

The SBA Franchise Loan Transparency Act of 2021 (S. 1120) *Senators Cortez Masto, Baldwin, Feinstein, Murphy and Warren*

Supported by the *Coalition of Franchisee Associations (CFA)*ⁱ; *American Association of Franchisees and Dealers (AAFD)*; *Dunkin Donuts Independent Franchise Owners Association (DDIFO)*; *Independent Organization of Little Caesar Franchisees*; *International Association of Kumon Franchisees*; *Maine Franchise Owners Association*; *Max Independent Franchise Owners' Association (MaxIFOA, Inc.)*; *Meineke Dealers Association (MDA)*; *National Coalition of Associations of 7-Eleven Franchisees*; *National TUPSSO Franchise Owner Association*; *North American Association of Subway Franchisees*; *Pit Owner's Association*; *South Florida Franchise Owner Association of 7-Eleven*; and *Supercuts Franchisee Association*

The SBA Franchise Loan Transparency Act would mandate that franchise corporations provide the franchisee borrower, the lender, and the SBA historic revenue data – average and median first-year and all businesses -- and store closing and sold during the first year of operation – so the franchisee borrower can make an informed business decision.

Background

Franchise businesses represent a large segment of retail and service businesses and are rapidly replacing more traditional forms of small business ownership in the American economy.ⁱⁱ During economic crises, franchises sales increase as people seek to find other sources of income. One of the benefits of franchising is the presence of accurate revenue, profit and loss, and other financial data that can guide an entrepreneur deciding to buy a franchise business.

Many potential franchisees rely on SBA guaranteed lending programs to access credit to buy a franchise. One of the key components of the SBA guaranteed loan process is the franchise disclosure document (FDD) prepared and presented by the franchise corporation (franchisors) for the franchise owner (franchisee). Unfortunately, franchisors are not required to disclose any financial performance projections or estimates about franchised businesses, such as first-year revenue estimates, which are used as a guide when determining the loan type, amount, and payment schedule. As a result, according to a 2013 Government Accountability Office (GAO) study,ⁱⁱⁱ this information is often left out of the FDD by franchisors. Furthermore, a 2011 audit^{iv} conducted by the SBA Office of the Inspector General found that when franchisors did include first-year revenue projections, they were significantly higher than historical actuals. Without accurate financial disclosure, franchisees with SBA loans, especially veteran-owned businesses, are more likely to fail; because they are guaranteed loans, lenders and borrowers -- and sometimes taxpayers -- cover the loss.^v

Although franchisors are not required to share financial performance projections or estimates with prospective franchisees, they often must share it with franchise lenders in order to have the loans approved. This means that franchisees are kept in the dark about crucial financial performance information about the business they are investing in, even though this same information is compiled and distributed to their lenders.^{vi} As the author of a law review article put it, “[o]ne of the ironies regarding FPRs [financial performance representations] is that even those franchisors that do not make FPR claims in their FDD must often create and distribute

those exact same numbers to the financial institutions of prospective franchisees seeking financing to purchase the franchise.”^{vii}

In 2012, the SBA released stunningly high levels of failure rates of loans to franchises from October 1, 2001 until September 30, 2011.^{viii} A 2015 independent study similarly found that the failure rate on SBA-backed loans to franchisees is high and rising, reaching nearly one in five in the most recent period.^{ix} Since then, the SBA has stopped releasing franchise loan default rates by brands; however, a recent letter from the SBA finds some brands reaching high loan default rates.^x An October 2019 SBA Office of Inspector General Report reported that “General report found that the “SBA continued to guarantee loans to high-risk franchises ... without monitoring risks, and where necessary, implementing controls to mitigate those risks.”^{xi} In April 2020, Senator Cortez Masto’s office published a report noting that high default rates for some franchise brands persist.^{xii}

The bill requires the franchise owner receive the following in order to receive an SBA-guaranteed loan:

- (a) The average and median first-year revenue for all franchise businesses, in accordance with the 2017 North American Securities Administrators Association (NASAA) Franchise Commentary on Financial Performance Representation,
- (b) The average and median revenue for all franchise businesses, in accordance with the 2017 North American Securities Administrators Association (NASAA) Franchise Commentary on Financial Performance Representation,
- (c) The number of franchise locations that went out of business or were sold by the franchisee during the first year of operation, and
- (d) The franchisor shall not disclose any revenue numbers, directly or through a third party, that conflict with the revenue numbers provided in the disclosure document, unless the franchise purchase includes existing units, in which case the actual revenue numbers shall be disclosed for those units.

This historic revenue disclosure is necessary to prevent misrepresentation and defaults in the SBA guaranteed loan process and to ensure a fair and solid start for small business owners. This language removes hidden discussions between the franchisor and the lender regarding financial data critical to the SBA guaranteed loan process. It also lowers SBA borrowers’ default rates which would result in lower fees and rates and possibly prevent taxpayers from compensating the lenders for failed loans. The bill also mandates the SBA enforce these requirements and consider denying guarantee payments in case of defaults if a loan fails. This bill does not preempt state law.

This bill protects franchisees and the SBA itself by increasing the likelihood that these small businesses will succeed.

ⁱ Coalition of Franchisee Associations. “Support the Franchise Loan Disclosure Act.” *Coalition of Franchisee Associations*. January 12, 2017. <http://thecfainc.com/action-center/>.

ⁱⁱ International Franchise Association. “National Impact of Franchising.” *International Franchise Association*. 2019. <https://franchiseeconomy.com/>.

