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ITEM 19 IN A NEW WORLD

Danell Caron
Director of Legal and Franchise Administration
Great Clips, Inc.
Minneapolis, Minnesota

Brian Schnell
Partner
Faegre Drinker Biddle & Reath LLP
Minneapolis, Minnesota

Max Schott, II
Shareholder
Larkin Hoffman
Minneapolis, Minnesota

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I. Introduction[1]

The prevalence and importance of financial performance representations ("FPRs") in Item 19 of franchise disclosure documents ("FDDs") have increased over the years. We estimate that between one-half and two-thirds of franchisors now include FPRs in their FDDs. This is not surprising. Like any reasonable prospect, if we were considering the purchase of a franchise, one of the first things we would want is a clear financial picture – including, specifically, how much money can we make. A franchisor without an Item 19 disclosure may find itself at a competitive disadvantage and also more at risk for the disclosure of unauthorized FPRs.

Even prior to COVID-19, the increased use of FPRs and the release by the North American Securities Administrators Association, Inc. ("NASAA")[2] of the final version of its Commentary on Financial Performance Representations ("FPR Commentary") in May 2017[3], caused state regulators to heighten their level of review of FPRs to ensure a "reasonable basis" existed for including them in Item 19. Just when regulators, franchisors and their attorneys had gotten used to this new guidance, the appearance of COVID-19 added a new wrinkle. To help franchisors analyze how COVID-19 may impact their FPRs and understand whether their FDDs needed to be amended, in June 2020, NASAA released its commentary titled "Disclosing Financial Performance Representations in the Time of COVID-19" ("COVID-19 FPR Commentary").[4] The State of Washington soon followed by issuing its own notice covering this same issue ("Washington COVID-19 Notice").[5] Since then, most franchisors now have gone through two franchise renewal seasons, and have had to evaluate what impact (both negative and positive) COVID-19 has had and continues to have on its system, and what information the franchisor can or must include in Item 19 of its FDD to ensure that its FPRs have a reasonable basis.

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[1] The authors wish to thank David Archer of Faegre Drinker and Susan Tegt of Larkin Hoffman for their valuable contributions to this paper.

[2] NASAA is the oldest international organization devoted to investor protection. NASAA is a voluntary association whose membership consists of 67 state, provincial, and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico. NASAA's Franchise and Business Opportunity Project Group (a standing committee formed in the 1980s) proposes model laws, commentaries, and other initiatives regarding franchise disclosure in an effort to further its investor protection role and to promote uniformity among state franchise regulators and the FTC. While NASAA has no direct authority over franchising, the FTC and states that regulate franchising have historically given great weight to the recommendations, commentaries, and policy initiatives of NASAA's Business Opportunity Project Group and, in many cases, states have specifically incorporated them into their franchise laws.

[3] http://www.nasaa.org/wp-content/uploads/2017/05/Financial-Performance-Representation-Commentary.pdf (last visited May 4, 2022); Bus. Franchise Guide (CCH) ¶ 5707 ("FPR Commentary").

[4] Disclosing Financial Performance Representations in the Time of COVID-19, NASAA Franchise Project Group (June 10, 2020), https://www.nasaa.org/wp-content/uploads/2020/06/FPRs-in-the-time-of-COVID-19.pdf (last visited May 4, 2022) ("COVID-19 FPR Commentary").

[5] Notice Regarding Historical Financial Performance Representations During the COVID-19 Pandemic, Washington Department of Financial Institutions, Securities Division (June 17, 2020) https://dfi.wa.gov/sites/default/files/notice-nasaa-fpr-guidance.pdf (last visited May 4, 2022) ("WA COVID-19 Notice").

This paper is intended for experienced practitioners who are grappling with how to draft FPRs in (what is hopefully) a post-COVID world that (i) comply with federal and state law, (ii) are acceptable to state regulators, and (iii) provide meaningful information to prospects. While we provide some background, this paper assumes a certain level of knowledge about FPRs. Should you desire more information, the International Franchise Association ("IFA") and the ABA Forum on Franchising ("ABA Forum") have published many excellent resources on FPRs and the requirements of Item 19.[6]

Section II of this paper provides a brief history of FPRs and summarizes the resources franchisors and their attorneys must consider in preparing FPRs. Section III analyzes how COVID-19 continues to impact FPRs and the franchise regulators' evaluation of them. Section IV discusses FTC FAQ 38 and what it means for franchisors on a practical level. Section V provides a summary of some of the FPR-related comments franchisors have received in response to their 2022 renewal filings. Section VI describes hot topics relating to the use of FPRs in advertising materials and on social media. Section VII offers tips for effective coordination between counsel and in-house executives (including franchise development personnel) in the preparation of FPRs. Section VIII provides a summary of key FPR litigation. Section IX describes NASAA's proposed Statement of Policy regarding the use of franchise questionnaires and acknowledgments, and how questions and acknowledgments relating to FPRs may need to be revised or eliminated if the Statement of Policy is adopted. Finally, Section X summarizes the FTC's Advance Notice of Proposed Rulemaking concerning false, misleading, and unsubstantiated earnings claims.

II. Item 19 – Background and Resources

A. Brief History of Financial Performance Representations (FPRs)

From the very beginning, both state and federal franchise pre-sale disclosure requirements have addressed a franchisor's use of financial performance information to stimulate interest in their franchise offerings. Originally referred to as "earnings claims," these disclosures caused mounting problems throughout the 1960s. According to the Statement of Basis and Purpose ("SBP") of the original FTC Rule, many franchisors used unsubstantiated, exaggerated, and misleading statements concerning actual past performance of earlier franchises or of projected future performance of the franchises being offered.[7]

As a result of these problematic disclosures, the initial wave of state franchise registration and disclosure laws directly regulated earnings claim information. Specifically, in 1974 when the Midwest Securities Commissioners Association ("MSCA") developed the original disclosure Requirement and Guidelines of the first Uniform

[6] Here is a list of some of the IFA and ABA resources on FPRs: Dale Cantone, Eric Karp & Max Schott, II, *Advanced Drafting of Financial Performance Representations: A Reasonable Basis*, 39th Annual ABA Forum on Franchising, W-13 (2016) ("Advanced Drafting of FPRs"); Dale Cantone, Lulu Gomez & David Gurnick, *Promises, Promises: Financial Performance Representations - Advanced Issues*, 43rd ABA Forum on Franchising, W-16, (2020) ("Promises, Promises"); Justin Klein, Brenton Permesly, Sandy Wall & Nathan Quigley, *Item 19 FPRs & COVID-19*, 53rd Annual Legal Symposium (2021) ("Item 19 FPRs").
[7] *See*, Statement of Basis and Purpose, 43 FR at 59684 (Dec. 21, 1978); Bus. Franchise Guide (CCH) ¶6302.

Franchise Offering Circular ("UFOC"), earnings claim regulation was a separate category of disclosure, captured in the now-famous "Item 19" disclosure. The UFOC format allowed for the disclosure of actual or projected earnings based on data from franchised units, so long as the underlying data was prepared according to generally accepted accounting principles.[8] While, the original UFOC format prohibited franchisors from relying on company-owned data for purposes of basing financial performance representations, in 1977 the MSCA modified the UFOC format to allow use of data from company-owned or company-operated outlets.[9]

When the Federal Trade Commission ("FTC") enacted the original FTC Rule in 1978, it, too, directly regulated earnings claim disclosures.[10] The original FTC Rule imposed "reasonable basis" and "geographic relevance" requirements for purposes of crafting an earnings claim disclosure.[11] Further, the original FTC Rule required the franchisor to set forth in detail the material basis and assumptions upon which the earnings claim representation was based.[12] Finally, under the FTC format disclosure document an earnings claim representation needed to be in a separate "Earnings Claim Document."[13]

Between 1986 and 1993, the NASAA (into which the old MSCA had been merged) engaged in a further examination of the policies and regulations involving financial performance disclosure. The outcome was a rewrite of Item 19 in 1993, merging the state and FTC regulatory goals in an evolved new version of Item 19, which was documented in NASAA's UFOC Guidelines. The revised version of the UFOC Guidelines, including Item 19, was supported and eventually endorsed by the FTC. The 1993 version of Item 19 allowed, even encouraged, franchisors to disclose financial performance information provided the disclosures: (1) were in the offering circular, (2) had a "reasonable basis" (the FTC Rule's standard), and (3) were formatted in accordance with the UFOC Item 19 requirements.

Then, in 2007, the FTC completed its first review and revision of the franchising rule since its original enactment in 1979 (the "FTC Rule").[14] Among other changes, the FTC changed the name of Item 19 from "earnings claims" to "financial performance representations" or "FPRs"[15] Also, the requirement that financial performance data be prepared according to GAAP was replaced with a requirement only that the data be "reasonable." Finally, and unlike the original FTC Rule, any financial performance representation was required to be included in Item 19 of the franchisor's FDD, not in a separate earnings claim document.

The FTC Rule defines "financial performance representation" to mean:

[8] Marvin Rooks, *It is Time for the Federal Trade Commission to Require Financial Performance Representations to Prospective Franchisees*, 11 WAKE FOREST J. BUS. & INTELL, PROP. L. *61-63 (2010).*
[9] *Id.*
[10] *See,*16 C.F.R. §436.5.
[11] *See*, 16 C.F.R. §436.1(b)(1); §436.1(c)(1); §436.1(c)(4) and; §436.1(e)(2).
[12] *See*, 16 C.F.R. §436.1(b)(2); §436.1(b)(3).
[13] *See*, 16 CFR 436.1(d).
[14] *See*, 16 C.F.R. §436.
[15] *See*, 16 C.F.R. §436.5(s).

