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The Future of Global Franchising: Innovations, Technologies, and New Markets

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WORKSHOP 1:
FPRS IN INTERNATIONAL TRANSACTIONS

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1. Introduction

Financial performance representations (an "FPR") are among the most consequential disclosures a franchisor can make to a prospective franchisee. Whether expressed as historical revenue data, projected earnings, or industry-specific performance metrics, FPRs directly influence the investment decisions of prospective franchisees and carry significant legal and commercial implications for franchisors. As franchise systems continue to expand across borders, the challenges associated with preparing, presenting, and regulating FPRs have grown in both complexity and importance.

This paper examines the legal frameworks governing FPRs in three distinct jurisdictions – the United States, Brazil, and Switzerland – each of which represents a different regulatory approach. The United States maintains a comprehensive federal and state regulatory regime under which FPRs, though optional, are subject to detailed disclosure requirements and substantiation standards when made. Brazil lacks a formal statutory framework specific to FPRs but addresses them through general principles of good faith and mandatory pre-contractual disclosure obligations under its franchise law. Switzerland, which has no franchise-specific legislation, relies on the general provisions of its civil and commercial codes, the principle of good faith, and the *Federal Act against Unfair Competition* to govern the information exchanged between franchisors and prospective franchisees during pre-contractual negotiations.

Beyond the legal definitions and requirements, this paper addresses the practical considerations that franchisors face in preparing FPRs for use in international markets. These include evaluating the comparability and reliability of available data, determining the most relevant financial metrics, navigating the complexities of translation and localization, and establishing appropriate protocols for monitoring, updating, and maintaining records to substantiate FPR claims.

The goal of this paper is to provide franchise practitioners, whether representing franchisors or prospective franchisees, with a comparative understanding of FPR regulation and practice across these three markets, along with actionable guidance for preparing FPRs that satisfy applicable legal standards while serving their intended commercial purpose.

2. Legal Framework: Definitions of "Financial Performance Representations" (and Similar Information)

2.1. United States

(i) Overview of US Franchise Laws

The United States Federal Trade Commission (the "FTC") and various state governmental authorities have adopted laws and regulations regulating the offer and sale of franchises and the franchisor-franchisee relationship in the United States. The FTC's authority is broad and applies throughout the United States and its territories and possessions. As to state franchise laws, while there is variation between states, they will usually apply if (i) the offer or sale of a franchise is made in or from the state, (ii) the offer is directed within or to the state, (iii) the franchised business will be located in the state, and/or (iv) the prospective franchisee is a resident of, or domiciled in, the state.

The FTC's franchise rule (the "FTC Rule") applies to the "offer or sale" of a franchise to be operated in the United States.[1] Unless a transaction qualifies for an exemption or an exclusion from the FTC Rule's provisions and any applicable state franchise laws requiring pre-sale disclosure, the franchisor must provide a disclosure document to prospective franchisees in a prescribed form, called a franchise disclosure document (an "FDD"). Under the FTC Rule, it is an unfair or deceptive act or practice for any franchisor to fail to furnish a prospective franchisee with a copy of the franchisor's current FDD at least 14 calendar-days before the prospective franchisee signs a binding agreement with, or makes any payment to, the franchisor or an affiliate in connection with the proposed franchise sale.[2] The FTC Rule prescribes the format and establishes the basic disclosure requirements for FDDs, and certain additional guidance and clarifications have been provided by the FTC, as well as in the 2008 Franchise Registration and Disclosure Guidelines (the "NASAA Guidelines"), and subsequent additional commentary, adopted by the North American Securities Administrators Association ("NASAA").[3]

Neither the FTC Rule nor the state franchise laws require that a franchisor provide prospective franchisees with information about the historical or potential financial performance or earnings of the franchises it offers in the United States. The laws do, however, address the conditions by which a franchisor may provide information about the historical or potential financial performance or earnings of the franchises it offers in the United States. Under the FTC Rule, it is an unfair or deceptive act or practice in violation of Section 5 of the *Federal Trade Commission Act* for a franchisor or any other franchise seller to disseminate an FPR to a prospective franchisee unless the franchisor has a reasonable basis and written substantiation for the representation at the time the representation is made, and the representation is included in Item 19 of the franchisor's FDD.[4]

