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FRANCHISE DISCLOSURE UNDER THE MICROSCOPE: STATE REGISTRATION TRENDS

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I. Introduction

The franchise disclosure document (FDD) is not a static artifact. It is a living regulatory instrument that reflects and is shaped by shifting enforcement priorities, evolving case law, and the practical realities of franchise sales. For practitioners who prepare, review, or litigate FDDs, the past several years have brought evolving regulator scrutiny during the state registration process. Regulators are asking harder questions about fee disclosures, disclaimer language, and the interplay between the base franchise agreement and the state-specific addenda that franchisors are required to include as a condition of registration. At the same time, courts are being asked with increasing frequency to interpret the legal effect of addendum provisions that franchisors may have treated as regulatory formalities but that franchisees now invoke as substantive contractual rights.

This paper examines three areas where these trends converge. Section II addresses the increasingly restrictive regulatory environment surrounding disclaimer and non-reliance language in FDDs, franchise agreements, and ancillary documents—a landscape reshaped by NASAA's 2022 Statement of Policy on Franchise Questionnaires and Acknowledgments and by California's enactment of AB 676. Section III turns to the disclosure challenges that arise when the fees a franchisee will pay over the life of the franchise relationship have not been fixed at the time of disclosure, analyzing the structuring options available to franchisors under Items 5 and 6, the common comment letter objections those disclosures generate, and the perspectives of franchisees, franchisors, and regulators. Section IV examines state addenda requirements and the litigation risks they create, drawing on current sample addenda from California, New York, and Washington, and tracing the developing case law on how courts interpret the legal effect of addendum provisions including the emerging contract-interpretation framework under which addendum rights are treated as independently enforceable contractual rights rather than as choice-of-law arguments.

Throughout, the paper adopts three perspectives—franchisee, franchisor, and regulator—recognizing that each stakeholder approaches these issues from a distinct vantage point but that all share an interest in a disclosure system that is clear, enforceable, and fair. The goal is not to advocate for any single perspective but to equip practitioners on all sides with a current and practical understanding of what the regulatory landscape requires, what the case law permits, and where the remaining uncertainties lie.

II. Franchise Disclaimers in the Modern Regulatory Landscape: Navigating the Line Between Permissible Disclosure and Prohibited Waiver

A. Introduction

1. The Rise of Disclaimer Language in Franchise Disclosure Documents

Disclaimer and non-reliance language in franchise disclosure documents ("FDDs") and franchise agreements became a prominent feature over at least the last thirty years. Such language has been included so that the franchisor can later use the responses as part of a defense to franchisee claims.[1] One type of disclaimer takes the form of a series of acknowledgments in the franchise agreement regarding the franchise offering. Another type takes the form of a questionnaire where the franchisor requires prospective franchisees, at or prior to signing a franchise agreement, to mark "yes" or "no" to a series of questions or agree to a series of representations about what purportedly occurred, or did not occur, in the franchise sales process.[2] Virtually all such questionnaires and acknowledgments address whether a prospective franchisee received some type of representation different from what the franchisor disclosed in its FDD.[3]

Practitioners and regulators alike observed an increase in these devices following the implementation of the amended FTC Franchise Rule in 2007.[4] These provisions appear with particular frequency in Item 19, Item 11, and in exhibits to the FDD.[5] From a litigation perspective, franchisee-side counsel have noted that such questionnaires are frequently deployed as "Exhibit A" for the defense when a franchisee later alleges misrepresentation or fraud.[6]

This proliferation did not occur in a regulatory vacuum. The 2007 amendments to the FTC Franchise Rule (the "Rule") were designed to modernize and harmonize pre-sale disclosure requirements, reduce deception, and align federal standards with state registration practice. The amendments were adopted against a background record of deception in franchise and business opportunity sales, including material misrepresentations and non-disclosures that caused serious economic harm to prospective franchisees.[7] The regulatory philosophy underlying the Rule remained consistent: federal franchise regulation is grounded primarily in pre-sale disclosure, requiring franchisors to provide material information so that informed investors can determine for themselves whether a particular deal is in their best interest, rather than regulating the substantive terms of the franchise relationship.[8]

It was precisely within that disclosure-centered architecture that the question of disclaimers became contested terrain. As franchisors adapted their documentation practices to a more sophisticated sales environment, the line between appropriate

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[1] N. AM. SEC. ADM'R ASS'N, NASAA STATEMENT OF POLICY REGARDING THE USE OF FRANCHISE QUESTIONNAIRES AND ACKNOWLEDGEMENTS (2022), https://www.nasaa.org/wp-content/uploads/2022/09/NASAA-Franchise-Questionnaires-and-Acknowledgments-Statement-of-Policy-9-18-2022.pdf [hereinafter NASAA Questionnaires and Acknowledgments Policy]
[2] *Id.*
[3] *Id.*
[4] FRANCHISE RULE WORKSHOP TRANSCRIPT 62-104 (discussion of disclaimers), https://www.ftc.gov/system/files/documents/public_events/1579375/transcript-full-franchise-rule-wksp.pdf.
[5] *Id.*
[6] *Id.*
[7] Amended Rule Statement of Basis and Purpose, 72 Fed. Reg. 15444 (Mar. 30, 2007).
[8] *Id.*

explanatory language and prohibited disclaimer language became both harder to locate and more consequential to miss.

2. The Regulatory Framework and the Core Tension

The tension at the heart of the disclaimer debate is structural. The Rule imposes affirmative disclosure obligations on franchisors; those obligations exist because Congress and the Commission recognized that information asymmetries between franchisors and prospective franchisees create conditions conducive to fraud and overreaching. The Rule's anti-disclaimer provision expresses the Commission's judgment that permitting franchisors to use mechanisms to disclaim or waive the representations they are required to make would be detrimental to the protective purpose of the disclosure regime. At the same time, franchisors should have a means to confirm with a prospect that the sales process was consistent with the FDD and have a record confirming the factual matters underlying the sale.

A recurring theme in the Commission's rulemaking record was the franchisee community's complaint of "abusive practices" including "the use of disclaimers to limit liability for misrepresentations."[9] Yet the Commission's response was calibrated rather than categorical. The Commission generally declined to impose industry-wide, substantive relationship-law remedies absent the evidentiary predicates for an unfairness rule, preferring instead targeted disclosure requirements designed to reduce deception and facilitate franchisee verification.[10]

The same regulatory tension animates the Commission's treatment of specific FDD items. The Rule's Item 19 architecture reflects this balance: regulators designed the prescribed preambles both to prevent deception (by countering the alleged misstatement that the Rule "prohibits" financial performance information) and to discourage prospective franchisees from relying on unauthorized earnings representations made outside the disclosure document.[11] In other words, the Rule assumes that carefully framed, prescribed warnings can educate prospects and guide conduct.[12]

At the state level, a parallel but distinct regulatory framework has evolved through franchise registration and disclosure laws. Several states have enacted franchise registration and disclosure laws that include protections for prospective franchisees not found in the Rule.[13] Most of those same statutes also include anti-waiver provisions that prohibit or render void any provision or condition requiring a prospective franchisee to agree to a release, waiver, or estoppel that would relieve a person from liability under that law.[14] The intersection of the federal disclaimer prohibition and these state anti-waiver

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] NASAA Questionnaires and Acknowledgments Policy, *supra* note 1.
[14] *Id.*

provisions has become the principal battleground on which the disclaimer debate has been fought.

3. The NASAA Statement of Policy and the New Regulatory Landscape

The regulatory landscape shifted materially on September 18, 2022, when NASAA formally adopted its Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments (the "SOP"), effective January 1, 2023.[15]

NASAA's foundational concern was that franchisors routinely sought 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 had been successful in doing so.[16] In NASAA's view, questionnaires and acknowledgments are not the most effective mechanisms for preventing fraud, but they are powerful defense mechanisms that franchisors can deploy to defeat claims of fraud and misrepresentation regardless of what actually occurred in the franchise sales process. The concern was that these devices allow unscrupulous franchisors to avoid the consequences of franchise fraud.[17] NASAA also took the position that such devices shifted the compliance burden from franchisors to prospective franchisees, when it should be the franchisor's burden to police its own sales personnel and agents.[18]

The SOP was not adopted without controversy. During the one-month comment period, a total of thirty-nine comments were submitted to NASAA, of which twenty-five were generally in favor, thirteen were generally opposed, and one was neutral.[19] Notwithstanding numerous comments challenging the initial version, NASAA adopted the Statement of Policy with virtually no changes.[20] The debate that the SOP crystallized remains central to franchise practice today.

4. Stakeholder Perspectives

The disclaimer debate implicates fundamentally different understandings of the franchise relationship and the purposes of franchise disclosure law. The three primary stakeholder perspectives – franchisors, franchisees, and regulators – each reflect distinct but not irreconcilable concerns.

