Id.*

86. *Id.* at 13.

87. See DLA Piper, *supra* note 69, at 2–3; see also FTC Franchise Rule, Statement of Basis and Purpose, 72 Fed. Reg. 15,533, 15,535 (Mar. 20, 2007) (discussing an example involving an ice cream store franchisor making an Item 19 financial performance representation pertaining to units based in Florida, and selling a franchise unit in Alaska, and stating: "Nothing in section 436.9(h) would prevent a franchisor from having a prospective franchisee sign a clear and conspicuous acknowledgment that the Florida-based performance representation does not apply to states such as Alaska").

88. See Faegre, *supra* note 69, at 2.

lack of any common understanding as to what qualifies as a “disclaimer,” and the NASAA Proposed SOP only further confuses that issue.⁸⁹ As another commentator noted, *Black’s Law Dictionary* defines “disclaimer” as a “renunciation of one’s legal right or claim,” “waiver” as the “voluntary relinquishment or abandonment—express or implied—of a legal right or advantage,” and “release” as the “liberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced.”⁹⁰ Commentors pointed out that factual statements made in response to questionnaires and acknowledgments, such as factual affirmations regarding the receipt of the FDD; the timing of the receipt of the FDD and the signing of the franchise agreement; the absence of representations from the franchisor and its personnel of information contrary to the FDD, including financial performance representations; and the accuracy of the prospective franchisee’s application and submissions,⁹¹ do not “waive,” “release,” or “disclaim” any claims, rights, or liabilities, any more than the recordation of true facts or conduct may impede a party from later asserting inconsistent facts.

Similarly, commentors opined that the Proposed SOP was too broad and exceeded its goal of reining in questionnaires and acknowledgments that violate state anti-waiver laws.⁹² The commentors argued that the Proposed SOP prohibits questionnaires and acknowledgments that are legitimate evidence of facts related to whether certain pre-sale disclosures were made or not made.

Several commentors expressed concern with the potential effect of the Proposed SOP. They pointed out that questionnaires and acknowledgments require that a franchisee is honest in its answers to specific factual questions, and that, as discussed earlier, if a franchisee’s answers to Questionnaires or Acknowledgments reveal potential problems with the sales process or the underlying understandings of the parties, the franchisor can stop the sale and address the issue before the sale is consummated. However, if franchisees knowingly and intentionally lie in statements to the franchisor, the Proposed SOP would protect them.⁹³ Commentors further pointed out that the Proposed SOP even cited, in support of the proposed policy, an anonymous comment to the FTC as part of its decennial review of the Franchise Rule in which a franchisee admitted to lying in response to a questionnaire in

89. Spandorf, *supra* note 69, at 1; see also Int’l Franchise Ass’n, *supra* note 70, at 3 (“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.”); Baker, Donelson, *supra* note 69, at 5 (noting the “confusion between factual affirmations and waivers.”).

90. Lathrop, *supra* note 69, at 5–6 (citing *Disclaimer, Waiver, Release*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

91. Baker, Donelson, *supra* note 69, at 5.

92. See, e.g., DLA Piper, *supra* note 69, at 4–5; Lathrop, *supra* note 69, at 10.

93. Cheng Cohen, *supra* note 69, at 2–3; Lathrop, *supra* note 69, at 15–16.

order to consummate the transaction.⁹⁴ Finally, most commentators provided detailed responses to some or all the eleven specific restricted questions in the Proposed SOP.⁹⁵

D. Final Statement of Policy and State Adoption

On September 18, 2022, NASAA formally adopted the Proposed SOP and stated that it would become effective on January 1, 2023. The final SOP adopted by NASAA did not materially differ from the original proposed SOP.⁹⁶

E. Several States Adopt the SOP and/or Enact Similar Legislative Provisions

As of May 2023, three states have taken regulatory or legislative action to adopt the SOP or otherwise enacted similar provisions. On January 23, 2023, the Washington State Department of Financial Institutions, Securities Division (DFI) issued a Notice of Preproposal Statement of Inquiry Concerning NASAA Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments stating that it was “considering proposing to amend [Washington’s Administrative Code] to formally adopt” the SOP.⁹⁷ DFI further stated that the SOP “prohibits provisions that would require a prospective franchisee to make statements that are subjective, unreasonable, or that attempt to absolve the franchisor or its agents of liability in connection with the sale of a franchise.”⁹⁸ DFI noted that the statements prohibited by the SOP “are also inconsistent with . . . the anti-waiver provisions” of Washington State’s franchise law and, accordingly, “the adoption of the [SOP] does not represent a material change” in Washington’s franchise regulations. Instead, DFI reasoned that “adoption of the [SOP] would aid franchisors in complying with existing Washington law by providing specific examples of prohibited questionnaires and acknowledgments.”⁹⁹ Washington

94. NASAA PROPOSED SOP, *supra* note 33, at 2 n.4. Similarly, the Policy cites *Braatz, L.L.C. v. Red Mango FC, L.L.C.*, 642 F. App’x 406 (5th Cir. 2016), in which a franchisee alleged that it knowingly changed two truthful answers in a questionnaire to consummate the transaction. The Policy noted that dishonesty should not be rewarded.