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- ⁱⁱⁱ United States Government Accountability Office. *Small Business Administration Review of 7(a) Guaranteed Loans to Select Franchisees*. September 2013. <https://www.gao.gov/assets/660/657723.pdf>.
- ^{iv} Office of Inspector General U.S. Small Business Administration. *Report Number: 11-16*. July 13, 2011. [https://www.sba.gov/sites/default/files/oig/Audit Report 11-16 0.pdf](https://www.sba.gov/sites/default/files/oig/Audit%20Report%2011-16%200.pdf).
- ^v Taylor, Kate. "Report: 10 Brands Most Likely to Have Franchisees Default on Their Loans." *Entrepreneur*. September 11, 2014. <https://www.entrepreneur.com/article/237376>.
- Clark, Patricia. "Franchise Loans Keep Blowing Up, and the Government Keeps Backing Them." *Bloomberg*. May 14, 2015. <https://www.bloomberg.com/news/articles/2015-05-14/franchise-loans-keep-blowing-up-and-the-government-keeps-backing-them>.
- ^{vi} Cortez Masto, Catherine. "Strategies to Improve the Franchise Model: Preventing Unfair and Deceptive Franchise Practices." April 2021. <https://www.cortezmasto.senate.gov/imo/media/doc/Franchise%20Report%20from%20the%20Office%20of%20Senator%20Cortez%20Masto.pdf>;
- Ellison, Keith. "Special Investigation: Franchising," in *We The Podcast*. August 4, 2015. <https://www.podomatic.com/podcasts/wethepodcast>.
- ^{vii} Rooks, Marvin. "It's Time for the Federal Trade Commission to Require Financial Performance Representations to Prospective Franchisees." *Wake Forest Journal of Business and Intellectual Property Law*. 2010-2011. <http://ipjournal.law.wfu.edu/files/2011/02/article.11.55.pdf>.
- ^{viii} Mack, Jonathan. "SBA Enables Franchise Liar Loans: Chronically Fails to Act on its Own Recommendations." *Blue Mau Mau*. October 15, 2013. <https://www.blumaumau.org/blog/2013/10/15/sba-enables-franchise-liar-loans-chronically-fails-act-own-recommendations>.
- ^{ix} Patton, L. "U.S. Franchise Owners Say They Can't Make a Decent Living." April 30, 2015. *Bloomberg*. <https://www.bloomberg.com/news/articles/2015-04-30/u-s-franchisees-say-they-can-t-earn-decent-living-survey-says>.
- ^{ix} U.S. Government Accountability Office. *Patriot Express: SBA Should Evaluate the Program and Enhance Eligibility Controls*. September 12, 2013. <https://www.gao.gov/products/GAO-13-727>.
- ^x Seaborn, Dianna L. "SBA response to Senator Catherine Cortez Masto." June 17, 2019.
- ^{xi} U.S. Small Business Administration Office of the Inspector General. "*Report on the Most Serious Management and Performance Challenges by Office of Inspector General*." October 11, 2019. Page 9. <https://www.sba.gov/document/report--report-most-serious-management-performance-challenges-office-inspector-general>
- ^{xii} Cortez Masto, Catherine. "Strategies to Improve the Franchise Model: Preventing Unfair and Deceptive Franchise Practices." April 2021. <https://www.cortezmasto.senate.gov/imo/media/doc/Franchise%20Report%20from%20the%20Office%20of%20Senator%20Cortez%20Masto.pdf>;

SBA Franchise Loan Default Disclosure Act of 2021 (S. 2162)
Senators Catherine Cortez Masto and Warren

Supported by the *American Association of Franchisees and Dealers (AAFD)*; *Coalition of Franchisee Associations*; *Dunkin Donuts Independent Franchise Owners Association (DDIFO)*; *Independent Organization of Little Caesar Franchisees*; *Envy Owners Association (Massage Envy)*; *National TUPSSO Franchise Owner Association*; *Fair Franchising Initiative*, *Maine Franchise Owners Association*, *Reform Lodging*, and *Tudor Doctor Franchise Owners Chapter*

Summary: The bill requires the Small Business Administration publish default rates for the past decade for each franchise brand. The default rates shall be updated quarterly. This transparency would ensure that the franchisee borrower has access to loan performance data needed to make informed business decisions prior to taking on a decades-long financial commitment.

Franchise businesses represent a large segment of retail and service businesses and are rapidly replacing more traditional forms of small business ownership in the American economy.ⁱ Many potential franchisees rely on SBA guaranteed lending programs to access credit to buy a franchise. One of the key components of the SBA guaranteed loan process is the franchise disclosure document (FDD) prepared and presented by the franchise corporation (franchisors) for the franchise owner (franchisee). Unfortunately, franchisors are not required to disclose any financial performance projections or estimates about franchised businesses, such as first-year revenue estimates, which are used as a guide when determining the loan type, amount, and payment schedule. Without accurate financial disclosure, franchisees with SBA loans, especially veteran-owned businesses, are more likely to fail; because they are guaranteed loans, lenders and borrowers -- and sometimes taxpayers -- cover the loss.ⁱⁱ

In 2012, the SBA released stunningly high levels of failure rates of loans to franchises from October 1, 2001 until September 30, 2011.ⁱⁱⁱ A 2015 independent study similarly found that the failure rate on SBA-backed loans to franchisees is high and rising, reaching nearly one in five in the most recent period.^{iv} Since then, the SBA stopped releasing franchise loan default rates by brands. An October 2019 SBA Office of Inspector General Report reported that “General report found that the “SBA continued to guarantee loans to high-risk franchises ... without monitoring risks, and where necessary, implementing controls to mitigate those risks.”^v

The bill requires the Small Business Administration publish and update on a quarterly basis loan default rates by franchise brand during the preceding 10-year period on the website of the Administration in a manner that is publicly accessible and linked to the Franchise Directory of the Administration.