Franchisors have advanced several justifications for questionnaires and acknowledgments. Currently, franchisors rely on acknowledgments and

[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Polsinelli, *NASAA Shuts Down Use of Acknowledgments and Questionnaires in Franchise Sales Process*, JD Supra (Oct. 5, 2022), https://www.jdsupra.com/legalnews/nasaa-shuts-down-use-of-acknowledgments-3633453/.

questionnaires for a variety of reasons: to ensure sales personnel followed the required and appropriate sales process; to discover whether inaccurate information was given to a prospective franchisee or whether insufficient time passed between delivery of the FDD and execution of the franchise agreement; and to confirm that a prospective franchisee understands the risks of the business and has conducted due diligence on the franchise opportunity.[21] From a contract law perspective, franchisor-side practitioners also defend integration clauses as standard black-letter contract doctrine, necessary to define the scope of the parties' agreement and support predictability in the franchise relationship.[22]

Franchisees and their advocates have contested the benign characterization of these devices. Franchisee-side counsel have argued that disclaimers and non-reliance language can functionally "supersede" the disclosure regime. They argue that the disclaimers permit a seller to make extra-document sales claims and then invoke waivers or questionnaire responses to defeat any subsequent claim of liability.[23] The themes that emerged from comments supporting the SOP were that: the franchise industry is affected by franchisors and their agents who make promises or financial performance representations outside the FDD; many franchisors instruct prospective franchisees how to answer questionnaires; the primary use of questionnaires and acknowledgments is to defend against franchise fraud claims; questionnaires and disclaimers deprive franchisees of the protection of state franchise laws; and the SOP would deter unethical franchisors and improve standards for the franchise industry.[24]

Regulators occupy the ground that seeks to preserve the structural integrity of the disclosure regime without eliminating documentation practices that serve legitimate compliance functions. From a state regulatory perspective, integration clauses and non-reliance language are viewed as reflecting the information and bargaining-power imbalance between franchisors and prospective franchisees, and as potentially circumventing investor protection. Regulators assert that the "problem" is language asserting that the franchisee did not rely on representations outside the FDD, rather than the integration clause itself.[25] The FTC, for its part, included a limited ban on disclaimers in the FDD when it promulgated the 2007 amended Rule, but did not specifically address a franchisor's use of questionnaires or the effect of acknowledgments on franchisee fraud claims.[26]

The analytical challenge for franchise practitioners is to understand with precision what the applicable regulatory framework permits, what it prohibits, and where the

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[21] *NASAA Shuts Down Use of Acknowledgments and Questionnaires in Franchise Sales Process, supra* note 20.
[22] FRANCHISE RULE WORKSHOP TRANSCRIPT, *supra* note 4.
[23] *Id.*
[24] NASAA Questionnaires and Acknowledgments Policy, *supra* note 1.
[25] FRANCHISE RULE WORKSHOP TRANSCRIPT, *supra* note 4.
[26] NASAA Questionnaires and Acknowledgments Policy, *supra* note 1.

practical boundaries between explanatory language and impermissible disclaimers lie. That is the task of Section 2.

B. Compliant and Non-Compliant Disclaimer Language

1. The Governing Federal Standard: Section 436.9(h) and Its Scope

The foundational federal rule governing disclaimer language in franchise disclosure documents is 16 C.F.R. § 436.9(h). That provision makes it an unfair or deceptive act or practice, in violation of Section 5 of the FTC Act, for any franchisor to: include in any franchise disclosure document, or in any exhibit or amendment to that document, any disclaimer or other language that disclaims or requires a prospective franchisee to waive reliance on any representation made in the disclosure document.

When the FTC promulgated the amended Rule in 2007, it included a limited ban on disclaimers made in the FDD itself and its exhibits or attachments, but did not specifically address a franchisor's use of questionnaires or the effect of acknowledgments on franchisee fraud claims.[27] The statutory scope of § 436.9(h) is therefore bounded by the four corners of the FDD and its attachments — a limitation with significant practical consequences.

FTC staff has taken the position that franchisors may not accomplish indirectly what § 436.9(h) forbids directly. For example, a franchisor may not require a prospective franchisee to identify which FDD statements are "material," because a court could treat the failure to select a given statement as a waiver of reliance on it, thereby producing the disclaimer effect that the Rule prohibits.[28] Similarly, FTC staff's view is that a general release required as a condition of obtaining a franchise violates § 436.9(h) unless it expressly excludes claims arising from representations in the FDD, its exhibits, or its amendments.[29]

Critically, although the FTC held a public workshop in 2020 to explore issues related to both questionnaires and acknowledgments, the FTC has not yet directly addressed whether or when those provisions violate the FTC Franchise Rule.[30] The federal rule, therefore, leaves a regulatory gap with respect to stand-alone questionnaires and closing-document acknowledgments that appear outside the FDD — a gap that NASAA's SOP and several state legislatures have moved to address.

A governing principle, consistently articulated by both federal staff and state regulators, is the distinction between **explanation** and **disclaimer**. Workshop

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[27] NASAA Questionnaires and Acknowledgments Policy, *supra* note 1.
[28] FTC, FREQUENTLY ASKED QUESTIONS (Dec. 2013), http://www.ftc.gov/tips-advice/business-center/guidance/amended-franchise-rule-faqs
[29] *Id.*
[30] NASAA Questionnaires and Acknowledgments Policy, *supra* note 1.

participants emphasized a "big difference between explaining and disclaiming" in the context of Item 19 — that is, allowing business-model-specific and situation-specific context to prevent misleading impressions is permissible with the regulator's caveat so long as it is not cloaked as a disclaimer and has a reasonable basis. Deciding when and whether the disclosure in the context provided is a disclaimer or an explanation is often a judgement call.[31] This distinction is foundational to the item-level analysis that follows.

2. *Compliant Language: Categories and Illustrative Examples*

i. Item 19

Item 19 of the FDD is the most heavily debated site of the disclaimer debate. The Rule permits, but does not require, franchisors to make financial performance representations ("FPRs"). When a franchisor elects to make an FPR, the Rule requires a reasonable basis and disclosure of the bases and assumptions, together with an admonition that actual earnings may differ.[32]

The NASAA FDD Guidelines provide model admonition language for Item 19 that represents the compliance benchmark for registration-state review. NASAA's model admonitions for Item 19 appear as separate paragraphs: for historical results, the prescribed form is "Some [outlets] have [sold] [earned] this amount. Your individual results may differ. There is no assurance that you'll [sell] [earn] as much," and for projections, "These figures are only estimates of what we think you may [sell] [earn]. Your individual results may differ. There is no assurance that you'll [sell] [earn] as much."[33]

These admonitions are affirmatively required and therefore compliant by definition. However, the compliance question frequently arises when franchisors seek to supplement the required admonition with additional language. On this point, NASAA's guidance is unambiguous: after providing the admonition, franchisors may not add language that disclaims the FPR or tells the franchisee not to rely on the information presented.[34]

Beyond the admonition itself, compliant Item 19 disclosure may include specific, business-model-linked explanatory context. State regulators have indicated that explanations tied to the franchisor's specific business conditions may be acceptable, while generalized caveats that suggest the FPR is not representative or accurate may be treated as disclaimers that imply the disclosure lacks a reasonable basis.[35] The operative distinction is whether additional language is needed to make a financial performance representation complete and not misleading — in which case it may be permissible — or

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[31] FRANCHISE RULE WORKSHOP TRANSCRIPT, *supra* note 4.
[32] Amended Rule Statement of Basis and Purpose, 72 Fed. Reg. 15444 (Mar. 30, 2007).
[33] N. AM. SEC. ADM'R ASS'N, NASAA FRANCHISE COMMENTARY FINANCIAL PERFORMANCE REPRESENTATIONS (2017), https://www.nasaa.org/wp-content/uploads/2017/05/Financial-Performance-Representation-Commentary.pdf.
[34] *Id.*
[35] FRANCHISE RULE WORKSHOP TRANSCRIPT, *supra* note 4.

whether it functions to distance the franchisor from the representation it has just made, in which case it is prohibited.

