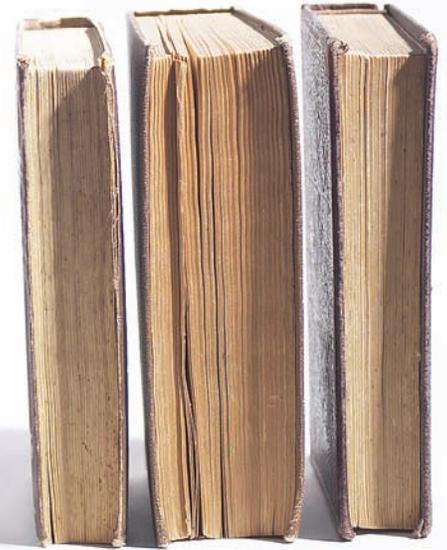


Electronic Disclosure Some Practical Considerations

By Michael Melvin



Electronic disclosure holds numerous potential benefits for both franchisors and franchisees. For franchisors, electronic disclosure has the potential to reduce or eliminate printing and shipping costs associated with paper disclosure, allow greater responsiveness to information requests from prospective franchisees and reduce record-keeping costs. For franchisees, electronic disclosure affords the opportunity to use electronic search tools and internal document links in reviewing disclosure documents, the ability to more efficiently share disclosure documents back and forth with advisors, and a simple and efficient means of permanent document retention. However, in spite of the benefits associated with electronic disclosure, Canadian franchise legislation has lagged behind that of other countries, such as the U.S. and Australia, in providing franchisors

and franchisees with a clear framework within which franchisors can implement electronic disclosure. Franchise legislation in both Alberta and Ontario, for example, is silent on the issue of electronic disclosure.

To date, only Prince Edward Island has expressly provided for electronic disclosure in its Franchises Act Regulations (the “PEI Regulations”). However, recently both New Brunswick and Manitoba have indicated that they will include electronic disclosure provisions in their franchise regulations. In light of this trend towards accommodating electronic disclosure, this article considers some of the practicalities of making electronic disclosure under the PEI Regulations.

The electronic disclosure requirements in the PEI Regulations¹ state that a disclosure document may be delivered “by electronic means” (i.e., by e-mail or download) or “in

machine readable media” (i.e., by physical delivery of a CD or other storage device), if the electronic disclosure document: is delivered as a single, integrated, document or file; has no extraneous content beyond what is required or permitted by law²; has no links to or from external documents or content; is delivered in a form that intrinsically enables the recipient to store, retrieve, and print the disclosure document; and conforms as to its content and format to the requirements of law.

In addition to the mandatory electronic disclosure document characteristics set out above: the franchisor must keep records of its electronic delivery of disclosure documents; and a written acknowledgment of receipt must be received from the prospective franchisee.

From a practical standpoint, the franchisor’s electronic disclosure document

¹Subject to some variation, the PEI requirements are modeled on those proposed in the 2003 NASAA Statement of Policy Regarding Electronic Delivery of Franchise Disclosure Documents (“NASAA Policy”) issued by the U.S.-based North American Securities Administrators Association (“NASAA”). The NASAA Policy also formed the basis for the electronic disclosure provisions proposed by the Ontario Bar Association’s Joint Subcommittee on Franchising (the “OBA”) in its Report on Ontario Regulation 581/00. To date, the provisions proposed by the OBA have not been adopted.

²As noted below, and as set out in the full text of the PEI Regulations, standard software devices and tools, such as scroll bars and search functions, are permissible.

The franchisor must take care to ensure that no security features inhibit the prospective franchisee's ability to save, reopen or print the disclosure document

should be in PDF or another non-editable format. The disclosure document must contain no superfluous content, such as promotional or advertising materials, and no multimedia features such as audio, video, animation, or pop-up screens. While the document must not contain any links to external content, internal links, such as between sections of the disclosure document and corresponding provisions of the attached franchise agreements, are allowable and may be helpful to prospective franchisees. The franchisor must take care to ensure that no security features inhibit the prospective franchisee's ability to save, reopen or print the disclosure document. The franchisor must also keep copies of all e-mails, cover letters and other documents generated in the course of making electronic disclosure. While the PEI Regulation does not require the franchisor to obtain the franchisee's consent to use electronic disclosure, the franchisor should nevertheless ascertain, in its pre-disclosure correspondence with the prospective franchisee, whether the franchisee has the requisite comfort level and technical capability to accept electronic delivery of a disclosure document, taking into consideration the file format, file size and delivery method. If

there is any uncertainty regarding the likelihood of a successful electronic delivery, the franchisor should err on the side of caution and make paper disclosure instead. The franchisor should keep both electronic and paper copies of all correspondence and other records evidencing electronic delivery and should archive a copy of the disclosure document issued to the prospective franchisee.

In addition to the above requirements, the franchisor must obtain a written receipt from the prospective franchisee. Although it may be possible to satisfy the requirement for a "written" receipt through a variety of electronic means, the simplest and surest way to meet this requirement is to have the franchisee print, sign and date the receipt attached to the disclosure document and fax or scan and e-mail it to the franchisor, with the original to follow by mail. This eliminates any ambiguity as to whether this requirement is met, provides the franchisor with the usual evidence of its compliance with the 14 day cooling off period under franchise legislation, and, assuming the franchisor has not provided both electronic and paper disclosure, provides evidence that the franchisee was able to open and print the disclosure document.

As electronic disclosure becomes more and more prevalent in Canada in the coming years, franchisors will no doubt develop an exhaustive body of "best practices" associated with electronic disclosure. In this regard, it is hoped that franchisors will find the tips set out in this article to be a useful starting point. 🌸

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