This historic revenue disclosure is necessary to prevent misrepresentation and defaults in the SBA guaranteed loan process and to ensure a fair and solid start for small business owners. It also lowers SBA borrowers’ default rates which would result in lower fees and rates and possibly prevent taxpayers from compensating the lenders for failed loans. This bill protects franchisees,

including any that invest in a particular franchise, not just those that receive government guaranteed loans.

ⁱ International Franchise Association. “National Impact of Franchising.” *International Franchise Association*. 2019. <https://franchiseeconomy.com/>.

ⁱⁱ Cortez Masto, Catherine. “Strategies to Improve the Franchise Model: Preventing Unfair and Deceptive Franchise Practices.” April, 2020. <https://www.cortezmasto.senate.gov/imo/media/doc/Franchise%20Report%20from%20the%20Office%20of%20Senator%20Cortez%20Masto.pdf>

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Taylor, Kate. “Report: 10 Brands Most Likely to Have Franchisees Default on Their Loans.” *Entrepreneur*. September 11, 2014. <https://www.entrepreneur.com/article/237376>.

Clark, Patricia. “Franchise Loans Keep Blowing Up, and the Government Keeps Backing Them.” *Bloomberg*. May 14, 2015. <https://www.bloomberg.com/news/articles/2015-05-14/franchise-loans-keep-blowing-up-and-the-government-keeps-backing-them>.

ⁱⁱⁱ Mack, Jonathan. “SBA Enables Franchise Liar Loans: Chronically Fails to Act on its Own Recommendations.” *Blue Mau Mau*. October 15, 2013. <https://www.blumaumau.org/blog/2013/10/15/sba-enables-franchise-liar-loans-chronically-fails-act-own-recommendations>.

^{iv} Patton, L. “U.S. Franchise Owners Say They Can't Make a Decent Living.” April 30, 2015. *Bloomberg*. <https://www.bloomberg.com/news/articles/2015-04-30/u-s-franchisees-say-they-can-t-earn-decent-living-survey-says>.

^v U.S. Government Accountability Office. *Patriot Express: SBA Should Evaluate the Program and Enhance Eligibility Controls*. September 12, 2013. <https://www.gao.gov/products/GAO-13-727>.

^v U.S. Small Business Administration Office of the Inspector General. “*Report on the Most Serious Management and Performance Challenges by Office of Inspector General*.” October 11, 2019. Page 9. <https://www.sba.gov/document/report--report-most-serious-management-performance-challenges-office-inspector-general>

Petition to the United States Federal Trade Commission
Request for Investigation of the Franchise Industry

September 22, 2021

Preamble

This petition is the result of a collaboration between Franchisee Advocacy Consulting and its Principal, Keith R. Miller of Meadow Vista, California and Witmer Karp Warner & Ryan LLP of Boston, Massachusetts (WKWR), acting through Eric H. Karp and Thomas Ayres as counsel to the National Coalition of Associations of 7-Eleven Franchisees. Mr. Miller is a long time Subway franchisee. Mr. Karp and Mr. Ayres are franchise attorneys whose practice concentrates on the representation of national franchisee associations and individual franchisees, dealers, and distributors. They have acted as counsel to franchisee associations in many well-known franchise and distribution systems. In addition, Mr. Karp is a former Chair of the American Bar Association Forum on Franchising and has served on the North American Securities Administrators Association Franchise Project Group since 1996. Mr. Ayres is a senior attorney with the firm whose practice focuses on resolution of franchising and distribution disputes.

Franchisees invest a substantial amount of their own money, take loans (often secured by their home and retirement accounts, and the American taxpayer via loans guaranteed by the Small Business Administration), and enter long-term obligations for franchised businesses in order to support themselves and their families. But for all too many franchisees, the promise of entrepreneurial success gives way to shockingly one-sided franchise agreements and unilateral decision making by franchisors, building a relationship which looks much more like investing in an employment relationship than an arm's length business partnership.

In fact, many franchise agreements seek to draft around the implied covenant of good faith and fair dealing, a long-standing concept embedded in the law of every state, in favor of the so-called business judgment rule, thus reserving the right of the franchisor to act in a manner that disregards the legal and financial interests of the franchisee, denies the franchisee the intended fruits of the contract and purports to allow the franchisor to act in bad faith.

Most franchise agreements provide franchisees with what is mischaracterized as a right to renew the contract and thus perpetuate the business in which they have invested. These franchise agreements require the franchisee to sign the then-current form of agreement upon renewal, the terms of which are undisclosed at the outset of the relationship and often contain new and different as well as higher fees, charges, and costs. That then-current form of agreement amounts to a right of first refusal giving the franchisee the unenviable choice of signing the document or walking away. The same principle applies in the event the franchisee seeks to sell his or her business to another franchisee. The franchisee buyer must also sign the then-current form of agreement which often makes the business less valuable in the hands of the buyer than it is in the hands of the seller.

A typical franchise agreement also reserves to the franchisor vast amounts of discretion requiring the franchisee to participate in deep discounting promotions, loyalty programs and other initiatives without regard to their impact on the franchisees' profitability. In addition, most

franchisors purport to retain the discretion to require franchisees to make substantial capital re-investments in the business, without any assurance or substantiation of a return.

Franchise agreements reflect a profound imbalance of contractual, economic and market power in favor of the franchisor and fail to give due regard to the legitimate business interests of the franchisee. Most franchisors present the franchise agreement on a take-it-or-leave-it basis, so franchisees' freedom to achieve a contract negotiated at arm's length is greatly limited by the disparity of bargaining power and incomplete, opaque, or deceptive disclosures, as well as self-serving and extensive disclaimers.