The FTC has also provided staff-level guidance on a narrow category of closing language that may appear at the end of an Item 19 disclosure where the franchisor makes no FPR. FTC staff has indicated that a specific statement confirming the franchisor makes no FPRs and does not authorize employees or representatives to make them is permissible, but only if the exact wording provided by FTC staff is used with no additions, deletions, or modifications.[36]

ii. Item 11

Item 11 of the FDD addresses the assistance, advertising, computer systems, and training that the franchisor provides. Item 11 requires disclosure to open with a bold statement that, "[e]xcept as listed below, [the franchisor] is not required to provide you with any assistance," a provision designed to counter express misrepresentations and correct the misconception that assistance is inherent in every franchise.[37] This prescribed opening language functions as a mandated disclosure alert to prospects about the limits of franchisor support obligations, and it is required rather than optional.[38]

This "except as listed" construction is properly understood as a mandatory limiting disclosure. It does not purport to waive any right of the franchisee or disclaim any representation made elsewhere in the FDD; its function is precisely the opposite: to establish a clear and affirmative scope of the franchisor's actual commitments, ensuring the franchisee is not misled into believing that unlimited or implied assistance obligations exist.

iii. Item 20

Where franchisors have required current or former franchisees to execute confidentiality agreements within the three-year period preceding the disclosure, Item 20 requires a prescribed statement advising the prospective franchisee that some current or former franchisees may be restricted from speaking openly. The prescribed language advises prospects to talk to current and former franchisees but to recognize that not all such franchisees will be able to communicate freely.[39]

The Commission expressly rejected an outright ban on confidentiality clauses and adopted this disclosure approach as a balanced provision to protect franchisee due diligence while recognizing legitimate franchisor interests.[40] This approach is instructive:

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[36] FTC, FREQUENTLY ASKED QUESTIONS (Dec. 2013), *supra* note 28.
[37] Amended Rule Statement of Basis and Purpose, 72 Fed. Reg. 15444 (Mar. 30, 2007).
[38] FTC, FRANCHISE RULE COMPLIANCE GUIDE 44 (May 2008).
https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf.
[39] Amended Rule Statement of Basis and Purpose, 72 Fed. Reg. 15444 (Mar. 30, 2007).
[40] *Id.*

rather than prohibiting the underlying contractual device, the Commission required disclosure of its existence and effect, leaving the prospective franchisee informed to exercise independent judgment.

iv. Context-Specific Acknowledgments

The FTC's own Statement of Basis and Purpose and related guidance confirm that not every acknowledgment in a franchise closing document is prohibited. As noted in commentary on the FTC's 2007 rulemaking, the Commission expressly confirmed that nothing in § 436.9(h) would prevent a franchisor from having a prospective franchisee sign a clear and conspicuous acknowledgment that a particular Item 19 financial performance representation – for example, one based on Florida-based unit performance data – does not apply to a different geographic context, such as Alaska.[41] The key distinguishing feature is that such an acknowledgment does not disclaim the representation; it clarifies its geographic or factual scope.

This principle supplies the analytical framework for evaluating acknowledgment language more broadly: an acknowledgment that helps the franchisee understand the limits of an FPR without abandoning the representation is compliant; an acknowledgment that functions to negate the franchisor's responsibility for what was disclosed or represented is not.

v. The Anti-Disclaimer Legend Required by the NASAA SOP

For franchisors operating in states that have adopted the NASAA SOP, the SOP requires the inclusion of a specific anti-disclaimer legend in the FDD and franchise agreement (or applicable state addenda). The SOP mandates that the franchisor include the following provision: "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."[42]

This required legend is itself a form of compliant disclosure language. It does not prohibit questionnaires or acknowledgments entirely; rather, it limits their legal effect with respect to claims arising under state franchise anti-waiver and anti-fraud provisions.

3. Non-Compliant Language: Categories and Illustrative Examples

[41] NASAA Questionnaires and Acknowledgments Policy, *supra* note 1.
[42] *Id.*

i. The NASAA SOP's Non-Exhaustive List of Eleven Prohibited Statements

The NASAA SOP provides the most detailed regulatory articulation of what constitutes prohibited disclaimer language in the questionnaire and acknowledgment context. Under the SOP, franchisors and their franchise sellers shall not require a prospective franchisee 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 SOP or are similar to the prohibited statements.[43]

The SOP then enumerates eleven specific statements that are prohibited as non-exhaustive examples. Those statements are as follows:

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 the franchisor nor the 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 the franchisee.
7. That the franchisor bears no liability or responsibility for the franchisee's success or failure.
8. Any statement that 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 or has not actually consulted with professional advisors, consultants, or other franchisees.
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. Any statement that requires or suggests that the prospective franchisee must agree to any questionnaires, acknowledgments, or similar documents prohibited

[43] NASAA Questionnaires and Acknowledgments SOP, *supra* note 19.

by the SOP, or provide false answers, as a condition to the purchase of the franchise.

Practitioners should note that the eleven specific statements constitute a non-exhaustive list, leaving franchisors to judge whether particular representations or acknowledgments in their FDDs and agreements meet the qualifications of prohibited statements under the Statement of Policy.

The SOP acknowledges a limited fact-finding function. Footnote 15 states that the SOP "is not intended to prohibit a Franchisor from conducting factfinding or asking Prospective franchisees questions about the sales process, but Franchisors may not require a Prospective franchisee to document and sign statements that act as waivers in violation of state law." This carve-out is meaningful but narrow: oral or informal fact-finding may be permissible; requiring the franchisee to execute a document memorializing statements that function as waivers is not.

ii. Waivers of Reliance on FDD Representations (Prohibited Under § 436.9(h))

Any contractual provision that requires a prospective franchisee to waive reliance on representations made in the disclosure document is prohibited under 16 C.F.R. § 436.9(h). This applies equally to broad integration clauses that are drafted in a manner that disclaims liability for franchisor-authorized representations in the FDD. FTC workshop participants confirmed that while integration clauses may be permissible in their conventional form, the Rule does not permit provisions that disclaim liability for statements authorized by the franchisor in the disclosure document. Regulators drew a sharp line between a standard integration clause and the "problem part": language asserting that the franchisee did not rely on representations outside the FDD, which regulators indicated should be removed or substantially limited.

iii. "Materiality Selection" Devices

FTC staff has confirmed that a franchisor may not require a prospective franchisee to identify which statements in the FDD are "material," because a court could treat the failure to identify a given statement as a waiver of reliance on it. If permitted, this could achieve the effect that § 436.9(h) directly prohibits.[44]

iv. Questionnaire Provisions Used to Defeat Fraud Claims

Questionnaires and acknowledgments arise regularly in franchise litigation involving fraud or negligent misrepresentation claims, where contemporaneous questionnaire responses or acknowledgments denying that a misrepresentation was made or relied upon have historically been considered highly relevant and powerful evidence.[45] Courts in numerous jurisdictions have relied, at least in part, on answers in

[44] 16 C.F.R. § 436.9(h), FREQUENTLY ASKED QUESTIONS No. 21 (Dec. 2013), *supra* note 28.
[45] NASAA Questionnaires and Acknowledgments Policy, *supra* note 1.

questionnaires or acknowledgments to grant summary judgment against franchisees' fraud or misrepresentation claims.[46]

The NASAA SOP directly addresses this litigation dynamic. In the view of NASAA's 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 under a state franchise law, and that prospective franchisees who sign such documents and later dispute their accuracy should have the opportunity to explain any discrepancy before a factfinder, rather than have their claims dismissed based solely on having signed a questionnaire or series of acknowledgments.[47]

The litigation risk cuts in both directions. Some courts have allowed fraud claims to survive summary judgment even in the face of questionnaires and acknowledgments, ruling that such documents may be considered by the trier of fact but are not necessarily dispositive on questions of whether fraud occurred or reliance was reasonable.[48] The court in *Randall v. Lady of America Franchise Corp.*, for example, held that a disclaimer cannot change the historical facts — if the franchisor made misrepresentations, then misrepresentations were made regardless of what the franchise agreement says — and that a disclaimer can only attempt to change the legal effect of those misrepresentations, which is precisely what the anti-waiver language of the Minnesota Franchise Act forbids.[49] Similarly, in *Hanley v. Doctors Express*, the court held that disclaimers and acknowledgments contained in a franchise agreement and FDD were legally inoperative to bar franchisee claims under the Maryland Franchise Law, to the extent they would operate as a release, waiver, or estoppel.[50]

v. Prohibited Language Under California AB 676

California's legislative response to the disclaimer problem is categorical and statutory in character. On September 29, 2022, the California Legislature passed AB 676, which makes various changes to the Franchise Investment Law and the California Franchise Relations Act, effective January 1, 2023.[51] Corporations Code section 31512.1, added by AB 676, provides that any provision of a franchise agreement or related document requiring the franchisee to waive specific provisions of the law is contrary to public policy and is void and unenforceable.

Specifically, any provision of a franchise agreement, franchise disclosure document, acknowledgment, questionnaire, or other writing (including any exhibit thereto) disclaiming or denying any of the following shall be deemed contrary to public policy and shall be void and unenforceable:

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[46] *Id.*
[47] NASAA Questionnaires and Acknowledgments Policy, *supra* note 1.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] California Assembly Bill 676.

(a) representations made by the franchisor or its personnel or agents to a prospective franchisee;
(b) reliance by a franchisee on any representations made by the franchisor or its personnel or agents;
(c) reliance by a franchisee on the franchise disclosure document, including any exhibit thereto; and
(d) violations of any provision of the California Franchise Investment Law.

Under section 31512.1, franchisors may not disclaim or deny any representations they or their representatives make to franchisees, require franchisees to waive reliance on any such representations or on the FDD, or disclaim or deny any violations of the Franchise Investment Law — and may not put these disclaimers or waivers in an FDD, any exhibit to the FDD, or related documents such as a franchise agreement, questionnaire, or acknowledgment. AB 676 separately amends the California Franchise Relations Act to prohibit a franchisor from requiring a franchisee to waive any of the protections of that Act.

The California statute applies broadly: the prohibition applies to all offers and sales in California, regardless of whether the franchisor is registered or exempted from registration. This means that franchisors who rely on registration exemptions in California are nonetheless bound by the AB 676 disclaimer prohibitions.

