



June 8, 2023

Via Electronic Submission: <http://www.regulations.gov>

The Honorable April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Solicitation for Public Comments on Provisions of Franchise Agreements and Franchisor Business Practices (FTC Docket No.-2023-0026) (March 10, 2023)

Dear Secretary Tabor,

The Home Care Association of America (“HCAOA”) appreciates the opportunity to submit our views to the Federal Trade Commission in connection with the FTC’s Request for Information as part of its review of the FTC Rule on Franchising (“Franchise Rule”).

I. Home Care Association of America

HCAOA is the home care community’s leading trade association—currently representing 23 of the largest franchises throughout the United States in home care. HCAOA is the trusted voice of the home care industry, strengthening its members through advocacy, education, and research. HCAOA’s purpose is to provide leadership, representation, and education for the advancement of home care and provide a strong unified voice to speak to issues of concern within the home care industry. Each of HCAOA’s members are committed to abiding by its Code of Conduct and striving for excellence in service in the home care industry.¹

Founded in 2002, HCAOA represents 4,300 companies that employ millions of dedicated Care Professionals across the United States. Care Professionals provide medical, skilled, personal, and companion home care, enabling seniors and individuals with disabilities to remain in their homes as long as possible at a cost that is more affordable than institutionalized care. This includes Private Duty Nursing (PDN)—medically necessary nursing services under Medicaid for medically fragile patients, primarily children. Care Professionals also assist with a variety of non-medical activities of daily living, such as bathing, dressing, eating, and other services necessary for seniors and the disabled to thrive at home.

¹ The HCAOA Member Code of Conduct is accessible at <https://www.hcaoa.org/codeofconduct.html>. This Code of Conduct includes a Home Care Aid Assurance that each member “[c]onducts criminal background checks, training and supervises all home care aides.” Franchisee members take this responsibility very seriously in the operation of their independently owned and operated businesses.



HCAOA is invested in legal developments in franchising, as nearly three-quarters of its members are franchisees of twenty-three of the leading franchisors in the home care industry. The issues raised in this RFI are highly relevant to those members. HCAOA is concerned that the FTC’s statement regarding a “growing concern around unfair and deceptive practices in franchising” and various components of the RFI, including those focused on a franchisor’s right to make system changes or other franchisor requirements that are appropriately addressed in a franchise agreement, are not supported by data and facts, but based instead on anecdotal experiences by a relatively small number of franchisees or other franchisee advocates when compared to the tens of thousands of franchisees who believe in the franchise business model and the opportunities that franchising has provided them.

HCAOA submits this response to provide insights from its members.

II. Franchising’s Positive Impact on the U.S. Economy

The franchise model became popular in the United States in the 1970s.² It has become an increasingly significant part of our economy ever since. According to the International Franchise Association’s (“IFA”) 2023 Franchising Economic Outlook,³ the total output of franchised businesses will exceed \$860 billion this year and franchising makes up 3% of the total GDP. Over 8.4 million people in the United States work for a franchised business.

Franchising offers constant, new opportunities for individuals seeking to own their own business and companies looking for wider distribution of their products, systems, and services. Franchising gives new business owners a leg up through the use of trade names, marketing experience, acquisition of a distinctive brand appearance, standardization of products and services, training, and advertising support. With franchising, starting a new business and expanding that business becomes attainable for many individuals that otherwise would not have that type of opportunity to build a successful business. Franchising particularly provides opportunities to individuals who may have otherwise faced obstacles to starting a business, including women, minorities, and first-time business owners.

Indeed, franchising has proven to be quite a successful model. According to a 2016 survey, franchisees report sales that are on average 1.8 times as large and provide 2.3 as many jobs as non-franchise businesses.⁴ Franchised businesses operate in over 300 business lines in the United States from amusement parks, automotive, business-to-business services, cell-phone repair, fitness, hair care, home

² For an excellent overview on the history of franchising and franchise regulations, *see* William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship*, Franchise Law Journal (Summer 2008). Though first published over a decade ago, Killion’s article still rings true today.

