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**VIA EMAIL**

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**Re: NASAA Request for Public Comment re: NASAA Draft Model Franchise Broker Act (May 13, 2024)**

NASAA Project Group:

I am submitting these comments personally, and they are not comments submitted or endorsed by my law firm or other lawyers in my law firm.

Attached are my proposed revisions to the draft Model Franchise Broker Act (the “Act”).

The proposed revisions, in summary, are based on the following concepts:

1. The Act should be limited to imposing obligations on franchise brokers. It should not impose new obligations on franchisors, subfranchisors, and franchisees.

2. In the interest of promoting uniform franchise broker disclosures throughout the U.S., the revisions bring the requirements in the Act closer to the requirements in CA SB-919, the third-party franchise seller bill being considered in California.

3. Franchisors, subfranchisors, and franchisees generally offer and sell franchises. The revisions reflect the fact that franchise brokers typically communicate with prospective franchisees about franchising generally and/or about specific franchises, but often are not directly or indirectly involved in the offer or sale of specific franchises, although they are compensated if franchise sales occur.

4. If states are going to impose franchisor broker registration and disclosure requirements, it is my view that only natural persons who are franchise brokers should be required to register and to use disclosure statements particular to them.

5. Franchise brokers should be required to provide disclosure statements to prospective franchisees with information such as the information required to be disclosed by CA SB-919, including a general explanation of the compensation typically received by the franchise broker when franchise sales occur, but they should not be required to provide separate compensation disclosure statements specific to particular franchises they discuss with prospective franchisees. The latter requirement could be confusing to prospective franchisees and would be cumbersome for franchise brokers.

6. Franchisors, subfranchisors, and franchisees use the services of franchise brokers. Those persons should not be required to register with the states as users of franchise brokers. Only franchise brokers should be required to register with the states. Requiring users of franchise brokers to register would be unduly burdensome and difficult to manage considering the fluid nature of franchisors', subfranchisors' and franchisees' business relationships with franchise brokers.

7. Franchise brokers should be liable for their own registration and disclosure violations. Franchisors, subfranchisors, and franchisees that use franchise brokers should not be liable for the brokers' registration and disclosure violations. Those persons already have liability under existing laws for their own registration and disclosure violations.

8. The \$1,000 annual threshold in Section 2(3) of the Act is too low for franchisees that receive compensation from their franchisors and subfranchisors for leads resulting in franchise sales. The revisions propose a \$25,000 annual threshold, if NASAA chooses to use a dollar threshold approach.

9. The revisions require franchise brokers to make disclosures about their franchise broker networks (if any).

Respectfully submitted,

*Warren L Lewis*

Warren Lee Lewis

Attachment

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## NASAA Model Franchise Broker Registration Act

(Adopted \_\_\_\_\_)

[\(Proposed revisions are from Warren Lee Lewis, 6/13/24\)](#)

**Prefatory Notes:** The NASAA Model Franchise Broker Registration Act requires registration of franchise brokers, Persons that receive compensation for engaging in one or more of the following activities may need to register under this Act: (1) locating prospective franchisees, (2) acting as an intermediary between prospective franchisees and franchisors, (3) evaluating the qualifications of prospective franchisees, (4) assessing the suitability of prospective franchisees for particular franchise opportunities, (5) managing franchise prospects for franchisors, and/or (6) providing prospective franchisees information about franchise offerings. Jurisdictions considering this model legislation that have a franchise registration and disclosure law may be able to incorporate this model into their existing franchise law with minimal modifications. For example, franchise registration and disclosure laws may already contain certain definitions in Section 2 and may have provisions for revoking registrations and establishing filing fees that can be modified to incorporate broker registration, eliminating the need for Sections 4(5) and 8. Jurisdictions that do not have a franchise registration and disclosure law can use the NASAA Model Franchise Act (available at <https://www.nasaa.org/wp-content/uploads/2023/05/MODEL-FRANCHISE-INVESTMENT-ACT.pdf>) for definitions and provisions necessary for implementation of this Act. For example, the NASAA Model Franchise Act provides a definition for “franchise” and provisions regarding fraudulent, deceptive and prohibited practices, rulemaking, enforcement powers, private civil actions, and waivers.

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### Section 1: Short Title

Sections 2 to 8 may be cited as the “Franchise Broker Registration Act.”