> [A]ny representation, including any oral, written or visual representation, to a prospective franchisee, including a representation in the general media, that states, expressly or by implication, a specific level or range of actual or potential sales, income, gross profits, or net profits. The term includes a chart, table, or mathematical calculation that shows possible results based on a combination of variables.[16]

Like its predecessor rules and regulations, the FTC Rule does not require franchisors to include a financial performance representation in its FDD.[17] Of course, if a franchisor chooses to not include financial performance representation in its Item 19 disclosure, a franchisor, except in limited circumstances prescribed by the FTC Rule, may not provide a prospective franchisee with any financial information before the franchisee signs a franchise agreement.[18] If a franchisor chooses to include a financial performance representation in its FDD, the FTC Rule identifies specific rules and requirements a franchisor must follow when preparing and presenting its representation. Specifically, the FTC Rule requires:

- The franchisor must have a reasonable basis for making the representation and written substantiation for the information contained in the representation at the time the representation is made.[19]

- The franchisor must expressly state whether its financial performance representation reflects a historic performance of its franchised outlets or a forecast of future potential performance.[20]

- The financial performance representation must include a clear and conspicuous admonition that a new franchisee's individual financial results may differ from the results stated in the financial performance representation.[21]

- A franchisor must have written factual information in its possession that reasonably supports the financial performance representation and the Item 19 disclosure must expressly state that written substantiation for the financial performance representation will be

[16] 16 C.F.R. § 436.1(e).
[17] If a franchisor elects not to make a financial performance representation, the FTC Rule requires a franchisor to include prescriptive language in the second paragraph of its Item 19 disclosure. *See,* 16 C.F.R. §436.5(s)(2).
[18] There are two key exceptions to this rule. *See*, 16 C.F.R. §§436.5(s)(4)-(5). Specifically, a franchisor may provide a prospective franchisee with financial performance information for a specific outlet the prospect is interested in purchasing. Additionally, if a franchisor has made an Item 19 FPR, it may provide a prospect with supplemental financial information relating to a particular location or addressing a particular characteristic of an outlet.
[19] *See*, 16 C.F.R. §436.5(s).
[20] *See*, 16 C.F.R. §436.5(s)(3).
[21] *See*, 16 C.F.R. §436.5(s)(3)(iv).

made available upon reasonable request.[22]

Regardless of whether a franchisor's financial performance representation is a historic report of all or a subset of existing franchised outlets, or whether the information is a forecast of future potential performance, a franchisor must identify the supporting facts and underlying basis for the representation.[23] The type of information needed to support the underlying basis of the financial performance representation is detailed in the FTC Rule[24] and varies depending on whether the FPR is a historical representation or a forecast of potential performance.

B. Resources for Drafting FPRs

While franchisors and their counsel are given a large amount of latitude under Item 19 as to the type and content of FPRs they include in their FDDs, all FPRs must have a "reasonable basis" and "written substantiation" at the time they are made.[25] Included below is a summary of the resources that provide guidance on these requirements and should be consulted as a part of drafting FPRs.

1. FTC Franchise Rule and Other FTC Materials

- FTC Franchise Rule – Item 19[26]

- FTC Compliance Guide[27] – The FTC Compliance Guide provides significant additional guidance regarding Item 19 disclosures. Regarding FPRs based on historic performance, the Compliance Guide lists the six bases identified in the Rule: 1) the group of outlets measured, 2) the time period measured, 3) the number of outlets measured, 4) the number of outlets reporting, 5) the number and percentage of outlets that achieved the stated level of performance, and 6) any distinguishing characteristics of the outlets measured—and provides additional explanation, including illustrations and examples, of each.[28] The Compliance Guide also addresses FPRs based on projections, and includes a list of factors which should be considered in order to make reasonable forecasts.[29]

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[22] *See*, 16 C.F.R. §436.5(s)(3)(v). Information that reasonably supports the FPR includes the type of information a prudent business person would use when making an investment decision. *See, Franchise Rule* 16 C.F.R. Part 436, FTC, *Franchise Rule Compliance Guide*, at 135 (May 2008), https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf.*Compliance Guide* ("Compliance Guide").
[23] *See*, 16 C.F.R. §436.5(s)(3)(i).
[24] *See*, 16 C.F.R. §436.5(s)(3).
[25] 16 C.F.R. § 436.5(s).
[26] *Id.*
[27] Compliance Guide, *supra* Note 22.
[28] *Id.* at 85-91.
[29] *Id*. at 135-136.

- FTC FAQs[30] – The FTC FAQs currently consist of 38 questions and answers, four of which—FAQs 8, 27, 33, and 38 —relate to FPRs.

    - FAQ 8 explains that "in limited circumstances, a franchisor may base a financial performance claim upon the results of operations of the substantially similar business of an affiliate," but only if it lacks adequate performance data of its own and it discloses any characteristics of the subset of affiliate outlets that may differ materially from the characteristics of the franchised outlets being offered.[31]

    - FAQ 27 clarifies that if a franchisor elects to make an FPR in Item 19, it also may elect to include the prescribed statement that the franchisor does not make any other FPRs.[32]

    - FAQ 33 establishes that the FTC Franchise Rule does not allow a franchisor to include an FPR in an attachment to its FDD, instead of placing it directly in Item 19.[33]

    - FAQ 38 advises that when a franchisor revises its Item 19 at the request or direction of one registration state, it should ordinarily incorporate the same revisions in the FDD it uses in all other registration and non-registration states.[34] The impact of this FAQ is further expanded on in Section IV below.

- FTC Statement of Basis and Purpose[35] – Although primarily intended to explain the justification of the FTC Franchise Rule, the Statement also provides advice on how the Rule will be applied in practice. The Statement addresses two main topics concerning Item 19—the Rule's treatment of cost and expense information, and its treatment of general media claims.

- FTC Informal Advisory Opinions[36] – From time to time, the FTC releases informal advisory opinions, some of which may cover FPR-related issues.

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30 FTC, *Frequently Asked Questions*, https://www.ftc.gov/tips-advice/business-center/guidance/amended-franchise-rule-faqs (last visited May 4, 2022) ("FTC FAQs").
31 *Id.* at No. 8.
32 *Id.* at No. 27.
33 *Id.* at No. 33.
34 *Id*. at No. 38.
35 16 C.F.R. § 436(III)(A)(5).
36 FTC, *Advisory Opinions*, https://www.ftc.gov/legal-library/browse/advisory-opinions (last visited May 4, 2022)

2. NASAA Guidance and Commentary

- NASAA's 2008 Franchise Registration and Disclosure Guidelines[37] – In reaction to the FTC's release of the FTC Franchise Rule, on June 6, 2008, NASAA adopted the 2008 Franchise Registration and Disclosure Guidelines ("NASAA Guidelines") as a model for states with franchise registration and disclosure laws. The NASAA Guidelines incorporated the new disclosure requirements under the amended FTC Rule and added a new state cover page, new filing instructions, and new application forms.

- NASAA's Commentary on 2008 Franchise Registration and Disclosure Guidelines[38] – On April 27, 2009, NASAA adopted the Commentary on 2008 Franchise Registration and Disclosure Guidelines ("NASAA Commentary") to provide franchisors with practical guidance about the disclosure requirements and instructions adopted under the NASAA Guidelines.

- NASAA's FPR Commentary[39] – On May 8, 2017, NASAA released its FPR Commentary, which provides further guidance as to what constitutes a "reasonable basis" for purposes of making and substantiating a financial performance representation. The FPR Commentary includes a series of answers to questions raised by state franchise examiners and franchisor representatives.[40] The FPR Commentary provides guidance with respect to the disclosure of FPRs generally, use of data from company-owned outlets, use of subsets, averages and medians, use of forecasts and projections, and disclaimers.

- NASAA's Disclosing FPRs in the Time of COVID-19[41] – In June 2020, NASAA released its COVID-19 FPR Commentary to help franchisors analyze how COVID-19 may impact their FPRs and understand whether their FDDs needed to be amended. This document is further discussed in Section III.A below.

3. State Laws

- Franchisors must comply with anti-fraud provisions in state franchise registration and disclosure laws in states where those laws apply. These state franchise laws make it unlawful,

[37] https://www.nasaa.org/wp-content/uploads/2011/08/6-2008UFOC.pdf (last visited May 4, 2022); Bus. Franchise Guide (CCH) ¶ 5705 ("NASAA Guidelines").
[38] http://www.nasaa.org/wp-content/uploads/2011/08/FranchiseCommentary_final.pdf (last visited May 4, 2022); Bus. Franchise Guide (CCH) ¶ 5706 ("NASAA Commentary").
[39] FPR Commentary, *supra* Note 3.
[40] *Id.*
[41] COVID-19 FPR Commentary, *supra* Note 4.

generally, for a franchisor, in connection with the offer or sale of a franchise, to make an untrue statement of material fact or to omit to state a material fact that would make a statement not misleading.[42] Franchisors also must comply with the laws that regulate in the inclusion of FPRs in franchise sales materials as further described in Section VI below.

- Washington Notice Regarding Historical FPRs During the COVID-19 Pandemic[43] – The Washington COVID-19 Notice was released shortly after the NASAA's COVID-19 Commentary and is further described in Section III.A below.

III. Continued Impact of COVID-19 on FPRs

This Section III analyzes how COVID-19 continues to impact FPRs and the franchise regulators' evaluation of them.

A. Initial Reaction of State Examiners

While the COVID-19 virus had arrived in the United States by January 2020, its devasting impact on many businesses, like restaurants, gyms/health clubs and salons, was not felt until March and April of that year. By that time, the majority of franchisors had likely already updated and submitted their 2020 FDDs to the franchise registration states and, for those with Item 19 disclosures, it is fair to assume most of their FPRs included 2019 data, but not any data from 2020. Because of the severe disruption COVID-19 caused to the economy and many industries and the uncertainty it created, many franchisors faced the issue of when, if ever, their businesses would return to normal, or least to 2019 levels. In contrast, other businesses, like hardware stores and those providing delivery services, saw their sales skyrocket.

Although franchise sales activity not surprising slowed or paused during this period for many franchisors, a question quickly rose to the forefront: Was it reasonable for a franchisor to continue to disclose FPR information from 2019 and earlier periods to prospective franchisees in light of COVID-19, without also including information from 2020? In fact, it was at the request of several state administrators that the NASAA Franchise Project Group prepared and released its COVID-19 FPR Commentary dated June 10, 2020.[44] The Washington Department of Financial Institutions, Securities Division, quickly followed with the issuance of the Washington COVID-19 Notice on June 17, 2020, specifically informing franchisors and their counsel that the state intended to follow NASAA's guidance.[45]

[42] *See, e.g.*, California Franchise Investment Law, CAL. CORP. CODE. §§31200-04; Hawaii Franchise Investment Law, HAW. REV. STAT. §482E-5(b); New York Franchise Act, N.Y. GEN. BUS. LAW, ART. 33 §687.
[43] WA COVID-19 Notice, *supra* Note 5.
[44] COVID-19 FPR Commentary, *supra* Note 4.
[45] WA COVID-19 Notice, *supra* Note 5.