A franchisor's failure to comply with these requirements and limitations could subject the franchisor to investigations, enforcement actions and fines by the FTC. While no private right of action exists under the FTC Rule, franchisees who previously purchased franchises relying upon misleading or incomplete information may be able to bring common law claims (such as fraud) against the franchisor. In addition, many states, including states with no franchise laws or regulations of their own, have enacted statutes (known as little FTC acts) that make illegal any conduct that would violate the *Federal Trade Commission Act* and the regulations promulgated thereunder (including the FTC Rule). Unlike the *Federal Trade Commission Act* and the FTC Rule, however, these state statutes often confer private rights of action upon aggrieved franchisees (either expressly by statute or by virtue of case law that has conferred standing

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[1] 16 C.F.R. § 436.1 et seq., *Franchise Rule* (15 U.S.C. §§ 41–58), 72 Fed. Reg. 15,444 (Mar. 30, 2007) [hereinafter FTC Rule].

[2] *Id.* § 436.2.

[3] Additional guidance issued through the FTC includes the Franchise Rule Compliance Guide published by the FTC in May 2008 [hereinafter FTC Compliance Guide]. Fed. Trade Comm'n, *Franchise Rule Compliance Guide* (May 2008), https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf. The FTC Rule regulates pre-sale disclosure through the FDD obligations, but it does not require registration with a federal agency. States may adopt franchise laws that impose greater disclosure obligations than under the FTC Rule and impose additional conditions on franchisors. Currently, fourteen states (California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin) have state franchise laws that require franchisors to register the franchise offering with the state before they may begin offering or selling franchises relating to that state. Additionally, many of these states have adopted the NASAA Guidelines. N. Am. Sec. Adm'rs Ass'n, *2008 Franchise Registration and Disclosure Guidelines* (Amended and Restated UFOC Guidelines) (July 1, 2008), available at nasaa.org; *see also* N. Am. Sec. Adm'rs Ass'n, NASAA Franchise Commentary: Financial Performance Representations (2017).

[4] FTC Rule § 436.9(c).

under such statutes), instead of reserving those rights to governmental authorities alone. Consequently, if a franchisor violates the FTC Rule by failing to furnish a proper FDD to a franchisee, or provides an FPR that is not included in the franchisor's FDD, that franchisee may attempt to hold its franchisor liable under a little FTC act, which typically permits the franchisee to sue for damages, rescission, and legal fees and expenses, in addition to any state franchise registration and disclosure statute.

(ii) Definition of FPR

The FTC Rule defines the term "financial performance representation" very broadly. The FTC Rule states that a financial performance representation is 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.[5] In practical terms, an FPR is almost anything communicated to a prospective franchisee that expresses operational results in terms of dollars, percentages, or proxies for those details (except as explained below).[6] Below are a few examples:

- A statement that "our average unit volume in 2025 was $1.2 million" is a relatively obvious FPR.

- The claim "earn a 10% return on investment" is an FPR, because a franchisee knows what its investment is and, thus, can estimate a level or range of profits.

- The claim "convert your business to our system and double your profits" is also considered an FPR because the franchisee knows the results of its present business and, thus, can estimate a level or range of profits after conversion.

- The claim "you can expect 100 customers a day paying the suggested retail price" is an FPR, since a franchisee knows the suggested retail price and, thus, can back into a level or range of gross sales.

- A chart, table or mathematical calculation presented to demonstrate possible results based upon the combination of variables (e.g., if you make 100 sales a day at $5.00 per sale your gross sales will be $500) is an FPR, based upon specific regulatory instructions and advisory opinions.

- On the other hand, a statement such as "tremendous profits are possible" is not an FPR, since the phrase "tremendous" is not quantifiable to a "level or range."

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[5] *Id.* § 436.1(e).

[6] With very limited exception, the U.S. state franchise laws do not provide a definition for "FPRs" other than by incorporating the requirements of the FTC Rule or NASAA Guidelines. For purposes of this paper, we will focus on the FTC Rule, although it is noteworthy that some states have additional requirements and limitations relating to advertising that includes FPRs.

