Franchise Sales Laws Need Revisions to Further Their Objectives, but Federal Preemption Is Not the Solution

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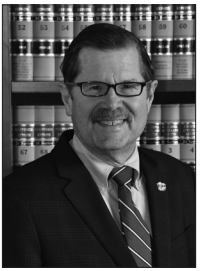

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A recent *Franchise Law Journal* article recommends transmogrifying all state and federal franchise sales laws into a unitary federal standard which would preempt all state laws (the Preemption Article).[1] A central premise of the Preemption Article is the chorus of franchisors' complaints of expensive and duplicative state franchise registration requirements. The Preemption Article concludes by recommending preempting federal legislation, including several new, and some useful, provisions: 1) establishing a national database for all franchise disclosure documents (FDDs); 2) deputizing state attorneys to enforce a new federal disclosure law; and 3) providing a federal cause of action under the new federal disclosure statute.

But the Preemption Article provides no justification for the central proposal of eliminating state government review of FDDs before registration and sale of franchises. Nor are studies or empirical evidence provided that the current dual-regulation regime is overly burdensome and expensive. To the contrary, the uniform national disclosure standards are mandated by the Federal Trade Commission (FTC) under the FTC Franchise Rule (FTC Franchise Rule).[2] And state franchise registration laws, rather than being administered inconsistently by state franchise examiners, are unified in approach and streamlined under the auspices of the North American Securities Administrators Association (NASAA).

1. Rochelle Spandorf, *Can Federal Preemption Solve What's Wrong with Franchise Sales Laws?*, 39 Franchise L.J. 477 (2020).

2. Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436 *et seq.*

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The Preemption Article prioritizes the desires of franchisors to quickly get to market and sell franchises over consumer protection—namely, the checks and balances that promote accuracy and completeness. Society's goal, reflected in state franchise laws, is to ensure potential franchisees receive sufficient and accurate information to enable them to make informed investment decisions and avoid misleading franchise offerings. The best social outcome would be to increase the portion of franchises sold that succeed, not merely increase the number of franchises sold. The Preemption Article's suggested policies would eliminate core state law protections by eliminating prior review of FDDs and other safeguards provided by multiple states. Presale screening and stop orders by state franchise examiners thwart some of the worst actors before fraudulent franchise sales occur. State enforcement actions also provide needed relief and enjoin continuing violations. Without state presale review, there would be no stopping the distribution of fraudulent, deceptive, or incomplete FDDs to prospective franchise buyers.

Dual regulation in commerce is often the rule, rather than the exception, in our federal system. This is especially so in the regulation of fraud in the marketplace. And a public policy concern arises when the real goal of federal preemption is to lessen public protections with weak federal legislation supplanting stronger state laws. Changes to the franchise laws should instead address the purpose of franchise disclosure: providing essential, understandable, and truthful information to prospective franchisees. Many proposals to this end were presented to the Commission during the FTC's 2019 FTC Franchise Rule review. Some of the additions suggested in the Preemption Article could assist in that effort, including increased private enforcement via a federal cause of action, but preemption is not warranted.

A. *A Brief History of the Purpose of Franchise Sales Regulation*

1. In the Beginning, State Franchise Regulation Through Review, Registration, and Disclosure Was Followed by Federal Regulation Limited to Disclosure

The first franchise disclosure law, the California Franchise Investment Law, was enacted in 1970 following testimony from franchisees and law enforcement regarding franchise fraud. State Senator Bill Bradley explained the purpose: "There are no effective legal remedies available to combat the problem of misleading and deceptive practices engaged in by those franchisors whose activities reflect unfairly on the rest of the industry."[3] The proposed law was drafted by the California Department of Corporations and the California Attorney General using the registration and disclosure structure of California's securities laws. The statute was signed into law by then Governor Ronald Reagan as part of his 1970 consumer protection package. The

3. Statement of State Senator Clark Bradley, SB 67, California Leg. Intent Servs. (Mar. 30, 1970).

future President explained that the need for consumer protection required honest businesses to accept regulation:

> The fact is, free enterprise has prospered in our society—indeed, it has brought this nation the highest standard of living ever known to man—because, on the whole, the system has served our people honestly and fairly. Nevertheless, there are always some persons who try to misuse and exploit the system through dishonest and unethical operating methods. The laws I have proposed to the legislature have been directed at these unrepresentative few—to either bring them in line or put them out of business. At the same time, I have cautioned that we must always be scrupulously careful *not* to penalize the vast multitude of hardworking, honest, and legitimate businesses for the sins of the few.[4]

The California statute was copied, in whole or in part, by several states. A group of states adopted laws requiring presale registration of franchise offerings as well as disclosures, including Hawaii, Illinois, Indiana, Maryland, Minnesota, New York, North Dakota, Rhode Island, Virginia, and Washington.[5] A smaller group, either originally or later, eliminated registration in favor of notice filing only, including Michigan, South Dakota, and Wisconsin. Oregon and Ohio simply require disclosure without registration.[6] Florida and Mississippi have statutory anti-fraud requirements regarding the sale of franchises but do not require registration or pre-sale disclosure. That state franchise sales laws are not identical in definitional coverage, substantive regulation, or remedies, is not unusual. In our federal system, the caldron of fifty state legislative bodies, the "laboratories of democracy," often leads to better laws and protections.[7] The big picture, however, is that the states' legislative approaches are remarkably similar: most require franchise offerings, similarly defined, to be reviewed and registered and for there to be disclosure to potential franchisees before a sale. Some states only require notice filings. Almost all states have addressed statutory fraud with most prohibiting misrepresentations and material omissions in the FDD or elsewhere.

In 1971, after Congress failed to enact federal franchise disclosure legislation, the Federal Trade Commission announced the proposed rulemaking that led to the enactment of the FTC Franchise Rule in 1978. The ensuing rule provided for similar pre-sale disclosure, but did not require registration or approval of the disclosure document. The Commission's process included substantial public comments and testimony, culminating in an official Statement of Basis and Purpose for the Franchise Rule. The FTC found

4. Press Release, Office of the Governor Ronald Reagan (Sept. 24, 1970).

5. These statutes and other franchise disclosure laws are ably delineated in the following treatise: Franchise Deskbook: Selected State Laws, Commentary, and Annotations (Bethany L. Appleby, W. Michael Garner & Karen Boring Satterlee eds., 3d ed. 2019).

