

Solicitation for Public Comments on Provisions of Franchise Agreements and Franchisor Business Practices

In a franchise relationship, franchisees typically pay a fee in exchange for a business format or system developed by a franchisor, the right to use the franchisor's trademark for a specific number of years, and assistance. Owning a franchise, however, comes with defined costs, franchisor controls, and contractual obligations. Through this Request for Information, the Federal Trade Commission (FTC) is interested in learning more about the means by which franchisors exert control over franchisees and their workers. Specifically, the FTC is interested in how franchisors disclose certain aspects and contractual provisions of the franchise relationship whether it be in Franchise Disclosure Documents, franchise agreements, operating manuals, or elsewhere. In addition, this Request for Information seeks information about the scope, application, and effect of certain contractual provisions and aspects of the franchise relationship.

The FTC enforces a number of laws and rules that may apply to the franchisor-franchisee relationship.

Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits both unfair methods of competition and unfair or deceptive acts and practices in or affecting commerce; these authorities may apply to and prohibit certain contract terms.

The FTC also enforces the Franchise Rule. The Franchise Rule is a pre-sale disclosure rule, which requires franchisors to provide prospective purchasers of franchises specified material information they need to weigh the risks and benefits of such an investment. In 2019, [the FTC solicited public comment on, among other things, the continuing need for the Franchise Rule](#). In 2020, [the FTC held a public workshop](#) related to issues raised in the public comments it had received, and solicited additional comments on those issues. The Franchise Rule is currently under regulatory review.¹

Finally, the FTC also enforces the Robinson-Patman Act, 15 U.S.C. § 13, which, among other things, proscribes commercial bribery, or "kickbacks." Section 2(c) of the Robinson-Patman Act makes it unlawful for any person to pay or to receive anything of value except for services rendered in connection with the sale or purchase of goods.

The FTC is currently seeking public comment on a proposed rule to ban noncompete clauses for workers in some situations. As part of that proposed rulemaking, the FTC is interested in public comments on the question of [whether that proposed rule should also apply to noncompete clauses between franchisors and franchisees](#). Comments related to the use of noncompete restrictions in franchise agreements should be [submitted as part of the noncompete rulemaking through April 19, 2023](#).²

¹ This RFI is separate and distinct from the Franchise Rule regulatory review. Comments submitted in response to this RFI will not automatically become part of the Franchise Rule regulatory review record.

² This RFI is separate and distinct from the noncompete rulemaking proceeding. Comments submitted in response to this RFI will not automatically become part of the rulemaking record for the noncompete rule.

In this RFI, the FTC seeks public comment on the following:

1. The Franchise Relationship
 - a. The ability of franchisees to negotiate the terms of franchise agreements
 - i. To what extent are franchise agreements presented to prospective franchisees as take-it-or-leave-it contracts?
 - ii. What terms, if any, of franchise agreements are negotiated between the franchisee and franchisor?
 - iii. To the extent that franchise agreements are not meaningfully negotiated, what are the effects on franchisees?
 - iv. To the extent such agreements are non-negotiable, what are the justifications?
 - b. The ability of franchisors to make unilateral changes to the franchise system during the course of a franchise relationship
 - i. What types of changes to operating manuals are made unilaterally? How prevalent are such practices?
 - ii. Aside from changes to the operating manual, how do franchisors make unilateral changes?
 - iii. Do franchisors disclose prior to the initiation of the franchise relationship that such unilateral changes may be made, and if so, where and how?
 - iv. What restrictions are there on franchisors' ability to make unilateral changes to the franchise system?
 - v. What are the effects of franchisors' ability to make unilateral changes to the franchise system on franchisees, consumers, workers, and competition? How prevalent are such effects?
 - vi. What justifications are there for franchisors making unilateral changes to the franchise system, including to the operating manual?
2. Provisions of the Franchise Agreement
 - a. For any of the provisions identified below, discuss (1) the prevalence of such provision in franchise agreements; (2) how the provision affects franchisees, consumers, workers, and competition, or (3) any justifications for such provision.
 - i. Provisions that restrict a franchisee from hiring employees of the franchisor or other franchisees (often described as "no-poach" provisions)
 - ii. Provisions that require that the franchisee provide employee training, and whether costs are borne by the franchisor or the franchisee
 - iii. Provisions that require franchisees to purchase or lease goods, services, real estate, or other items related to establishing or operating a franchised business, either from the franchisor, its designee, or suppliers approved by the franchisor, or under the franchisor's specifications
 - iv. Prohibitions on the sale or purchase of unapproved products or services
 - v. Provisions that impose maximum or minimum prices or otherwise limit franchisee discretion to price products and services
 - vi. Provisions that determine wages, hours or working conditions of employees of the franchise