4. State Adoption of the NASAA SOP: A Patchwork Compliance Environment

While the NASAA Statement of Policy (SOP) does not itself carry the force of law unless adopted by a state, NASAA plays a significant and influential role in the development of state franchise regulation. NASAA is a nonprofit association of state securities and franchise administrators—rather than a governmental or regulatory agency—but it is comprised of the very officials responsible for implementing and enforcing state franchise laws. As a result, its policy work is widely respected and often carries meaningful weight with legislators and regulators. Although some courts have held that NASAA guidelines and policy statements are not legally binding unless formally adopted through legislative or regulatory processes, NASAA's standards frequently inform state rulemaking and contribute to greater consistency and clarity in franchise regulation nationwide.

In jurisdictions without franchise disclosure laws, the Rule is the governing authority, and although nothing in the Rule prohibits questionnaires and acknowledgments, the FTC Compliance Guide specifically states that the Rule prohibits franchisors from including in an FDD any information that is not required or expressly permitted, either by the Rule or by state law.[52] Naturally, franchise regulators have applied the SOP to franchise registrations and renewals regardless of whether their state has

[52] FTC, FRANCHISE RULE COMPLIANCE GUIDE 122 (May 2008).

formally adopted it because the policy aligns with existing federal guidance and state franchise law. For example, the following state-level actions have been taken:

- **California**: On September 29, 2022, California Governor Gavin Newsom signed Assembly Bill 676, which amended both the California Franchise Investment Law and the California Franchise Relations Act, implementing anti-disclaimer and anti-waiver provisions that parallel and in some respects exceed the SOP's requirements.
- **Washington**: Washington State's Department of Financial Institutions issued a Notice of Preproposal Statement of Inquiry in January 2023, noting that the prohibited statements targeted by the SOP "are inconsistent with" Washington's anti-waiver provisions and that adoption of the SOP "does not represent a material change" in Washington's franchise regulations. Washington has since concluded the rulemaking process and formally adopted the SOP, effective September 18, 2023.
- **Maryland**: On January 26, 2023, the Maryland Office of the Attorney General, Securities Division, issued an interpretive opinion regarding the SOP, noting that Maryland franchise regulations already contained an anti-waiver provision. The interpretive opinion directed franchisors currently registered or seeking registration in Maryland to include the SOP's required anti-disclaimer provision in their FDDs and franchise agreements; to delete questionnaires or acknowledgments contrary to the SOP, or include a statement that those provisions shall not apply to Maryland residents; and to update offering materials to comply with the NASAA SOP in the next amendment or renewal.
- **Other registration states**: In practice, many franchisors in registration states have responded to the SOP by adding the NASAA-prescribed anti-waiver legend and removing or revising questionnaire and acknowledgment language for the reasons noted above. This has occurred even in states that have not formally adopted the SOP, as regulators in several registration states have issued comment letters requesting conformity with NASAA's approach, reflecting the influence and persuasive value of NASAA's policy work.

Maintaining separate FDD versions for registration and non-registration states can present meaningful compliance and operational challenges for a franchisor. Managing multiple versions increases the risk of delivering the incorrect FDD to a prospective franchisee and may prompt closer review from registration-state regulators, who rely on NASAA's work to promote clarity and uniformity in franchise disclosure. Aligning more closely with NASAA's standards can help reduce these risks and support a smoother, more predictable compliance process.

5. Practical Drafting Guidance: The Compliance Hierarchy

For practitioners advising franchisor clients, the following hierarchy of compliance considerations applies to the review and drafting of FDD and franchise agreement disclaimer language:

Step 1 — Apply the federal floor. Apply the federal floor. Every FDD and its exhibits must comply with 16 C.F.R. § 436.9(h). Any provision in the FDD or its attachments that disclaims, limits, or requires a franchisee to waive reliance on representations made in the FDD is prohibited and must be removed in all jurisdictions. This federal requirement establishes the baseline against which all additional state-law and NASAA SOP considerations operate.

Step 2 — Assess the applicable state anti-waiver framework. Assess the applicable state anti-waiver framework. For registration-state offerings, determine whether the state has formally adopted the NASAA SOP, enacted parallel statutory language (as California has), or is applying the SOP through the registration comment process. Because the SOP reflects long-standing anti-waiver principles embedded in state franchise laws, each state's anti-waiver statute should be analyzed to understand the scope of its protections and how the SOP aligns with and reinforces them.

Step 3 — Include the NASAA-required anti-disclaimer legend in all registration-state offerings. The SOP requires franchisors to include the prescribed anti-disclaimer legend wherever a state anti-waiver or anti-fraud statute applies. Including the legend as a standard provision across all affected offerings not only promotes consistency with state law but also supports the SOP's objective of aligning disclosure practices with federal and state policy prohibiting waiver of statutory protections.

Step 4 — Audit existing questionnaires against the SOP's eleven prohibited categories. Because the SOP confirms and clarifies the types of waiver-style statements that violate state anti-waiver laws, franchisors should review existing questionnaires to determine whether any question falls within (1) the eleven enumerated prohibited categories or (2) the broader standard targeting subjective, unreasonable, or rights-surrendering statements. Any inconsistent language should be revised or removed to ensure alignment with both state statutes and the SOP's interpretive guidance.

Step 5 — Preserve legitimate fact-finding functions through non-waiver-style documentation. The SOP's fact-finding carve-out reflects the space state law has always allowed franchisors to conduct compliance and verification activities. To remain within that permissible zone, franchisors should structure fact-finding as internal compliance documentation rather than franchisee-executed acknowledgments that could function as unlawful waivers of statutory rights.

Step 6 — Review Item 19 language carefully. After including required admonition, franchisors may provide additional explanatory context but may not add any language that disclaims the financial performance representation or

instructs the franchisee not to rely on the information provided. Additional Item 19 disclosures must be tied to objective business-model explanations and must remain consistent with both the FTC Rule and state anti-waiver statutes as clarified by the SOP.

The distinction between permissible explanatory language and prohibited disclaimer language is not always intuitive, and reasonable practitioners may differ on close calls. What the alignment of § 436.9(h), the NASAA SOP, and California AB 676 makes clear, however, is that federal and state policymakers are converging toward a more consistent articulation of long-standing anti-waiver and anti-fraud principles. In this environment, drafting conventions developed before 2023 merit careful reassessment to ensure they remain fully consistent with current federal guidance and state franchise law protections.

III. Structuring Approaches for Variable Fee Disclosures

A. The Disclosure Challenge: When Fees Are Not Yet Fixed

One of the more persistent compliance challenges facing franchisor counsel is how to prepare adequate disclosures under Item 6 of the FDD when the fees a franchisee will pay over the life of the franchise relationship have not been fixed at the time of disclosure. The FTC Franchise Rule requires franchisors to disclose initial fees, recurring fees, and estimated initial investment amounts with specificity. State franchise regulators in registration jurisdictions have increasingly scrutinized fee disclosures that leave prospective franchisees without a clear understanding of their total financial obligations.

The tension is inherent in the franchise model. Franchisors operate systems that span decades. Costs of technology, marketing, insurance, real estate, and third-party services change over time in ways that are often unpredictable. A franchisor that locks in fees at artificially low levels risks undermining the system's financial viability. A franchisor that reserves unlimited discretion to increase fees risks regulatory objection and, eventually, litigation. The disclosure challenge, then, is to describe fees that may change in a manner that is both compliant and commercially workable.

Item 6 in particular requires close attention to format and substance. Item 6 requires a franchisor to disclose in tabular format all fees that the franchisee must pay to the franchisor or its affiliates, or that the franchisor or its affiliates impose or collect in whole or in part for a third party.[53] In addition to disclosing the type, amount, and due date of each fee, the franchisor must include any formula used to compute the fees or show the range in which the fees will fall, and if the fees may increase, the franchisor must disclose the formula or maximum amount of the increase.[54] Column 4 of the required

[53] 16 C.F.R. § 436.3(f).
[54] *Id.*

table—the “remarks” column—serves as the primary vehicle for explanatory detail, and many franchisors supplement these remarks with footnotes following the table.[55]

Where any of these fees are subject to future adjustment, the franchisor must disclose that fact along with the basis for the adjustment. Vague language such as “fees may change from time to time” is generally insufficient to satisfy either the FTC Franchise Rule or state regulators.

B. Structuring Options

Franchise counsel have developed a range of approaches for disclosing variable fees. The appropriate structure depends on the nature of the fee, the franchisor’s business model, and the regulatory expectations of the states in which the FDD will be registered. The principal structuring options are discussed below.

1. Fixed Fee with Stated Escalation Schedule

The most straightforward approach is to set a fixed fee amount with a pre-determined escalation schedule built into the franchise agreement. For example, a technology fee might be set at $500 per month for years one through five, $600 per month for years six through ten, and so on. This approach provides maximum transparency and is the least likely to draw regulator comment. The fee amount at each stage is known, and the franchisee can project costs with reasonable certainty.