6. All of the state statutes are covered in the *Franchise Deskbook*, *id.*, except Ohio's. Perhaps this omission was due to the designation of the statute as the Ohio Business Opportunity Purchasers Protection Act. Ohio Rev. Code Ann. § 1334 *et seq.* Nonetheless the Ohio law allows franchisees to sue under that statute for violations of the FTC Franchise Rule, including its prohibitions of misrepresentations and certain omissions.

7. *Preemption of State Laws: Good for Big Tech, Bad for the Public*, Public Citizen (May 30, 2019), https://www.citizen.org/article/preemption-faq.

significant evidence that the sale of franchises included multiple instances of misrepresentations, especially false and deceptive earnings claims, as well as fly-by-night operators. In addition, the Commission noted the existence of a fundamental information imbalance: Professor Urban Ozanne testified that "a severe informational disparity exists as well . . . [when] the franchisor presents the information about the franchise and its sales and profits. Unlike the franchisee, he knows how much information is fact and how much puffery."[8]

The initial FTC Franchise Rule required disclosure similar to the already existing state statutes, but no federal review or registration. The lack of registration or filing thus differs from the similar regulation of stock prospectuses by the SEC. While stock prospectuses must be disclosed to investors like FDDs, federal law requires non-exempt prospectuses to be filed with the SEC.[9] In addition to registration, the SEC selectively reviews prospectuses as well as companies under the Sarbanes-Oxley Act of 2002.[10]

The SEC does not guarantee that a disclosure is complete and accurate; instead that responsibility rests with the company and its professional advisers. While the SEC review of prospectuses is not exhaustive, the SEC review is a first line of defense from fraudulent offerings. The SEC describes its reviews as follows: "In its filing reviews, the Division [of Corporate Finance of the SEC] concentrates its resources on critical disclosures that appear to conflict with Commission rules or applicable accounting standards and on disclosure that appears to be materially deficient in explanation or clarity."[11] Unlike the SEC, the FTC conducts no reviews of FDDs. Because it has no registration or review obligation, the FTC does not maintain staff trained for review of FDDs.

When a security offering is fraudulent or otherwise fails, the investor loses only their investment, sometimes denominated as risk-capital. But when a franchise is fraudulent or otherwise fails, the franchisee stands to lose much more than the initial franchise fee. The failing franchisee loses the investment in a buildout of the unit, in the equipment, and possibly in other long-term obligations, which keep growing such as commercial leases, equipment leases, and loans with accruing interest. On top of those losses, the franchisee may have been looking to the franchise business for their livelihood. The magnitude of risk for franchisees is often exponential to that of stock investors.

The FTC specifically declined to preempt consistent state regulations and specifically allowed additional state protections of franchisees:

8. FTC Statement of Basis and Purpose, Bus. Franchise Guide (CCH) ¶ 6304 (July 21, 1979).

9. 15 U.S.C. § 77j. *See generally* Securities Act of 1933, the Securities Exchange Act of 1934, and the Sarbanes-Oxley Act of 2002.

10. Sarbanes-Oxley Act of 2002.

11. SEC, Filing Review Process (Aug. 8, 2020), https://www.sec.gov/divisionscorpfin/cffiling review.htm.

> The FTC does not intend to preempt the franchise practices laws of any state or local government except to the extent of an inconsistency with part 436. A law is not inconsistent with part 436 if it affords prospective franchisees equal or greater protection, such as a registration of disclosure documents or more extensive disclosures.[12]

This provision reflects a partial preemption of state franchise statutes: state franchise sales laws are preempted to the extent they are inconsistent with the FTC Franchise Rule.

2. The States' Pre-Sale Review and Registration of FDDs

Although not significantly analyzed in the Preemption Article, state franchise disclosure statutes conduct a first line of defense to fraudulent and defective offerings, much like the SEC. This state review, like the SEC, typically includes study of critical disclosures, legal compliance, and appropriate accounting reporting, and ensures that disclosures are complete and clear. This should not be surprising, as NASAA is comprised of state securities and franchise disclosure regulators who regularly meet and train with representatives of the SEC and FTC. Among the specific and multiple consumer protections not found under the FTC Franchise Rule, and enforced by state agencies, are the following:

> —Presale review of franchise offering circulars and required registration before franchises can be offered and sold in the state.[13]

> —Prior review of franchise advertisements.[14]

12. 16 C.F.R. § 436.10(b).

13. The following states conduct presale review and registration of franchise disclosure documents although with some exemptions: California, Cal. Corp. Code §§ 31110–31225 (Commissioner may issue a stop order); Hawaii, Haw. Rev. Stat. §§ 482E-3 (filing), 482E-8(a) (stop orders); Illinois, 815 Ill. Comp. Stat. 705/1 §§ 705/5, 705/10, 705/22–705/23 (Administrator may issue stop orders); Maryland, Md. Code Ann., Bus. Reg. §§ 14-214–14.215, 14-221 (Commissioner may issue a stop order); Minnesota, Minn. Stat. §§ 80C.02–80C.05 (verification of registration); New York: N.Y. Gen. Bus. L. § 683(1); North Dakota, N.D. Cent. Code § 51-19.03; Rhode Island, R.I. Gen. Laws § 19-28.1-5; Virginia, Va. Code Ann. § 13.1-560; Washington, Wash. Rev. Code §§ 19.100.020, 19.100.120 (Director may issue stop order). The following states generally require only notice filing and disclosure with no review and registration before sale of franchises: Indiana, Ind. Code § 23-2-2.5-9; Michigan, Mich. Comp. Laws § 445.1507(a); Oregon, Or. Rev. Stat. § 441-325-0020 (Oregon requires disclosure but no registration or filing); South Dakota, S.D. Codified Laws § 37-5B-5; Utah, Utah Code Ann. § 13-15-1; Wisconsin, Wis. Stat. § 553.21.

14. The following states conduct presale filing or review of advertisements for the sale of franchises: California, Cal. Corp. Code §§ 31156–31157 (Commissioner may summarily find advertisements as false or misleading and prohibit publication of the advertisement); Illinois, Ill. Admin. Code tit. 14 § 200.301 (limits on content of advertising regarding safe investments, success, and profits); Indiana, Ind. Code § 23-2-2.5-26; Maryland, Md. Code Ann., Bus. Reg. § 14-225, Md. Regs. Code § 02.02.08.09; Michigan, Mich. Comp. Laws § 445.1524 (filing may be required); Minnesota, Minn. Stat. § 80C.09 (filing required five days before use), Minn. R. §§ 2860.4100, 2860.4200; New York, N.Y. Gen. Bus. L. § 683(15); North Dakota, N.D. Cent. Code Ann. § 51-19.10; South Dakota, S.D. Codified Laws § 37-5B-23; Washington, Wash. Rev. Code §§ 19.100.100, 19.100.110.