### Section 2: Definitions

In this act, unless the context otherwise requires:

- (1) “Affiliate” means a person controlling, controlled by, or under common control with another person, every officer or director of such person, and every person occupying a similar status or performing similar functions [for such person](#).
- (2) “Director” means the [official administering the act].
- (3) “Franchise broker” means any [natural](#) person [who communicates with a prospective franchisee about franchising generally or any specific franchise, where such person receives, expects to receive,](#) or is promised, a fee, commission, or other form of

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consideration from a franchisor, subfranchisor, or franchisee, or an affiliate of a franchisor, subfranchisor, or franchisee, if the prospective franchisee purchases a franchise. “Franchise broker” does not include: (i) a franchisor, a subfranchisor, or an affiliate of a franchisor or subfranchisor; (ii) an officer, director, or employee of a franchisor, a subfranchisor, or an affiliate of a franchisor or subfranchisor; or (iii) a current franchisee of a franchisor or subfranchisor so long as the franchisee does not receive fees, commissions, or other forms of consideration valued at more than \$25,000 (an amount that will be adjusted annually for inflation) in a calendar year.

(4) “Franchise broker network” means any corporation, partnership, trust, or other entity, whether designated as a “broker network,” as “franchise sales organization,” or as some other type of entity, which promotes, represents and/or provides services to a network of franchise brokers.

(5)

(6) “Other form of consideration” as used in Section     , includes, but is not limited to: (i) the granting of equity in a franchisor, a subfranchisor, or an affiliate of a franchisor or subfranchisor; (ii) a buy-out or similar provision in which a franchise broker or a franchise broker network will receive a fee if the contract or arrangement between a franchise broker or a franchise broker network and a franchisor, a subfranchisor, or an affiliate of a franchisor or subfranchisor is terminated; or (iii) a portion of the royalties or other ongoing payments of franchisees in a system.

(7) “Person” means a natural person, corporation, partnership, trust, or other entity, including an online platform, and in the case of an entity, it includes any other entity which has a majority interest in such entity or effectively controls such entity as well as the individual officers, directors, and other persons in control of the activities of such entity or other entity.

(8) “Prospective franchisee” means any person that contacts or is contacted by a franchise broker or franchise broker network to discuss franchising generally or any specific franchise. “Prospective franchisee” does not include: (i) a franchise broker or franchise broker network; (ii) a franchisor, a subfranchisor, or an affiliate of a franchisor or subfranchisor; or (iii) an officer, director, or employee of a franchisor,

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Deleted: natural person other than a franchise broker who represents a franchise broker in effecting or attempting to effect offers or sales of franchises. A franchise broker representative can be an owner, officer, director, employee, or independent contractor of a franchise broker.

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a subfranchisor, or an affiliate of a franchisor or subfranchisor working in his or her official capacity.

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**Deleted:** "Sale" or "sell" includes every contract of sale, contract to sell, or disposition of a franchise.

### Section 3: Prohibited Practices

(1) It is unlawful for any franchise broker to communicate [in this state] [language should fit the jurisdictional scope of the state's franchise registration and disclosure law, if any, applicable to franchisors] with a prospective franchisee about franchising generally or any specific franchise unless the franchise broker is registered under this act.

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**Deleted:** It is unlawful for any franchise broker representative to directly or indirectly engage in the offer or sale of a franchise in this state unless the franchise broker representative is registered under this act.

(3) ▾

(4) ▾

**Deleted:** It is unlawful for any franchisor or the services of a franchise broker to directly or indirectly engage in the offer or sale of a franchise in this state unless the franchise broker is registered.

### Section 4: Registration

(1) A franchise broker must apply for registration by filing with the director (i) a completed application in a form the director prescribes by rule or otherwise, (ii) a consent to service of process, (iii) an irrevocable consent to jurisdiction and venue in the state, and (iv) the fee prescribed by Section 8.

**Deleted:** It is unlawful for any franchisor or subfranchisor to use the services of a franchise broker representative to directly or indirectly engage in the offer or sale of a franchise in this state unless the franchise broker representative is registered.

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a. A franchise broker shall be deemed duly registered for a period of one year from the effective date of registration unless the director by rule or order specifies a different period.

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b. Registration of a franchise broker may be renewed for additional periods of one year each, unless the director by rule or order specifies a different period, by filing with the director no later than thirty calendar days prior to the expiration thereof a renewal application containing such information as the director may require to indicate any substantial changes in the information contained in the original application or the previous renewal application and payment of the prescribed fee.

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c. If a material change in the information contained in an application or other required submissions should occur, a franchise broker, as the case may be,

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must amend the registration on file with the director as soon as reasonably possible and in any case, before communicating [in this state] [language should fit the jurisdictional scope of the state's franchise registration and disclosure law, if any, applicable to franchisors] with a prospective franchisee about franchising generally or any specific franchise.