Once the franchise agreement is executed, franchisees are often denied adequate legal recourse to protect themselves due to significant contractual and procedural restrictions, inconsistent legal standards, and the prospect of expensive and open-ended proceedings in arbitration or litigation. For example, over time, state statutes, regulations and rules of civil procedure have attempted to create a fair balance between the parties to a contractual relationship or a dispute. But the typical franchise agreement upends that balance by denying the franchisee access to the right to litigate in their home state, to a jury trial, to the right to consolidate their claims with other franchisees who have similar or identical claims, to participate in a class action, to recover multiple or punitive damages and to file their proceeding within the limitations period prescribed by state law.

We respectfully direct your attention to our letters to the Federal Trade Commission dated December 17, 2018, April 25, 2019, December 17, 2020, and March 23, 2021. The information contained in those letters are incorporated by reference herein. The petitioners are aware of a similar request made by SEIU in 2015 and respectfully direct attention to its extensive and annotated analysis of endemic problems within the franchise industry.

Based on the findings of the comprehensive report concerning franchising issued by Senator Catherine Cortez Masto on April 13, 2021, and other input, we recommend that this Order be sent to the following United States franchisors:

1. 7-Eleven, Inc.
2. Subway
3. The UPS Store, Inc.
4. IHG Hotels and Resorts
5. Choice Hotels
6. Experimax/Experimac
7. Supercuts
8. Massage Envy
9. Dickey's Barbecue Pit

Specifications

Produce the following information, Documents, and items, consistent with the definitions, instructions, and formatting requirements contained in Attachment A, and in each case, unless otherwise stated, for the Applicable Period.

You

1. Identify in Detail the name, address and percentage owned by each of the beneficial owners of You.
2. Describe in Detail the name, address and percentage owned by each of the beneficial owners of the ultimate parent company of You.
3. If and to the extent any of the owners of You are private equity companies, describe the monthly quarterly or other periodic management fees or similar payments made to such private equity company.
4. If and to the extent any of the owners of You are private equity companies, describe in Detail the extent to which such owners are involved in the management of the relationship between You and your franchisees.
5. Describe in Detail each instance in which you have engaged in negotiations with a prospective franchisee regarding one or more material terms or conditions of the franchise agreement.

Extended Operations

6. If You require Your franchisees to operate 24 hours a day and/or seven days a week (excluding certain holidays), submit a Report for each Quarter of the average retail sales made by day of the week and by hour of the day at (a) Company-Owned and (b) franchised locations. If such sales vary materially based on geography, provide Detail on such variances.
7. If You require Your franchisees to operate 24 hours a day and/or seven days a week (excluding certain holidays), submit a Report for each Quarter of the number and type of reported criminal incidents by day of the week and by hour of the day at (a) Company-Owned and (b) franchised locations. If such incidents vary materially based on geography, provide Detail on such variances.
8. Describe in Detail how the You prepare, teach, or train employees to prevent, report, and respond to criminal activity at Company-Owned locations.
9. Describe in Detail how You prepare, teach, or train franchisees to prevent, report, and respond to criminal activity at franchised locations.
10. If You require Your franchisees to operate 24 hours a day and/or seven days a week (excluding certain holidays), submit a Report for each Quarter of the profitability of (a) Company-Owned and (b) franchised locations on Sundays and between the hours of midnight and 6:00 AM.

11. Submit a Report for each Quarter of the profitability of (a) Company-Owned and (b) franchised locations between on Sunday.
12. If You require Your franchisees to operate 24 hours a day and/or seven days a week (excluding certain holidays), submit a Report for each Quarter of the incremental revenue earned by You by altering the percentage of royalties or gross profits You charge Your franchisees as a consequence of closing locations on Sundays or one or more hours between midnight and 6:00 AM.
13. Describe in Detail for each Quarter the number of days and the number of hours that Company-Owned locations have been closed due to inability to secure adequate staffing.

Supply Chain

14. Describe in Detail the Company's relationships with distributors, suppliers, and other providers of products and services to (a) Company-Owned and (b) franchised locations.
15. Describe in Detail any policies, procedures, or practices relating to how the Company chooses distributors, suppliers, and other providers of products or services to (a) Company-Owned and (b) franchised locations.
16. Submit a Report of the amounts paid by distributors, suppliers, and other providers of products or services to (a) Company-Owned and (b) franchised locations to attend, sponsor or exhibit at your trade shows, conventions, or similar meetings.
17. Submit all agreements between the Company and all distributors, suppliers, and other providers of products or services to (a) Company-Owned and (b) franchised locations.
18. Submit all agreements between the Company and all third-party services that deliver products from (a) Company-Owned and (b) franchised locations to customers who purchased them through the Internet or mobile applications.
19. Submit a Report of the revenues, discounts, commissions, kickbacks, or other forms of consideration received by the Company or its affiliates from each distributor, supplier, and other provider of products or services to Company-Owned or franchised locations.
20. If You pay vendors for goods and services on behalf of franchisees, describe in Detail any policies, procedures, or practices relating to how the Company reconciles overpayments to such vendors.
21. Submit a Report of the profit earned by the Company or its affiliates from or by reason of payments from distributors, suppliers, and other providers of products or services to Company-Owned or franchised locations.
22. Submit a Report of the revenues, discounts, commissions, kickbacks, or other forms of consideration received by the Company or its affiliates from third-party delivery companies such as Door Dash, Uber Eats and the like providing services to Company-Owned or franchised locations.