—Franchisors with limited financial capacity may be required by most state laws to impound, defer, escrow or secure with a surety bond, initial franchise fees pending performance of the franchisor's initial training and opening assistance obligations.[15]

—Administrative enforcement.[16]

—Criminal prosecutions for violations.[17]

—Private civil lawsuits including for damages and rescission for willful violations. This self-help remedy is missing from FTC Franchise Rule, which contains no private right of action.[18]

—Jurisdiction over the franchisor by the state and for service of process by service on the state.[19]

15. The following states provide for impoundment of initial franchise fees in certain conditions. California, 10 Cal. Admin. Code § 310.113; Hawaii, Haw. Code R. 16-37-5; Illinois, 815 Ill. Comp. Stat. § 705/15, Ill. Admin. Code tit. 14 §§ 200.502–200.508; Indiana, Ind. Code § 23-2-2.5-12; Maryland, Md. Code Ann., Bus. Reg. § 14-217, Md. Regs. Code § 02.02.08.08; Washington, Wash. Rev. Code § 19.100.050; Michigan, Mich. Comp. Laws § 445.1512; Minnesota, Minn. R. 2860.1800, 2860.1900; New York, N.Y. Gen. Bus. L. § 685, N.Y. Comp. Codes R. 200.6; Virginia, Va. Admin. Code § 5-110.65, 553.605.

16. The following states provide for administrative enforcement under the statutes: California, Cal. Corp. Code § 31406; Hawaii, Haw. Rev. Stat. §§ 482E-8, 482E-10-7; Illinois, 815 Ill. Comp. Stat. §§ 705/23-705/31; Indiana, Ind. Code § 23-2-2.5-14, 23-2-2.5-35; Maryland, Md. Code Ann., Bus. Reg. §§ 14.210, 14.222; Michigan, Mich. Comp. Laws § 445.1535; Minnesota, Minn. Stat. §§ 80C.12–80C.18 (verification of registration); New York: N.Y. Gen. Bus. L. §§ 688-689; North Dakota, N.D. Cent. Code Ann. §§ 51-19.09, 51-19-13; Oregon, Or. Rev. Stat. § 650.057; Rhode Island, R.I. Gen. Laws §§ 19-28.1-18, 19-28.1-25; Virginia, Va. Code Ann. § 13.1-570; Washington, Wash. Rev. Code § 19.100.130; Wisconsin, Wis. Stat. §§ 553.55–553.57.

17. The following states provide criminal sanctions for certain violations: California, Cal. Corp. Code §§ 31404, 31410–31416; Hawaii, Haw. Rev. Stat. §§ 482E-10.5 (civil penalties), 482E-10.6 (criminal penalties); Illinois, 815 Ill. Comp. Stat. §§ 705/24–705/25; Indiana, Ind. Code §§ 23-2-2.5-36, 23-2-2.5-37; Maryland, Md. Code Ann., Bus. Reg. §14-211; Michigan, Mich. Comp. Laws §§ 445.1538, 445.1540 (fines); Minnesota, Minn. Stat. § 80C.16 (civil fines and criminal penalties); New York, N.Y. Gen. Bus. L. §§ 690, 692; North Dakota, N.D. Cent. Code Ann. § 51-19.03; Rhode Island, R.I. Gen. Law § 19-28.1-20; South Dakota: S.D. Codified Laws § 37-5B-25; Virginia, Va. Code Ann. § 13.1-569; Wisconsin, Wis. Stat. §§ 553.52, 553.57.

18. Virtually all states, unlike the FTC Franchise Rule, provide for private rights of action for franchisees for violations of the state statutes: California, Cal. Corp. Code § 31300; Hawaii, Haw. Rev. Stat. §§ 482E-9; Illinois, 815 Ill. Comp. Stat. § 705/26; Indiana, Ind. Code §§ 23-2-2.5-28, 23-2-2.7-4; Maryland, Md. Code Ann., Bus. Reg. § 14-227; Michigan, Mich. Comp. Laws §§ 445.1531–445.1532; Wisconsin: Wis. Stat.§ 553.51; Minnesota, Minn. Stat. § 80C.17; New York: N.Y. Gen. Bus. L. § 691; North Dakota, N.D. Cent. Code Ann. § 51-19.12; Oregon, Or. Rev. Stat. § 650.020; Rhode Island, R.I. Gen. Laws § 19-28.1-21; Virginia, Va. Code Ann. § 13.1-571; Washington, Wash. Rev. Code § 19.100.190.

19. Most states provide for jurisdiction in their courts by franchisors and for service of process on the franchisor at government offices: California, Cal. Corp. Code § 31420; Hawaii, Haw. Rev. Stat. §§ 482E-5(c); Illinois, 815 Ill. Comp. Stat. 705/1 § 705/35: Indiana, Ind. Code §§ 23-2-2.5-24, 23-2-2.5-38; Michigan, Mich. Comp. Laws §§ 445.1522, 445.1539; Minnesota, Minn. Stat. § 80C.020; New York, N.Y. Gen. Bus. L. § 686; North Dakota, N.D. Cent. Code Ann. § 51-19.15; Oregon, Or. Rev. Stat. § 650.070; Rhode Island, R.I. Gen. Laws § 19-28.1-28; South Dakota, S.D. Codified Laws § 37-5B-22; Virginia, Va. Code Ann. § 13.1-566, Va. Admin. Code § 5-110.7; Washington, Wash. Rev. Code § 19.100.160; Wisconsin, Wis. Stat.§ 553.73.

—Anti-waiver provisions.[20]

—Voiding of out of state of state venue clauses.[21]

State agencies regularly obtain judgments and orders against franchisors for violations of state franchise disclosure statutes and regulations.[22]

3. NAASA and State Regulators Provisions for Uniformity

Also not addressed in the Preemption Article is the dedicated and valuable work by NASAA and state franchise examiners that has provided a fundamental unifying element to all franchise sales laws. NASAA is the association of sixty-seven state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA also works on franchise regulations that are most often modeled after securities laws and that exist in sixteen states.