The drawback is inflexibility. A franchisor that commits to a fixed schedule may find itself locked into below-market rates if costs increase faster than anticipated, or charging above-market rates if costs decline. Nonetheless, where a franchisor can reasonably project cost trajectories, this approach is preferred from both a compliance and a franchisee-relations perspective.

2. Range Disclosures

A second approach is to disclose the current rate alongside a stated range and the criteria the franchisor will use to determine adjustments within that range. For example, an advertising fund contribution might be disclosed as “currently between $345 to $595 per month.”[56]

Range disclosures satisfy the FTC Compliance Guide’s expectation that franchisors provide specifics about how fees may change. They also give regulators a ceiling against which to evaluate the franchisor’s flexibility. The key compliance requirement is that the range must be meaningful, a range of “$0 to unlimited” is functionally equivalent to no disclosure at all and will not survive regulator review. Where fees are imposed by vote of a franchisor-controlled cooperative, Item 6 also requires

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[55] *Id.*
[56] Amada Senior Care, FRANCHISE DISCLOSURE DOCUMENT, 14 (2025).

disclosure of the voting power of company-owned units and, if controlling voting power exists, the maximum and minimum fees that may be imposed.[57]

3. Percentage-Based Escalation Caps

Some franchisors disclose that a fee may increase by no more than a stated percentage per year. For example, a technology fee might be disclosed as "$299 per month" subject to "the right to increase the fee by up to 10% once per calendar year."[58] This approach provides both a current figure and a ceiling, enabling the franchisee to calculate maximum exposure over the full term of the agreement.

This structure works well for fees that are expected to track general inflation or cost-of-living increases. It offers the franchisor reasonable flexibility while constraining the maximum economic impact on the franchisee. State regulators generally accept percentage-based caps, provided the cap is reasonable in context and the disclosure clearly states the frequency and method of adjustment.

4. Index-Tied Adjustments

A more sophisticated approach ties fee increases to a published economic index, most commonly the Consumer Price Index for All Urban Consumers (CPI-U) published by the U.S. Bureau of Labor Statistics. The FDD might disclose, for example, that fees "will be adjusted annually in accordance with any annual change in the National Consumer Price Index. "[59] "This is calculated by obtaining the CPI values from the U.S. Bureau of Labor Statistics for the starting year and the ending year, and multiplying the renewal fee by the ratio of the later CPI to the earlier CPI."[60]

Index-tied adjustments offer objectivity and predictability. Neither party controls the index, and both can monitor it. However, this approach introduces complexity, particularly for mathematically challenged lawyers. The FDD must identify the specific index, the measurement period, the adjustment date, and any floor or ceiling. Franchise counsel should also consider what happens if the index is discontinued or materially revised as a successor-index provision is advisable.

5. Fees Subject to Franchisor Discretion

Some franchise systems reserve to the franchisor the right to adjust certain fees in its sole discretion. This is the approach most likely to attract regulatory scrutiny. State regulators have issued comment letters requiring franchisors to provide a cap, a range, or some other limiting principle when fees are described as subject to the franchisor's discretion.

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[57]16 C.F.R. § 436.3(f)(4); Keith Kanouse, Dawn Newton & Michelle Webster, *Fundamentals 201: Drafting the Six Most Challenging Items in the FDD*, ABA 38TH ANNUAL FORUM ON FRANCHISING W-16 at 4 (2015).
[58] Amada Senior Care, FRANCHISE DISCLOSURE DOCUMENT, 15 (2025).
[59] Pirtek, FRANCHISE DISCLOSURE DOCUMENT, 17, 19, 21 (2026).
[60] *Id.*

Where the franchisor's business model genuinely requires discretion such as for example, because a fee reflects the pass-through of third-party costs that the franchisor cannot predict or control then the disclosure should explain the basis for the franchisor's discretion, the types of costs that drive adjustments, the process by which changes are communicated to franchisees, and any contractual constraints on the exercise of discretion. Where a franchisor's initial fee is variable and depends on factors such as the size of the territory, different regulators view the level of detail required differently, and that there is room for dialogue between the franchisor and the regulator on what information will be required.

C. Franchisee Perspective: Understanding Total Cost Over the Full Term

Prospective franchisees and their counsel should approach variable fee disclosures with particular care. A fee that appears modest at signing can compound significantly over a ten- or twenty-year franchise term, particularly when a franchisor could go through ownership changes during the term. The franchisee's due diligence should include projecting total fee exposure under both the base case and the maximum-adjustment scenario disclosed in the FDD.

Item 6 also requires disclosure of whether disclosed fees are "uniformly imposed."[61] If fees are not uniformly imposed, the franchisor must disclose the reason. A franchisor's willingness to negotiate is itself a source of non-uniformity, creating drafting challenges because negotiations occur after the FDD is already drafted.[62] From the franchisee's standpoint, evidence of non-uniformity provides negotiation leverage to request caps on discretionary fees, audit rights to verify pass-through costs, advance notice requirements, and most-favored-nation provisions.

Franchisee counsel should also compare disclosed fees across Items 5 and 6 to ensure no fees are misclassified or omitted. Commonly overlooked fees include new supplier inspection fees, service charges, reimbursement of audit costs, ongoing inventory charges, and relocation fees.[63] The failure to disclose liquidated damages provisions and lost profits claims is another area with significant litigation consequences.[64]

D. Franchisor Perspective: Balancing Flexibility with Compliance

Franchisors face a genuine tension between commercial flexibility and regulatory compliance. A fee structure that is too rigid may leave the franchisor unable to fund necessary system improvements. A fee structure that is too open-ended may not survive state registration review.

Several best practices help navigate this tension. First, franchisors should conduct a comprehensive fee audit before each annual FDD update. State franchise regulators

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[61] 16 C.F.R. § 436.3(f)(4)(iv).
[62] Kanouse, Newton & Webster, *supra* note 57 at 4–5.
[63] *Id.* at 5–6.
[64] *Id.* at 6–7.

expect clear, careful drafting following the exact requirements of the FTC Franchise Rule.[65] Second, when fees change mid-year, franchisors should evaluate whether the change triggers a material-change obligation.[66] Third, franchisors should draft fee disclosures with litigation in mind.

Annual update obligations deserve particular attention. The FTC Compliance Guide notes that, unlike Item 5, Item 6 does not require a disclosure of a lack of uniformity in collecting fees in a prior fiscal year.[67] However, if the franchisor has previously negotiated to waive an infrequent fee, the best practice is to disclose the potential lack of uniformity.[68] Also, practitioners should be aware of and comply with California's negotiated sales provisions.[69]

E. Regulator Perspective: Common Comment Letter Objections

State franchise regulators have become more attentive in their review of variable fee disclosures since the publication of FTC Guidance on the issue.[70] Upon receiving a comment letter, the best approach is to review the comments carefully and contact the regulator directly to discuss options for resolution.[71]

1. "Provide a Cap or Range"

This is perhaps the most common comment letter directive. When a franchisor discloses a fee as variable without providing a cap or range, regulators will typically require the franchisor to add one. Franchisors should anticipate this comment and build caps or ranges into their initial fee disclosures.

2. "Clarify the Basis for Increases"

Regulators frequently ask franchisors to explain what triggers an increase, what limits exist, and how the franchisee will be notified. Providing this information proactively in the FDD's remarks column reduces the risk of a comment letter and accelerates registration.

3. "'May Change' Is Insufficient—Provide Specifics"

Phrases such as "subject to change," "may be adjusted," or "as determined by franchisor" without further elaboration are increasingly rejected. For multi-state FDDs containing a liquidated damages provision, practitioners should include a footnote noting

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[65] *Id.* at 50.
[66] 16 C.F.R. § 436.7.
[67] FRANCHISE RULE COMPLIANCE GUIDE, 46 (May 2008); Kanouse, Newton & Webster, *supra* note 57, at 4.
[68] FRANCHISE RULE COMPLIANCE GUIDE, 46 (May 2008); Kanouse, Newton & Webster, *supra* note 57, at 5.
[69] Cal. Corp Code section 31109.1 and Rule 310.100.4. or Rule 310.100.2
[70] Staff Guidance on the Unlawfulness of Undisclosed Fees Imposed on Franchisees, July 12, 2024
[71] *Id*. at 45.

that Minnesota and North Dakota restrict such provisions, and that under California Civil Code § 1671, certain liquidated damages clauses are unenforceable.[72]

IV. State Addenda Requirements, Interpretation and Risks

A. Typical Provisions Found in State Addenda

Franchise registration states require franchisors to include state-specific addenda in their FDDs and franchise agreements as a condition of registration.[73] Rather than maintaining separate FDDs for each state, it is common practice for franchisors to use a single multistate FDD with state-specific addenda.[74] Some states require only changes to the FDD, others only to the franchise agreement, and still others to both.[75] A review of current sample addenda from California, New York, and Washington illustrates the range and specificity of these requirements.

