



NASAA Group Proposes to Ban Most Acknowledgments and Compliance Questionnaires Used by Franchisors. — Lathrop GPM Vigorously Objects

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Without previous notice that it was even under consideration, on December 6, 2021, the NASAA Franchise Project Group (the "Group") requested comments by January 5, 2022 on a comprehensive proposal to eliminate the use of the acknowledgments and questionnaires ("A&Qs") franchisors usually incorporate into their franchise sales closing processes.

Why? According to the Group, "Franchisors 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. Some have been successful."

"In the opinion of [the Group] A&Qs violate state Anti-Waiver Provisions when they are used as contractual disclaimers that release or waive a franchisee's rights under a state franchise law....The state legislatures that enacted these franchise laws intended to protect franchisees from the effect of contractual disclaimers, including those that may take the form of A&Qs."

A copy of the proposal may be found [here](#).

Lathrop GPM Fights Back.

Upon learning of the proposal three days after it was published (and while the ABA Franchise Forum's "list serve" was not operational), the Lathrop GPM franchise team met to plan a response to defend its franchisor clients' rights to continue to use A&Qs. First, they requested a 60-day extension of time to prepare a response because few in the franchise community were aware of the proposal, and the 30-day comment period closed just after the holiday season. Lathrop GPM urged IFA to make a similar request, which it did.

The issues are far too important to be subject to an arbitrary 30-day deadline. (Around this time the firm also learned that the Group's chair, Dale Cantone, was retiring from the Maryland Attorney General's office on December 31 — so it was not clear what his role would be, assuming he actually receives the comments



addressed to him at his former employer's address.)

In Lathrop GPM's response they set out several reasons why A&Qs are beneficial to the process of recruiting good franchisees and of making sure that franchisees' expectations and understanding of franchise relationships are realistic.

Lathrop GPM's response explains that the proposal creates new substantive law. It is much more than an interpretation of existing disclosure requirements. Although courts have interpreted As&Qs during the 30 years that the Group says that they have been used, and the FTC considered whether "disclaimers" of information outside of FDDs should be prohibited when issuing the 2007 Amended FTC Rule, neither courts nor the FTC has concluded that As&Qs are unlawful waivers and may not be used in the franchise sales process.

Lathrop GPM challenged the jurisdiction of the Group to change the law, rather than to interpret existing disclosure requirements. They challenged their interpretation of the cases that were cited in the proposal as signifying that disclaimers, and As&Qs, "violate anti-waiver" provisions of state franchise laws. In fact, whenever courts have concluded that specific disclaimers, or As&Qs could be construed as "waivers" of franchisee's rights under state franchise registration statutes, the courts have refused to dismiss cases based on those disclaimers and A&Qs. But those courts allowed the disclaimers, A&Qs to be used as evidence in trials to evaluate whether franchisee-plaintiffs actually reasonably relied on alleged misrepresentations.

The full Lathrop GPM response to the proposal, developed by Mark Kirsch, Michael Sturm, James Wahl, Elizabeth Dillon and Carl Zwisler may be found here.