23. Submit a Report of the amounts paid by franchisees during each Quarter for royalties and advertising contributions on revenue paid by a customer but retained and not paid to the franchisees by third party delivery companies such as Door Dash, Uber Eats and the like.
24. Submit all agreements between the Company or its affiliates and third-party delivery companies such as Door Dash, Uber Eats and the like providing services to Company-Owned or franchised locations.
25. Describe in Detail disruptions in the supply chain due the inability of companies providing goods and services to franchisees to make timely or complete deliveries because of the inability to secure adequate staffing.

Sale of Gasoline

26. If You or Your franchisees sell gasoline to the public, describe in Detail how the Company sets the retail price of gasoline at (a) Company-Owned and (b) franchised locations.
27. If You or Your franchisees sell gasoline to the public, describe in Detail the average retail price of gasoline at (a) Company-Owned and (b) franchised locations during each Quarter.
28. If You or Your franchisees sell gasoline to the public, describe in Detail the number of (a) Company-Owned and (b) franchised locations offering gasoline for sale to the public at the end of each Quarter.
29. If You or Your franchisees sell gasoline to the public, describe in Detail the percentage of Company-Owned locations offering gasoline as a whole of all Company-Owned locations at the end of each Quarter.
30. If You or Your franchisees sell gasoline to the public, describe in Detail the percentage of franchised locations offering gasoline as a whole of all franchised locations at the end of each Quarter.
31. If You or Your franchisees sell gasoline to the public describe in Detail the percentage of gasoline retail sales as a whole of total merchandise and gasoline sales at (a) Company-Owned and (b) franchised locations during each Quarter.
32. If You or Your franchisees sell gasoline to the public, submit a Report of the number of gallons of gasoline sold at (a) Company-Owned and (b) franchised locations during each Quarter.
33. If You or Your franchisees sell gasoline to the public, submit a Report of gasoline commissions the Company paid to franchisees at franchised locations offering gasoline during each Quarter.
34. If You or Your franchisees sell gasoline to the public, submit and Report of the retail fuel margin (measured in cents per gallon) earned by the Company from (a) Company-Owned and (b) franchised locations offering gasoline during each Quarter.
35. If You or Your franchisees sell gasoline, submit a Report of the gasoline gross profit, expressed in dollars, achieved by the Company during each Quarter.

36. If You or Your franchisees sell gasoline to the public, submit a Report of the gasoline gross profit, expressed as a percentage of total gasoline sales, achieved by the Company during each Quarter.
37. If You or Your franchisees sell gasoline to the public, submit a Report of merchandise retail sales at (a) Company-Owned locations offering gasoline and at (b) Company-Owned locations not offering gasoline during each Quarter.
38. If You or Your franchisees sell gasoline to the public, submit a Report of merchandise retail sales at (a) franchised locations offering gasoline and at (b) franchised locations not offering gasoline during each Quarter.
39. If You or Your franchisees sell gasoline to the public, submit a Report of unit-level incremental expenses associated with offering gasoline (a) Company-Owned and (b) franchised locations during each Quarter.
40. If You or Your franchisees sell gasoline to the public, submit a Report of unit-level expenses relating to maintaining, monitoring, and documenting gasoline tanks incurred by You at (a) Company-Owned and (b) incurred by franchisees at franchised locations by Fiscal Year.
41. If You or Your franchisees sell gasoline to the public, submit a Report of how incremental changes in the retail price of gasoline affect merchandise sales at (a) Company-Owned and (b) franchised locations during each Quarter.
42. If You or Your franchisees sell gasoline to the public, submit a Report of customer purchasing behavior at Company-Owned locations that offer gasoline during each Quarter, Including:
 - a. The percentage of customers that purchase just gasoline and the average amount spent;
 - b. The percentage of customers that purchase just merchandise and the average amount spent; and
 - c. The percentage of customers that purchase both gasoline and merchandise and the average amount spent on each.
43. If You or Your franchisees sell gasoline to the public, submit a Report by Quarter of customer purchasing behavior at franchised locations that offer gasoline during each Quarter, Including:
 - a. The percentage of customers that purchase just gasoline and the average amount spent;
 - b. The percentage of customers that purchase just merchandise and the average amount spent; and
 - c. The percentage of customers that purchase both gasoline and merchandise and the average amount spent on each.

Furniture, Fixtures, and Equipment

44. Describe in Detail any policies, procedures, or practices relating to adding, moving, or replacing furniture, fixtures, and equipment at (a) Company-Owned and (b) franchised locations.
45. Submit all internal Communications, reports and analysis of the return on investment earned by adding or replacing furniture, fixtures or equipment at (a) Company-Owned and (b) franchised locations.
46. Submit all agreements between the Company and all distributors, suppliers, and other providers of furniture, fixtures, and equipment to (a) Company-Owned and (b) franchised locations.
47. Submit a Report of the Company's investment in new furniture, fixtures, and equipment at and remodels or refurbishment of (a) Company-Owned and (b) franchised locations during each Fiscal Year.
48. Submit a Report of the expenses associated with maintaining and repairing furniture, fixtures, and equipment at (a) Company-Owned and (b) franchised locations during each Fiscal Year Period.
49. Submit all agreements between the Company and all entities that maintain and repair furniture, fixtures, and equipment at (a) Company-Owned and (b) franchised locations.

Gross Profit Margins and Operating Costs

50. If You charge Your franchisees a percentage of gross profits, submit a Report of merchandise gross profit margin expressed as a percentage of gross sales at (a) Company-Owned and (b) franchised locations during each Quarter.
51. If You or Your franchisees sell groceries and other convenience items, submit a Report of unit-level sales of fresh foods and hot foods at (a) Company-Owned and (b) franchised locations during each Fiscal Year.
52. If You or Your franchisees sell groceries and other convenience items, submit a Report of unit-level incremental expenses associated with offering of fresh foods and hot foods, including preparation, refrigeration, heating, serving and wastage, at (a) Company-Owned and (b) franchised locations during each Fiscal Year.