For over thirty years, NASAA's Franchise Project Group has worked to assist franchise examiners and practitioners to comply with state franchise disclosure and registration laws. The Franchise Project Group has developed multiple policy statements and interpretive guidelines to assist franchisors and the franchise bar. NASAA and the Franchise Practice Group conduct annual trainings and webinars for franchise examiners.

While none of the state statutes and regulations is identical, NASAA has consistently led the way toward achieving uniformity. NASAA worked diligently developing the Uniform Franchise Offering Circular, which the FTC approved for use under the Franchise Rule despite the different federal disclosure format. NASAA consults with the FTC staff on franchise regulation. In comments supporting the continuation of the Franchise Rule, NASAA President Michael Pieciak stated:

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20. The following states have anti-waiver provisions: California, Cal. Corp. Code § 31512; Illinois, 815 Ill. Comp. Stat. 705/1 § 705/41; Maryland, Md. Code Ann., Bus. Reg. § 14-226; Michigan, Mich. Comp. Laws § 445.1527(b); Minnesota, Minn. Stat. § 80C.21, Minn. R. 2860.4400.D; North Dakota, N.D. Cent. Code Ann. § 51-19.16(7); South Dakota, S.D. Codified Laws § 37-5B-26(8); Virginia, Va. Code Ann. § 13.1-571(c); Wisconsin, Wis. Stat.§ 553.76.

21. The following states laws void out-of-state venue clauses in franchise agreements: California, Cal. Bus. & Prof. Code § 20040.5; Illinois, 815 Ill. Comp. Stat. §§ 705/1, 705/4, Ill. Admin. Code tit. 14 § 200.608.

22. *In re* Dental Support Plus Franchise, LLC, Kent Maerki, and Norma Jean Maerki, Cal. Dep't of Bus. Oversight (Dec. 20, 2018) (citation and cease and desist order for selling franchises; making untruthful statements or willfully omitting required disclosures); *In re* USA Sub, Inc., Case No. SEU-2017-028, Dep't of Com. & Consumer Affs. (June 29, 2020) (order against franchisor for selling unregistered franchises to Hawaii residents also without disclosures. Civil penalty of $30,000 and franchisor ordered to offer rescission of franchise agreements and payment to franchisees within sixty days); Virginia, *ex rel.* State Corps. Comm'n v. N.Y. Bagel Enters., Inc., Case No. SEC-2016-00046, State Corps. Comm'n (Mar. 10, 2017) (judgment against franchisor and its principals for selling unregistered franchises, using false statements, and material omissions in the offer and sale of franchises to Virginia residents. Award of $225,000 in penalties, ordered to rescind franchises with restitution to franchisees, and pay costs to the State in excess of $20,000); *In re* Conner & Assocs., Inc., Case No. S-16-2021-19-FO01, State of Wash. Dep't of Fin. Inst. Secs. Div. (Sept. 16, 2019) (sales of unregistered franchise agreement including by misrepresentations and material omissions, cease and desist against certain defendants).

> On June 6, 2008, NASAA adopted the disclosures under the Franchise Rule as the replacement for the [Uniform Franchise Offering Circular] Guidelines. The Franchise Practice Group works closely with Commission staff and state franchise regulators regarding franchise disclosure requirements.[23]

B. *What's Wrong with the Status Quo of Franchise Sales Regulation?*

Are the problems asserted in the Preemption Article substantiated, and substantial enough, to warrant preempting current state regulation protecting prospective franchisees? Or are some of the problems advanced in the Preemption Article insubstantial, exaggerated, or simply straw men introduced to advance the interests of regulated franchisors to the detriment of prospective franchisees? The touchstone in analyzing the future of franchise sales regulation should be the intent of franchise disclosure. Bearing that in mind, some of the non-preemption proposals in the Preemption Article, such as creating a national data base of FDDs and providing real remedies for franchisees, do merit further study.

1. Multiple Franchise Definition Problems, Not So Much

The differences between the definitions of a franchise in the FTC Franchise Rule and most state franchise disclosure statutes are minimal. The definitions generally include the right to operate a business substantially associated with the franchisor's trademark, a marketing plan by the franchisor, and a franchise fee paid by the franchisee.[24] The sole exceptions are the few statutes that include a different definition of a *community of interest*, such as in the Minnesota Franchise Act.[25] The Preemption Article cites no cases that found an accidental franchise under state law that was not a franchise under the FTC Franchise Rule.

The problem of the scope of statutory definitions and gray areas on the edges is inherent in any regulatory scheme. Regulated parties will contest the limits of the definitions as to whether there are one or more regulatory definitions. And whatever definitions of a franchise exist, both accidental franchisors and prospective licensors who want to avoid regulation as a franchisor will have incentive to contest the application of the definitions. Some putative franchisors may also seek to skirt the definitions and disclosures. But this evasion is not a function of dual regulation; it is inherent to the intersection of regulation and commerce. The presence of definitional litigation does not warrant the removal of the protections provided by state regulations.

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23. Letter from Michael Pieciak, NASAA Pres., Comments on Franchise Rule Regulatory Review, to April Tabor, FTC Acting Sec., 2 (May 13, 2019), https://www.nasaa.org/wp-content/uploads/2019/05/NASAA-Comment-Letter-FTC-Franchise-Rule.pdf.

24. 16 C.F.R. § 436.1(h).

25. Minn. Stat. § 80C.01(4)(a)(1)(ii). The oft-cited Wisconsin Fair Dealership Law (Wis. Stat. § 135.01 *et. seq*.) includes a community of interest element in its definition of *dealership*, but is not a franchise statute. *See* Bruce Napell, *State Definitions of Franchise Relationship Laws Not Uniform*, 26 Franchise L.J. 3, 12 (2006).

