



# WHAT IN THE WORLD IS A ROFR?



**W**ait, what? What in the world is a ROFR? No, it is not a fancy breed of dog. It stands for “right of first refusal.” And, if you are not aware of what that is, or how it might impact your exit strategy from your franchise network, then you should take time to learn about it and how it works.

In the vernacular sense, a right of first refusal, or ROFR, is a contractual option (but not an obligation) where one party is granted the right to consummate a transaction with another party before someone else may. In the franchise world, it is common, if not standard, for a franchise agreement to include a ROFR for the benefit of the franchisor. This generally gives the franchisor the right (but not the obligation) to purchase a franchise unit or network before a franchisee can sell it to an outside buyer. There are many theories on why franchisors include such a provision in the franchise agreement, but one thing is certain: If not carefully considered as a part of any potential transaction, a ROFR can have serious consequences on the success of that transaction. Accordingly, when you are considering a transfer of your network or certain units within your network, it is imperative to be mindful of the transfer and approval process in general, and the ROFR, specifically.

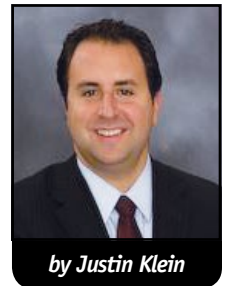
The current version of the Planet Fitness Franchise Agreement (“Franchise Agreement”) includes the following provision:

**13.8 OUR RIGHT OF FIRST REFUSAL.** For any proposed Transfer which would constitute a transfer of this Agreement to a third party, would constitute a Transfer to a third party of a controlling interest in you (or a series of proposed Transfers which in the aggregate would constitute the Transfer to a third party of a controlling interest in you), or would constitute a Transfer of substantially all the assets of the BUSINESS under Article 13.3.2 to a third party, we have the right, exercisable by written notice delivered to you or your selling Owners within thirty (30) days from the date of the delivery to us of both an exact copy of such bona fide offer

and all other information we request, to purchase such interest for the price and on the terms and conditions contained in such bona fide offer, provided that:

- (1) we may substitute cash for any form of payment proposed in such offer;
- (2) our credit will be deemed equal to the credit of any proposed purchaser;
- (3) we will have not less than sixty (60) days after giving notice of our election to purchase to prepare for closing; and
- (4) we are entitled to receive, and you and your Owners agree to make, all customary representations and warranties given by the seller of the assets of a business or the capital stock of an incorporated business, as applicable, including, without limitation, representations and warranties as to:
  - (a) ownership and condition of and title to stock or other forms of ownership interest and/or assets;
  - (b) liens and encumbrances relating to the stock or other ownership interest and/or assets; and
  - (c) validity of contracts and the liabilities, contingent or otherwise, of the corporation whose stock is being purchased.
- (5) If the proposed Transfer is part of a contemporaneous transfer involving additional PLANET FITNESS businesses or one or more area development agreements (collectively, the “Transfer Group”), then we will refrain from exercising our right of first refusal to purchase less than the entire Transfer Group.

**13.9 NON-EXERCISE.** If we do not exercise our right of first refusal, you or your Owners may complete the sale to such purchaser pursuant to and on the exact terms of such bona fide offer, subject to our approval of the Transfer as provided in Articles 13.2, 13.3 and 13.4. If the sale to such purchaser is not



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completed within one hundred twenty (120) days after delivery of such bona fide offer to us, or if there is a material change in the terms of the sale (which you agree promptly to communicate to us), the sale will be treated as a new sale subject to our right of first refusal as provided in Article 13.8.

How does it work? Generally, when a buyer and a seller engage in discussions about a potential transaction there are several documents that may be created. One such document is a non-disclosure agreement (“NDA”), which prohibits one or both parties from sharing each other’s confidential information with any third party. An NDA may also include provisions that provide for exclusivity. This means that while the NDA is pending, neither party will enter into any similar or competing transactions with another buyer/seller. If the parties determine to proceed with a transaction, most times there is a letter of intent (“LOI”) or a term sheet that identifies the deal terms upon which the parties have agreed. The LOI will often include language that the transaction is subject to or conditioned upon the franchisor’s waiver of its ROFR. Once the LOI is executed, it is then submitted to the franchisor as a part of the review and approval process. Then, the waiting game begins.

In accordance with Section 13.8 of the Franchise Agreement, Planet Fitness must exercise its ROFR within 30 days from the date of delivery of the offer (i.e., the LOI) and all other information they request. It can take the franchisor several days or even weeks to determine it has received “all other information they request,” so this aspect of the ROFR provision in the Franchise Agreement is important to understand. As timing is critical to the success of all deals, it is important to promptly deliver all requested information to the franchisor as soon as practicable as the clock will not start running until that occurs. Likewise, it is vital in preparing for a transaction like this to begin gathering all required information as soon in the process as possible, so it is readily accessible once requested. If you are not sure what to gather, you should speak to someone who has been through a similar transaction before, like another franchisee or your legal or business advisors. And, don’t be afraid to ask the franchisor what information it will typically require as part of its ROFR review in advance of submitting the offer, which may also help save time.

Once you have submitted all of the requested information, if the franchisor does not exercise its ROFR within 30 days they waive their right. If the franchisor exercises its option, it must “purchase such interest for the price and on the terms and conditions contained in such bona fide offer.” This means, essentially, that the franchisor is stuck with the same deal as the potential third-party purchaser. Be mindful though, this can get tricky when there are “quasi-monetary” terms included in the LOI or the offer, such as continued employment for the seller, consulting arrangements or the rolling of equity into the acquiring company by the seller, all of which are a part of the bona fide offer and all of which have monetary value toward the ultimate purchase price.

For example, a buyer can offer a purchase price of \$10 million with an employment agreement of \$200,000 per year for five years to the seller. The employment agreement has a monetary value that otherwise would have been included in the purchase price. If the franchisor exercises its ROFR, it may not want to keep the seller as an employee. And, the franchisor reserves the ability to “substitute cash for any form of payment proposed in [an] offer.” As such, there may need to be discussion as to the value of all of the quasi-monetary (i.e., Employment Agreement) terms included

in the offer so they may be considered as part of the deal when the franchisor is evaluating its ROFR. This can sometimes be a point of contention, so it is important to be prepared to defend any position on value.

Lastly, if the franchisor does not exercise its ROFR, or allows the time with which it can exercise to lapse and thus waives its right, you should be aware that the deal may only proceed on the exact terms as the offer that was submitted to the franchisor to review. This means that if there are material changes to the offer during the negotiation process or the document drafting stage that alter the terms as initially presented to the franchisor then the franchisor may again evaluate its ROFR and, in any event, must be notified of the changes.

ROFRs are standard in franchise agreements, and they are an integral part of any franchise exit. Those franchisees that are more knowledgeable on the effect of the ROFR on a transaction and how it works will be better equipped to negotiate terms to put themselves in the best possible position to achieve the maximum value for their network. The key takeaways are: know your agreement and how it works as it relates to transfer of any of your units; consider the ROFR and its effect on any transaction; have all the information you need to make sure the transaction moves smoothly; and make sure that you can support the true value of the deal. ⚙️

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