NASAA's COVID-19 FPR Commentary clarified that if the outlets included in a franchisor's "Historical FPR" (an FPR based on historical data from franchisee or company-owned outlets from 2019 or periods that predate the impact of the COVID-19 pandemic), have experienced material changes in financial performance, or changes in the franchise system or how goods and services are delivered to the public, the franchisor must update its Historic FPR to reflect those changes.[46] To assist state administrators and franchisors in determining whether a material change has occurred due to COVID-19 that would require an amendment, the COVID-19 FPR Commentary includes a list of factors that should be considered.[47] Ultimately, however, NASAA recognized the following:

> Each franchise system is unique, and the determination of whether a franchisor has a reasonable basis to make an FPR is based on the specific facts and circumstances relating to the franchise offering. Therefore, franchisors making Historical FPRs in the FDDs they file with state franchise regulatory authorities should be prepared to respond to comments from state examiners asking for them to explain how the FPR complies with federal and state requirements.[48]

B. Ongoing Impact – Recurring Themes

Since the release of the guidance described above, most franchisors now have gone through two franchise renewal seasons, including the recent 2022 season. During this period, a number of timely IFA Legal Symposium and ABA Forum on Franchising papers were published to help franchisors and practitioners understand what issues state examiners were commenting on and what it means for an FPR to have a reasonable basis in the time of COVID-19, with the understanding that the answer may vary depending on the franchisor's business.[49] If you have not already done so, we invite to review these materials as they assist in informing us where we are now.

While we are still collecting data from the 2022 renewal season, there appear to be some recurring COVID-19-related themes that can be categorized under the questions below.

- What information can, cannot or must be included in a franchisor's FPR to ensure that it has a reasonable basis in light of the impact COVID-19 has had on its system?

This question originally was posed in the COVID-19 FPR Commentary to determine whether data from 2019 or before could be included in a franchisor's FPR

[46] COVID-19 FPR Commentary, *supra* Note 4 at 1-2.
[47] *Id.* at 2.
[48] *Id.* at 3.
[49] Timothy O'Brien, Michelle Webster & Rochelle Spandorf, *Regulatory Update*, 43rd Annual ABA Forum on Franchising, W-13, at 27-37 (2020) ("2020 Regulatory Update"), Promises, Promises, *supra* Note 6 at 22-25; Item 19 FPRs, *supra* Note 6, Peggy Shanks, Lulu Gomez & Maral Kilejian, *Regulatory Update*, 44th Annual ABA Forum on Franchising, W-13, at 16-20 (2021) ("2021 Regulatory Update").

without data from 2020.[50] The question, however, continues to be relevant in the analysis of FPRs today.

If COVID-19 has resulted in a permanent change to a franchisor's franchise system or how goods or services are delivered, the franchisor may not be able to include data from outlets before the change. For example, a food service concept that has decided to eliminate in-store dining or to do away with buffet-style service that used to be a prominent part of its business model may not have a reasonable basis for including data from outlets that occurred prior to either of these changes. In addition, if costs have increased considerably as the result of ongoing supply chain issues caused by COVID-19, an FPR with expense information from a prior year may no longer be relevant.

But what if no changes have occurred to the way a franchisor does business, its system was impacted by temporary closures and fewer customers during the height of COVID-19, but its sales have steadily increased during the past two years and are approaching 2019 numbers, can this franchisor include a gross sales FPR based on 2019, 2020 and 2021 information? While each situation is different, our experience is that state examiners are at least willing to consider that a franchisor may have a reasonable basis to include data from multiple years in its FPR, including pre-COVID-19 information, even though its system was impacted by the pandemic.

At this point, it seems clear that a franchisor would be hard pressed to only include information from 2019 or before in its FPR. One exception, however, may be a franchisor whose system-wide sales were up during the past two years due to serving an at-home workforce, who is now slowly returning to the office. The 2019 data may be the most relevant to prospective franchisees, although the franchisor and its counsel would likely have to justify to franchise examiners why this is the case, which may be a difficult task. The alternative would be to include data from the past three years, although that could be misleading if sales are declining due to a returning workforce and any language a franchisor adds to the FPR to describe the situation could be viewed as an unacceptable disclaimer (see below).

- What information can be included in an FPR to describe the impact COVID-19 has had and continues to have on a franchisor's system?

The answer has been and continues to be – a fairly limited amount. While this may be less important now than it once was, franchisors that want to describe the impact of COVID-19 on their systems should stick to factual statements. For example, how many outlets temporarily closed and for how long. This year, in particular, state examiners are looking for any statements that could be construed as a disclaimer (i.e., a statement implying a prospect should not rely on the information provided). Anticipating this may be an issue, NASAA prohibited the inclusion of COVID-19-related disclaimers in FPRs in the last paragraph of the COVID-19 FPR Commentary and specifically included the following: "[a]lthough some franchisors may argue that statements like

[50] COVID-19 FPR Commentary, *supra* Note 4 at 2.

these are purely factual and accurate, the language can only be viewed by a prospective franchisee as a further admonition not to rely on the information presented."[51] Therefore, franchisors and their counsel should carefully consider any language of this type they want to include in an FPR.

- How should temporary and permanent closures due to COVID-19 be addressed in FPRs?

This has become less of an issue now that so few outlets are currently closed on a temporary basis due to COVID-19, but this could change with a new surge or some other event that causes widespread temporary closures. We have included below 19.18 from NASAA's FPR Commentary, which addresses this issue.

19.18 *Item 19 – Omission of Outlets that Have Closed*

QUESTION: If a franchisor makes an FPR that includes an average or median, may the franchisor, in calculating that average or median, exclude data from any company-owned outlets or franchise outlets that closed during the time period covered in the FPR?

ANSWER: Yes. A franchisor making an FPR that includes an average or median may exclude data from company-owned outlets and franchise outlets that closed during the time period covered in the FPR, provided the franchisor discloses in the FPR: (i) the number of company-owned outlets that closed during the time period, if the FPR includes company-owned outlets; (ii) the number of franchise outlets that closed during the time period, if the FPR includes franchised outlets; and (iii) the number of excluded outlets that closed during the same time period after being open less than 12 months. This disclosure should cover each year or other period of time covered in the FPR.[52]

It is fairly clear from 19.18 that a franchisor may exclude permanent closures, whether the result of COVID-19 or some other cause, as long as it complies with the disclosure requirements described in (i)-(iii) above.[53] An argument can be made that 19.18 also applies equally to the exclusion of temporary closures, provided the same required disclosures are made. However, some franchise examiners, including at least one in California, have taken the position that 19.18 does not apply to temporary closures and, therefore, while a franchisor may include an FPR that excludes outlets that temporarily closed, it may only do so after including an FPR that includes the outlets that temporarily closed, which will skew any FPRs that include averages. Franchisors and their counsel are advised to weigh the risk of a comment before excluding any temporary closures.

[51] *Id.* at 3.
[52] FPR Commentary, *supra* Note 3 at 19.18.
[53] *Id.*

IV. FTC FAQ 38

As mentioned above, the FTC has issued four FAQs relating to FPRs, the last of which – FAQ 38 – is the most concerning to franchisors given the potential impact it may have on the information they disclose in Item 19 of their FDDs.[54] This is especially true given state franchise examiners' increased scrutiny of FPRs and what appears to be a rise in FPR-related comments.

A. Background

It is our understanding that the FTC issued FAQ 38 (its newest FAQ) on July 2, 2014, in an effort to curtail a perceived practice by franchisors of including required FPR revisions in response to state comment letters in state-specific FDDs, rather than folding these revisions into their multistate FDDs. There does not appear to have been much in the way of discussion regarding this FAQ and its release, at the time, seemed to fly under the radar. We have included the text of FAQ 38 below as we feel it is important to read it in its entirety.

> 38. If a franchisor is unable to register a franchise offering in a state with a franchise registration law without removing or altering a Financial Performance Representation ("FPR") in Item 19, may the franchisor use the unaltered FPR in the Franchise Disclosure Document ("FDD") it delivers to potential purchasers in other states?
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> Answer: If a franchisor revises its FDD at the request or direction of one registration state, it ordinarily should incorporate the same revisions in the FDDs it uses in other registration and non-registration states to ensure that its disclosures are complete and accurate.[1] In the case of an FPR in Item 19 questioned by one registration state, a failure to make any resulting voluntary or involuntary changes to the FPR in all other states, or abandonment or withdrawal of the registration application without making changes, will raise significant concerns about whether the FPR meets the requirements of the Franchise Rule. In particular, any such failure will call into question whether an FPR meets the requirement that a franchisor have written substantiation demonstrating that its FPR had a reasonable factual basis at the time it was made.
>
> As always, the franchisor will bear the burden of proving that its written substantiation shows that factual information in its possession at the time it made the representation supports the FPR as it is likely to be understood by a reasonable prospective franchisee.[2] Any failure to use the same FPR in all states will not change the franchisor's burden, but may expose the franchisor to the risk of heightened scrutiny by federal or state franchise law enforcers.
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> Issued: July 2, 2014.

[54] FTC FAQs, *supra* Note 30.

[1] 16 C.F.R. § 436.1(d) (definitions of "[d]isclose, state, describe, and list each mean to present all material facts accurately, clearly, concisely, and legibly in plain English").