Finally, a nationwide non-partisan group, the Uniform Law Commission (ULC), exists to assist with state law uniformity. This group of lawyers, judges, and legislators appointed by state governments "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law."[26] In the mid-1980s, a proposed Uniform Franchise Act achieved little more than disagreements between franchisor and franchisee attorneys as to the need for legislation at all much less coverage of the legislation.[27]

2. Regulatory Process Problems, Not So Much

The central problem with dual regulation asserted in the Preemption Article, and elsewhere, is that it is duplicative and a waste of franchisor resources. The Preemption Article characterizes state agencies as "uncoordinated," "redundant," a "patchwork," and even a "noose strangling the golden goose." State regulators are accused of wielding "absolute authority." But the support for these positions is remarkably sparse. Instead of empirical evidence or data, the Preemption Article cites opinions of two franchisor lawyers.[28] And the final opinion that state regulation of franchising is destroying franchising is belied by contrary published data. According to the International Franchise Association (IFA), the 750,000 franchises in the United States account for over forty percent of all retail sales in the country.[29] Despite the COVID-19 pandemic hitting in the middle of this year's franchise registration cycle, the state of California received a total of 1,126 franchise registration and renewal applications in the spring of 2020.[30] Ironically, when the IFA was newly formed, it initially supported franchise regulation to help cleanse the franchise marketplace of fraudsters and fly-by-night operators.[31]

If franchising has been growing steadily since the 1970s despite state regulation, one of the reasons is the efficacy of NASAA's promulgation of the original Uniform Franchise Offering Circular Guidelines and the more recent 2008 Franchise Registration and Disclosure Guidelines, which are

26. Uniform Law Comm'n, Overview, https://www.uniformlaws.org/aboutulc/overview (last visited Sept. 24, 2020).

27. Rupert M. Barkoff & Timothy Fine, *The Proposed Uniform Franchise Act: Questions and Answers*, 5 Franchise L.J. 4 (Spring 1986).

28. The opinions came from two respected members of the franchise bar, the late Rupert Barkoff and Philip Zeidman. Rupert M. Barkoff, *Franchise Sales Regulation Reform: Taking the Noose off the Golden Goose*, 3 Entrepreneurial Bus. L.J. 233, 240 (2009); Rupert M. Barkoff, *Upcoming Review of the Franchise Disclosure Rule: Here We Go Again*, Law.com (Nov. 19, 2018), https://www.law.com/newyorklawjournal/2018/11/19/upcoming-review-of-the-franchise-disclosure-rule-here-we-go-again/?slreturn=20200824132539; Sharon Collins Casey, *Franchisors and the FTC: State Regulation and Federal Preemption*, 3 Harv. J.L & Pub. Pol'y 155, 160–65 (1980).

29. *See*, *e.g.*, PriceWaterhouseCoopers LLP, The Economic Impact of Franchised Businesses, Vol. IV (2016).

30. Interview of Theresa Leets, Attorney, Cal. Dep't of Bus. Oversight (July 2, 2020).

31. IFA, *The International Franchise Association—Celebrating Fifty Years of Dedicated Service to Franchising*, Franchising World 2 (Jan. 2020).

accepted by the FTC and all franchise registration and notice filing states. Uniform disclosure helps alleviate redundancy and a lack of coordination.[32]

Regarding the problem of patchwork laws, NASAA addressed concerns over differing state cover pages, by a new uniform state cover page.[33] This document also eliminates redundancy and a lack of coordination. Regarding the related claimed problems of lack of coordination and redundancy, NASAA has recently commenced a program allowing electronic filing of franchise registrations in multiple states simultaneously.[34] The Electronic Filing Depository (EFD) largely copies the program for state securities filing. Although in its infancy, the program allows for a single filing for electronic registration of an FDD in multiple states, with the FDD automatically forwarded to listed states in the filing, together with electronic payment for all listed state application fees. The program is brand new, and not all states have entered the program for franchise registrations due to the presence of electronic filing platforms already present in several states.

NASAA's very existence belies the Preemption Article's assertions about an uncoordinated patchwork: NASAA has led the way in studying and educating the FTC and the public about ongoing, new, and difficult issues regarding franchise regulation, registration, and disclosure. Although the FTC provided innumerable advisory letters and opinions in the 1980s, NASAA has been the enduring resource for the franchising industry and the franchise bar. Here are some of NASAA's additional output to assist practitioners:

—Disclosing Financial Performance Representations in the Time of COVID-19[35]

—NASAA Financial Performance Representation Commentary[36]

—NASAA Franchise Multi-Unit Commentary (adopted September 16, 2014)[37]

—NASAA Commentary on 2008 Franchise Regulation and Disclosure Guidelines[38]

—NASAA Franchise Disclosure Handbook[39]

32. 16 C.F.R. § 436.10(b); *see also* NASAA Franchise State Cover Sheets Instructions (effective Jan. 1, 2020), https://www.masaa.org/industry=resources/franchise-resources.

33. NASAA Franchise State Cover Sheets Instructions, *supra* note 32.

34. NASAA, Electronic Filing Depository, www.efdnasaa.org (last visited Sept. 24, 2020); *see also* NASAA, Electronic Filing Depository Functionality Expanded (May 27, 2020), https://www.nasaa.org/48078/nasaas-electronic-filing-depository-functionality-expanded/#:~:text=WASHINGTON%2C%20DC%2C%20March%2012%2C,UITs)%20with%20state%20securities%20regulators.

35. Disclosing Financial Performance Representations in the Time of Covid-19 (June 2020), https://www.masaa.org/industry-resources/franchise-resources.

36. NASAA, Financial Performance Representation Commentary (May, 8, 2017), https://www.masaa.org/industry-resources/franchise-resources.

37. NASAA, Franchise Multi-Unit Commentary (adopted Sept. 16, 2014), https://www.masaa.org/industry-resources/franchise-resources.

38. NASAA Commentary on 2008 Franchise Regulation and Disclosure Guidelines (adopted Apr. 27, 2009), https://www.masaa.org/industry-resources/franchise-resources.

39. NASAA, Franchise Disclosure Handbook (June 2020), https://www.masaa.org/industry-resources/franchise-resources.

Further, NASAA annually provides training, and often webinars, to state franchise examiners to enhance their knowledge and provide for uniformity. And NASAA franchise examiners regularly confer between meetings on all manner of topics seeking uniformity in regulation and enforcement.

The remaining challenge to franchise registration is the claim of "absolute authority" over franchise registrations. While this assertion is discussed in some length, not one example of a worthy FDD that was not eventually registered is presented. Instead the real issue may be that franchisors and their attorneys do not want to be told no. But the rules are present to be followed, and many registrations are lodged with missing disclosures, missing exhibits, or worse, with inconsistent or unsubstantiated data. Moreover, many states have exemptions from registration for large franchisors, which the statutes presume to be experienced and to employ competent counsel. Even experienced legal counsel have to follow the rules. And so too should regulators. At the end of the day, systems are in place for franchisors to challenge all actions by state examiners and administrators. Stop orders can be challenged by a variety of means, including administrative hearings and court proceedings.