95. See, e.g., Lathrop, *supra* note 69, at 16–20; Faegre, *supra* note 69, at, at 3–4; Greensfelder, *supra* note 69, at 2; Baker, Donelson, *supra* note 69, at 6–7; Spandorf, *supra* note 69, at 9–10; DLA Piper, *supra* note 69, at 2–4; Larkin Hoffman, *supra* note 69, at 2–7.

96. The most significant change that was made between the Proposed SOP and the final SOP is the inclusion of footnote 15, which states that the SOP is “not intended to prohibit a [f]ranchisor from conducting factfinding or asking [p]rospective franchisees questions about the sales process, but [f]ranchisors may not require a [p]rospective franchisee to document and sign statements that act as waivers in violation of state law” NASAA Statement of Policy Regarding the Use of Questionnaires and Acknowledgments 6 n.15 (Sept. 18, 2022), <https://www.nasaa.org/wp-content/uploads/2022/09/NASAA-Franchise-Questionnaires-and-Acknowledgments-Statement-of-Policy-9-18-2022.pdf> (effective Jan. 1, 2023).

97. Wash. Dept. of Fin. Inst., Notice of Preproposal Statement of Inquiry Concerning NASAA Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments (Jan. 23, 2023), <https://dfi.wa.gov/sites/default/files/cr-101-memo-nasaa-sop-franchise.pdf>.

98. *Id.*

99. *Id.* The adoption of the SOP in Washington seems to be a foregone conclusion. In February 2023, in an email sent to franchise practitioners, which is on file with the authors, DFI

has since concluded the rulemaking process and adopted the SOP effective September 18, 2023.¹⁰⁰

On January 26, 2023, the Maryland Office of the Attorney General, Securities Division, issued an interpretive opinion regarding the SOP.¹⁰¹ It noted that Maryland franchise regulations contained an anti-waiver provision and that Maryland Securities Division examiners have required franchisors registering in Maryland to include language in their FDDs that such questionnaires and acknowledgments “may violate the Maryland anti-waiver provision” and that they “are not intended to nor shall they act as a release, estoppel or waiver of any liability” under Maryland franchise law.¹⁰² The interpretive opinion directed franchisors either currently registered or seeking registration in Maryland to do three things:

- (1) Include the provision described in Section II(C)(3) of the SOP in its FDD and franchise agreements;
- (2) Delete their questionnaires or acknowledgments that are contrary to the SOP, or include a statement that their questionnaires and those specific Acknowledgments shall not apply to prospective franchisees who are Maryland residents or who seeks to purchase a franchise located in Maryland; and
- (3) Update its offering materials to comply with the NASAA SOP in the next amendment or renewal, whichever comes first, that the franchisor files with the Securities Division for that franchise offering.¹⁰³

However, open questions remain regarding the enforceability of the Maryland Interpretive Opinion. It cites for its authority Section 14-209 of the Maryland Franchise Law and Code of Maryland Regulations 02.02.08.13B.¹⁰⁴ But Regulation 02.02.08.13B addresses financial statements, not waivers, the subject of the SOP, or the Interpretive Opinion. And although Section 14-209 of the Maryland Franchise Law provides that the Commissioner may issue interpretive opinions, the law also provides that such an opinion must be made only in response to a written request, and it

advised all franchisors with offerings registered in Washington that DFI expected the SOP would be adopted, despite the public comment period being open until June 2023. *See also Further Developments Relating to NASAA Statement of Policy on Franchisors’ Use of Franchise Questionnaires and Acknowledgements*, HUCK BOUMA (Feb. 10, 2023), <https://www.huckbouma.com/blog/2023/02/further-developments-relating-to-nasaa-statement-of-policy-on-franchisors-use-of-franchise-questionnaires-and-acknowledgements> (“In practice the Washington franchise examiners have already been issuing comments requiring revisions to the acknowledgments and questionnaire used by franchisors.”).