[2] FTC Franchise Rule Compliance Guide (May 2008), p. 135.[55]

FAQ 38 advises that, when a franchisor revises its Item 19 at the request or direction of one registration state, it should ordinarily incorporate the same revisions in the FDD it uses in all other registration and non-registration states. Essentially, under FAQ 38, a state comment arguably creates a presumption that a franchisor's FPR does not meet the requirements of the FTC Franchise Rule. Ultimately, however, for states other than the commenting state, it is up to the franchisor and its attorneys to decide whether its FPR meets the requirements of the FTC Franchise Rule, with the understanding that the burden of proving its FPR had a reasonable basis at the time it was made rests with the franchisor.[56]

B. Practical Impact

So, what does FAQ 38 mean to franchisors on a practical level? The conservative approach in dealing with it would be to incorporate any and all state-required FPR revisions into a franchisor's multistate FDD, and notify all other applicable franchise registration states of the revisions. Depending on the timing and where the franchisor is already registered, this could involve pre-effective amendments, informal notifications (if acceptable to the state) or formal amendment filings, all of which increase costs, take time, bog down the sales process and, in some cases, delay existing franchisees from renewing their expiring franchise agreements or selling their business to a new franchise owner if the franchisor requires the buyer to sign the then current form of franchise agreement. In other words, the impacts of this conservative approach are real and many.

Obviously, if a franchise examiner points out a material deficiency in its FPR, a franchisor should take the conservative approach and revise the FPR and submit it to all applicable franchise registration states. But what if the franchisor believes the required FPR revision is not material or that its FPR still has a reasonable basis without the required revision? Can it create a state-specific FDD with the required FPR revision to submit to the state and not make the revision to the FDD(s) it uses in other states, or at least not until the next amendment or renewal filing? The answer is yes, although the franchisor will be subject to the presumption against it under FAQ 38 and bear the burden of proving its FPR complies with requirements of the FTC Franchise Rule. In addition, the creation of a state-specific FDD in response to a comment may raise a red flag for the franchise examiner who issued the comment and that examiner could reach out to their counterparts in other states.

[55] *Id*. at No. 38.
[56] *Id.*

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 answer to these questions is probably yes, but the franchisor and its attorneys should think long and hard before doing so. Both scenarios seem to fit within FAQ 38. In addition, it is widely known that examiners talk with each other and a franchisor that takes one of these approaches may find itself receiving additional comments from other states. A careful assessment and balancing of the interests must occur so as to avoid surprises when one course of action is taken over another relative to FAQ 38.

Can a franchisor maintain separate FDDs, one with FPRs and the other without FPRs? The answer is probably yes. However, a franchisor and its sales team would want to be careful not to provide or refer a prospect to an FDD with an FPR if that prospect is located in a state or a resident of a state that has a state-specific FDD without an FPR. This becomes somewhat murky with copies of FDDs electronically available from registration states and other sources. It also seems to go against the spirit of FAQ 38, without necessarily implicating or violating it. More importantly, however, we are proponents of providing meaningful FPRs to all prospects and working with state examiners to find a way of doing so.

V. 2022 Comment Letters

In preparing this paper, we reviewed a sampling of FPR-related state comment letters from this renewal season. We also reached out to franchise examiners in the States of California, Illinois, Maryland, Virginia and Washington to get a sense of the Item 19 issues they and their offices are seeing this year. Included below is a summary of some of the comments.

A. Missing Information Specifically Required Under the NASAA's FPR Commentary

In all of the "Ask the Regulators" programs we have attended, it seems like the issue of simply failing to include information required under the FPR Commentary is always high on the list. Based on our discussions with state examiners, this year is no different. In particular, they noted as issues missing averages or medians,[57] or percentages at or above the average, the failure to properly account for all closed or excluded outlets,[58] and not including the required admonition it the specified format (i.e., in bold and in a separate paragraph).[59] One examiner also shared with us that the following comments are the ones they make the most:

(i) Failure to adequately describe the types of outlets (franchised, company-owned and affiliate-owned) included and those excluded from each FPR, preferably at the beginning of Item 19

[57] FPR Commentary, *supra* Note 3 at 19.16 and 19.17.
[58] *Id.* at 19.18.
[59] *Id.* at 19.21 and 19.22.

(ii) For FPRs that include information from company-owned or affiliated-owned outlets, failure to explain any differences between these outlets and franchised outlets, including differences in operations, fees, costs, etc.

B. Disclaimers vs. Explanations

Many state franchise examiners have continued to scrutinize any language in an FDD that could be construed as a disclaimer, especially in Item 19. As support, the examiners point to 19.23 of the FPR Commentary, which states:

> Under the FTC Franchise Rule, a franchisor is prohibited from disclaiming or requiring a prospective franchisee to waive reliance on any representation made in the Franchise Disclosure Document. A franchisor, therefore, may not include in Item 19 or elsewhere in a Franchise Disclosure Document any disclaimers that contradict, mitigate, or are inconsistent with the admonition prescribed in FPR Commentary Item 19.3.[60]

Along these lines, at least one franchise examiner in the State of Washington has taken the position that statements included in Item 19 informing a prospect the data contained therein has not been audited or independently verified are prohibited disclaimers. For example, this examiner has requested that the following language be removed this year:

- "We collected this information, but have not independently audited or verified it."
- "Unaudited Statement" (included in the description of an FPR table)
- "The financial statements [franchisor] receives from franchisees for these stores are unaudited, and [franchisor] does not audit or independently verify, or express an opinion regarding these statements."

We found this comment to be interesting given that this type of language is fairly common in FPRs. We were somewhat surprised, however, to discover that there does not appear to be any provision or guidance that requires it, other than 19.6 of the FPR Commentary that states: "[a] franchisor must clearly identify the sources of all data presented in an FPR."[61]

Another issue that came up with Maryland this year relates to the interpretation of a required Item 19 disclosure. If an FPR is based on past performance of the franchise system's existing outlets, under 16 CFR § 436.5(s)(3)(ii), the franchisor must disclose the "material bases" for the representation, including:

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[60] *Id.* at 19.23.
[61] *Id.* at 19.6.

(F) Characteristics of the included outlets, such as those characteristics noted in paragraph (3)(ii)(A) of this section, that may differ materially from those of the outlet that may be offered to a prospective franchisee.[62]

The specific characteristics referenced in paragraph (3)(ii)(A) include the following, although they are not meant to be an exhaustive list of the characteristics a franchisor should consider: "geographic location, type of location (such as free standing vs. shopping center), degree of competition, length of time the outlets have operated, services or goods sold, services supplied by the franchisor, and whether the outlets are franchised or franchisor-owned or operated."[63]

This language suggests that even though a franchisor may have a reasonable basis for including an FPR based on the past performance of existing outlets, it still has an obligation to inform prospects of the characteristics that may differ materially from the outlet being offered. Despite this obligation, a Maryland franchise examiner required the deletion of the language below from a franchisor's FPR.

- "There are a number of characteristics that vary among [_______®] franchised businesses depending on where they are located, including territory size, the weather, the seasonality of the [___________] service and repair business, applicable laws and regulations, the terms and conditions of leases, competition, and the market for [___________] services and repair."

This language arguably responds to the required disclosure and is in keeping with characteristics described in paragraph (3)(ii)(A). The response from the Maryland examiners, was that this language is too broad and could apply to any business, the requirement of 16 CFR § 436.5(s)(3)(ii)(F) is meant to be read narrowly, and that any characteristics listed that may differ materially must be specific to the particular franchise. While the language above could be more narrowly tailored, it seems things like seasonality, degree of competition, territory size and type of services and repair offered could be considered legitimate characteristics that may materially differ. By simply deleting language of this type, a franchisor may open itself up to liability for failing to disclose the characteristics of the included outlets that may materially differ from the franchise offered to prospective franchisees. Analysis of this issue becomes even more complicated when factoring in the potential implications of FAQ 38, and will require some careful consideration on the part of franchisors and their attorneys.

Although weeding out language that could be construed as prohibited "disclaimers" clearly has become an emphasis for some registration states, this is not true across all of the states. In fact, examiners is two different registration states explained to us that checking on "disclaimers" and asking franchisors to delete statements in Item 19 was not one of their priorities.

[62] 16 C.F.R. §436(s)(3)(ii)(F).
[63] 16 C.F.R. §436(s)(3)(ii)(A).

VI. FPR Issues in Franchise Sales Advertising

More franchisors are utilizing Item 19 FPR information in their franchise sales advertising than ever before. Fifteen years ago, this practice was typically limited to instances like restaurant franchisors including a full-page advertisement in the monthly publication of *Nation's Restaurant News*. Today, seeing a franchise sales ad with some type of FPR information is much more common across all the various industries in which franchisors operate, and these ads appear not only in traditional media publications but also many different forms of digital media, including many of the popular social media networks.

Franchisors that pursue a franchise sales advertising strategy that includes FPR information and utilizes digital media formats should consider three different points. First, special rules apply to a franchise sales ad that includes FPR information. Second, in addition to the FPR rules, a franchisor must make sure that an ad does not include any prohibited statements or inferences that a franchise is a safe investment or similar impermissible statements.[64] Third, given the increasing use of digital media formats, a franchisor will want to confirm that it is complying with NASAA's Internet Exemption (or the state equivalents), as further discussed below, from the requirement in certain states that a franchisor must file an ad with the state prior to use. If the Internet Exemption is not available, then the franchisor must file a copy of the proposed advertisement or promotional materials with several of the registration states.

The states that require franchise sales advertisements to be filed prior to use are: California, Maryland, Minnesota, New York, North Dakota and Washington.[65]

All franchise sales advertisements must contain certain information prescribed by law. State examiners review the advertisements for compliance with these laws, so it is important to understand and comply with various unique state requirements and prohibitions concerning these advertisements. For example, the six states noted above require the advertisement to be true, accurate and not misleading, and prohibit statements indicating that the purchase of the franchise is a safe investment. There are significant restrictions on advertisements which include any statements of revenue or projections of income. Further, any advertisement (whether traditional media or digital) or marketing brochure may not include any assurance of earnings or profits and may not contain any information which is inconsistent with the franchisor's FDD.

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[64] A number of state regulations provide that an advertisement must not contain any statement that (i) a purchase of a franchise is a safe investment, (ii) failure, loss or default is impossible or unlikely, or (iii) assurances of earnings or profits. Cal. Code Regs. tit. 10, §310.156.1; Ill. Admin. Code, tit. 14, §200.301; Md. Code Regs. §02.02.08.09; Minn. R. 2860.4100; and Wash. Admin. Code. In Illinois, the advertisement may include words such as "success," "profits," or "profit potential" so long as these terms are "reasonably qualified." Ill. Admin. Code, tit. 14, §200.301.