³ 2023 Franchising Economic Outlook, International Franchise Association, available at <https://www.franchise.org/franchise-information/franchise-business-outlook/2023-franchising-economic-outlook#:~:text=Franchises%27%20GDP%20share%20of%20the,of%204.2%25%20to%20%24521.3%20billion> (last accessed June 5, 2023).

⁴ *See The Value of Franchising*, International Franchise Association & Oxford Economics, available at <https://www.franchise.org/media-center/press-releases/ifa-oxford-economics-release-new-franchise-report> (last accessed June 6, 2023).



repair services, tutoring, spas, childcare, pet care and senior care. In addition, *The Value of Franchising* report released by the IFA and Oxford Economics in 2021 discusses the role of franchising in supporting entrepreneurship for underrepresented groups, including women and people of color. The report observes that franchise establishments are more likely to have an owner of color than non-franchises on average and across most of the major franchise industry sectors. It also notes that franchising has proven to be a path to entrepreneurship for immigrants and newcomers in a variety of industries. The report further found, based on a survey of franchisees, that nearly a third of respondents reported that they would not own a business if they were not franchisees.

Within HCAOA and the home care industry generally, the franchise business model has been the vehicle that has allowed dozens of franchisors to enable thousands of franchisees to start and grow thriving businesses that provide thousands of Care Professional jobs and enable hundreds of thousands of families to have the peace of mind of keeping their loved ones in need of care at home rather than placing those family members in an out-of-home facility. Never in U.S. history has there been such a need for quality in home care service providers due to the doubling of the number of older adults over the last 30 years. Franchising has proven to be a successful ingredient in meeting this growing need. These franchisees are key members of their local communities, who employ Care Professionals who provide care to a family's loved one with tremendous devotion and passion. It is franchising that allows (i) the home care franchisor to offer a quality brand and service and create opportunity for small business owners in thousands of communities, and (ii) the home care franchisee to invest in its business, employ, train, and supervise incredible Care Professionals, and focus on the delivery of the safe and quality home care to patients.

The franchise business model and the roles of the franchisor and franchisee in that model are not broken, as the RFI suggests. In fact, according to the IFA's 2023 Franchising Economic Outlook, home health care franchises are among the fastest growing franchise categories and are expected to enjoy continued growth over the next few years given the large demand for this industry. Every year, new business owners enter home care franchising based on the recommendation of happy and successful franchisees.

The FTC's pursuit of the topics covered in the RFI in the manner that is foreshadowed in the RFI would have a negative impact on all the stakeholders in the HCAOA members' brands, including the franchisors, the franchisees and the Care Professionals employed by franchisees. HCAOA's views, however, do not mean that improvements with the FTC Rule can't be made. We address those suggested improvements in Section VI below.



III. The Nature of the Franchise Relationship

A business format franchisor does not just license a trademark, it provides its franchisees with an entire method of doing business that is defined and controlled by system standards. These system standards also drive uniformity, protect the brand integrity, and drive consistency around the brand experience. It is this system uniformity that is the cornerstone of business format franchising in today's world, as customers expect the same quality of products or levels of service from every business that is part of a franchise network. In many respects, system standards are about controls. To some, these controls may appear pervasive. But each control exercised or retained by a legitimate franchisor serves to protect the brand for the franchisor and the franchisee, rather than controlling a franchisee's day-to-day operations.

Franchisors also provide support to franchisees in a number of ways, including franchisee training, marketing and advertising, vendor relationships, and technology platforms, among other things. Franchisees value this franchisor support, and, as noted above, a significant number of franchisees report that they would not be in business if it weren't for the franchise model and corresponding support that it provides.

Much of existing law and regulation falsely assumes the franchise model has not changed since it became popular in the 1970s. These laws and regulations also assume franchisees are relatively unsophisticated business entities at the mercy of the far more powerful franchisor. Implicit in the FTC's RFI and questions laid out therein is the same assumption. But this is not the case. The franchise model involves complex, dynamic, and ever-evolving business relationships. It involves not only the franchisors and franchisees, but other stakeholders as well, such as citizens who aspire to one day own their own business, consumers who turn to franchising to deliver goods and services, employees and suppliers who earn their living from franchising, and the other franchisees in the particular franchise system that are dependent on the continued success of the system.