- vii. Provisions that mandate franchisees to maintain certain hours of operation
 - viii. Provisions that restrict or do not restrict the territory or sites where the franchisee may operate its business
 - ix. Provisions that restrict or do not restrict a franchisor or its successors-in-interest from competing with a franchisee by one or more means within a designated area
 - x. Provisions that require franchisees to make non-recoverable capital investments at the franchisor's direction (often described as "mandatory capital investment provisions")
- b. Non-disparagement and goodwill clauses
- i. To what extent do franchisors enforce non-disparagement, goodwill or similar clauses and how do they enforce them?
 - ii. To what extent do non-disparagement, goodwill or similar clauses inhibit franchisees from filing complaints with state, local, or federal agencies related to unfair or deceptive conduct by franchisors?
 - iii. To what extent do non-disparagement, goodwill or similar clauses inhibit franchisees from providing information to prospective or current franchisees or third parties about the franchise and their experience as a franchisee?
 - iv. What effects do non-disparagement, goodwill or similar clauses have on franchisees, consumers, workers, and competition? How prevalent are such effects?
 - v. What justifications are there for non-disparagement, goodwill, or similar clauses?
3. Franchisor Business Practices
- a. Retaliation for participation in franchisee associations
- i. Do franchisors retaliate against franchisees for participating in non-franchisor endorsed or sponsored franchisee associations? If so, how prevalent is such retaliation, and what form does it take, including possibly audits or on-site inspections?
 - ii. How do these practices affect franchisees, consumers, workers, and competition?
- b. Wages and Working Conditions
- i. How do franchisors exercise control over the wages and working conditions in franchised entities other than through the terms of franchise agreements?
 - ii. What service-based quality control measures, whether imposed through licensing or other agreements, depend on franchisee employee performance?
 - iii. What data do franchisors collect and retain regarding franchisees' employees, labor and employment law compliance, and labor costs?
 - iv. How do these practices affect franchisees, consumers, workers, and competition?

- v. How prevalent are these practices?
- vi. What justifications exist for these practices?

4. Payments to Franchisors from Third Parties

- a. Do franchisors receive payment or other consideration from third parties (*e.g.*, suppliers, vendors) related to the purchase of goods or services from those third parties by franchisees.
 - i. If so, do franchisors provide any services that justify the payments?
 - ii. Do franchisors facilitate, encourage, or require franchisees to purchase goods and services from the third party?
 - iii. Are franchisees able to source goods or services independently from third parties other than those approved by the franchisor?
- b. Do franchisors direct or steer franchisees to purchase goods or services from third parties that are owned, in whole or in part, by an entity that has an ownership stake in the franchisor?
- c. Do franchisors direct or steer franchisees to refrain from selling goods or services that compete with third parties that are owned, in whole or in part, by an entity that has an ownership stake in the franchisor?
- d. How prevalent are the following forms of payment or consideration to franchisors from third parties for franchisee purchases?
 - i. Direct cash payments
 - ii. Rebates
 - iii. Signing bonuses
 - iv. Access fees
 - v. Exclusivity fees
 - vi. Preferential wholesale pricing
 - vii. Most-Favored-Nation (MFN) clauses
 - viii. Other discounts
 - ix. Other forms of consideration, including consideration deriving from co-ownership of the third party and the franchisor.
- e. To what extent do franchisors fail to disclose, or seek to conceal, the receipt of payments from third parties based on purchases made by franchisees?
- f. What justifications exist for these third party-franchisor payments?

5. Indirect Effects on Franchisee Labor Costs Related to Franchisor Business Practices

- a. What portion of a franchisee's nonlabor operating costs are determined by the franchisor?
- b. What effect, if any, does the franchisor's control over nonlabor operating costs have on labor costs, and what is the effect on franchisees, consumers, workers and competition?

6. Language Barriers

- a. To what extent, if any, are franchisors marketing their franchises using languages other than English?
 - i. How prevalent are these practices?
 - ii. Is this more common in particular franchise industries? If so, which ones?
 - iii. In such instances, is the franchisor providing disclosures, contracts, operating manuals and other documents to prospective and existing franchisees in the language in which they market the franchise? If not, what is the justification?

The FTC encourages members of the public, including franchisors, franchisees, current and past employees of franchisors and franchisees, government entities, economists, attorneys, academics, and consumers to comment on any issues or concerns they believe are relevant or appropriate for our consideration and to submit written data, empirical research, views, facts, and opinions addressing this RFI.

Comments may be submitted at [regulations.gov](https://www.regulations.gov) and must be received no later than May 9, 2023. To ensure the Commission considers your online comment, please follow the instructions on the web-based form. Your comment – including your name and your state – will be placed on the public record, including, to the extent practicable, on the <https://www.regulations.gov> website. You may view submitted comments at <https://www.regulations.gov> at any time.

Because your comment will be placed on the public record, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not contain sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “[t]rade secret or any commercial or financial information which . . . is privileged or confidential” – as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) – including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names. Anonymized or industry-wide information is not considered competitively sensitive.