[65] California Franchise Investment Law, Cal. Corp. Code § 31003; Indiana Franchise Act, Ind. Code § 23-2-2.5-1; Maryland Franchise Registration and Disclosure Law, Md. Code Ann., Bus. Reg. § 14-201; Minnesota Franchise Act, Minn. Stat. Ann. § 80C.01; New York Franchise Sales Act, N.Y. Gen. Bus. Law § 681; North Dakota Franchise Investment Law, N.D. Cent. Code § 51-19-02; South Dakota Franchise Investment Act, S.D. Codified Laws § 37-5A5; Washington Franchise Investment Protection Act, Wash. Rev. Code § 19.100.010; Wash. Admin. Code § 460-80-520.

If a franchisor chooses to use any information which constitutes an FPR in any type of advertising (brochures, magazines, electronic or digital ads, etc.), the franchisor must comply with the following requirements:

* 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.

Below is a sample excerpt from the marketing brochure utilized by a franchisor in a retail services industry (of course, the brochure itself has fantastic photos and great narrative and stories that do a great job of showcasing the franchisor's culture, system, existing franchisees and the franchise opportunity):

> *Our financial results speak for themselves as seen in our 2022 Franchise Disclosure Document (FDD), which has 2021 and 2020 calendar year figures available. In 2021, for Outlets open more than 12 months, our top 25% highest earning franchises generated an average of $1,324,129 in annual gross revenue, and the average for all locations was $926,236.**
>
> ** Figures represent averages for the 144 revenue-reporting franchises open and operating for more than 12 months during the 12-month period ending December 31, 2021. Of all 144 franchises, 72 (50%) exceeded the average of $926,236. Of the 36 franchises representing the top 25%, 11 (30%) exceeded the average of $1,324,129. Of the 36 franchises representing the bottom 25%, 18 (53%) exceeded the average of $505,386. The financial performance representations contained in Item 19 of our 2022 Franchise Disclosure Document also include: (1) select expenses; and (2) system-wide gross revenue for 2021 and 2020.* ***Your results may differ from this information and the information included in Item 19 of our 2022 Franchise Disclosure Document, and there are no assurances you will do as well.***

With the increased use of FPR information in franchise sales ads it is worth noting that Maryland and Minnesota laws provide that franchise advertisements may not include FPRs.[66] The Maryland and Minnesota prohibitions mean that a franchisor cannot direct franchise sales advertising to residents of those states without filing the

[66] Md. Code Regs. §02.02.08.09; Md. Code Regs. §02.02.08.16; Minn. R. 2860.4100; and Minn. R. 2860.4500. In Washington, an advertisement may not contain a projection of future franchisee earnings unless it is based on historic information over a reasonable period and is substantiated by supporting data. Wash. Admin. Code 460-80-510.

ads with the state agency, with the notable exception of advertising that qualifies for the Internet Exemption.

On May 3, 1998, NASAA issued the Statement of Policy Regarding Offers of Franchises on the Internet ("Internet Exemption"). The Internet Exemption was the functional equivalent to the exemption from the requirement that franchisors file advertising in the six states for advertisements in a newspaper or other publication of general, regular and paid circulation which has had more than two-thirds of its circulation outside the state during the past 12 months, or to radio or television programs originating outside the state which are received in the state. Generally, to be exempt from the advertising filing requirement, (i) the franchisor's website must include a disclaimer that the franchise is not being offered to residents of a state that requires the registration of a franchise prior to any offer and sales activity in the state, (ii) the internet advertising must not be directed to any person in the franchise registration state, and (iii) the FDD cover page must include the URL address for the internet advertisement. California is the one state that requires an annual filing of an internet advertising exemption notice.[67] In general, states have interpreted this exemption to exempt internet advertising meeting the criteria from the state filing and approval requirements.

The current digital age dynamics that are not adequately addressed in the Internet Exemption are the myriad types of digital advertising that go far beyond a franchisor using its website to advertise franchise sales. Current digital technologies include methods where franchisors can re-market or geo-target specific audiences to have a more targeted impact. It is these more targeted digital technologies that can create issues under the Internet Exemption.

In *Franchise Advertising in the Digital Age: Regulators Need to Contemporaneously Address Advancing Advertising Technologies or Step Aside*[68], Mark Burzych illustrates the analysis a franchisor must consider in instances where its franchise sales advertisement may be more targeted to specific audiences, including audiences in specific states that require registration of franchise advertising. Mr. Burzych notes:

> In the franchise sales context, a person may visit the franchisor's franchise Internet site, clearly indicating that the consumer may be interested in purchasing a franchise. So long as the franchisor's franchise sales web page complies with the NASAA Internet advertising exemption, the initial inquiry by the consumer to the franchisor's franchise sales webpage is not an advertisement that requires registration in any of the franchise advertising states. If the franchisor uses this re-targeting technology to re-engage the consumer who visited the website, and so long as the franchisor's re-targeting campaign only

[67] Cal. Code Regs. tit. 10, §310.156.3. California also requires the following statement in a state specific California Addendum to the FDD (in at least 12-point font): OUR WEBSITE HAS NOT BEEN REVIEWED OR APPROVED BY THE CALIFORNIA DEPARTMENT OF CORPORATIONS, ANY COMPLAINTS CONCERNING THE CONTENT OF THIS WEBSITE MAY BE DIRECTED TO THE CALIFORNIA DEPARTMENT OF CORPORATIONS AT www.corp.ca.gov

[68] Franchise Law Journal, Vol. 40, No. 2, Fall 2020, p. 221.

attempts to redirect the consumer back to the franchisor's compliant franchise sales webpage, the franchisor is engaging in no new advertising that would trigger additional state regulatory involvement. However, if the franchisor's re-targeting campaign uses an advertisement that is not is not a re-direction link back to the franchisor's franchise sales webpage (that already complies with the Internet advertising regulations), but rather another advertisement for the sale of the franchise, the franchise advertising regulation of the various states may apply. Though it could be argued that as long as the new advertisement was not directed disproportionately to one or more states (i.e., more than two-thirds of the circulation directed outside of the relevant state) the new advertisement is part of a national advertising campaign exempt from the registration requirements of California, Maryland, New York, and Washington, regulators may argue that these new advertisements are "directed to a person" in the state. It is probably difficult to argue that this new advertisement is not "directed to a person" in California, Maryland, New York, or Washington. The franchisor in this case should either only re-target a customer using the link back to the franchisor's compliant franchise sales webpage or register the new advertisement in the applicable states in which the franchisor's re-targeting campaign is directed.[69]

VII. Preparing FPRs – Effective Coordination Between Counsel and In-house Executives and Development Personnel

A. Understand the Business

It may seem simple and obvious, but step one to preparing an effective FPR is understanding the franchised business. While this step has always been critical from an FPR preparation standpoint, the COVID-19 pandemic has underscored the need for counsel to truly understand the details of the business. Negative or positive, the pandemic impacted almost all franchised businesses resulting in system and process changes that most franchisors never anticipated. Over the past two years franchised businesses faced temporary closures, restrictions on product and services offerings, and were forced to evolve long-standing business practices to accommodate mandated governmental closures and increased regulation. Adding to that, in the past year alone, many businesses have had to adjust even their "new normal" practices due to severe labor shortages, which can impact hours of operation, service standards and even a franchisee's ability to open a new location. For some, these external forces resulted in new business products and services, altered methods of delivery, and even changed technology – each of which impacts the financial performance of the franchised business.

Now, two years after the official start of the COVID-19 pandemic, it's important to not only reflect back on where we've been, but on what business looks like moving forward. Are the business changes that were made in light of the pandemic temporary survival adaptations or permanent shifts to business operations? Regardless of the answer to this question, it is essential that any FPR disclosure take into account these temporary or permanent shifts and, as the author of the FPR story, counsel must

[69] *Id*. at 231.

clearly explain these changes and their impact on the financial metrics of the franchised business as part of any FPR disclosure. For example, if the changes are temporary adaptations, counsel is advised to ensure that any FPR disclosure clearly emphasizes the temporary nature of the reported financial metrics. Likewise, if the business change is permanent and part of the franchised system moving forward, counsel should ensure that the shift in business operations is adequately highlighted especially if other, historical metrics are provided as part of the FPR disclosure. And, if the external force creating change is of unknown duration (e.g., labor shortage), the franchisor must clearly frame the impact and results as such – ensuring, always, that it is neither painting a picture that is too dire nor too hopeful.

In addition to considering the permanency of any business adaptations, counsel is advised to evaluate whether the historical approach to preparing an FPR disclosure still makes sense in this new world. While the legal standard for preparing an FPR disclosure remains the same – reasonable basis – the approach to measuring a franchised business' financial health and performance may be different than the metrics used pre-COVID. In fact, historical FPRs that have served a company well for many years may no longer meet the reasonable basis standard or even make sense given the new world post-COVID. As franchisor counsel (whether in-house or outside counsel), it is more important than ever to dig deep and understand the details of the franchised business when preparing an FPR disclosure. For example, consider:

- How has the business evolved over the last two years? Are these changes temporary or longstanding? How critical are these adaptations to the overall financial condition and health of the franchised business?

- What questions are prospects asking in light of COVID-19? How has the pandemic impacted a prospective franchisee's due diligence process? What questions are prospects asking the development team that they are unable to answer given the information contained in the current FPR disclosure?

- How has franchisee validation changed? Do your existing franchisees view and measure the financial performance of their franchised business by using metrics not currently included as part of your FPR disclosure? What financial adaptations have your existing franchisees leveraged as they navigate the pandemic – for example, governmental programs, rent abatement, among others?

- What financial and business metrics is the franchisor using to measure the financial health of the franchise system and for purposes of establishing company goals?

- What goals and benchmarks are the operations team using to coach franchisees and measure business performance?