Each of these stakeholders within the system has become increasingly sophisticated in recent years. Modern franchisees are far more sophisticated now than they were in prior decades when most franchise-related legislation and regulation was enacted. There are two primary reasons for this. First, franchisees have access to far more presale information. They receive a franchise disclosure document (FDD) containing information such as the litigation history and financial condition of the franchisor, the fees the franchisee will pay the franchisor, the estimated initial investment a franchisee will make in the franchised business, the support the franchisor will provide the franchisee, any territorial protection the franchisee may receive, information about current franchisees, and key terms of the franchise agreement. With that information, franchisees can easily understand the risks and shop for alternative franchise opportunities. The choices are meaningful, as there are thousands of separate franchise investment opportunities in the United States today, and dozens within the home health care industry alone. Potential franchisees become just like any other informed investor able to weigh the pros and cons and make a rational decision before entering into a business venture.

Second, franchisees have increased bargaining power. More and more franchisees are becoming multi-unit owners. These multi-owner franchisees often come to the table with sophisticated business



experience and commercial perspective. They are invested in, and are willing to provide feedback about, the system. These multi-unit franchises are very desirable business partners for many franchisors, and franchisors work to help them expand and prosper.

Franchise regulation that treats franchisees as naïve, uniformed entities does not reflect the model as it exists today. Modern franchise relationships require a modern approach to regulation – one that treats both the franchisor and franchisee as the sophisticated parties that they are. Any franchise relationship regulation that would result in a “one size fits all” approach on franchise agreement provisions or key aspects of the franchise relationship is not the answer. One clear example of the inadequacy of such an approach is the hours of operation point referenced in the RFI. No home care business has hours of operation like a restaurant or other retail business or many of the residential or commercial service businesses. Unlike residential service businesses such as house cleaning or other home services where homeowners want the service provided during the workday, home care franchisees must be prepared to provide around the clock care for those families who need that support.

Moreover, for a franchise system to be successful, there must be a culture of collaborative leadership and alignment on the brand promise by all brand stakeholders. The franchisor and franchisee leaders in the best franchise systems are fully aligned on the importance of both strong unit level economics and strong franchise relationships with authentic collaboration, all of which leads to a sustainable future. This is especially critical in today’s world, where customers demand constant change and franchise systems must be able to quickly adapt. Franchisors who don’t embrace change and design a culture where franchisees embrace and implement change will fall behind their competition. With that real-world dynamic, successful franchisors do not lead with primarily a command-and-control style, but rather embrace collaborative leadership where a franchisor retains decision-making authority on key brand matters, while also listening closely and collaborating with franchisees under a shared desire to create sustainable, profitable businesses.

In short, franchise owners may be in business *for* themselves, but they are not in business *by* themselves. It is thus no wonder that nearly a third of franchise owners say they would not own their business without the support of a franchise system.

IV. The Role of the Franchise Agreement – Protect the Brand and all Brand Stakeholders

Central to the modern franchise relationship is the franchise agreement, which sets forth the terms of the franchise relationship. At its foundation, the franchise agreement is the legal contract between the franchisor and franchisee, defining each party’s rights and obligations regarding key functions each plays in the franchise system and important facets of the franchise relationship. Although the RFI seems to question “take it or leave it” franchise agreements, a largely uniform franchise agreement across all franchisees benefits not just the franchisor but also the franchisees by providing franchisees a level playing field within the system and consistent with a franchisor’s obligations as a licensor of its trademarks under 15 U.S.C. § 1051 (1946) (the Federal Lanham (Trademark) Act).



The goal of the franchise agreement is to give the parties the framework and tools for a successful franchise relationship while protecting the brand and brand stakeholders. Modern franchise agreements accomplish this goal by setting clear standards for the brand while preserving the franchisor's flexibility to grow the brand, facilitate changes to the brand, protect the brand on behalf of all stakeholders, and capitalize on extensions of the brand.

Franchisors rightly impose requirements and system standards to assure uniformity in the franchise system and to protect their marks, logos, and other intellectual property central to the brand. Franchise agreements often expressly declare that any required standards exist to protect the franchisor's interests in the system and the trademarks and not for the purpose of establishing any control or duty to take control over those matters that are reserved to the franchisee. Franchisors and the franchise agreement recognize that the franchisor's role is to protect, grow, and evolve the brand and system; the franchisee is responsible for the day-to-day operation of the business.