(iii) Cost Information Alone is not an FPR

Notably, the definition of "financial performance representations" ordinarily does not include costs – if expressed in absolute dollar terms and not as a percentage of sales. Accordingly, a franchisor can share cost information (without it being an FPR) – again, so long as the cost and expense information is not presented as a percentage of sales, profits, or another measure that would allow a prospective franchisee to calculate the potential income, sales, or profits of the franchise.[7] As such, if a franchisor intends to provide cost data outside of its FDD, it should evaluate how that cost information may be used in combination within the framework of other information provided to prospective franchisees (including in FDDs, franchise advertisements, and other items such as press releases).

(iv) FPRs are Optional; Conditions Required to Make an FPR

As noted above, a franchisor is not required to make any FPR. In cases where a franchisor chooses not to include an FPR in its FDD, then (with limited exceptions) the franchisor cannot make any statements or representations to prospective franchisees concerning past, current, or potential sales, income, or profits.

For any franchisor that chooses to make an FPR, "Item 19" is the portion of the FDD in which the FPR must be disclosed.[8] The FPR may reflect historical information or be a projected financial performance and may cover franchised or company-owned outlets (subject to some limitations under NASAA guidance). We note that the term "outlet" is used in the rules but generally applies to each of the franchised or company-owned businesses within the system, regardless of whether there is a physical location or retail unit from which that business is operated. As such, a franchisor has considerable latitude as to the form and content of FPRs, so long as it meets certain legal requirements as to both the foundation of the claims and the data and explanations provided. The foundational conditions that a franchisor must satisfy are that the franchisor has: (1) a "reasonable basis" for making the representation, and (2) "written substantiation" for each FPR at the time it is made, and that the franchisor advise prospects that written substantiation is available upon request.[9]

Over the years, the question of what constitutes a "reasonable basis" has been discussed at length. In the FTC Compliance Guide, the FTC staff explained that "factual information must be the sort of information upon which a prudent businessperson would rely in making an investment decision."[10] Further, FTC staff observed that there is "the implicit assumption" underlying a historic financial performance representation "that a prospective franchisee may achieve at least the same level of performance."[11] While the "implicit assumption" comment of the FTC Compliance Guide is not included in the FTC Rule, it nevertheless highlights the importance that the outlets forming the basis of the FPR be relevant to the new franchise being offered. If the outlets are not substantially comparable, it raises the question of whether there is a reasonable basis for making the FPR based on those outlets; and, this is particularly true if the differences cannot be adequately identified and explained in the FDD.

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[7] *See also* FTC Compliance Guide, at 131.
[8] FTC Rule § 436.5(s).
[9] *Id.*
[10] FTC Compliance Guide, at 135.
[11] *Id.* at 90. Importantly, the FTC staff tempered that comment with the acknowledgment that the assumption is not a "guarantee" to the prospect of a similar result.

If those foundational conditions are met, the franchisor may craft its FPR and Item 19 disclosures. In doing so, Item 19 rules require the franchisor to make specific disclosures, which include the points set forth below.[12]

- Whether it is an historic financial performance representation about the franchise system's existing outlets or is a forecast of the prospective franchisee's future financial performance, and a description of the factual basis and the material assumptions underlying its preparation and presentation. The requirements and details will differ between FPRs regarding historic performance versus projections.

- If historical data is disclosed for the franchise system's existing outlets, this includes:

  - Whether the representation relates to the performance of all of the franchise system's existing outlets or only to a subset of outlets (use of subsets is subject to certain limitations) that share a particular set of characteristics (e.g., 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).

  - The dates when the reported level of financial performance was achieved.

  - The total number of outlets that existed in the relevant period and, if different, the number of outlets that had the described characteristics.

  - The number of outlets with the described characteristics whose actual financial performance data were used in arriving at the representation.

  - Of those outlets whose data were used in arriving at the representation, the number and percent that actually attained or surpassed the stated results (for any averages reported, the data must include mean, median, number and percentage meeting the stated average).