We are not suggesting that the historical view of measuring financial performance of a franchise system no longer applies. The key prospective franchisee question of "How much money can I make?" hasn't changed due to the pandemic. The challenge for franchisor counsel, however, is to truly understand and appreciate the business. Consider the "what else," the business pivots made in light of differing impacts (e.g., COVID, societal, etc.), and work with your internal business teams to prepare an effective FPR disclosure that encompasses the changes we have all experienced over the past two years. COVID-19 forced franchisors to take a closer look at their business model and, for many franchisors, altered their historical approach to financial performance and operational metrics. Likewise, franchisor counsel is advised to understand and evaluate these changes and modifications in connection with crafting an FPR disclosure.

When preparing an FPR in this new world, it is important to consider these changes to ensure that you are providing the best, most relevant information to prospective franchisees. Below are a few recommendations to aid in the process of preparing an FPR is this new world:

- Meet early (and often) with in-house executives to understand the financial information and metrics available for preparing an FPR. Consider including a larger cross-section of executives to ensure a full understanding and appreciation of any new business offerings and metrics. While input from the franchise development team remains critical, obtaining perspectives from other executive functions such as finance, operations, real estate, marketing and even facilities and purchasing are key to preparing a robust and accurate FPR disclosure.

- What performance metrics and benchmarks are your operations team using when coaching existing franchisees from a financial performance and business metrics perspective? If the key measures have changed as a result of the pandemic, consider whether these new metrics should form the basis of or, at a minimum, be included in the FPR disclosure. It is quite possible that these new metrics of performance are more relevant in the new world than those included in a historical FPR disclosure.

- Consider the franchisee validation process. Has the way in which your existing franchisees view the financial condition of the business changed? Do your franchisees measure performance differently or focus on additional metrics?

- From a franchise development perspective, understanding the resiliency of the franchised system to the challenges imposed by COVID-19 likely is quite important to prospective franchisees. Rather than a yearly snapshot of information, consider whether a comparative analysis that illustrates brand performance during the height of COVID makes sense based on the inquiries and conversations had by your franchise development team.

- Understand what additional information your franchise development team would like to share with prospects but can't given the current structure of your FPR disclosure.

- Close partnership with your finance and business analytics teams is key in preparing a compliant FPR. The metrics may have changed and having the flexibility to slice and dice financial performance information from a unit-level perspective is important.

- Remain agile, pivot and be creative. If anything, the pandemic has forced us to think outside the box, be ready to pivot at a moment's notice, and get creative. Remember that the method previously used to measure franchised business performance may no longer make sense – or, may make sense when coupled with additional information.

Bottom line, understand the franchised business at a deeper level, ask questions and think strategically when preparing an FPR disclosure. While your historical approach may still work, push the envelope to make sure your FPR tells the best and most complete story when it comes to franchised business financial performance.

B. Internal FDD Compliance Training

Conducting an annual FDD update and franchise sales compliance training is always a recommended best practice for any franchise system. Be sure to not only include the franchise development team in the training, but all franchise sellers. For example, if members of the franchisor's real estate or operations teams are part of the franchise development program, it is critical that these individuals are aware of any annual updates and are well-versed the rules governing franchise sales.

In addition to reviewing the annual updates and baseline franchise sales compliance rules, emphasis on FPRs is critical to any sales compliance training. This is especially true if a change has been made to the type or format of information disclosed. Never assume that your internal teams independently will review the details of your FPR disclosure and be prepared to answer prospective franchisee questions. And, if you have changed the format or type of information included in your FPR disclosure explaining why the change was made may be as (if not more) important to ensuring that your franchise sellers truly understand the financial performance information they can share and what is now off-limits. Of course, if you share more information than what is included in your FPR disclosure as part of your sales training, it is important to review the rules surrounding FPRs to ensure that your sales teams understand the appropriate boundaries. In short, it's Item 19 and nothing else.

Below are a few best practices to consider when sharing FPR modifications with your internal sales team:

- Remind your team of the definition of an FPR. Often times, it encompasses more than they think. Use real-life business examples to illustrate the slippery slope of information that "by implication" states a specific level or range of sales.

- Encourage your sales team to only discuss financial performance information when they have a copy of Item 19 of the FDD in front of them. As corporate staff, the internal sales team has access to more information than what is disclosed in the FPR. This disciplined approach will ensure that the sales team remains focused on the financial information actually disclosed in the FDD and nothing else. Bottom line, stick to the script and nothing else.

- Historical FPRs are off limits – even if the financial performance information was contained in an FDD that was previously approved by the prospective franchisee's home state. Generally speaking, a prospective franchisee does not request historical FPR information, but this issue can arise if there is a change to the FPR format or if a franchisor makes the business decision to not include an FPR disclosure in its current FDD. It's important to remind your sales team that the content of historical FDDs – including, historical financial performance representations – are off limits and cannot be shared with prospects. Provide your sales team with talking points to address this request should it arise. For example, empower your sales team to respond to these inquiries with a focus on the financial information that is included in the current form of FDD or encourage the prospect to discuss these questions and obtain this historical information from an existing franchisee through the validation process.

- Providing a blank proforma to prospective franchisees is permitted under the FTC Franchise Rule and applicable state franchise laws. As part of your sales compliance training, remind all franchise sellers that they cannot help a prospect complete or otherwise verify the information a prospective franchisee adds to the proforma. Counsel should once again empower the sales team to respond to requests for assistance or verification by encouraging the prospect to share and discuss the proforma as part of its franchisee validation call process.

C. Franchisee Validation

After releasing the FDD and training internal staff on the new FPR disclosure, it is important to remember your existing franchisees. No one understands this new world and the impact of COVID-19 on the franchised business better than your existing franchisees. Now, more than ever, franchisee validation is key to a successful and well-rounded franchise development program.

Many franchise systems – especially mature franchisors – have used a similar (if not the same) FPR format for many years and any change to this historical approach may create confusion during franchisee validation. For example, if you have used the same FPR format and approach for the past several years, your existing franchisees will naturally assume that you have continued to follow this approach when speaking with prospective franchisees. As a result, existing franchisees may simply refer the prospect to the Item 19 disclosure for certain financial metrics rather than share their own experience. If information has been removed or altered and your existing franchisees are unaware of this change, this can create confusion (and even frustration) during the validation process.

From a franchisee validation perspective, ensure your existing franchisees understand any updates or changes to your annual FDD – this is particularly true from an FPR disclosure perspective. But, proceed with caution. Keep in mind that your existing franchisees are also potential prospective franchisees should they choose to acquire or expand their existing franchised business so you need to be mindful of the information you share. Below are a few recommendations for sharing annual updates while staying within the boundaries of the applicable franchise laws:

- Share any updates with the entire franchise system. Be mindful to not cherry-pick.

- Alert your franchisees to the changed or updated format but then refer them to the actual FDD for specifics. Consider sharing this update via a systemwide franchisee news publication or email communication.

- If you no longer include an FPR disclosure in your FDD, let your existing franchisees know. If you have provided an FPR disclosure historically, you don't want them to simply assume that the same information is provided when it isn't. This will only cause confusion and frustration for everyone involved in the validation process.

- Encourage your existing franchisees to share as much financial performance information with prospective franchisees as they are comfortable sharing – even if the information is already included in the FPR disclosure from an averages perspective. Understand a franchisee's actual experience is beneficial to the prospect, especially as it relates to context involving the pandemic.

VIII. Summary of Key Financial Performance Representation Litigation

A. Introduction

Over the years, FPRs have been the subject of considerable litigation. Cases regarding FPRs frequently include allegations by franchisees that franchisors engaged in common law fraud and/or misrepresentation, violations of state franchise disclosure and relationship statutes, and violations of state deceptive trade practice acts in connection with allegedly false and misleading FPRs that resulted in the purchase of a franchise. These cases often hinge on questions of *reliance* and involve a fact-intensive evaluation of whether a franchisee *reasonably relied* on FPRs before electing to make a franchise investment. In a similar vein, FPR cases also frequently consider whether a franchisor's disclaimers or waivers adequately cautioned franchisees not to rely on FPRs and whether waivers and disclaimers are enforceable at all.

More often than not, franchisors appear to prevail against franchisees that raise claims that a franchisor engaged in fraud or violated various state statutes in making FPRs to franchisees. However, franchisees have also repeatedly succeeded on claims against franchisors either at the motion to dismiss or summary judgment phases, or outright at trial, sometimes setting precedent on issues of reliance and waivers/disclaimers that have caused the whole industry to take note.

B. FPR Litigation

The following reflects a non-exhaustive examination of some of the cases and issues that state and federal courts have heard regarding claims made related to FPRs, as of April 7, 2022.

In some cases, a franchisor can avoid liability by carefully disclosing what it is and is *not* disclosing to prospective franchisees.

In *7-Eleven, Inc. v Spear*,[70] a franchisor disclosed sales performance information in its UFOC for stores that had operated for more than twelve months, but not for stores that had operated for less than 12 months. Franchisee was also "given store-specific information concerning other stores in which she had expressed interested [*sic*] that were not new stores."[71] Franchisee alleged fraud because 7-Eleven had not disclosed sales for a specific store, which had operated for less than 12 months. The court dismissed the case, holding that 7-Eleven's representations were not fraudulent because 7-Eleven satisfied its disclosure requirements, disclosed that the sales performance information did not cover specific stores, like the plaintiff's, that had not operated for more than twelve months, and did not otherwise provide inaccurate information.[72] In ruling, the court noted that "[b]y all accounts, 7–Eleven followed the disclosure scheme that was explicitly described in the UFOC."[73]

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[70] No. 10-cv-6697, 2011 WL 2516579 (N.D. Ill., June 23, 2011).
[71] *Id*. at *5.
[72] *Id.* at *7.
[73] *Id.*

In *Avon Hardware Co. v. Ace Hardware Corp.*,[74] a franchisee alleged fraud and violation of Indiana and Illinois franchise disclosure and deceptive practices statutes in connection with Ace Hardware's representations about historical and future financial performance. 2013 IL App. (1st) 130750. Plaintiff alleged that franchisor misrepresented store sales averages and otherwise included inaccurate information that it relied upon to its detriment. The trial court dismissed the case and the appellate court affirmed, holding that Ace Hardware's UFOC clearly disclosed that its financial data was "based only on a small fraction of all Ace stores" and that historical financial data was not representative of performance for all stores.[75] The court also rejected plaintiffs' argument that Ace had failed to include closed-store sales because "the UFOC contained information regarding the number of Ace stores which closed in the preceding three years, listing the numbers by state."[76] The court added that plaintiff failed to sufficiently plead reliance because cautionary language in Ace Hardware's disclosures was "replete with warnings to not rely upon any of the projection or past performance data to predict future performance by any store."[77]