- (2) The director may require by rule or otherwise that a franchise broker pay a competency examination fee and pass a competency examination or meet certain experience requirements prior to applying for registration. A franchise broker that is not a natural person is exempt from any competency examination requirement.
- (3) The director may require by rule or otherwise that a franchise broker complete continuing education requirements.
- (4) The director may require by rule or otherwise that a franchise broker meet certain financial or insurance requirements.
- (5) The director may by order deny, suspend, or revoke the registration of any franchise broker if the director finds that the order is in the public interest and that the applicant or registrant, or any partner, officer, or director of the applicant or registrant:
  - a. Has filed an application for registration as a franchise broker which, as of its effective date, or as of any date after filing in the case of an order denying effectiveness, is incomplete in any material respect or contains any statement which is, in the light of the circumstances under which it is made, false or misleading with respect to any material fact;
  - b. Has willfully violated or willfully failed to comply with any provision of this act or any rule or order under this act;
  - c. Has been convicted, within the past five years, of any misdemeanor or felony involving a franchise, or any aspect of the securities, commodities, business investments, franchise, business opportunities, insurance, banking, or finance business, or of any felony involving moral turpitude;
  - d. Is permanently or temporarily enjoined or restrained by any court of competent jurisdiction in an action brought by the director or a state or federal government agency from engaging in or continuing any conduct or practice

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- involving any aspect of the securities, commodities, business investments, franchise, business opportunities, insurance, banking, or finance business;
- e. Is the subject of an order of the director denying, suspending, or revoking registration as a franchise broker;
  - f. Has engaged in dishonest or unethical practices in the franchise industry;
  - g. Is insolvent, either in the sense that the person's liabilities exceed the person's assets or in the sense that the person cannot meet obligations as they mature; or
  - h. Refuses to allow or otherwise impedes the director from conducting an audit, examination, inspection, or investigation, or refuses access to any business location to conduct an audit, examination, inspection, or investigation.

The director may by order summarily postpone or suspend a registration pending final determination of any proceeding under this section.

#### Section 5: Disclosure Obligation

- (1) A franchise broker must provide a prospective franchisee with a disclosure statement prior to an in-person, virtual, telephonic, or electronic communication relating to any specific franchise opportunity. The disclosure statement must be prepared in a form the director prescribes by rule or otherwise, and the director may require that the disclosure statement include disclosures about the franchise broker's: personal information and professional experience; company (if any); broker network (if any), personal, company and broker network litigation history; franchises represented; services provided; and typical compensation. The director also may require that the disclosure statement to include disclosures about compensation to franchise broker's broker network (if any) and prospective franchisees whose franchise purchases resulted in compensation being paid by franchisors, subfranchisors or franchisees to franchise broker. The director may prescribe by rule or otherwise that the disclosure statement be filed with the director prior to use.
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**Deleted:** A franchise broker or a franchise broker representative must disclose to a prospective franchisee all compensation the franchise broker or the franchise broker representative will receive in connection with the offer and sale of a franchise no later than the time the prospective franchisee receives a copy of a Franchise Disclosure Document. The director may require by rule or otherwise that a franchise broker or a franchise broker representative disclose other compensation information to the prospective franchisee. The fee disclosure statement must be prepared in a form the director prescribes by rule or otherwise.

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**Section 6: Recordkeeping Obligation**

- (1) Every franchise broker that is registered or required to be registered must keep and maintain a complete set of books, records, and accounts related to [prospective franchisees and their purchases](#) of franchises as prescribed by the director by rule or otherwise.
- (2) All the records of a franchise broker are subject at any time or from time to time to such reasonable periodic, special, or other examinations by representatives of the director, within or without this state, as the director deems necessary or appropriate in the public interest or for the protection of franchisees.
- (3) If a franchise broker ceases to transact business, the franchise broker must retain books, records, and accounts related to [prospective franchisees and their purchases](#) of franchises for a period of 10 years following the cessation of business.

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**Deleted: Section 7: Obligations of Franchisors and Subfranchisors**

**Deleted:** A franchisor or subfranchisor that uses a franchise broker or a franchise broker representative must file with the director a notice that identifies each franchise broker or franchise broker representative that will operate in this state before the franchise broker or the franchise broker representative directly or indirectly engages in the offer or sale of a franchise for the franchisor or subfranchisor. The notice must be prepared in a form the director prescribes by rule or otherwise.

**Section 8: Fees**

- (1) The director must charge and collect the fees fixed by this section. The director shall not refund fees.
- (2) The fee for filing an application for initial registration under Section 4(1) is [\$].
- (3) The fee for filing an application for renewal of a registration under Section 4(1) is [\$].
- (4) The fee for filing an amendment to the application under Section 4(1) is [\$].