  - Characteristics of the included outlets that may differ materially from those of the outlet that may be offered to a prospective franchisee.

- For projections or forecast FPRs, disclosures regarding the "material bases and assumptions" for the FPR should include the economic or market conditions that are basic to a franchisee's operation, which may encompass a franchisee's sales, the cost of goods or services sold, and operating expenses. Further, while not part of the FTC Rule, the FTC Compliance Guide recommends that franchise sellers consult with the current standards for projections issued by professional organizations like the American Institute of Certified Public Accountants.[13]

- A statement advising prospective franchisees that they may request written substantiation of the FPR.

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[12] FTC Rule § 436.5(s)(3).
[13] FTC Rule § 436.5(s)(3)(iii); FTC Compliance Guide, at 92.

While a detailed discussion is beyond the scope of this paper, we note that in 2017, NASAA issued guidance specific to disclosures of FPR, supplementing the NASAA Guidelines.[14] The NASAA FPR Commentary provides definitions of certain commonly used and key terms to FPRs (such as gross sales, gross profit, and net profit) and guidance as to the data that may or must be presented in FPRs. These added some significant parameters for FPRs, such as the degree to which an FPR disclosure can be based on company-owned outlet performance, segregation of company-owned and franchised outlets, the circumstances in which the performance of company-owned outlets must be differentiated or adapted to compare to franchised outlets, conditions in which FPRs of subsets of a system may be provided, and the use of "disclaimers" or explanations regarding the data disclosed.

(v) Exceptions and Supplemental FPRs

Although generally all FPRs must be included in Item 19 of the franchisor's FDD, there are three primary exceptions to this requirement.

- First, the limitations described above do not apply where a specific outlet is being offered for sale if the information is given only to bona fide potential purchasers of that outlet. Typically, franchisors that provide this type of information include a "wrap-around disclosure" with the information to explain the data and any assumptions for the results.[15]

- Second, if the franchisor furnishes financial performance information in the FDD, the franchisor may deliver to a prospective franchisee a supplemental FPR about a particular location or variation, apart from the FDD. A supplemental FPR must be in writing, must explain the departure from the more fulsome FPR presented in Item 19, and must meet all of the same requirements for its preparation as if it were going to be included in Item 19. The scope of the FPR that is printed in the FDD establishes the limit of how expansive a supplemental FPR can be – e.g., if the FPR printed in Item 19 of the franchisor's FDD includes only gross sales data, then the franchisor cannot provide a supplemental FPR that includes percentage-based cost-of-goods sold information.[16] Even with these limitations, a supplemental FPR may be very useful, particularly to examine the results of subsets of the reported businesses, such as those within a particular geographic area, or with a particular format, size, or age of operations.

- Third, the pre-sale disclosure rules (including the FPR standard) apply only to prospective franchisees – so once a franchise agreement is signed (and assuming that the franchisee does not have the opportunity to undo the deal and get a refund) – the pre-sale disclosure rules no longer apply. As a result, in many (but not all instances) sharing data that might otherwise be a "financial performance representation" with incumbent franchisees for the purpose of benchmarking their businesses is not considered to be providing an FPR. A franchisor should, however, remain aware of the circumstances in which it is providing this type of data to existing franchisees, as an existing franchisee may become a "prospective franchisee" in connection with the purchase of additional franchises.

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[14] N. Am. Sec. Adm'rs Ass'n, NASAA *Franchise Commentary: Financial Performance Representations* (2017), http://www.nasaa.org/wp-content/uploads/2017/05/Financial-Performance-Representation-Commentary.pdf.
[15] FTC Rule § 436.5(s)(4).
[16] FTC Rule § 436.5(s)(5).

