



# 54TH ANNUAL IFA LEGAL SYMPOSIUM



**IFA**<sup>®</sup>

INTERNATIONAL FRANCHISE ASSOCIATION



# Item 19 In A New World

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# Today's Objectives

- A Brief Item 19 History Lesson
- The Impact of COVID-19 on Item 19 FPRs
- The Current State of Item 19
  - Preparation
  - Use of Item 19 in the Sales Process
  - State Regulators' Review
  - Other Regulatory Considerations

# Item 19's History



# The Item 19 Essentials

- A reasonable basis
- State whether historical or forecast of future potential performance
- Clear and conspicuous admonition that a new franchisee's individual results may differ
- Franchisor must have written factual information and Item 19 must state that written substantiation will be made available upon request

# FPR Drafting Resources

- FTC Franchise Rule and Other FTC Materials
  - Franchise Rule – Item 19
  - Compliance Guide
  - FAQs
  - Statement of Basis and Purpose
  - Informal Advisory Opinions



# FPR Drafting Resources (cont'd)

- NASAA Guidance and Commentary
  - 2008 Franchise Registration and Disclosure Guidelines
  - Commentary on Guidelines
  - FPR Commentary
  - Notice Disclosing FPRs in the Time of Covid-19
- State Laws (including anti-fraud provisions)

# COVID-19 Impact on FPRs



- State Examiner Initial Reactions
- Ongoing Impact – Recurring Themes
  - Information that can, cannot or must be included to ensure reasonable basis in light of COVID-19
  - What information can be included in an FPR to describe the impact of COVID-19
  - How should temporary and permanent closures due to COVID-19 be addressed

# FTC FAQ 38



- Background
- Practical Impact
  - FAQ 38: When a franchisor revises Item 19 at the request of one state, it should ordinarily incorporate the same revisions in the FDD it uses in all other states.
  - In response to an FPR comment from a state, can a franchisor simply elect not to respond to the state or withdraw its filing with the state, and continue to use the FPR in other states?
  - Similarly, in response to an FPR comment from a state, can a franchisor create a state-specific FDD without an FPR for use in that state, and continue to use the FPR in other states?

# The Current State of Affairs

- 2022 Comment Letters
- Disclaimers vs. Explanations
  - “We collected this information, but have not independently audited or verified it.”
  - “The financial statements we received from franchisees is unaudited.”
  - Statements regarding the characteristics of the outlets not included
- Disclosure of Information for Multiple Years



# FPR information in Franchise Sales Advertising

- Any advertisement with FPR information must have the following:
  - the information in the ad must be consistent with the information in Item 19
  - the ad also must include:
    - the number and percentage of outlets that actually met or exceeded the represented results;
    - the time period in which the results were achieved; and
    - a clear and conspicuous admonition that a new franchisee's results may differ from the represented performance.
- Understand the Internet Exemption



# Preparing FPRs and Internal Sales Compliance Training



- Understand the business
- How has the business evolved – new metrics/KPIs
- What questions are prospects asking in light of Covid-19
- Has franchisee validation changed
- Educate and train the entire team

# What's Next

- NASAA's Proposed Statement of Policy Regarding Use of Franchise Questionnaires and Acknowledgements
- FTC Advance Notice of Proposed Rulemaking Concerning False, Misleading and Unsubstantiated Earnings Claims