We sincerely hope that *The Annotated Franchise Agreement* will be a useful resource guide. It is designed especially for business attorneys who may be relatively new to drafting franchise agreements, whether that person is a seasoned transactional attorney who is less familiar with franchising or a newer associate or corporate counsel who wants to understand the caselaw and reasoning behind some of the typical structures of a franchise agreement.

From many readers, the editors can anticipate an initial question: Where can we download the franchise agreement template? The answer is that this reference book does not come with a cut-and-paste-ready template, for two specific and important reasons.

First, a careful review will show that, despite the comprehensive coverage, the sections discussed in this book do not fit together like perfect puzzle pieces. Some provisions overlap with one another slightly, covering some of the same information in more than one place. Some sections include multiple samples, each appropriate for a different situation. In other sections, the sample language is drafted in a way that lends itself very well to a specific type of franchising, such as food service or the hotel industry, and is not as well suited to the many other types of business franchising that exist in the United States. The authors selected these sections to illustrate some of the points their comments make about how and why to draft certain terms in various situations.

Second, and even more importantly, one of the goals of this book is to persuade the reader that there is no one-size-fits-all franchise agreement template. A well-drafted franchise agreement is the product of careful analysis of many considerations, including the type of business at issue, its business goals and objectives, the specific obligations of the franchisor and franchisee in a particular system, the level of sophistication of both franchisor and prospective franchisees in that system and
the power dynamic between them, regulatory issues, judicial direction, and the culture of that franchise system. While each franchise system’s agreement will invariably deal with many if not most of the same issues, they may be addressed in an entirely different manner from one franchise agreement to the next.

A good franchise agreement is also, by necessity, a reflection of where the brand is in its life cycle. Quite often, a “mom and pop” franchise start-up will have a franchise agreement that is more generous to franchisees in various ways, including lower fees. It may exert slightly fewer controls over a franchisee’s latitude to be creative or regional in its product or service offerings than a well-established system under a famous brand. At the same time, the start-up will typically promise less in the way of support and franchisor obligations, while the famous brand can be expected to offer a robust and extremely consistent level of support including, for example, high production value advertising and sophisticated research and development programs focused on developing new products and services and responding to trends. As the start-up matures, establishing more units and accumulating more brand recognition, these elements change, and the franchise agreement changes along with it. Thus, the sample agreement language in this guide is a jumping off point for the drafter to modify to fit the specific franchise system at issue.

Understanding the meaning and purpose of a clause in a franchise agreement is key to being able to provide quality advice to clients, whether they are franchisors or franchisees. There is a real risk to taking one form of franchise agreement and believing it can be used in another, or any other, franchise system, which, unfortunately, some franchisors and lawyers may do at times. Although often intended as a cost-saving measure, this can result in a system using forms of agreement inappropriate to the type of franchise being offered. Those systems can then spend more on marketing the franchise, as they try to explain to prospects the content of a form that is not appropriately tailored to the situation. But the real long-term cost may be much more significant: more and costlier legal disputes result when interpretation of the contract wording becomes the focus. It should go without saying that inappropriate or incorrect provisions result in substantial problems.
• **Territory Definition:** A description or map of the territory granted to the franchisee
• **Personal Guaranty:** A form of personal guaranty which the individual owners are required to sign if the franchisee is not a natural person
• **Nondisclosure Agreement:** A form of nondisclosure and noncompetition agreement that the franchisee is required to use to bind its employees to duties not to disclose the brand’s confidential information or unfairly compete with the brand
• **Acknowledgment:** An acknowledgment to be executed by the franchisee, confirming that the franchisee has not relied on outside information or representations not made within the franchise agreement and any disclosure document which may have been provided
• **Collateral Lease Assignment:** A form of lease addendum that must be made part of the lease for the physical premises where the franchisee will operate its business, ensuring that the franchisor may assume the lease in the event the franchisee defaults or its franchise agreement is terminated
• **Telephone Number Assignment:** An agreement that telephone numbers either belong to the franchisor or will be assigned to the franchisor, in the event of termination of the franchise
• **Software License Agreement:** A software license agreement permitting the franchisee to use and sometimes sublicense brand-specific software or mobile apps
• **ACH Agreement:** An agreement allowing the franchisor to draw fees directly from the franchisee’s designated bank account

This is a non-exhaustive list, and many systems have additional agreements appropriate to their business formats. The same care which a drafter takes in creating the franchise agreement should also be taken in drafting these ancillary agreements.¹

The franchise agreement is the key document that establishes the franchise relationship. This relationship is characterized legally, in broad strokes, by a franchisor granting a franchisee a temporary or time limited right to use the franchisor’s system and trademarks to conduct business.² In many systems, the term of a franchise agreement is ten years, and the franchise agreement’s individual provisions set out the rights and obligations of each party over that decade-long relationship in detail. For this reason, it is critical that prospective franchisors and franchisees understand the purpose and drafting issues behind each provision in the agreement, as well as the historic rationale for such a provision, in order to ensure they are willing to enter into it.