If, at the end of the day, the complaints about dual regulation are not supported by data, then what is the real intent of the Preemption Article? Rather than stopping dual-state regulation, the Preemption Article appears to be an attempt to stop presale review and approval of disclosure documents. This is a substantive proposal for weakening the protections of franchisees, masquerading as the mere avoidance of duplicative regulation. The FTC does not look at anything before it hits the marketplace. It does not review or vet franchise disclosure documents. Franchisors' advertising is not presented to the Commission staff for study and possible action. Franchisors' balance sheets are not examined to determine the necessity of impounding initial franchise fees or requiring surety bonds. Rather than creating regulatory uniformity, the Preemption Article seeks substantive deregulation by eliminating any and all presale review. Without mandatory regulatory review, there will be no chance that contradictory, incomplete, or fraudulent franchise offerings will be weeded out before being offered and sold. Questionable earnings claims will not be prohibited. The horse will be out of the barn, and damage done to franchisees who have invested. The current regulatory regime does not stop every scam, but it catches some and deters others. Requiring no prior review empowers fraudfeasors and bad actors; the very persons that the statutes seeks to regulate and stop.

3. Lack of Statutory Remedies for Aggrieved Franchisees; Yes, This Is a Problem for Half of All Franchisees

The Preemption Article asserts that most of the United States is a "registration free zone" and that "[t]here is something unjust with a status quo where all franchisees in the same network may experience the same wrongdoing yet some are left remediless."[40] The Preemption Article correctly notes that not all franchisees have rights for violations of franchise statutory

40. Spandorf, *supra* note 1, at 491–92.

disclosure and anti-fraud rules and that this is a serious problem. The scope of the problem may be overstated, while a minority of states have state franchise statutes several of the larger states by population, including California, New York, and Illinois, have those statutes. Yet in most states there are no franchise disclosure laws or statutory remedies. In case after case, courts have concluded there is no private right of action under the FTC Act or its trade regulation rules like the FTC Franchise Rule.[41] Defrauded franchisees are left to cobble together claims under common law fraud or Little FTC Acts. But such claims may not exist or succeed. And state Little FTC Acts may be limited to consumer transactions or provide limited remedies. Common-law fraud claims are, in many states, subject to being thwarted by the omnipresent disclaimers franchisors' use to negate justified reliance.[42] Thus the proposal in the Preemption Article for a federal private right of action for violations of the FTC Franchise Rule is long overdue.

The Preemption Article also includes a proposal for all state prosecutors to be deputized to enforce a preempting federal disclosure law. But there are concerns with this novel proposal. First, no comparable antecedents are cited. Currently, several state governments have franchise-law expertise from reviewing FDDs for registration. These states have experienced franchise-registration examiners and legal counsel. Many have decades of experience in franchising, having reviewed hundreds of franchise disclosure documents. Even novice examiners receive training and develop a depth of specialized knowledge and experience. If the state registration laws are eliminated, this resource will be unavailable to state attorneys general who would be prosecuting such actions.

4. National Database of Franchise Disclosure Documents: A Helpful Proposal

The Preemption Article also proposes creation of a national database of all FDDs. This proposal neither relates to, nor justifies, preemption of state law protections. But a national database would be an incremental improvement. Currently, three states have publicly accessible databases of franchisor filings: California, Minnesota, and Wisconsin. But many large franchisors are exempt from registration, and, therefore, their FDDs are not included in the databases. Given franchise industry estimates that there are between 4,000 to 5,000 franchisors in the United States, it is clear that many FDDs are not available to the public. The NASAA multi-state filing platform may eventually become a national database of franchisors filing for registration.

41. Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Morales v. Walker Motor Sales, Inc., 162 F. Supp. 2d 786 (S.D. Ohio 2000); Days Inn of America Franchising, Inc. v. Windham, 699 F. Supp. 1581 (N.D. Ga. 1988); Freedman v. Meldy's, Inc., 587 F. Supp. 658 (E.D. Pa. 1984).

42. Courad, LLC v. Kidville Franchise Co., 109 F. Supp. 3d 615 (S.D.N.Y. 2015).

Currently, however, the NASAA system is simply a platform allowing a franchisor to upload an FDD once for registration in multiple states.

A national database could increase competition in franchising. If the FDDs for five major pizza franchisors were online, prospective franchisees could compare the initial investment costs, the royalty rates, and any financial performance representations. Franchisors not providing financial performance representations could be ignored, and the most competitive franchisor would likely be selected by the prospects. This option comports with the theory of competitive free-market economies: the marketplace functions best when sellers and buyers are fully informed about everything in the marketplace. Only then will sellers offer, and buyers choose, the best products at the best price. On a practical level, with full and transparent disclosure and a national database, prospective franchisees would be unlikely to purchase franchise businesses that are unprofitable or merely break even, often with the franchisees working long hours with no pay to themselves.

C. *Why Federal Preemption of State Franchise Regulation Is Unlikely*

1. The Scope of Federal Preemption

Federal preemption flows from the United States Constitution's Supremacy Clause: "This Constitution and the Laws of the United States . . . shall be the supreme law of the land."[43] The category "laws of the United States" extends to the duly enacted regulations of federal agencies.[44] Nonetheless, the federal government has enumerated, rather than unlimited, powers. The express federal power that commonly supports preemption is the Commerce Clause, which gives Congress the power "to regulate Commerce . . . among the States."[45] And case after case has expansively recognized the power of Congress to regulate commerce and, expressly or by implication, preempt conflicting state regulation.[46] Moreover, modern jurisprudence has found that the federal commerce authority extends to intrastate conduct that affects interstate commerce.[47] As a result, few would doubt, and the Preemption Article agrees, that Congress could enact federal laws regulating the sale of franchises nationwide under the Commerce Clause and preempt state franchise sales laws.

In asserting its preemptive authority, Congress can act in varying degrees. Most drastically, Congress can expressly prohibit state regulation of a subject

43. U.S. Const. art. VI. cl. 2.

44. Sperry v. Florida, 373 U.S. 379 (1963) (noting federal statute authorizing the Patent Office to regulate practice of patent agents allowed lawyer residing in Florida to continue to practice patent law under Patent Office regulations despite the Florida Supreme Court finding the lawyer committed the unlicensed practice of law in California).

45. U.S. Const., art. I. § 8, cl. 3.

46. *E.g.*, New York v. United States, 505 U.S. 144 (1992); Hodel v. Va. Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264 (1981).