An effective franchise agreement must also allow the franchise system the opportunity to change over the life of the agreement, especially given the often lengthy term of the agreement (10 years or more). It is impractical, if not impossible, to amend the franchise agreement to address every change that will be faced by the franchise business and system during the term of the franchise agreement. The agreement must therefore be flexible enough to accommodate the need for system changes and evolution. Indeed, franchisors often compete with larger companies with corporate locations, as well as other franchise systems. If those competing businesses are able to more nimbly roll out new product lines or new marketing campaigns, they will have a leg up in the marketplace, with negative consequences for franchisor and franchisee alike. This highlights the need for franchise agreements to allow for franchisors to implement system-wide changes and otherwise evolve the system to meet competitive demands and ever-changing consumer preferences.

As an example, as technology has advanced, so too has the threat of cyber attacks and data breaches have become more pronounced. To respond to these threats, some franchisors in the home care space have begun requiring franchisees to carry cyber liability insurance to manage and mitigate cyber risk. If the franchise agreements were not flexible enough to allow franchisors to introduce these types of new requirements, franchisors would be more limited in their ability to protect the brand and system from cybersecurity and other threats that were less prominent or not referenced at all at the time the franchise agreement was executed.

As another example, franchisors in the home care space had to act swiftly to implement changes to respond to the COVID-19 pandemic emergency, including to implement system-wide requirements around handwashing procedures, personal protective equipment (PPE) requirements, and health screening requirements before entering homes. If franchise agreements are not flexible enough to allow franchisors to respond to these types of unpredictable events, it could have severe adverse consequences for the system as a whole. Indeed, if a single franchisee flouts the requirements and it resulted in client illness or death, that human tragedy can besmirch all franchise businesses within the system and have a negative impact on the entire brand.



Protecting the brand through strong franchise agreements does not only benefit the franchisor. It is an important tool for all stakeholders in the franchise system. Strong franchise agreements allow the franchisor to deal with free-riding franchisees that refuse to play by the rules. Using an economic analogy, it is the franchisee free rider who potentially creates great risk to all the other stakeholders in the system by hurting not only the franchisor, but also all the franchisees that do play by the rules, and the system and brand as a whole. All stakeholders in the brand should support a franchise agreement that allows the franchisor to effectively deal with free riding franchisees. In that circumstance, the franchise agreement appropriately balances the interests of the franchisor, the franchisee, and the system as a whole.

Strong brands also build customer loyalty. Consumers care about, and will remain loyal to, a consistent, positive brand experience. Moreover, when franchisees flout their requirements under franchise agreements, it creates risks for all the stakeholders in the franchise system. For example, the franchisee that refuses to contribute to a brand marketing fund or that introduces unapproved products or services weakens the overall brand and introduces unnecessary risk to all stakeholders associated with the franchise. As noted earlier, all stakeholders in the brand should want a franchise agreement that allows the franchisor to effectively deal with franchisees that are not abiding by their obligations to the franchise system.

The bottom line is that any legal framework around franchising thus must allow franchisors to develop strong franchise agreements in order to protect brand standards to everyone's benefit, including all the franchisees who have invested heavily in their franchised businesses. In fact, for many HCAOA franchisor members, it is those very franchisees who expect and demand that their franchisor enforce the franchise agreement against those free-riding franchisees who refuse to comply with brand standards and create risk for their business.

V. Franchisor Business Practices (Home Care Franchisors)

HCAOA members are committed to fostering sophisticated, collaborative, and successful franchise systems. To that end, they often utilize the following best practices, many of which do not appear to be acknowledged by the FTC's RFI approach to the following key topics.

a. Franchise Advisory Councils and Franchisee Associations

Franchisees' influence in a franchise system is magnified by a franchisor's collaboration with a franchise advisory council ("FAC") or other franchise association. FACs are organizations comprised of both franchisor and franchisee representatives that work together to improve the system, address problems, and create an open line of communication. FACs play a pivotal role in strategic planning for the brand. As an elected group from their franchisee peers, the FAC works collaboratively in working groups alongside the franchisor to provide valuable franchisee insight and perspective and to continually improve the overall performance and success of the brand. Franchisee associations are independent groups of franchisees that facilitate information sharing and communication with the franchisor.



