



Office of Commissioner
Melissa Holyoak

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Melissa Holyoak

Policy Statement of the Federal Trade Commission on Franchisors' Use of Contract Provisions, Including Non-Disparagement, Goodwill, and Confidentiality Clauses

FTC Matter No. P244402

July 12, 2024

The Franchise Policy Statement (“Policy Statement”) that the Commission issues today overstates Section 5’s relevance to the use of non-disclosure, non-disparagement, confidentiality, and goodwill clauses in franchisor-franchisee contracts, in a manner that is likely to sow confusion and impose unnecessary costs on law-abiding businesses. This Commission has issued an unprecedented number of policy statements.¹ Where a policy statement correctly describes extant law and gives helpful guidance to businesses, I will support it. Where, however, a policy statement attempts to effect a change in the law or, as here, overstates the law and confuses or burdens businesses, I will not support it. I therefore respectfully dissent.²

The Policy Statement states that franchisees should be able to discuss or file reports with the Commission regarding potential law violations. I agree that non-disparagement, confidentiality, and goodwill clauses in franchisor-franchisee contracts do not—and should not—impede law enforcement communications, which are important to the Commission’s work. But that does not mean that the inclusion of neutral provisions in a contract is *unfair*, in violation of Section 5 of the FTC Act.

The Policy Statement—whose ostensible purpose is to provide guidance that reflects existing law—does not explain what franchisors looking to stay on the right side of the law should do. For example, should franchisors simply call or email franchisees to let them know that franchisors will not impede franchisees’ “free communication about potential law violations with a government agency acting within its statutory mandate”³? Should franchisors remove all non-disparagement, confidentiality, and goodwill clauses from their contracts, for fear that apparently neutral provisions may not “narrowly articulate a company’s legitimate interest in

¹ See FTC Legal Library: Policy Statements (last visited July 8, 2024), <https://www.ftc.gov/legal-library/browse/policy-statements> (listing policy statements issued by this Commission on issues ranging from unfair methods of competition to biometric data, the gig economy, breaches of health information, rebates, right to repair, “ed tech,” negative option marketing, etc.).

² Statement of Comm’r Holyoak, Joined by Comm’r Ferguson, Regarding the Health Breach Notification Rule, FTC Matter No. P205405, at 2, Apr. 26, 2024, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-holyoak-joined-commissioner-ferguson-regarding-health-breach-notification>.

³ Franchise Policy Statement at 4 n. 20.

protecting its intellectual property rights”⁴ and may therefore “operate to inhibit”⁵ law enforcement communications? Will this open the door to lengthy and burdensome contract renegotiation? Should franchisors eliminate such clauses from future contracts? Or perhaps a caveat on such clauses in future contracts will suffice.

Policy statements should provide useful guidance about the state of the law and predictable enforcement criteria to businesses. Certainty and clarity about the state of the law is a critical incentive to investment in and formation of new business. Today’s Policy Statement neither provides useful guidance, nor does it increase certainty about the state of the law. Rather, it casts a pall over the use of non-disclosure, non-disparagement, confidentiality, and goodwill clauses in franchisor-franchisee contracts, in a manner that is unlikely to help franchisors comply with the law while potentially impeding franchisors’ ability to protect their brands and intellectual property. I therefore respectfully dissent.

⁴ *Id.* at 20.

⁵ *Id.* at 7.