Despite the variation from one franchise agreement to the next, virtually all such agreements contain the same key concepts, regardless of the industry or business. This book explores the common and often complex terms and conditions found in franchise agreements by providing, for each section:

- One primary sample provision (which appears in italics), and where appropriate, reference to alternatives or variations on how a particular issue may be addressed;
- A discussion on the provision’s meaning and typical purpose; and,
- Where appropriate, practical perspectives on the clause, franchisee negotiation points, and statutory and judicial considerations.3

Of course, every industry, business, and relationship has unique considerations, and each consideration may affect and alter the sample provisions. So while the text provides some variations of clauses, the full myriad of possible provisions is beyond the scope of this book.

A franchise agreement should be drafted with precision and care. It should be clear (with concise and simple language), user friendly, and comprehensive. The sections should build logically on one another, should be placed under appropriate headings, and should be easily found by any person reading it. To make the agreement as comprehensible as possible, drafters might consider approaching the project as if they are writing a “story,” so that users can see the big picture of the franchise relationship.4

Drafters must keep in mind that the typical franchise agreement is a long and complicated document. If a franchise agreement is not logically built, and/or if provisions are not easy to find, then the agreement could, at best, become a source of confusion and frustration in the franchise sales process as well as during the ongoing business relationship and, at worst, add to the time, cost, and complication of disputes between a franchisor and franchisee.

Given the importance of a well-structured franchise agreement, commentators have noted that several general approaches have emerged to structuring the basic framework of the agreement. Some drafters prefer to take a “life cycle” approach and set out a sequential outline of what will happen in the franchisee/franchisor relationship.5 Another approach is the “highlight-the-deal” approach where the key aspects of the relationship are covered first, followed by a sequential life-cycle approach for the remainder of the agreement.6 Lastly, some may use a “franchise disclosure agreement” approach, where the agreement follows the order of the information required by the Franchise Disclosure Document (FDD). This last approach often misses key provisions and is rarely used. Even though it is uncom-

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3. The clauses in this agreement are simply sample clauses drawn from typical franchise agreements. They are not intended to be comprehensive, the “gold standard,” or clauses recommended by the authors.
5. Id. at 7–9.
6. Id.
mon for drafters to follow the general structure of the FDD, they nevertheless should consider drafting in anticipation of franchise disclosure.

This book follows the life-cycle approach for the most part, which the editors believe is used most frequently. However, it is important to note that even within the life-cycle approach there is no single right way to order the provisions, and drafters should not feel constrained by the order in which this book considers the typical sections of the agreement. As noted in Chapter 2, sometimes a blended approach can be beneficial. The goal is an effective franchise agreement that embodies and clearly articulates the parties’ respective rights and obligations and provides an opportunity to assist in the resolution of disputes.

The sample franchise agreement language used in this book is modeled primarily on restaurant franchising, arguably the most common type of franchised business. This “standard” franchise structure presents an excellent starting point for understanding the key provisions in a franchise agreement. Drafters working on behalf of other types of systems, such as hotels, consulting service providers, janitorial systems, or mobile businesses, however, must consider the elements present in their systems, which may not be covered by the sample provisions presented here.

A few other editorial choices are also worth mentioning. As is briefly alluded to in Chapter 3, there is some dispute among franchise practitioners about the appropriateness of the term “sole discretion” in a franchise agreement, and as to the proper interpretation of what standard is meant by this phrase. While many agreements grant “sole discretion” to the franchisor as often as possible, some practitioners have made conscious efforts to use other terminology, and still others have included language defining whether “discretion” should be measured under the business judgment rule or the implied covenant of good faith and fair dealing. The sample provisions in this book include the word “discretion” in many instances, and the authors’ perspectives on this issue are reflected in these chapters.

In addition, we refer throughout the book to the agreement as a “franchise agreement” and to the parties as “franchisor” and “franchisee.” This is simply a decision to make the language in this book uniform. Some franchise systems call their agreements “license agreements” or may use other names to define the parties and these are generally all appropriate. And we avoided repeating dollar figures in both words and numbers (e.g., “three hundred dollars ($300)”) because this is a notoriously easy way to have one number changed and the other number unchanged, leading to disputes. We also removed virtually all the numbers from the sample provisions, even where a period of time such as 30 days or 12 months might be fairly standard, to avoid biasing the reader toward a particular period of time or dollar amount. As is repeatedly emphasized in this book, the best franchise agreements are customized to the particular system to which they belong, with the franchisor making specific choices rather than adopting “boilerplate” language to set its practices.

This book could not have come together without extraordinary contributions from a number of people. The editors are deeply grateful to all of the prominent practitioners who authored chapters, contributing an enormous amount of time and attention to making this book a reality and tolerating occasionally unexpected deadlines and difficult requests. Their experiences and suggestions make this guide a rich and detailed exploration of the language of franchise agreements and the statutory and judicial considerations which should inform drafters. This book also could not have come together without the attention and efforts of two different ABA Forum on Franchising Publications Officers, James Goniea and David Oppenheim, and Publication Committee member Theresa Koller whose patient and sometimes impatient prodding helped keep this project on track. The editors also thank Lee Plave for his contributions.

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