Both organizations facilitate problem-solving and avoid communication asymmetries. They allow for cooperation within the system without having to turn to influence from external regulation or other parties. Franchisors, including in the home care industry, value these resources as a way to create open dialogue and embrace the reality that the franchisor and franchisees' interests, roles, and responsibilities are in many respects aligned.

Some of HCAOA's members have fully embraced the FAC not only to work through issues that come up within the system, but also to roll out system changes. Before implementing a major system change, these members will engage with their FAC to design the change and discuss how best to implement it systemwide. Many initiatives to support the health and wellbeing of older adults have been deployed nationwide using this collaborative approach. This collaborative approach allows for a smoother process that takes advantage of franchisees' on-the-ground experience.

For example, when a HCAOA member franchisor was recently seeking to implement a national advertising fee, rather than implement the change unilaterally, the franchisor approached the FAC for advice and input. The FAC suggested that the franchisor discuss the plan to implement a national advertising fee with the system at the national conference. The franchisor heeded the FAC's advice and received their buy-in for the program.

As another example, another HCAOA member franchisor worked with its FAC in connection with upgrading the system's consumer technology offering. The FAC was part of the RFP process, demo meetings with potential companies, and involved in testing products and making recommendations for what was eventually rolled out systemwide.

b. Joint-employer related pressure points regarding franchisee employee Care Professionals

The intersection of franchise and employment issues are highly relevant to HCAOA's members' business model.

Dedicated teams of Care Professionals are hired by franchisees that have entered into franchise agreements with HCAOA's members. Those Care Professionals are not employees of the franchisor members themselves.

On occasion, counsel for a franchisee's employee may allege that legally the franchisor member is also his or her employer as a "joint employer." Courts use various tests to determine whether a defendant qualifies as a joint employer depending on which employment laws are at issue. The tests generally consider multiple factors, with the right to control the employee being the ultimate touchstone. These tests consider factors such as the following:

- The power to hire and fire employees;
- Supervision and control of employee work schedules or conditions of employment;
- Determination of the rate and method of payment; and



- Maintenance of employment records.

Plaintiffs often point to franchise controls—such as the franchisor’s brand standards, manuals, and rights under the franchise agreement—as evidence of joint employment. But courts have repeatedly rebuffed these claims and recognized that franchise controls are not the same as employer-type controls. Franchisor controls have a separate purpose from employee controls. They exist not to exert an employer’s influence over the employee, but rather to protect the franchise system brand.

It is uncommon for franchisors in the home care industry to require franchisees to enter into non-compete agreements with Care Professionals, and Care Professionals are free to work for multiple different brands. Nor do home care franchisors include no-poach provisions in their franchise agreements preventing franchisees from hiring another franchisee’s employees. Finally, HCAOA member franchisees are required to hire Care Professionals as W-2 employees, not independent contractors. Not only does this allow for better training and oversight of Care Professionals, but it also allows more protection for the consumer in the form of accountability and insurance.

The FTC should not use the Franchise Rule to blur any “joint employer” line when franchisors in the home care industry have taken great care to encourage their franchisees to fully embrace their responsibility to be the employers of choice in their local communities, and franchisees in the home care industry have embraced that responsibility to employ and train those Care Professionals. Any blurring of the “joint employer” line will only result in a blurring of the lines of communication and responsibility that will have a negative impact on families.

c. System Change

In today’s world, the speed and magnitude of change is staggering, especially when customers demand constant change. Franchisors who don’t embrace change and design a culture where franchisees embrace and implement change will fall behind their competition.

As noted above, franchisors and franchise systems face substantial competition. If a franchisor cannot compete effectively, neither the franchisor nor its franchisees will survive. All stakeholders in a franchise system should understand the importance of system change to the long-term sustainability of the brand. The franchise landscape is littered with franchisors and franchisees that refused to embrace change, resulting in customers simply making decisions to spend their hard-earned dollars elsewhere. A franchise system either embraces change or dies.