100. Wash. Dept. of Fin. Insts., Sec. Div. Rule-Making Order CR-103P (December 2017) (filed Aug. 18, 2023), <https://dfi.wa.gov/sites/default/files/nasaa-sop-cr-103.pdf>.

101. Md. Off. of the Att’y Gen., Sec. Div., Interpretive Opinion/No Action Position Adopting NASAA Statement of Policy Regarding the Use for Franchise Questionnaires and Acknowledgments (Jan. 23, 2023), https://www.marylandattorneygeneral.gov/Securities%20Documents/Franchise%20_SOP_Revised_022323.pdf.

102. *Id.* at 1.

103. *Id.* at 3.

104. *See* MD. CODE ANN., BUS. REG. § 14-209; MD. CODE REGS. 2.02.08.13B.

is not clear whether a written request was in fact made to the Commissioner for the Interpretive Opinion.¹⁰⁵

Finally, on September 29, 2022, California Governor Gavin Newsom signed Assembly Bill 676, which amended the California Franchise Investment Law and the California Franchise Relations Act. The California Franchise Relations Act was amended to include an anti-waiver provision,¹⁰⁶ and the California Franchise Investment Law was amended to include a new section providing that any provision of a franchise agreement, franchise disclosure document, acknowledgment, questionnaire, or other writing, disclaiming or denying any of the following, is contrary to public policy, void, and unenforceable:

- (1) Representations made by the franchisor or its personnel or agents to a prospective franchisee;
- (2) Reliance by a franchisee on any representation made by the franchisor or its personnel or agents;
- (3) Reliance by a franchisee on the FDD, including any exhibit; or
- (4) Violations of any provision of the California Franchise Investment law is contrary to public policy and therefore void and unenforceable.¹⁰⁷

IV. Effects of the SOP and the Reaction to It from the Perspective of Franchisors and Franchisees

A. The Franchisor Perspective and Effects

Franchising is subject to a comprehensive regulatory scheme, so it is important to place NASAA's role and its SOP into context: NASAA is a nonprofit trade association for state securities administrators.¹⁰⁸ It is not a governmental or regulatory agency, and its pronouncements do not carry the weight or force of laws or regulations. Indeed, several courts have recognized that NASAA "guidelines" and "policy statements," in both franchise and non-franchise contexts, are legally irrelevant unless adopted by federal or state legislatures or regulatory bodies pursuant to proscribed legislative and regulatory rule making procedures.¹⁰⁹ And for good reason—NASAA "policies"

105. See MD. CODE ANN., BUS. REG. § 14-209(a).

106. CAL. BUS. & PROF. CODE § 20015(b).

107. CAL. CORP. CODE § 31512.1.

108. See Comment Letter from Anthony Chereso to Kelly Laufman on Division Request for Comment on Revised Rule 1301-6-3-90 (May 9, 2022), <https://www.ipa.com/wp-content/uploads/2022/05/IPA-Letter-to-Ohio-Division-of-Securities-on-Securities-rule-update-5.9.22-FINAL.pdf>.

109. See, e.g., *Platsis v. E.F. Hutton & Co. Inc.*, 642 F. Supp. 1277, 1294 (W.D. Mich. 1986) (disregarding NASAA guidelines related to oil and gas offering materials because the "guidelines were not adopted in Michigan until . . . after plaintiff's investments. Accordingly, they cannot be deemed binding at the time of plaintiff's investment."), *aff'd*, 829 F.2d 13 (6th Cir. 1987); *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1120 (Del. Ch. 2008) (disregarding NASAA guidelines related to commodities pool operators because "there is no allegation that Delaware has adopted the NASAA Guidelines; in fact, the Cargill Plaintiffs note

are not subject to the rigorous administrative inquiry and deliberation demanded by legislative and regulatory rule-making processes.¹¹⁰

The SOP has no legal effect in jurisdictions without disclosure laws. In those jurisdictions, the FTC's Franchise Rule is the governing authority.¹¹¹ Nothing in the Franchise Rule prohibits questionnaires and acknowledgments, and, as discussed earlier, the FTC considered and rejected a prohibition of questionnaires and acknowledgments multiple times.

With respect to the fourteen states with anti-waiver laws, each of those states have statutory and regulatory laws, rules, and processes that must be followed before the SOP can take effect. Those laws and rules are designed to permit public comment, the submission of evidence, and public accountability before statutory and regulatory changes are made. As discussed earlier, as of the date of this publication, only three states—Washington, Maryland, and California—have taken formal actions to adopt and implement the SOP, or a similar legislative provision, under their legislative and administrative processes.