47. *E.g.*, United States v. Sw. Underwriters, 322 U.S. 533 (1944); United States v. Darby, 312 U.S. 100 (1941).

matter. An example is the Federal Cigarette Labeling and Advertising Act, which, when enacted in 1966, required all cigarette packages and advertising to state: "CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH." The statute then expressly preempted state law by stating: "No statement relating to smoking and health, other than the statement required by this Act, shall be required on any cigarette package."[48] Alternatively, Congress can positively prohibit conflicting state laws, but expressly allow state regulation that does not conflict, including additional state regulation supplementing the federal law. Still other preemption cases involve confusing or inconsistent express Congressional preemption provisions.

When Congress fails to address preemption in a federal statute or regulation, courts are nonetheless often called upon to resolve assertions of federal preemption. With an outright conflict, such as when a state law mandates conduct proscribed by federal law, the result will be federal preemption. On other occasions, courts will find a congressional intent to occupy an entire field of legislation and preempt state laws. In *Northern States Power Co. v. Minnesota*, the Eighth Circuit found that Congress occupied the field of radioactive discharges from nuclear power plants and struck down a Minnesota law imposing more stringent limitations on radioactive discharges from a Minnesota plant.[49]

The FTC Franchise Rule, although adopted by an administrative agency, currently follows the pattern of prohibiting inconsistent state laws but expressly allowing non-conflicting additional or supplementary state regulation.[50] In *Mon-Shore Management, Inc. v. Family Media, Inc.*,[51] the U.S. District Court for the Southern District of New York confirmed that the FTC Franchise Rule did not preempt more stringent state law franchise disclosure protections.

If there are political and public policy choices regarding Congress's decisions to preempt state laws, and to what extent, at least one elephant remains in the room. The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States, respectively, or to the people."[52]

48. Express preemption statutory language may still lead to uncertainties. The cigarette industry sought to use the above federal preemption to shield itself from common law fraud and breach of warranty claims of a diseased and dying smoker in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The Supreme Court narrowly construed the preemption language to allow state law claims to proceed. *See also* Altria Group, Inc. v. Good, 555 U.S. 70 (2008).

49. N. States Powers Co. v. Minn., 320 F. Supp. 172 (D. Minn. 1970); Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

50. 16 C.F.R. § 436 n.2 (1996); 6 C.F.R. § 436.10(b).

51. Mon-Shore Mgmt., Inc. v. Fam. Media, Inc., 584 F. Supp. 186, 190 n.1 (S.D.N.Y. 1984) (quoting the FTC's statement of non-preemption in the Statement of Basis and purpose); *see also* Spring Fresh Corp., v. Dep't of Secs., 829 P.2d 1001 (Okla. App. 1992).

52. U.S. Const. amend. X.

2. Traditional State Police Power Regulation of Fraudulent Business Practices and Preemption

The states regularly enact legislation under their reserved and plenary police powers. Health and safety laws lead the list. When New York enacted a requirement for mandatory typhoid fever inoculation, the United States Supreme Court upheld the law against a constitutional challenge.[53] Perhaps the second most common area in which states exercise their police power is statutes prohibiting fraud in the marketplace. Virtually every state prohibits unfair and deceptive practices under "Little FTC Acts" and unfair and deceptive practices statutes.[54] Such state regulation extends into many fields of commerce such as Blue Sky laws regulating the sales of securities, insurance laws, false advertising laws, and consumer protection statutes.

In deference to the Tenth Amendment, the U.S. Supreme Court has repeatedly declared a presumption against preemption, especially over legislation traditionally covered by state legislation.[55] In *Medtronic v. Lohr*, the U.S. Supreme Court held that the Medical Device Amendments of 1976 did not preempt Florida common law allowing the injured plaintiff to maintain an action for negligent design of her pacemaker.[56]

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the *scope* of its intended invalidation of state law, we used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in *Cipollone*. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.[57]

53. Jacobsen v. Commonwealth of Mass., 197 U.S. 11 (1905).

54. Many of the state unfair and deceptive practices mirror the FTC Act and hence are called "Little FTC Acts." Some state statutes differ in their coverage of unfair and deceptive acts and practices. Some states cover only consumer transactions while others also include business practices including disclosure and other misconduct by franchisors. *See*, *e.g.*, Bethany L. Appleby, Robert S. Burstein & John M. Doroghazi, *Cause of Action Alchemy: Little FTC Act Claims Based on Alleged Disclosure Violations*, 36 Franchise L.J. 429 (2010); Altresha Q. Burchett-Williams, Robert M. Einhorn & Paula J. Morency, *Claims Under the "Little FTC Acts" The High Stakes of Risk and Reward*, Am. Bar Ass'n 33rd Annual Forum on Franchising, W-6 (2010); John G. Parker & Angela M. Fifelski, *Claims Under Little FTC Acts*, Am. Bar Ass'n 28th Annual Forum on Franchising, W-4 (2005); Arthur L. Pressman, Ellen R. Lokker & Eric H. Karp, *The Use of State Little FTC Acts in* Franchise *Relationship Litigation*, Int'l Franchise Ass'n, 31st Annual Legal Symposium (1998).

55. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996); *see also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

56. *Medtronic*, *Inc.*, 518 U.S. at 485.

57. *Id.* (citations omitted).

Congress nonetheless has enacted federal laws that preempt state law designed to protect the public usually when industry contends that they would otherwise be unduly impaired. Approval of drugs and medications that are marketed nationwide was deemed to require uniformity. In *Geier v. American Honda Motor Co*., a passenger in a Honda was severely injured despite wearing a shoulder harness that met the National Traffic and Highway Commission's safety standards.[58] She contended that the car was unreasonably dangerous because it could have been manufactured with air bags available at the time. Honda successfully asserted federal preemption of state law claims, because the federal statute "reflects a desire to subject the industry to a single, uniform set of federal safety standards."[59]

Ultimately, this uniformity is a policy decision for Congress: does federal legislation set a minimum level of protection that states may exceed, or a uniform national standard that states may not alter? In the political caldron of the legislative process, many federal statutes wind up setting a floor and allowing states to provide more protection for their citizens. Minimum wages follow this path: federal law sets a floor, but states may adopt higher minimum wages. And Congress seldom thwarts the ability of states to protect their citizens from fraud and chicanery in commercial practices. Thus, the case for preemption will likely have to be significantly stronger than that made in the Preemption Article in order to convince Congress to pass a preemptive national franchise investment law.