For example, with the changing capabilities and functioning of the internet and search engines, a HCAOA franchisor members has made a significant investment in an updated website infrastructure that improves response times and search capability for all franchisees. This change required coordination with the franchisees to convert their current website content to the new framework, which in turn made the franchisee’s business more easily found by clients and families seeking information and services for their loved one.



As another example, after utilizing the same back-end software platform for over 15 years, another HCAOA member franchisor decided to review the market of options. Working with a group of technology super-users of the existing platform, franchisor leadership worked through an RFP process, demonstrations, and testing. After group recommendation, franchisor leadership negotiated terms with the new provider and migrated 100% of its network to the new platform.

VI. Suggested Franchise Rule/FDD Improvements

HCAOA agrees with the U.S. Government Accountability Office’s April 17, 2023 report concluding that better disclosures and more education are needed. HCAOA also strongly supports the International Franchise Association and its efforts in working collaboratively with franchisors, franchisees, and suppliers to develop recommended amendments to the Franchise Rule that focus on improved disclosures to provide clarity to prospective franchisees, especially regarding those issues that often give rise to relationship issues after the purchase of the franchise (for example, upgrades and innovations that may be required by a franchisor during the term of a franchise agreement).

Additional updates that the FTC might consider should focus on the technology improvements that are available to enable prospective franchisees to receive and review FDDs in a way that will be more meaningful to prospective franchisees. Technology advances also can be utilized to streamline or better organize the FDD and its exhibits, again with the primary focus on how to present the information to prospective franchisees so that they can fully evaluate the franchise opportunity, conduct their due diligence, and then make an informed decision with their eyes wide-open.

One additional area that merits consideration relates to educating prospective franchisees on the franchise business model generally. Despite clear guidance on the front cover page of every FDD that information on franchising is available, such as “A Consumer’s Guide to Buying a Franchise,” opportunities exist to better educate franchisees on the franchise business model. For example, in 2019 the North American Securities Administrators Association (“NASAA”) expanded required disclosures regarding State Cover Instructions and “What You Need To Know About Franchising Generally.” These required disclosures could be further expanded to cover additional general topics like the role of the franchisee in a franchise system and how that differs from an individual owning a small business outside of franchising. These areas of focus are wholly within the historical and legislative underpinnings that the FTC Rule is a disclosure rule only.

The required disclosures also could include a list of questions that a prospect should consider asking future or former franchisees, with a focus on providing a prospect with valuable information to assess in making an informed investment decision. Examples might include questions regarding how a franchisor implements system change or technology updates, or whether the franchisor effectively uses an FAC or other similar franchisee group in considering system change or other key decisions that require significant capital investment by the franchisee.



All stakeholders in franchising (including franchisors and franchisees alike) would receive far more benefits were the FTC to focus on improved disclosures under the FTC Rule and enhanced franchisee education, rather than the FTC attempting through rule-making to prescribe provisions that should be included or not included in a franchise agreement or regulate franchisor practices through a “one size fits all” franchise relationship approach when franchisors and franchisees operate in hundreds of different industries. In addition to the practical and commercially reasonable reasons for focusing on improving disclosure and education, any FTC attempts to regulate specific terms of the franchise agreement or the franchise relationship likely exceed the scope of the FTC’s rule-making authority. The approach we suggest here is consistent with the FTC’s view of the amended Franchise Rule in 2007, when it concluded that absent a record of truly prevalent and pernicious conduct--unlikely across even a single industry such as home care, much less over the estimated 300 lines of business in which the franchise business model operates in the U.S.—post-sale regulations likely fall outside of the FTC’s authority under Section 5 of the FTC Act.

VI. Conclusion

Thank you for the opportunity to submit these comments to the RFI. We appreciate your consideration.

Sincerely,

x/Eric M. Reinerman

Vice President, Government Relations
Home Care Association of America

Of Counsel:

Brian B. Schnell
Lauren W. Linderman
Hannah M. Leiendecker
FAEGRE DRINKER BIDDLE & REATH LLP
2000 Wells Fargo Center, 90 South Seventh Street
Minneapolis, MN 55402
brian.schnell@faegredrinker.com