Anecdotally, it appears some franchise regulators have applied the SOP to franchise registrations and renewals regardless of whether their state has formally adopted the SOP. That application should be troubling to any regulated party. Although many state regulators have statutory or regulatory discretion to interpret the FDD disclosure rules,¹¹² the policy set forth in the SOP is not a mere interpretation of existing law; it is a substantive change in the content of the FDD. Specifically, the content of the FDD is changed by (1) requiring the disclosure of Questionnaires and Acknowledgments in Item 22 and (2) prohibiting certain material disclosures and statements.¹¹³ As such, it cannot be implemented under the guise of regulatory discretion.

Finally, as more jurisdictions formally adopt bans on questionnaires and acknowledgments in franchise agreements, and questionnaires and acknowledgments start disappearing from franchise agreements, the SOP will

that Delaware is not listed among the twenty states that have adopted the Guidelines.”); *Andrew v. Power Mktg. Direct, Inc.*, 2008 WL 4458865, at *2 (D.S.C. Sept. 29, 2008) (disregarding the requirements of a NASAA cover-sheet risk factors disclosure and holding that “adherence to the NASAA form and guidelines do not appear to be required by any specific FTC regulation”).

110. For example, the lack of public access to the Project Group's data, evidence, and research is not fair or transparent and further diminishes the credibility of the SOP. Moreover, those concerns are only compounded by the fact that the Proposed SOP was adopted with virtually no material changes, and no response or adjudication of the significant concerns raised in public comments.

111. The common law and statutes of general applicability, such as unfair trade practice acts, are also relevant in those states, to the extent that they address the use of questionnaires and waivers.

112. CAL. CORP. CODE § 31114; HAW. REV. STAT. § 482E-3(4); HAW. REV. STAT. § 482E-3(22); ILL. COMP. STAT. §§ 705/9 and 705/32; IND. CODE § 23-2-2.5-13.1(b)(6); MD. CODE REGS. § 02.02.08.05 or 02.02.08.06(E); WASH. REV. CODE § 19.100.040(1).

113. See, e.g., Lathrop, *supra* note 69, at 22.

ultimately lead to an increase in litigation and a decrease in early adjudication of fraud and misrepresentation claims.¹¹⁴

B. The Franchisee Perspective on the SOP and Its Effects

From the franchisee perspective, the SOP eliminates a substantial barrier to franchisees' ability to advance otherwise meritorious fraud claims. Acknowledgments and questionnaires gained the NASAA advisory committee's attention because they were (1) frequently one of the strongest pieces of evidence in defeating franchisees' fraud claims, and (2) practically ubiquitous in FDDs and franchise agreements.

The franchisor community has long argued the disclaimers, acknowledgments and questionnaires were necessary to police franchise sales and deter unscrupulous brokers. However, very few of the comments submitted to NASAA provided a single specific example of when a franchise sale was stopped, a salesperson retrained, or a broker terminated because of an issue raised by a prospective franchisees' response to a questionnaire. Conversely, several commentators in support of the policy provided examples of the "weaponized questionnaires and acknowledgments" defeating franchise fraud claims.¹¹⁵ In each example, the case turned not on whether the franchisor's representative made the financial performance representation, side-deal, or verbal promise, but whether the questionnaire, acknowledgment, or disclaimer gave the franchisor a "get of jail free" card to escape any liability for that statement.¹¹⁶

In short, franchisees will view the SOP as a significant first step toward preventing unethical franchisors from escaping liability for their fraudulent practices. It also dramatically deepens the divide between the potential legal rights and the strength of potential claims of franchisees in registration versus non-registration states.

The effects of the SOP for franchisees in registration states falls into two categories: (1) franchisees who purchased their franchises after NASAA issued the SOP; and (2) franchisees who purchased before the SOP. For the post-SOP franchisees, if they purchase a registered franchise in a state that has adopted the SOP, they will not be asked to fill out a questionnaire or sign a franchise agreement containing the prohibited statements. If a post-SOP franchisee later files a claim for state franchise violations, fraud, or negligent misrepresentation, the franchisor will likely be unable to use the disclaimers, acknowledgments and/or questionnaires to defend against the claim. Not only will a franchisor be unable to move for summary judgment

114. Ronald K. Gardner & Natalma (Tami) McKnew, *The Effect of Anti-Waiver Clauses in Franchise Litigation*, INT'L FRANCHISE ASS'N 55TH ANNUAL LEGAL SYMPOSIUM, at 11 (2023) ("The authors . . . agree that the SOP will likely lead to an increase in litigation.").

