

## **NASAA Shuts Down Use of Acknowledgments and Questionnaires in Franchise Sales Process**

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The North American Securities Administrators Association, Inc. (“NASAA”) has just adopted a new policy regarding the use of franchise questionnaires and acknowledgments in the franchise sales process. In its Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments (“Statement of Policy”), NASAA takes a hard stance against franchisors’ using questionnaires in the franchise sales process and requiring prospective franchisees to make certain heretofore standard acknowledgments in franchise agreements. The full text of the Statement of Policy can be found [here](#).

Many franchisors will need to change the way they use acknowledgments and questionnaires in their agreements and Franchise Disclosure Document (“FDD”) in order to comply with the Statement of Policy, which becomes effective on January 1, 2023. Franchisors may even elect to do away with acknowledgments and questionnaires altogether.

Currently, franchisors rely on the use of acknowledgments and questionnaires in the franchise sales process for a variety of reasons. Acknowledgments and questionnaires allow franchisors to ensure its sales personnel followed the required and appropriate sales process. For example, in evaluating a prospective franchisee’s responses to a questionnaire, a franchisor may discover that inaccurate information was given to a prospective franchisee, or that not enough time passed between delivery of the FDD and execution of the franchise agreement, which would lead most franchisors to either remedy the violation or not proceed with the sale. Acknowledgments and questionnaires are also important tools for confirming that a prospective franchisee understands the risks of the business and has conducted due diligence on the franchise opportunity.

However, NASAA now views the use of acknowledgments and questionnaires much differently. In its

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new Statement of Policy, it calls them a “powerful defense mechanism[] that [unscrupulous] franchisors can use to defeat claims of fraud and misrepresentation regardless of what has occurred in the franchise sales process” and states that it believes the use of acknowledgments and questionnaires has inappropriately shifted the burden of policing the franchise sales process from franchisors to prospective franchisees: “It should be the franchisor’s burden to police its own sales personnel and agents; franchisees should not have to confirm that no violations of law have occurred during their own sales process.” Additionally, NASAA notes that state regulators have come across FDDs and franchise agreements they believe have “questions and representations that serve no legitimate purpose.”

In December 2021, NASAA issued a request for public comment on the Statement of Policy. Nine months later, notwithstanding numerous comments challenging the initial version, NASAA adopted the Statement of Policy with virtually no changes. The Statement of Policy requires a franchisor to attach a copy of any questionnaire, acknowledgments, and/or written scripts (if the franchisor requires verbal responses to questionnaires or acknowledgments) to Item 22 of the FDD if the franchisor requires prospective franchisees to make such statements at the end of the franchise sales process. The Statement of Policy also bars a franchisor from requiring a prospective franchisee to make any statement in a questionnaire or acknowledgment (i) that is “subjective or unreasonable,” (ii) would cause a prospective franchisee to surrender or believe they have surrendered rights to which they are entitled under federal or state law, or (iii) would shift a franchisor’s disclosure duties under federal or state law to the prospective franchisee. As examples of such categories of prohibited statements, the Statement of Policy prohibits eleven specific statements that have been heretofore helpful and standard in questionnaires and acknowledgments, including the following:

- The prospective franchisee has read or understands the FDD or any attachments thereto, including the franchise agreement.
- The prospective franchisee is qualified or suited to own and operate the franchise.
- 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.
- Statements that reiterate or duplicate any representation or statement already made elsewhere in the FDD and its attachments.

The eleven specific statements are a non-exhaustive list of prohibited statements, leaving franchisors to judge whether certain representations or acknowledgments in their FDDs and agreements meet the qualifications of prohibited statements under the Statement of Policy. In addition, the Statement of Policy requires any franchisor still choosing to include questionnaires or acknowledgments as part of the franchise sales process to state that the questionnaire or acknowledgment would not have the effect of waiving franchisee’s claims under applicable state fraud laws or disclaiming franchisee’s reliance on statements made during the franchise sales process.

NASAA’s adoption of the Statement of Policy does not change federal or state franchise law, but most state regulators rely on NASAA policies in reviewing franchise applications and granting registrations. Thus, we expect that most state regulators will follow the Statement of Policy once it becomes effective on January 1, 2023.

Because of this new NASAA Statement of Policy, franchisors must evaluate the usefulness of questionnaires and acknowledgments moving forward.

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