In *Steak N Shake Enters. v. Globex Co., LLC*,[78] franchisee defendants brought counterclaims that included various allegations that the franchisor's Item 19 FPR disclosures were false and misleading and did not reflect actual financial performance of its franchises. Defendants emphasized that various estimates, projected costs, and other forward-looking figures were misleading and overstated.[79] The court granted summary judgment to the franchisor, holding that, among other things, franchisee's argument that its poor financial performance did not create an inference that projections in the FDD were false, particularly because Item 19 contained disclosures that numbers were estimates.[80] The court also recognized that franchisee's own due diligence, which included hiring a CPA and consulting with their own attorneys, undermined their argument that they justifiably relied on the franchisor's representations.[81]

In *Qdoba Restaurant Corp. v. Taylors, Inc.*,[82] franchisee alleged various claims including under the Florida Deceptive and Unfair Trade Practices Act for allegedly "disseminat[ing] [misleading] financial performance representations."[83] The court granted summary judgment in favor of the franchisor, holding that plaintiff could show no more evidence of misrepresentation than that its own restaurant did not perform in accordance with financial projections. The court reasoned that own-store sales alone did not "create an inference that the projections were false at the time they were made and that Qdoba knew they were false."[84] The court also found that a projection that store sales could be increased by "20-30 percent" was not known to be false at the time

[74] 2013 IL App. (1st) 130750.
[75] *Id*. at ¶ 20.
[76] *Id*..
[77] *Id*. at ¶ 21.
[78] 110 F. Supp. 3d 1057, 1084 (D. Colo. 2015).
[79] *Id.* at 1084.
[80] *Id.*
[81] *Id.*
[82] No. 08-cv-01179, 2010 WL 1240410 (D. Colo. March 23, 2010).
[83] *Id*. at *2.
[84] *Id*. at *5.

they were made even though the franchisee could not ultimately increase store sales by that amount.[85]

In *Tilted Kilt Franchise Operating, LLC v. 1220, LLC*,[86] the franchisor plaintiff claimed that its area developer made false and misleading financial performance representations to prospective franchisees. The franchisor specifically claimed its area developer repeatedly made detailed and misleading financial performance representations to prospective franchisees' data.[87] They also told prospective franchisees that they would have "no problem" meeting financial projections.[88] The *franchisor* alleged these statements were false and misleading, were not disclosed in Item 19 of the FDD and breached a development agreement among other violations.[89] The court rejected the area developer's motion to dismiss and permitted the franchisor to proceed in its request for declaratory relief on its contract claim.[90]

In *Hardees of Maumell, Ark., Inc., v. Hardee's Food Systems, Inc.*,[91] a franchisee brought a claim of misrepresentation in connection with allegedly false financial projections. The court dismissed the action, reasoning that estimates of prediction of future gross sales are opinions, predictions, or promises of future conduct and were not fraudulent statements, adding that they are "not worthy of reliance to the extent that it is reasonable or justified to believe that there is nearly no risk that the restaurant will not meet or exceed the gross sales estimate."[92]

In *Cousins Sub Systems, Inc. v. McKinney*,[93] franchisee alleged that franchisor engaged in fraud by making promises of potential future profits. The court dismissed the claims reasoning that "statements about future performance are not considered statements of fact and are not usually actionable under a fraud theory."[94]

Not all cases are decided in favor of franchisors, however.

Recently, in *Wagenbrenner v. Little Nest Group, LLC.*,[95] a photography studio franchisee sought damages claiming the franchisor had provided misleading and inflated revenue prospects. The franchisor made a presentation that showed detailed financial projections based on purported annual average unit volumes.[96] The franchisor also stated that stores "historically performed better than what was reflected in the FDD."[97] After executing the franchise agreement, the franchisor provided a financial projection model purporting to show that after all expenses, franchisee would earn

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[85] *Id*. at *1.
[86] 2016 WL 4063172 (N.D. Ill. July 29, 2016).
[87] *Id.* at *2.
[88] *Id*.
[89] *Id.*
[90] *Id.* at *7
[91] Bus. Franchise Guide (CCH) ¶10,262 (SD Ind. 1993).
[92] *Id*.
[93] 59 F.Supp. 2d 816 (E.D. Wis. 1999).
[94] *Id*. at 821.
[95] 2019 WL 2491913 (D. Del., June 14, 2019).
[96] *Id.* at *2.
[97] *Id*.

$118,950 for a franchised studio with $550,000 in sales.[98] After further investigation, and after signing the franchise agreement, which included a ten-year lease, plaintiff discovered from that actual results varied significantly from results presented by the franchisor.[99] The district court rejected a motion to dismiss, finding that a claim of fraud and negligent misrepresentation had been sufficiently pled against the franchisor in connection with its financial representations.[100]

In *Hanley v. Doctor's Express Franchising, LLC*,[101] a franchisee claimed fraud and made claims under the Maryland franchise law against the franchisor in connection with financial performance representations. In denying the franchisor's motion to dismiss, the court noted that the plaintiff "articulated significant discrepancies between Doctors Express' projections and the actual results realized by plaintiffs, and the projections were based on concrete facts within Doctors Express' possession.[102] Plaintiffs have also plausibly alleged that the projections were contrary to other undisclosed facts within Doctors Express' possession at the time it made the statements at issue."[103] The Court also rejected the franchisor's reliance arguments, holding that a franchisor "cannot use a disclaimer to defeat [the franchisee's] misrepresentation claim," adding that the disclaimer presented a genuine issue for the fact finder.[104]

In *Rocky Mountain Chocolate Factory, Inc. v. SDMS, Inc.*,[105] franchisee alleged fraud in a counterclaim after franchisor brought suit for material breaches of the franchise agreement. Franchisee alleged, in particular, that franchisor had made misrepresentations in its Item 19 disclosures in connection with franchisor's assertions that "We do not have access to nor knowledge of the expenses or costs incurred by each of the 169 franchised Stores."[106] The court considered franchisee's arguments that franchisor "maintains profit and loss statements for each of its corporate-owned retail stores" and "requires each franchisee to provide quarterly profit and loss statements by the very terms of its own franchise agreement."[107] Accordingly, the court found that there were genuine issues of material fact as to the materiality of the alleged misrepresentation in Item 19 and whether franchisee reasonably relied on the statement and denied the franchisor's motion for summary judgment on the claim.

In *Randall v. Lady of America Franchise Corporation*,[108] plaintiff alleged misrepresentation under the Minnesota Franchise Act in connection with future projections of earnings. Franchisor challenged franchisee's claims noting that its reliance was not justified due to disclaimers contained in the UFOC and in the franchise agreement. The court denied summary judgment on the issue of reliance, citing

[98] *Id.* at *3.
[99] *Id.*
[100] *Id.* at *5.
[101] 2013 WL 690521.
[102] *Id*. at *24.
[103] *Id.*
[104] *Id*. at *29.
[105] No. 09-C-0336, 2007 WL 4268962 (D. Colo. Nov. 30, 2007).
[106] *Id*. at *3.
[107] *Id*.
[108] 532 F. Supp.2d. 1072 (D. Minn. 2007).

Minnesota's anti-waiver statute, and holding that "the Minnesota Franchise Act does not require that a franchisee's reliance on misrepresentations be justifiable."[109]

In *Kinship Inspection Service, Inc. v. Newcomer*,[110] franchisee alleged fraud in connection with financial representations about potential income and expenses. At trial, plaintiffs introduced two exhibits depicting past and projected revenues, expenses and income from the same period but containing different financial results that could not have "both be[en] right."[111] On appeal, the court affirmed the jury's finding that the data had been altered "in order to make their business appear more profitable than it was."[112]

Recently, in *Fabius v. Medinexo USA, LLC*,[113] plaintiff made various allegations that cloud-based virtual health care platform franchise made false and misleading representation. Plaintiff alleged that franchisor represented that he would earn approximately $75,000 in his first year and $400,000 by his second year. The court held that the claim of fraud lacked particularity, and granted leave to file an amended complaint. The court declined to rule that there was no reliance as a matter of law but noted that it "ultimately may prove difficult for plaintiffs to demonstrate the requisite reasonable reliance in light of [plaintiff]'s admitted expertise in the subject matter at issue, his engagement in extensive due diligence, his review of the disclosure documents, his participation in the negotiation of the integrated franchise agreement, and his execution of the franchise agreement despite his admitted concerns regarding Medinexo's lack of historical data."[114]

IX. NASAA's Proposed Statement of Policy Regarding Use of Franchise Questionnaires and Acknowledgments

On December 6, 2021, NASAA published a Request for Public Comment regarding the use of franchise questionnaires and acknowledgements ("Statement of Policy" or "SOP").[115] As NASAA noted in the Statement of Policy, "over at least the last 30 years, franchisors have included in their franchise agreements and FDDs language that they can later use as a disclaimer of liability. One type of disclaimer takes the form of a series of acknowledgments ("[a]cknowledgments") in the franchise agreement regarding the franchise offering. In addition, many—but not all—franchisors require prospective franchisees, at or prior to signing a franchise agreement, to mark "yes" or "no" to a series of questions or agree to a series of representations about what purportedly occurred, or did not occur, in the franchise sales process ("[q]uestionnaires"). Virtually all [q]uestionnaires and [a]cknowledgments address whether a prospective franchisee received some type of financial performance information different from what the franchisor disclosed in Item 19 of its FDD."[116]

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[109] *Id.* at 1087.
[110] 231 Wis. 2d 559, 567 (Ct. App. 1999).
[111] *Id*. at 568.
[112] *Id*. at 569.
[113] No. 4:19CV2526 JCH, 2020 WL 1666468, at *1 (E.D. Mo. Apr. 3, 2020).
[114] *Id.*
[115] North American Securities Administrators Association, Proposed Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgements (December 6, 2021)
[116] *Id*.