115. Brandon C. Moore, Comment Letter on NASAA PROPOSED SOP, at 1 (Jan. 4, 2022), <https://www.unhappyfranchisee.com/wp-content/uploads/2022/01/Brandon-Moore-Ltr-to-NASAA-010422.pdf>.

116. Malzahn, *supra* note 69, at 2; Karp & Ayres, *supra* note 46, at 2; Haff, *supra* note 46, at 3.

on the basis of questionnaire answers or acknowledgments alone, but also it will be unable to create a question of fact on the same basis. By prohibiting the existence of prohibited statements in questionnaires and acknowledgments, the NASAA SOP eliminates key pieces of evidence that franchisors can use to defeat reliance.

This does not mean that the franchisee plaintiff's burden is minimal. Under the current case law, the plaintiff-franchisee will still have to prove that a franchisor's representative made a fraudulent statement and that the plaintiff-franchisee reasonably and justifiably relied upon it. Additionally, franchisors will still have the ability to introduce any other evidence that it has to defend against the claims. Additionally, a franchisee making claims related to unlawful financial performance representations will still have to convince a trier of fact that the mandatory language in Item 19 does not negate their reliance.¹¹⁷

The SOP may also aid franchisees in registration states who purchased franchises before the enactment of the SOP or franchisees in states such as Oregon that do not require franchisor registration but do have state franchise laws with anti-waiver provisions. An attorney representing such a franchisee can argue that, in the SOP, NASAA clarified an application of existing law and regulations and that the SOP should be applied retroactively. The SOP states "in the opinion of the Section and Project Group" questionnaires and acknowledgments violate state franchise anti-waiver provisions "when they are used as contractual disclaimers" and a franchisee "should have [the] opportunity" to explain a discrepancy between their answer on a questionnaire and their later claims to a fact-finder.¹¹⁸ That section and the project group's argument closely follows the conclusions of the *Randall* and *Hanley* courts, which will allow franchisee attorneys to argue that the SOP re-affirms a decades-old interpretation of state franchise law. The franchisee attorney could also point out that Maryland found "good cause" to adopt the SOP effective January 30, 2023, without conducting any additional rule making, and that the Washington franchise regulators, in seeking to move forward with rule making, have stated that the prohibited statements targeted in the SOP "are inconsistent with" Washington law and that the adoption of the SOP "does not represent a material change in the requirements for franchise offerings in Washington."¹¹⁹

Unfortunately for franchisees, the SOP only deepens the chasm between franchisees who enjoy the benefit of state protection and those who do not. NASAA noted that the FTC Franchise Rule "include[s] a limited ban on disclaimers" but "did not specifically address a franchisor's use of questionnaires or the effect of acknowledgments on a franchisee's fraud claims."¹²⁰ The

117. Malzahn, *supra* note 68, at 2; Karp & Ayres, *supra* note 46, at 2; Haff, *supra* note 46, at 3.

118. NASAA PROPOSED SOP, *supra* note 33, at 2.

119. Wash. Dept. of Fin. Inst., *supra* note 97, at 1.

120. NASAA PROPOSED SOP, *supra* note 33, at 2.

FTC recently sought comment on the use of disclaimers and questionnaires but “has not addressed directly whether or when those provisions violate the FTC Franchise Rule.”¹²¹ Without specific FTC guidance, the question is left to the states, leading to inconsistencies.

Given their effectiveness in litigation, it is unlikely that franchisors will remove questionnaires and acknowledgments from the FDDs and franchise agreements that they use in non-registration states. This approach is not without risk. First, state regulators may be skeptical of franchise systems that use different disclosure documents for registration and non-registration states and subject those franchise offerings to closer scrutiny. Second, a franchisor who uses multiple versions of FDDs and franchise agreements runs the risk of errantly giving a non-compliant FDD and franchise agreement to a prospective franchisee. In those cases, franchisee counsel not only can argue that are the waivers, disclaimers, and questionnaires inadmissible in a franchise fraud case, but also can allege an additional technical violation of a state franchise statute and request recession.

V. Conclusion

The SOP has been one of the most discussed and controversial issues in franchise law since it was proposed in December 2021, and the immediate and long-term impacts of it are unclear. It is expected that additional states may commence legislative, regulatory, and/or administrative proceedings to adopt some or all of the SOP and the policies that it discusses, and the FTC may weigh in on the issues. The debate over the use of questionnaires and acknowledgments in the franchise sales closing process, and their use in litigation between the parties, is only getting started.

121. *Id.*