1. Non-Waiver of State Franchise Law

Nearly every state addendum includes a provision stating that any term requiring the franchisee to waive compliance with the state's franchise statutes is void. The Illinois Franchise Disclosure Act specifically prohibits waiver of rights relating to governing law, venue, and jurisdictional requirements.[76] Washington's addendum states categorically that in the event of a conflict of laws, the provisions of the Washington Franchise Investment Protection Act "will prevail."[77] New York's addendum preserves all rights and causes of action under Article 33 of the General Business Law, and expressly provides that the non-waiver provisions of General Business Law Sections 687(4) and 687(5) are to be satisfied.[78]

2. Anti-Disclaimer and Anti-Reliance Protections

An increasingly important category of addendum provision addresses the use of franchise questionnaires and acknowledgments. Both the New York and Washington addenda now contain substantially identical language providing that 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 waiving any claims under any applicable state franchise law, including fraud in the inducement, or

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[72] *Id.* at 7.
[73] Beata Krakus, Halima M. Madjid & Diana V. Vilmenay, My Addenda Say What? A Review of State Mandated FDD and Franchise Agreement Addenda, ABA 39TH ANNUAL FORUM ON FRANCHISING W-16 at 1-2 (2016).
[74] *Id.* at 2.
[75] *Id.* at 3–14.
[76] *Id.* at 6 (citing 815 Ill. Comp. Stat. 705/41).
[77] Washington Addendum to the Franchise Disclosure Document, the Franchise Agreement, and All Related Agreements, § 1 ("In the event of a conflict of laws, the provisions of the Washington Franchise Investment Protection Act, chapter 19.100 RCW will prevail.").
[78] New York State Addendum to FDD (Rev. April 2, 2024), §§ 3, 5 (preserving rights under Article 33 of the General Business Law).

disclaiming reliance on any statement made by the franchisor, franchise seller, or other person acting on behalf of the franchisor.[79],[80] These provisions expressly supersede any other term of any document executed in connection with the franchise, a powerful override that renders ineffective the acknowledgment clauses that many franchisors have historically relied upon to limit pre-sale liability.

3. Conflict of Laws

State addenda commonly provide that the state's franchise law prevails over conflicting provisions. The California addendum to the franchise agreement takes a characteristic approach, stating for each of arbitration, choice of law, and forum selection that the California Business and Professions Code Sections 20000 through 20043 provide rights to the franchisee, and that if the franchise agreement contains a provision that is inconsistent with the law, the law will control.[81] The California FDD addendum takes a related but more cautious approach, disclosing that the franchise agreement's application of another state's law "may not be enforceable under California law."[82] This distinction between "the law will control" in the franchise agreement addendum and "may not be enforceable" in the FDD addendum reflects the dual purposes of these documents: the franchise agreement addendum modifies the parties' contractual obligations, while the FDD addendum discloses risks to the prospective franchisee.

4. Forum Selection, Venue, and Arbitration Situs

Many state addenda require dispute resolution in the franchisee's home state. Washington's addendum provides that the arbitration or mediation site must be in Washington, at a place mutually agreed upon at the time of the proceeding, or as determined by the arbitrator or mediator, and that if litigation is not precluded, the franchisee may bring an action arising out of the sale of franchises or a violation of the WFIPA in Washington.[83] Michigan voids any provision requiring that arbitration or litigation be conducted outside the state, though it permits the franchisee to agree to an out-of-state arbitration location at the time of arbitration.[84] Washington's approach is notably more flexible than Michigan's, allowing mutual agreement on venue at the time of

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[79] New York State Addendum, *supra* note 78, § 6 ("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.").
[80]Washington Addendum, *supra* note 77, § 16 (containing virtually identical language).
[81]California Addendum to Franchise Agreement (sample) ("California Business and Professions Code Sections 20000 through 20043 provide rights to the franchisee concerning the choice of which state's law governs your franchise agreement. If the franchise agreement contains a provision that is inconsistent with the law, the law will control.").
[82]California Addendum to Disclosure Document (sample) ("The Franchise Agreement requires application of the laws of Florida. This provision may not be enforceable under California law.").
[83]Washington Addendum, *supra* note 77, § 3.
[84]Krakus, Madjid & Vilmenay, *supra* note 73, at 8–9 (quoting Mich. Comp. Laws § 445.1527).

the proceeding rather than voiding out-of-state provisions entirely.[85] Maryland takes a different approach, prohibiting franchisors from requiring franchisees to waive the right to file a lawsuit in Maryland courts.[86]

5. Termination and Non-Renewal Protections

State franchise relationship statutes impose good-cause requirements, written notice obligations, and cure periods. The California FDD addendum discloses that the franchise agreement's termination-upon-bankruptcy provision may not be enforceable under federal bankruptcy law.[87] California's addendum incorporates the California Franchise Relations Act and thus the termination statutory protections which limit the grounds upon which a franchisor can terminate or non-renew.[88] Washington's addendum addresses termination through its "Franchisee Bill of Rights" provision, stating that RCW 19.100.180 may supersede the franchise agreement's termination and renewal provisions.[89] Illinois requires that termination and non-renewal rights under the IFDA cannot be waived or modified.[90] Wisconsin requires at least 90 days' written notice with a 60-day cure period.[91]

6. General Release Restrictions

The restriction on general releases is among the most consequential provisions in state addenda. Maryland does not permit franchisors to condition renewal or transfer on a release of claims under the MFRDL.[92] California's FDD addendum addresses the issue directly, disclosing that the franchise agreement requires a general release upon renewal or transfer and that California Corporations Code Section 31512 provides that any condition purporting to bind any person acquiring a franchise to waive compliance with the franchise investment law is void.[93] Michigan's statutory language voids releases that deprive a franchisee of rights under the act, but carves out settlements entered into after

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[85]Washington Addendum, *supra* note 77, § 3 ("In any arbitration or mediation involving a franchise purchased in Washington, the arbitration or mediation site will be either in the state of Washington, or in a place mutually agreed upon at the time of the arbitration or mediation, or as determined by the arbitrator or mediator.").

[86]Krakus, Madjid & Vilmenay, *supra* note 73, at 7 (citing Md. Code Regs. 02.02.08.16(L)(3)).

[87]California Addendum to Disclosure Document, *supra* note 79 ("The Franchise Agreement provides for termination upon bankruptcy. This provision may not be enforceable under federal bankruptcy law (11 U.S.C.A. Sec. 101 et seq.).").

[88] California Addendum to Franchise Agreement (sample) ("California Business and Professions Code Sections 20000 through 20043 provide rights to the franchisee concerning the choice of which state's law governs your franchise agreement. If the franchise agreement contains a provision that is inconsistent with the law, the law will control.").

[89] Washington Addendum, *supra* note 77, § 2 (citing RCW 19.100.180).

[90] Krakus, Madjid & Vilmenay, *supra* note 73, at 6 (citing 815 Ill. Comp. Stat. 705/19 to 705/20).

[91] *Id.* at 14–15 (citing Wis. Stat. §§ 553.01 through 553.78; Wis. Stat. §§ 135.01 through 135.07).

[92] *Id.* at 7.

[93] California Addendum to Disclosure Document, *supra* note 79 ("The Franchise Agreement requires franchisee to sign a general release of claims upon renewal or transfer of the Franchise Agreement. California Corporations Code Section 31512 provides that any condition, stipulation or provision purporting to bind any person acquiring a franchise to waive compliance with any provision of that law or any rule or order thereunder is void.").

execution of the franchise agreement.[94] North Dakota prohibits requiring a general release as a condition of renewal or transfer.[95]

Washington's addendum goes even farther and provides that releases or waivers are void except when executed pursuant to a negotiated settlement after the agreement is in effect and where the parties are represented by independent counsel, in accordance with RCW 19.100.220(2), and specifies that any such release executed in connection with a renewal or transfer is likewise void except as so provided.[96] Such a protection is notable in that it is a common franchisor practice to include releases in standard documentation signed after the franchise agreement including when a franchise is assigned to a business entity, a territory is changed or in the case of a royalty deferral.

7. Fee and Pricing Constraints

Washington's addendum provides that transfer fees are collectable only to the extent they reflect the franchisor's reasonable estimated or actual costs in effecting a transfer.[97]

8. Indemnification Modifications

Washington's addendum provides a model of the modern indemnification carve-out: the franchisee's obligation to indemnify, reimburse, defend, or hold harmless the franchisor is modified such that the franchisee has no obligation to the extent that losses or liabilities are caused by the indemnified party's negligence, willful misconduct, strict liability, or fraud.[98] The inclusion of "strict liability" alongside negligence, willful misconduct, and fraud reflects an expansive view of the carve-out that goes beyond what most other states require.