Labor Costs and Other Issues

53. Submit a Report of how incremental increases in hourly wages impact net income at (a) Company-Owned and (b) franchised locations.
54. Describe in Detail all policies, procedures, or practices relating to the setting of hourly wages, salaries, benefits, and other forms of compensation at Company-Owned locations, including for the position of manager.

55. Describe in Detail how the Company prepares, teaches, or trains its employees to comply with wage and hour laws at (a) Company-Owned locations and (b) franchised locations.
56. Describe in Detail how the Company prepares, teaches, or trains current its employees to use E-Verify at (a) Company-Owned locations and (b) franchised locations.
57. Submit a Report of the unit-level expenses incurred relating to retention of outside auditors to verify compliance with wage and hour laws at franchised locations.
58. Submit all Communications with U.S. Department of Labor or any other federal or state agency regarding franchisees' compliance with wage and hour laws at franchised locations.
59. Submit all Communications with Immigration and Customs Enforcement or any other federal or state agency regarding franchisees' compliance with immigration laws at franchised locations.

Miscellaneous Operating Expenses

60. Submit a Report of unit-level occupancy and related expenses at (a) Company-Owned and (b) franchised locations during each Fiscal Year.
61. Submit a Report of unit-level incremental expenses and losses due to loyalty programs, promotional campaigns and discounts imposed by the Company at (a) Company-Owned and (b) franchised locations during each Fiscal Year.
62. Submit all internal Communications regarding the profitability to the Company of loyalty programs, promotional campaigns, and discounts.
63. Submit a Report of the unit-level expenses relating to liability insurance at (a) Company-Owned and (b) franchised locations during each Fiscal Year
64. Submit a Report of the unit-level expenses relating to Internet sales fulfillment, including delivery, at (a) Company-Owned and (b) franchised locations during each Fiscal Year.
65. Submit a Report of the franchised unit-level expenses and reimbursements relating to redemption or fulfillment of loyalty program points at (a) Company-Owned and (b) franchised locations during each Fiscal Year.
66. Submit a Report of loyalty program points at (a) Company-Owned and (b) franchised locations which remain unredeemed at the end of each Fiscal Year.

Franchisee Associations

67. Submit all Communications with each independent franchisee association (IFA) identified in Item 20 in any FDD of the Company, or entities that have requested inclusion in Item 20 as an IFA in any FDD of the Company at any time.

68. Describe in Detail how each IFA operates in your franchise system, including without limitation how the leaders of the IFA are elected, the extent to which material nonpublic information is shared with the IFA, the extent to which new initiatives and programs are discussed with the IFA prior to implementation, and elapsed time between such discussions and when the initiative or program is implemented.
69. Describe in Detail how a Franchise Advisory Council (FAC) or similar organization operates in your franchise system, including without limitation how the members of the FAC are elected or appointed, compensation and other payments to members of the FAC, the extent to which material nonpublic information is shared with the FAC, the extent to which new initiatives and programs are discussed with the FAC prior to implementation, and elapsed time between such discussions and when the initiative or program is implemented.
70. Describe in Detail any disputes submitted to mediation, arbitration or litigation filed in state or federal courts involving an IFA identified in Item 20 in any FDD of the Company, or entities that have requested inclusion in Item 20 as an IFA in any FDD of the Company at any time.
71. Describe in Detail any disputes submitted to mediation, arbitration or litigation filed in state or federal courts involving directors or officers of an IFA identified in Item 20 in any FDD of the Company, or entities that have requested inclusion in Item 20 as an IFA in any FDD of the Company at any time.
72. Describe in Detail any policies, procedures, or practices relating to Communications, collaboration or other interactions with an IFA identified in Item 20 in any FDD of the Company, or entities that have requested inclusion in Item 20 as an IFA in any FDD of the Company at any time.
73. Describe in Detail any policies, procedures, or practices relating to interactions with directors or officers of an IFA identified in Item 20 in any FDD or entities that have requested inclusion in Item 20 as an IFA in any FDD at any time.
74. Describe in Detail any instances in which you have been accused of retaliating, harassing or discriminating against franchisees by reason of their membership in or leadership of an IFA.
75. Describe in Detail any efforts undertaken by you to discourage franchisees from membership in or leadership of an IFA.
76. Describe in Detail any efforts undertaken by you to influence the election of the leaders of an IFA.

Advertising Funds

77. Submit complete financial statements prepared in accordance with generally accepted accounting principles, reflecting all the revenue and all of the expenses of any advertising or marketing fund administered by the Company.

78. Describe in Detail the extent to which you consult with or collaborate with an IFA or an FAC prior to deciding how to allocate and spend funds deposited in any advertising or marketing fund administered by the Company.
79. Submit a Report of amounts expended from advertising or marketing funds administered by the Company on (a) the sale or attempted sale of franchises by the Company, (b) to support private brands of the Company, and (c) customer loyalty programs.
80. Submit a Report of the amounts expended from the advertising and marketing funds administered by the Company on employee compensation and benefits, occupancy expense and other expenses of the Company.
81. Describe in Detail any policies, procedures, or practices relating to how the company allocates and spends funds from the advertising and marketing funds administered by the Company.

Financial Performance Representations

82. Describe in Detail any policies, procedures, or practices for the collection, use and Analysis of profit and loss statements from franchisees.
83. Submit a Report of the median profitability of (a) Company-Owned and (b) franchised locations during each Fiscal Year.
84. Submit all documents used, reviewed, or consulted by the Company in drafting or compiling each financial performance representation reflected in each Item 19 of each FDD of the Company.
85. Submit a Report of the year over year increase or decrease in same store sales of (a) Company-Owned and (b) franchised locations during each Fiscal Year.
86. Describe in Detail all financial information and other documents or information provided to any lender or potential lender for any franchisee or prospective franchisee.