3. The Use of Federal Preemption by Regulated Industries to Remove or Weaken State Regulations and Protections

Perhaps the biggest concern with preemption is the use of federal preemption by industry to weaken or remove states' protections for their citizens. As noted above, federal preemption can negate not only state legislation but also state common-law remedies. The public-policy concern was succinctly described in a recent article in the *American Prospect*:

> Federal preemption is a bad thing when it prevents states from protecting their citizens more effectively than federal agencies that sometimes fail to fulfill their statutory responsibilities. Regulatory failure is clearly a problem when federal agencies are run by political appointees who are ideologically opposed to the agencies' missions. But even under leadership of non-ideological technocrats, agencies can become captured by regulated interests.[60]

The Preemption Article suggests franchising should adopt the proposed federal privacy law and preempt state laws in favor of a single federal standard. Since the enactment of the California Consumer Privacy Act, effective in 2020, several big technology companies have been pushing for a weaker

58. Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).
59. *Id*. at 871.
60. Thomas O. McGarity, *Trumping State Regulators and Juries*, Am. Spectator at 16 (Apr. 14, 2017).

federal statute preempting state laws. *Public Citizen* compiled examples of existing state statutes that could be preempted by a federal privacy law:

> —The California Consumer Protection Act (protects personal data);
>
> —The Illinois Biometric Information Privacy Act (safeguards biometric data);
>
> —The Vermont Data Broker Act (protects consumers from fraudulent data use);
>
> —The Massachusetts Data Security Law (establishes strong security and data breach notification standards);
>
> —Alaska's and Nevada's Genetic Privacy laws (safeguard genetic data);
>
> —Dozens of state laws that specifically protect the privacy of schoolchildren and prevent the commercial use of their educational information; and
>
> —Laws that protect consumers caught up in data breaches, which have been enacted in all fifty states, the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands.[61]

The Preemption Article proposes federal preemption with a few benefits for franchisees, but that could substantially hollow out real state regulation of franchise sales. Those state consumer protections designed to protect the public from the bad actors in the marketplace—including franchisors who make false and unsubstantiated financial performance representations and other frauds, or who misstate their experience and the value or quality of their systems, and are undercapitalized—would be rendered unenforceable.

D. *Conclusion: An Alternate Path Forward*

Future changes to franchise laws will likely start with the Commission's review of franchisor and franchisee comments regarding the 2019 FTC Franchise Rule review. Most of the franchisor comments followed the lead of the IFA that, from a franchisor perspective, the FTC Franchise Rule should continue as is, but should let the IFA know if any changes are considered. Other than the author of the Preemption Article, other comments did not raise the issue of federal preemption of state registration and disclosure laws. Franchisees and their counsel recommended strengthening the rule by multiple proposed changes to the FTC Franchise Rule.[62] The franchisee comments did not propose that the FTC adopt a private right of action under the FTC Franchise Rule, due to the multiple decisions that the FTC lacks such authority that will instead require congressional action.

> The franchisee advocates proposed strengthening the FTC Franchise Rule in multiple ways. Some proposed changes to individual disclosures. Others recommended eliminating franchisor disclaimers, noting that the FTC Franchise Rule was intended to provide information to prospective franchisees, not to disclaim

61. *Preemption of State Laws*, *supra* note 7, at 2.

62. Peter Lagarias & Jonathan Solish, *How Should the FTC Franchise Rule Be Restructured, If at All?*, Am. Bar Ass'n 42nd Annual Forum on Franchising, W-9 (Oct. 2019).

liability for franchisors. Perhaps the most fundamental changes emanated from comments regarding the difficulty of reading and comprehending FDDs, often exceeding three hundred pages in length with franchise agreements exceeding fifty single-spaced pages. Several cited not only their own experiences but also academic articles on the difficulty of laymen, even attorneys, understanding FDDs.[63] Rather than a mishmash of ideas, practical ideas were advocated for improvement of FDDs on readability and comprehension.

Here are some of those proposed changes:

1. The addition of a summary statement of key information in the front of the FDD with toggles to the full disclosure on each topic.[64]
2. Use of ever-advancing technology to allow prospects to link between table of content subjects and the full disclosure and then return to the table of contents. In addition, toggling may allow the user to link directly to the actual text of the standard franchise agreement on the same subject.[65]
3. Use of a single standard registry with uniform searching capabilities available not only to franchise examiners but also to prospective franchisees and their legal counsel. Such a uniform database would allow prospects to compare start-up costs and Item 19 financial disclosures of, for example, five different pizza franchisors. Such comparison shopping is impractical today and if available at all through expensive consulting and reports.[66]

A remaining core problem with FDDs today is that they are unreadable and incomprehensible. Even with comprehensible disclosures, imbalances remain that favor repetitive preparation and use of FDDs. This has allowed franchisors to refine how to disguise problems. Disclaimers added to franchise agreements and FDDs often immunize franchisors from liability for misstatements or even fraud. Settlement of lawsuits and arbitration claims by franchisors invariably require that settling franchisees agree to nondisclosure and non-disparagement provisions. From that moment onward the best and clearest source of the true results of being a franchisee are forever silenced.

Far from being hamstrung by registration and disclosure requirements, franchising has in fact flourished under the current dual regulatory system. While franchises are sold with aplomb, the result for many franchisees is not so beneficial. Disclosures are carefully crafted to avoid serious negative issues with particular franchisors. And the franchise agreements, among the most complex agreements in the known world, are not fathomable, and even if understood are not negotiable. For many the result is a perfect storm of

63. *See*, *e.g.*, Uri Benoliel & Xu (Vivian) Zheng, *Are Disclosures Readable? An Empirical Test*, 70 Ala. L. Rev. 237 (2018).

64. *See* Lagarias & Solish, *supra* note 62, at 25 (citing Eric N. Karp & Ari N. Stern, *A Proposal for a Mandatory Summary Disclosure Document*, 35 Franchise L.J. 541 (2016)).

65. *Id.*, at 25–26.

66. *Id.*

acquiring an unprofitable business with enormous and ongoing costs for which the franchisee has little or no rights and remedies. There is a need for stronger, not weaker, disclosure laws and, not mentioned in the Preemption Article, for franchise relationship laws providing basic rights and remedies for all franchisees. No one should lose all of their rights and assets simply because they signed a franchise agreement at a persuasive franchise salesperson's beckoning.