9. Noncompetition Restrictions

For a comprehensive discussion of post-term non-competes in franchise agreements, see NASAA's guidance.[99] Consistent with applicable legal authority, the guidance explains that franchisors should structure post-term non-compete provisions to reasonably protect the legitimate interests of the franchisor and existing franchisees, while also allowing former franchisees an opportunity to realize the value of their investment and experience in the franchised business.[100] The California FDD addendum discloses that the franchise agreement's post-term noncompete may not be enforceable under California law. Washington's addendum takes a far more detailed approach,

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[94] Krakus, Madjid & Vilmenay, *supra* note 73, at 8–9.
[95] *Id.* at 12 (citing N.D. Cent. Code § 51-19-09).
[96] Washington Addendum, *supra* note 77, § 4 (citing RCW 19.100.220(2)).
[97] Washington Addendum, *supra* note 77, § 6.
[98] Washington Addendum, *supra* note 77, § 12.
[99] N. AM. SEC. ADM'R ASS'N, NASAA POST-TERM NON-COMPETE PROVISIONS IN FRANCHISE AGREEMENTS SHOULD BE REASONABLE (2025), https://www.nasaa.org/wp-content/uploads/2025/01/Post-Term-Non-Compete-Provisions-in-Franchise-Agreements-Should-Be-Reasonable.pdf.
[100] *Id.*

incorporating specific statutory earnings thresholds: pursuant to RCW 49.62.020, a noncompetition covenant is void against an employee unless the employee's annualized earnings exceed $100,000, and under RCW 49.62.030, a noncompetition covenant is void against an independent contractor unless annualized earnings exceed $250,000, with both thresholds adjusted annually for inflation.[101] Washington also prohibits franchisors from restricting franchisees from soliciting or hiring any employee of another franchisee of the same franchisor, or any employee of the franchisor itself.[102]

The Washington addendum is worth studying as a model of the modern, comprehensive state addendum. Beyond the nine categories described above, it addresses additional subjects not traditionally found in state addenda, including restrictions on buy-back provisions, requirements for fair and reasonable pricing on mandated purchases, preservation of the right to seek treble damages, limitations on the franchisor's exercise of "reasonable business judgment,"[103] a prohibition on franchise agreement provisions that bar the franchisee from communicating with regulators,[104] and an advisory regarding franchise brokers, advising franchisees to carefully evaluate any information provided by a franchise broker.[105]

B. Can Addenda Be Negotiated?

1. What Is Negotiated?

State addenda are regulatory requirements, and their core protections are generally non-negotiable. Further, franchisors are often reluctant to push back on or negotiate addendums as it may slow the approval process.[106]

2. Common Comment Letter Issues

The consequences of comment letters are often aggravated by the fact that response times from different states vary widely.[107] Changes to a state addendum generally do not require re-filing with other states, making the addendum a useful vehicle for addressing isolated comments without triggering material change amendments in other jurisdictions.[108]

C. How Courts Interpret State Addenda

[101] Washington Addendum, *supra* note 775, § 14 (citing RCW 49.62.020 and RCW 49.62.030, with earnings thresholds of $100,000 for employees and $250,000 for independent contractors, adjusted annually for inflation).
[102] Washington Addendum, *supra* note 77, § 15 (citing RCW 49.62.060).
[103] Washington Addendum, *supra* note 77, §§ 8–11 (addressing buy-back provisions, fair and reasonable pricing, waiver of exemplary and punitive damages, and franchisor's business judgment, respectively).
[104] Washington Addendum, *supra* note 77, § 17.
[105] Washington Addendum, *supra* note 77, § 18.
[106] Krakus, Madjid & Vilmenay, *supra* note 73, at 30.
[107] *Id.* at 30.
[108] *Id.* at 30–31.

1. Does the Addendum Change the Choice of Law, or Are Its Provisions Incorporated into the Franchise Agreement?

The central interpretive question is whether the addendum operates as a choice-of-law modification or simply incorporates specific state-law protections into the franchise agreement without displacing the otherwise applicable governing law. Courts have taken varying approaches to analyzing addendums and the level of deference to be provided.

2. Addendum Supplements but Does Not Replace the Choice-of-Law Clause

Some court have held that a state addendum supplements but does not replace the choice-of-law clause. The *Long John Silver's* decision illustrates this approach.[109] The court found that the franchise agreement addenda, which deleted Kentucky venue provisions and acknowledged the Minnesota Franchise Act's anti-waiver provisions, did not create an obligation to litigate all claims in Minnesota.[110] The court construed the clause narrowly to find that "the acknowledgment that franchisees cannot be *required* to litigate outside of Minnesota nor stripped of other procedural or substantive rights does not amount to a obligation to litigate all claims in Minnesota."[111] Instead, the court found "that franchisees cannot be forced to submit to a forum or choice of law that would, in the absence of any forum selection or choice of law provision, be improper."[112] Because a "substantial part of the events at issue arose in Kentucky" the court found venue in Kentucky proper.[113]

When the addendum is placed in the franchise disclosure document as opposed to the franchise agreement it may not have any effect on the choice-of-law clause. In OnAxis Franchising Grp., LLC v. Harod, the court found that because the addendum was to the FDD and not the franchise agreement and because there was "no indication that the FDD was intended to operate other than as a disclosure statement" that "neither the California Addendum nor the California Business and Profession Code voids the application of the forum selection clause."[114]

3. Addendum Creates a Carve-Out for State Franchise Law Claims

Some courts have viewed addendums as modifying the choice of law to allow for state specific franchise law claims. The leading case is *Chorley Enterprises, Inc. v. Dickey's Barbecue Restaurants, Inc.*[115] The franchise agreements contained a broad arbitration clause (Article 27) and Maryland-specific provisions (Article 29) stating that the state-specific provisions "control" and that Maryland law would "govern and control any

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[109] Long John Silver's, Inc. et al. v. Nickleson, et al., No. 3:11-CV-93-H, 2011 WL 5025347 (W.D. Ky. Oct. 21, 2011).
[110] I*d.*
[111] *Id.* at *3.
[112] *Id.*
[113] *Id.* at *4.
[114] OnAxis Franchising Grp., LLC v. Harod, No. 1:23-CV-4835-MHC, 2023 WL 11959664, at *10-11 (N.D. Ga. Dec. 28, 2023).
[115] Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc., 807 F.3d 553 (4th Cir. 2015).

contrary or inconsistent provisions."[116] Article 29 further stated that the agreement "shall not require you to waive your right to file a lawsuit alleging a cause of action arising under Maryland Franchise Law in any court of competent jurisdiction in the State of Maryland."[117] The Fourth Circuit held that common law claims must proceed in arbitration while the franchisee's Maryland franchise law claims must proceed in state court.[118] As commentators have observed, this decision "put into question the presumption of many franchise lawyers, that the Federal Arbitration Act preempted state laws requiring court litigation or in-state dispute resolution."[119] The *Chorley* decision has continued to be followed.[120]

Similarly, in the *JTH Tax (Liberty Tax Service)* litigation, a Virginia federal court analyzed a franchise agreement with a Virginia choice-of-law clause and a California addendum acknowledging that the choice-of-law provision "may not be enforceable under California law."[121] The court noted that based on the addendum "the intent of the parties was to have California law apply to certain aspects of the contract."[122] The court concluded that California law applied where Virginia law was inconsistent with California's franchise protections, and transferred the case to California, recognizing California's strong public policy interest in providing a local forum for California franchisees.[123]

In *Rocksolid Granit (U.S.A.), Inc. v. Kingdom Renovations, Inc.*, "the Court interpret[ed] the Florida forum selection clause, Florida choice of law clause, and the California Addendum together to mean the following: the Franchise Agreement calls for Florida law to apply except for situations where Florida law is inconsistent with the CFRA. In such situations, the CFRA applies."[124] The court then went a step further holding that because the forum selection clause designating Florida as the exclusive forum conflicts with the California Franchise Relations Act prohibition against such clauses, that the Florida forum selection clause was void.[125] Nonetheless, the Court held that Florida had personal jurisdiction over the matter based on the agreements being sent to Florida for execution and acceptance, royalty payments being made in Florida and alleged acts occurring in Florida.[126]

4. The Contract-Interpretation Framework: Addendum Rights as Contractual Rights

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[116] *Id.* at 559.
[117] *Id.* at 560.
[118] *Id.* at 566-569.
[119] Krakus, Madjid & Vilmenay, *supra* note 73, at 1.
[120] *See e.g.,* MJ Enter. Holdings, Inc. v. Spiffy Franchising, LLC, No. CV RDB-24-3194, 2025 WL 2163052, at *9 (D. Md. July 30, 2025).
[121] JTH Tax, LLC v. Leggat, No. 2:22CV41 (RCY), 2022 WL 3970197, at *1 (E.D. Va. Aug. 31, 2022) (granting motion to transfer based in part on California's strong public policy interest in having franchisees located in California litigate in California).
[122] *Id.* at *7.
[123] *Id.*
[124] Rocksolid Granit (USA), Inc. v. Kingdom Renovations, Inc., No. 1:23-CV-22883-KMM, 2024 WL 6957668, at *4 (S.D. Fla. Jan. 9, 2024)
[125] *Id.*
[126] *Id.* at *5-6.

A critical analytical development in addendum litigation is the distinction between *contract interpretation* and *choice of law.* When a franchisee invokes a state addendum to defeat a forum selection clause, the franchisor's typical response is to frame the dispute as a choice-of-law question: the franchise agreement selects the franchisor's home-state law, and the franchisee is improperly attempting to override that choice by arguing that the franchisee's home-state public policy should prevail. If the dispute is framed as a choice-of-law question, the franchisor has the advantage of the strong federal presumption in favor of enforcing contractual choice-of-law provisions.