Franchisor Financial Statements

87. Submit each FDD issued by You.
88. Submit a Report of the number of pages in each FDD issued by You.
89. Submit the financial statements, prepared in accordance with generally accepted accounting principles, of any of your affiliates that act as distributors, suppliers or providers of products or services to Company-Owned or franchised locations.
90. Submit the financial statements, prepared in accordance with generally accepted accounting principles, of any affiliate of the Company to which the Company pays licensing fees for the use of the principal and other trademarks of the franchise system.

91. Submit the financial statements, prepared in accordance with generally accepted accounting principles, of any affiliate of the Company to which the Company pays fees for providing management over the Company.
92. Submit a Report reflecting the percentage of the Company's revenue each Fiscal Year derived from initial franchise fees, continuing royalty payments by franchisees and contributions to an advertising and marketing fund by franchisees.
93. Submit a Report reflecting the Company's collections and disbursements each Fiscal Year derived loyalty programs and funds and the extent to which they generated a profit for You.
94. Submit a Report reflecting the Company's revenue each Fiscal Year derived from reimbursements from franchisees for taxes imposed by one or more states on royalty revenue collected by the Company in such states.
95. Submit a Report reflecting contact information for each franchisee terminated or not renewed.

Item 20 Disclosures

96. Submit all Documents used, reviewed, or consulted by the Company in drafting or compiling each Item 20 reflected in each FDD of the Company.
97. Submit a Report of the number of franchisee-to-franchisee transfers that were (a) approved, or (b) disapproved by the Company or its contractual agent during each Fiscal Year, Identifying each transaction and the basis for the approval or disapproval.
98. Submit a Report of the number of franchisee renewals that were (a) approved, or (b) disapproved by the Company or its contractual agent during each Fiscal Year, identifying each franchisee and the basis for the approval or disapproval.
99. Submit a Report of the number of franchisee terminations during each Fiscal Year, identifying each franchisee and the reason or basis for determination.
100. Describe in Detail your policies, procedures, and practices regarding the approval or disapproval of franchisee-to-franchisee transfers.
101. Describe in Detail your policies, procedures, and practices regarding the approval or disapproval of franchisee renewals.
102. Describe in Detail your policies, procedures, and practices regarding termination of franchise agreements
103. Submit a Report with respect to each disclosure of franchise agreements signed but outlet not open at the end of each Fiscal Year, which includes the date on which each such franchise agreement was signed.

104. Submit a Report with respect to each disclosure of franchised units projected in the next Fiscal Year which includes the basis of each such projection and identifies the documents that were reviewed or consisted in making that projection.

Limitations on Franchisees' Free Speech

105. Describe in Detail any non-disparagement or non-disclosure clauses contained in your Franchise Agreements or amendments thereto.
106. Describe in Detail any non-disparagement or non-disclosure clauses contained in settlement agreements or amendments thereto with franchisees.
107. Submit all Communications with any franchisees in which you invoke any non-disparagement or non-disclosure clauses.
108. Submit all notices of material breach or notices of default sent to franchisees alleging violation of non-disparagement or non-disclosure clauses
109. Describe in Detail how the Company identifies current franchisees that it refers to prospective franchisees seeking information during their due diligence activities.
110. Describe in Detail how the Company prepares, teaches, or trains current franchisees to communicate with prospective franchisees seeking information during their due diligence activities.

Changes to Operations Manual

111. Submit all versions or iterations of the Company's Operations Manuals.
112. Submit all notices of material breach or notices of default the Company sent to franchisees based on purported violations of any versions or iterations of the Company's Operations Manuals.
113. Describe in Detail all Communications with an IFA or FAC explaining the rationale for, cost to be incurred and potential benefits to franchisees of changes in policies and procedures to be reflected in the Company's Operations Manuals.
114. Submit and Describe in Detail all internal Communications regarding the potential benefit and return on investment to franchisees which would justify franchisor mandated promotions.
115. Submit a Report of the costs projected to be incurred and actually incurred by franchisees to comply with changes in policies and procedures as reflected in the Company's Operations Manuals.

Attachment A

Definition and Additional Instructions

- A. **“Algorithms or Data Analytics”** means the process of examining and analyzing data in order to find patterns and make conclusions about that data, whether by machine or human analyst.
- B. **“Analysis”** or **“Analyses”** Include, but are not limited to, Algorithms, Data Analytics, studies, reports, tests, and experiments.
- C. The terms **“and”** and **“or”** have both conjunctive and disjunctive meanings as necessary to bring within the scope of this Order anything that might otherwise be outside its scope. The singular form of a noun or pronoun Includes its plural form, and vice versa; and the present tense of any word Includes the past tense, and vice versa.
- D. **“Applicable Time Period”** means, unless otherwise directed in the Specifications, the period from **January 1, 2016, until the date of full and complete compliance with this Order.**
- E. **“Communication”** means any exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished.
- F. **“Company”** means each named franchisor, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person in which there is partial (25% or more) or total ownership or control between the Company and any other Person.
- G. **“Company-Owned location”** means a location owned, operated or controlled by Company or its affiliates, including without limitation, those disclosed as such in item 20 of its franchise disclosure documents.
- H. **“Describe in Detail”** means providing the information requested in narrative form, Including an explanation of each material change, if any, made during the applicable time period Relating to the practices described, as well as the effective date(s) of the change(s) and the reason(s) for such change(s).
- I. **“Document”** and **“Documents”** mean any information, on paper or in electronic format, Including written, recorded, and graphic materials of every kind, in the possession, custody, or control of the Company. The term “Documents” Includes, without limitation: computer files and ESI; email messages; audio files; instant messages; text messages; messages sent on any enterprise messaging system; any other form of electronic message; drafts of Documents; metadata and other bibliographic or historical data describing or Relating to Documents created, revised, or distributed electronically; copies of Documents that are not identical duplicates of the originals in that Person’s files; and copies of Documents the originals of which are not in the possession, custody, or control of the Company.
 - 1. Unless otherwise specified, the term “Documents” excludes:

- a. bills of lading, invoices, purchase orders, and other similar Documents of a purely transactional nature;
 - b. architectural plans and engineering blueprints;
 - c. Documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues; and
 - d. relational and enterprise databases, except as required to comply with an individual Specification.
2. The term “**computer files**” Includes information stored in, or accessible through, computers or other information retrieval systems. Thus, the Company should produce Documents that exist in machine-readable form, Including Documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off Company premises. If the Company believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with the Commission’s need for Documents and information, You are encouraged to discuss a possible modification to this Definition with the Commission representative identified on the last page of this Request. The Commission representative will consider modifying this Definition to:
- a. exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from those that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Company;
 - b. limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, certain time periods, or certain Specifications identified by the Commission representative; or
 - c. Include other proposals consistent with Commission policy and the facts of the case.

J. The terms “**Each,**” “**any,**” and “**all**” mean “each and every.”

K. “**Electronically Stored Information**” or “**ESI**” means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any electronic medium from which information can be obtained either directly or, if necessary, after translation by You into a reasonably usable form. This Includes, but is not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and video and sound recordings, whether stored on: cards, magnetic or electronic tapes, disks, computer hard drives, network shares or servers, or other drives, cloud-based platforms, cell phones, PDAs, computer tablets, or other mobile devices, or other storage media.

- L. The term “**Fiscal Year**” means each calendar year ending on December 31 of each year.
- M. “**Identify**” or “**Specify**,” when used in reference to a natural Person, mean to state the Person’s (1) full name; (2) present or last-known residence and telephone number and present or last-known business address and telephone number; and (3) present or last known employer and job title. For any Person identified, if any of the above information was different during the time period relevant to the Order, supply both the current information and such different information as applies to the time period relevant to the Order. Once a natural Person has been identified properly, it shall be sufficient thereafter when Identifying that same Person to state the name only.
- N. The terms “**Identify**” or “**Specify**,” when used in reference to a corporation or other nonnatural Person, mean (1) to state that entity’s name; (2) to describe its nature (e.g., corporation, partnership, etc.); (3) to state the location of its principal place of business; and (4) to Identify the natural Person or Order. Once such an entity has been identified properly, it shall be sufficient thereafter when Identifying that same entity to state the name only.
- O. The terms “**Identify**” or “**Specify**,” when used in reference to facts, acts, events, occurrences, meetings, or Communications, mean to describe, with particularity, the fact, act, event, occurrence, meeting, or Communication in question, Including, but not limited to, (1) Identifying the participants and witnesses of the fact, act, event, occurrence, Meeting, or Communication; (2) stating the date or dates on which the fact, act, event, occurrence, meeting, or Communication took place; (3) stating the location(s) at which the fact, act, event, occurrence, meeting, or Communication took place; and (4) providing a description of the substance of the fact, act, event, occurrence, meeting, or Communication.
- P. The terms “**Include**” and “**Including**” mean “including, but not limited to.” The use of the term “Include” in any request shall not be used to limit the generality or scope of any request. Nor shall the generality of any request be limited by the fact that another request touches on the same topic with a greater or lesser degree of specificity.
- Q. “**Person**” Includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- R. The term “**Quarters**” shall mean three month periods ending on March 31, June 30, September 30, and December 31 of each calendar year.
- S. “**Relate**,” “**Related to**,” and “**Relating to**” mean, in whole or in part, addressing, analyzing, concerning, constituting, containing, commenting on, discussing, describing, Identifying, referring to, reflecting, reporting on, stating, or dealing with.
- T. “**Report**” means a Document reflecting a detailed Analysis all information in the possession custody or control of the Company.
- U. “**You**” and “**Your**” means the individual or entity to whom this Order is issued and Includes the “Company.”

[DISCUSSION DRAFT]

JULY 20, 2021

117TH CONGRESS
1ST SESSION**H. R.** _____

To provide a private right of action for persons harmed by violations of the Franchise Rule of the Federal Trade Commission, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Ms. SCHAKOWSKY introduced the following bill; which was referred to the Committee on _____

A BILL

To provide a private right of action for persons harmed by violations of the Franchise Rule of the Federal Trade Commission, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. PRIVATE RIGHT OF ACTION.**

4 (a) IN GENERAL.—Notwithstanding any other provi-
5 sion of law, any person [found [by the Federal Trade
6 Commission] to have committed] any violation of part

1 436 of title 16, Code of Federal Regulations, shall be lia-
2 ble to any person harmed by such violation for—

3 (1) actual damages;

4 (2) additional equitable relief including rescis-
5 sion of any contract, and such other equitable relief
6 as a court may find appropriate for persons similarly
7 situated as the person bring an action under this
8 section; and

9 (3) reasonable attorneys' fees and costs.

10 (b) JURISDICTION AND VENUE.—Jurisdiction and
11 venue of civil actions under this section shall be concurrent
12 and may be commenced in either the United States Dis-
13 trict Court in the district where the claimant resides or
14 in a State court of competent jurisdiction the State in
15 which the claimant resides.