NASAA identified other reasons in favor of the SOP, including its view that the acknowledgements and questionnaires serve no legitimate purpose, violate state anti-waiver provisions included in many of the state franchise laws when they act as a release or waiver,[117] and require that the prospective franchisee acknowledge or answer questions that are subjective, unreasonable, or repeat disclosures required to be stated in the FDD.[118] In a broad and sweeping effort to address these perceived problems, the Statement of Policy provides that a franchisor shall not require a prospective franchisee to make any statement in a questionnaire of acknowledgment that is subjective or unreasonable and also included a list of prohibited provisions in questionnaires and acknowledgements (the list specifically prohibits a statement that "neither Franchisor nor Franchise seller has made any representation, including any financial performance representation, outside of or different from the FDD and attachments thereto the prospective franchisee").[119]

NASAA received thirty-nine submissions in response to the Request for Public Comment. Not surprisingly, the submissions from franchisee advocates and law firms supported the Statement of Policy, noting in varying degrees the perceived imbalance in the franchisor/franchisee bargaining power at the time a franchisee signs a franchise agreement and resulting franchise relationship, misconduct of unscrupulous franchisors (although several commentators recognized that these types of franchisors were few rather than many), and other wrongs in the franchise sales process that these

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[117] *Id*. NASAA stated that Questionnaires and Acknowledgements are inconsistent with plain English standards and the legislative policies behind state franchise laws, which were passed to protect prospective franchisees by requiring presale disclosure.

[118] *Id*.

[119] *Id*. The Statement of Policy specifically includes the following:

> Prohibited Statements in Questionnaires, Acknowledgments, and similar documents include, but are not limited to, the following:
>
> a. That the Prospective franchisee has read or understands the FDD or any attachments thereto, including the franchise or other agreement.
>
> b. That the Prospective franchisee understands or comprehends the risks associated with the purchase of the franchise.
>
> c. That the Prospective Franchisee is qualified or suited to own and operate the franchise.
>
> d. That, in deciding to purchase the franchise, the Prospective franchisee has relied solely on the FDD and not on any other information, representations, or statements from other Persons or sources.
>
> e. That neither Franchisor nor Franchise seller has made any representation, including any financial performance representation, outside of or different from the FDD and attachments thereto.
>
> f. That the success or failure of the franchise is dependent solely or primarily on Franchisee.
>
> g. That the Franchisor bears no liability or responsibility for Franchisee's success or failure.
>
> h. That reiterates or duplicates any representation or statement already made elsewhere in the FDD and attachments thereto.
>
> i. That the Prospective franchisee has had the opportunity to or has/has not actually consulted with professional advisors or consultants or other franchisees.
>
> j. That the Prospective franchisee agrees or understands that the Franchisor is relying on the Questionnaire, Acknowledgments, or similar documents, including to ensure that the sale of the franchise was made in compliance with state and federal law or that no unauthorized, inaccurate, or misleading statements were made.
>
> k. That requires or suggests that the Prospective franchisees must agree to any Questionnaires, Acknowledgments, or similar documents prohibited by this Statement of Policy or provide false answers as a condition to the purchase of the franchise.

advocates asserted can only be adequately addressed by adopting the Statement of Policy.

On the other hand and also not surprisingly, franchisor advocates and law firms raised concerns with several key aspects of the Statement of Policy, including whether the Policy was indeed necessary to address the perceived significant problems noted by NASAA and challenging NASAA's proposal of the expansive list of prohibited provisions.

The issue of the proper scope and use of acknowledgments and questionnaires is not novel and has for years been the subject of debate and discussion among franchise regulators, attorneys, franchisors, and franchisees.

From a franchisor perspective, any limitations or restrictions on the use of questionnaires and acknowledgments should be very narrowly tailored to target specific conduct while upholding their legitimate business use. On the whole, questionnaires and acknowledgments do indeed serve legitimate business and information-collection purposes that can and do serve the interests of both franchisors and franchisees, providing assurances to both parties that the final franchise agreement is the complete agreement and the manifestation of the parties' intent. Integration clauses are a bedrock of contract law; they ensure that the parties understand that the terms of the franchise agreement are the entire agreement and that any representations or terms outside of the written agreement are ineffective.[120] Acknowledgements and questionnaires, which are much more explicit and focused than most integration clauses, are aimed at doing the same thing. Nor are acknowledgments and questionnaires unique to the franchise sector or unusual in other commercial settings—in fact, they are commonly used in commercial contracts, especially between two business parties.

A questionnaire is also intended to ensure a franchisee is not relying on representations or terms outside of the FDD and franchise agreement. Questionnaires are used at the end of the sales process before the execution of a franchise agreement. A typical questionnaire will ask questions designed to identify any misunderstandings between the parties. For example, if a franchisor includes an FPR in Item 19 of its FDD, a questionnaire will typically ask whether the potential franchisee received any financial performance information from a third-party or from a representative of the franchisor that is different from the information in Item 19. If the answer is "yes," then the franchisor and franchisee have an opportunity prior to a sale to clarify the terms of their agreement and to identify and correct any material misunderstandings or misplaced reliance a potential franchisee may have about the terms of the franchise agreement or statements in the FDD. Of course, the best time to address any issue or misunderstanding is immediately prior to or at the time of signing the franchise agreement and not one or more years down the road, after the franchisee has invested heavily in the franchised business. A questionnaire facilitates this process.

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[120] *See e.g.* 72 Fed. Reg. 15,534 (Mar. 30, 2007).

X. FTC Advance Notice of Proposed Rulemaking Concerning False, Misleading, and Unsubstantiated Earnings Claims

On March 11, 2022, the FTC published an Advanced Notice of Proposed Rulemaking (the "Notice") seeking public comment on a rule to address deceptive or unsubstantiated earnings claims. The public comment period expired on May 10, 2022.[121] The FTC explained the proposed rulemaking is intended to protect consumers across a number of industries, including multi-level marketing companies, gig companies and employers and businesses purporting to offer educational opportunities, from misleading sales tactics making promises of future earnings.[122] The FTC announced the proposed rulemaking proceedings were intended to "challenge bogus money-making claims used to lure consumers, workers, and prospective entrepreneurs into risky business ventures that often turn into dead-end debt traps."[123]

The Notice raised a series of questions for public comment but did not include a text of any proposed rule.[124] According to the FTC's press release, however, any new rule is intended to enable the FTC to pursue monetary relief for consumers harmed by false and misleading earnings claims as well as civil penalties against violators of the rule.[125] The proposed codification of these penalties is in response to the Supreme Court's recent holding in *AMG Capital Management LLC v. FTC,* which held that the FTC's enforcement powers under the FTC Act were limited to the pursuit of injunctive, and not monetary restitution.[126]

The proposed rulemaking appears to target business opportunities outside of franchising with the Notice acknowledging the FTC already regulates the use of earnings claims in franchising under the FTC Franchise Rule and asking commentors to opine on whether the same or similar regulations should extend to other business opportunities.[127] The rulemaking, however, has the potential to have significant impact on the franchise industry. First, as discussed above, any rule enabling the FTC to pursue monetary damages against a business making a false or unsubtantiated earnings claims may allow the FTC to pursue the same remedies under the FTC Franchise Rule.[128] Second, the Notice suggests that any new rule may require an

[121] Deceptive or Unfair Earnings Claims, 16 C.F.R. Part 462 (March 11, 2022).
[122] *Id.*

[123] *FTC Takes Action to Combat Bogus Money-Making Claims Used to Lure People into Dead-end Debt Traps* (Feb. 17, 2022), *available at:* https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-takes-action-combat-bogus-money-making-claims-used-lure-people-dead-end-debt-traps (last visited May 4, 2022) ("FTC Takes Action").
[124] 16 C.F.R. Part 462.
[125] *See* FTC Takes Action, *supra* Note 123.
[126] *Id.* (discussing *AMG Capital Mgmt., LLC v. FTC,* 141 S.Ct. 1341 (2021)).
[127] 16 C.F.R. Part 462 (citing 16 C.F.R. § 436 (2007)).
[128] *Id.* Question 18 in the Notice addresses this issue, asking:

amendment to the FTC Franchise Rule and specifically asks for public comment on the following question:

> *If a rule addressing [the use of false, unsubstantiated, or otherwise misleading earnings claims by entities or individuals in connection with the offer or sale of a good or service, participation in a job or other work opportunity, or in a business, investment, or other money-making opportunity] is adopted, should the Business Opportunity Rule, the Franchise Rule, or the Telemarketing Sales Rule be amended? Why or why not? If so, how and to what extent?*[129]

In addition to asking for public comment on the impact of any rulemaking on the FTC Franchise Rule, the Notice also asks commenters to weigh in on a variety of areas of interest to the FTC, including whether substantiation should be required for certain earnings claims, what information is required for effective substantiation, and whether disclaimers can be sufficiently used to correct a misleading impression resulting from an "atypical" earnings claim and, if so, what features the disclaimer should have. The Notice also asks for comments on whether "lifestyle" claims, such as promises that the business opportunity will allow a person to quit their job or buy a luxury car, should be covered by any new rule.[130]

XI. Conclusion

The regulatory environment continues to change and Item 19 is not exempt from the impacts of that trend. Whether changes to Item 19 stem from historical sales practices at the hands of bad actors, or, more recently, as another casualty of COVID-19's varied impact on business, the reality is that the Item 19 evolution will continue just as it has for decades. Staying abreast of the shifting regulatory guidance will help ensure that franchisor counsel can guide their clients toward the goal of creating FPRs that are meaningful to both the franchisor and prospective franchisees alike.

> Should a rule [addressing the use of false, unsubstantiated or otherwise misleading earnings claims by entities or individuals in connection with the offer or sale of a good or service, participation in a job or other work opportunity, or in a business, investment or other money-making opportunity] exempt from its coverage businesses or individuals that are subject to the Business Opportunity Rule, the Franchise Rule, or the Telemarketing Sales Rule? Why or why not? If so, how and to what extent? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

[129] *Id.* (Question 19).

[130] *Id.*

4885-0184-9628, v. 9