But a growing line of cases rejects this framing entirely. Under the contract-interpretation approach, the addendum does not override the choice-of-law clause; rather, the addendum incorporates the franchisee's home-state franchise law as an independent source of contractual rights within the franchise agreement itself. Because the addendum is part of the contract, enforcing it is a matter of giving effect to the parties' bargain—not of substituting one state's law for another.

The Sixth Circuit adopted this reasoning in *Servpro Industries, Inc. v. Woloski*, finding that despite a Tennessee choice-of-law clause, the California addendum "acted to enshrine the rights of the CFRA as contract rights into the parties' franchise agreement."[127] The Sixth Circuit ruled that the California addendum incorporated the California Franchise Relations Act to modify the terms of the franchise agreement, and specifically affirmed that the defendants could litigate the CFRA's rights as a breach-of-contract claim.[128] This holding reframes the entire analytical inquiry: the question is not whether California law "applies" notwithstanding a Tennessee choice-of-law clause, but whether the franchise agreement, as amended by the addendum, confers certain contractual rights that happen to derive from California statutory law.

The Central District of California reached the same conclusion in *Weber v. Saladworks, LLC*, ruling that the forum selection clauses were invalid not because they conflicted with California public policy, but because "the agreements themselves chose to apply California Business & Professions Code § 20040.5, which voids the forum selection clause."[129] The court emphasized that this was a matter of interpreting the parties' own contract: "As the objective expression of the parties' own intentions, the text of the agreements thus fails to designate Pennsylvania as a venue."[130]

The Ninth Circuit earlier reached a similar result in *Laxmi Investments, L.L.C. v. Golf USA*, finding that even a statement in a franchise offering circular, not included in the franchise agreement itself, that the CFRA would apply if inconsistent with the franchise agreement was sufficient to void a venue clause.[131] The Ninth Circuit has also recognized that Section 20040.5 of the California Business and Professions Code expresses a strong

[127] Servpro Indus., Inc. v. Woloski, No. 21-5685, 2022 WL 633844, at *2 (6th Cir. Mar. 4, 2022).
[128] *Id.*
[129] Weber v. Saladworks, LLC, No. SACV1301049MWFPJWX, 2014 WL 12581768, at *6 (C.D. Cal. Jan. 27, 2014).
[130] *Id.*
[131] Laxmi Invs., L.L.C. v. Golf USA, 193 F.3d 1095, 1097 (9th Cir. 1999).

public policy to protect California franchisees from the expense, inconvenience, and possible prejudice of litigating in a non-California venue.[132]

The practical significance of this contract-interpretation framework is substantial. If the addendum creates contractual rights, then the franchisor's choice-of-law clause is irrelevant to the venue question. The parties' own agreement voids the venue restriction regardless of which state's substantive law governs the relationship. This eliminates the franchisor's most powerful argument against transfer although there may still sometimes be contractual ambiguities between the addendum and the franchise agreement.

5. The Significance of Addendum Breadth

The outcome of the contract-interpretation analysis often turns on the breadth of the addendum's incorporation of state franchise law. The earlier *Servpro* district court decision in 2018 illustrates this point.[133] The court found that a narrower version of the addendum—which specifically incorporated the CFRA into only two limited provisions of the franchise agreement addressing renewal and default or termination—did *not* invalidate the venue clause.[134] The court reasoned that the addendum's incorporation of California law was limited to the specific franchise agreement sections it referenced.[135]

The court went on to distinguish that narrower form of addendum from cases involving broader addenda, finding the broader addenda "were much less precise as to the effect of California's franchise law on the parties' agreement."[136] This analysis establishes a clear drafting principle: the more broadly an addendum incorporates a state's franchise law, the more likely a court is to find that the addendum voids forum selection clauses and other provisions inconsistent with that law. An addendum that states, without limitation, that California Business and Professions Code Sections 20000 through 20043 provide rights to the franchisee and that if the franchise agreement contains a provision that is inconsistent with the law, the law will control, incorporates the entirety of the CFRA—including Section 20040.5, which voids provisions restricting venue to a forum outside California with respect to any claim arising under or relating to the franchise agreement.[137]

For franchise counsel, this line of cases underscores the importance of reading addendum language with precision. A franchisor's counsel who finds a broad addendum incorporating an entire state franchise act may inadvertently create contractual rights that void the franchisor's forum selection clause. Conversely, a franchisee's counsel who encounters a narrow addendum limited to specific sections of the franchise agreement may find that the addendum does not reach the venue clause at all.

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[132] Jones v. GNC Franchising, Inc., 211 F.3d 495, 497–98 (9th Cir. 2000).
[133] Servpro Indus., Inc. v. Woloski, No. 3:17-CV-01433, 2018 WL 11474910, at *3–4 (M.D. Tenn. July 9, 2018).
[134] *Id.* at *4.
[135] *Id.*
[136] *Id.*
[137] Cal. Bus. & Prof. Code § 20040.5.

6. Treatment of "Prevails" Language When the Addendum and Base Agreement Conflict

The *Dickey's* court's conclusion that the parties could have agreed to a single forum has been criticized as failing to account for the practical realities of franchise registration. As the IFA argued in its *amicus* brief, franchisors do not want to create conflicts with state regulators because they can significantly impact the franchisor's right to operate in that state.[138] Franchisors argue for a narrow reading: the addendum prevails only on specific points of conflict. Franchisees argue that any claim implicating the addendum's policy concerns should be resolved under the addendum's terms.

D. Litigation Risk Scenarios

The interplay between state addenda, forum selection clauses, and choice-of-law provisions creates recurring litigation scenarios.

Franchisee Invokes Addendum to Defeat Forum Selection. Courts in California, Illinois, Maryland, and other protective jurisdictions have been receptive to this argument, particularly where the addendum was a condition of state registration.

Franchisor Argues Narrow Reading. In *Long John Silver's*, the court accepted this reasoning, finding that by deleting a venue requirement and including an anti-waiver acknowledgment, the franchisor had complied with Minnesota law without forfeiting its ability to bring claims in Kentucky.[139]

Bifurcation of Claims. The *Dickey's* scenario requires common law claims to proceed in arbitration while statutory franchise claims proceed in the franchisee's home-state court, creating significant cost and complexity that may force earlier settlement.[140] Notably, Maryland is alone in requiring in-state *litigation* of franchise statute disputes, as opposed to merely in-state dispute resolution.[141]

Drafting to Minimize Bifurcation Risk. One approach is to draft dispute resolution provisions as permissive rather than mandatory.[142] This was validated in *Ramada Worldwide, Inc. v. SB Hotel Mgmt. Inc.*, where a New Jersey federal court found that a permissive provision did not violate the Minnesota franchise statute.[143]

V. Conclusion

The three subjects addressed in this paper—disclaimer regulation, variable fee disclosure, and state addenda—share an important theme. Each illustrates the

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[138] International Franchise Association, Motion for Leave to File Amicus Curiae Brief, 2015 WL 9596024, at 6; discussed in Krakus, Madjid & Vilmenay, *supra* note 73, at 29.
[139] Long John Silver's, 2011 WL 5025347, at *3.
[140] Krakus, Madjid & Vilmenay, *supra* note 73, at 34–35.
[141] *Id.* at 35.
[142] *Id.* at 35–36.
[143] Ramada Worldwide, Inc. v. SB Hotel Mgmt. Inc., Civ. No. 2:14-02186 (WJM), 2015 WL 758536 (D.N.J. Feb. 23, 2015).

continuing effort to balance clarity and flexibility within franchise disclosure law. Regulators seek precise disclosures that protect prospective franchisees; franchisors seek workable standards that allow for business variation; and franchisees understandably want transparency and meaningful safeguards. The result is a layered legal framework in which a single franchise agreement may be shaped simultaneously by the FTC Franchise Rule, one or more state registration statutes, state relationship laws, and multiple state-specific addenda—each of which may modify or supplement the agreement in ways that are not always obvious from any single document alone.

Recent developments show a clear regulatory trajectory. NASAA's 2022 Statement of Policy on Franchise Questionnaires and Acknowledgments, California's AB 676, and the evolving expectations reflected in state examiner comment letters all point toward a disclosure environment that favors greater specificity, avoids language that could shift compliance responsibility to prospective franchisees, and recognizes state franchise protections as substantive rights that cannot be waived. On the litigation front, decisions such as the Sixth Circuit's Servpro opinion reinforce that addenda can operate as binding contractual rights—an evolution that affects not only how franchisors draft their addenda but also how both franchisors and franchisees approach forum selection and dispute-resolution planning.

For practitioners, the takeaway is straightforward. The FDD and its related agreements and addenda reward careful, attentive drafting and punish complacency. A proactive approach—one that regularly reassesses documents, incorporates emerging regulatory guidance, and aligns disclosures with current legal expectations—helps ensure that franchisors and franchisees alike can rely on a clear, accurate, and fully compliant franchise disclosure document.