In addition to the above exceptions, there are other potentially relevant circumstances when the strictures of the U.S. franchise laws may not apply to the sharing of FPR-type information. One is franchisee-provided data. Because the restrictions of the FTC Rule apply only to the conduct of franchisors and franchise sellers, existing franchisees are free, and may be encouraged by the franchisor, to share their financial results with prospective franchisees (unless the franchisee has become a "franchise seller"[17] by virtue of actively engaging in franchise sales on behalf of the franchisor). To the extent they are willing to share their experience and results with prospective franchisees, existing franchisees may be a valuable resource for prospective franchisees as they evaluate whether to purchase a particular franchise. Second is that under the FTC Rule, and under some state franchise laws, there are certain exemptions that, when applicable, relieve the franchisor of the obligation to provide an FDD to the prospective franchisee. In such circumstances, the franchisor may have greater latitude in the types of, and circumstances under which, financial performance information may be shared with prospective franchisees. However, because the standards for exemptions are not the same under the FTC Rule and the state franchise laws (and not all state franchise laws offer such exemptions), each transaction must be carefully reviewed to see whether an exemption applies and to which obligations the exemption applies. Additionally, exempt transactions generally remain subject to any deceptive or unfair trade practice laws.

2.2. Brazil

(i) Overview of Brazilian Franchise Law

In Brazil, franchising is governed by Law No. 13,966/2019. A "franchise" is defined as a contractual system involving the licensing of trademarks, know-how, and business methods, without creating employment or consumer relationships. The law does not regulate terms or conditions of franchise agreements. It emphasizes pre-contractual transparency through the presentation to prospective franchisees of a "*Circular de Oferta de Franquia*" (a "COF") ten days prior to any contract or payment by the franchisee to the franchisor. Material omission or inaccuracy in the COF may result in annulment of the agreement and refund of payments, plus penalties. A franchisor in Brazil is not required to register the COF with any government agency. It remains a private document between the franchisor and the prospective franchisee, who usually signs a non-disclosure agreement to have access to the information.

The COF must contain extensive financial and operational disclosures, including: (1) financial statements of the franchisor for the last two fiscal years; (2) investment estimates and fee structures; (3) a description of the business model and support system; (4) a list of franchisees and litigation history; and (5) operational obligations and territorial rules. These disclosures aim to ensure informed consent and risk awareness by the franchisee.

(ii) Consequences of Having an FPR in the COF

Brazilian law does not formally regulate FPRs, and FPRs are not required under the COF terms. However, it is a common practice by franchisors in Brazil to present information on potential financial performance during negotiation or in business meetings. Franchisors tend to inform prospects about

[17] FTC Rule § 436.1(j). "Franchise seller" means a person that offers for sale, sells, or arranges for the sale of a franchise. This definition includes the franchisor and its employees, representatives, agents, subfranchisors, and third-party brokers who are involved in franchise sales activities. It does not include existing franchisees who sell only their own outlet and who are otherwise not engaged in franchise sales on behalf of the franchisor.

expected performance by presenting examples of other franchisees or unit results, often without referring to the specific location targeted by the prospect.

The lack of equivalent performance and results usually arises in litigation later on in the franchise relationship. Brazilian courts treat them under general principles of good faith and mandatory disclosure rules in the COF. A court generally considers that any separate document about performance provided to the franchisee as part of the COF obligation, even if it is not expressly included in the original document. As a result, misleading financial representations may lead to annulment or voidability of the franchise agreement, refund to the franchisee of amounts paid by the franchisee to the franchisor, and damages awarded to the franchisee.

(iii) General Rules of a Valid FPR

From doctrine and jurisprudence, a valid FPR must:

- be clearly presented as estimates, not guarantees;
- be based on reasonable and verifiable data;
- avoid inducing false expectations of profitability; and
- be consistent with the COF.

The above considerations are not based on legal provision, but stem from a number of court decisions that led to these assumptions.

(iv) General FPR Practices by Franchisors

Brazilian franchisors typically provide investment ranges, not fixed projections, in their FPRs. They include disclaimers regarding risk and indicate that these are examples and not performance promises. It is critical to avoid binding financial promises.[18] The prospective franchisee should be encouraged to run its own independent due diligence.

(v) Invalid FPR and Penalties

Through case law, it has been established that an invalid FPR arises when: (1) profitability is guaranteed or strongly implied;[19] (2) information is false, incomplete, or misleading;[20] or (3) essential

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[18] Courts have found that projections are not binding if no promises were made. *See* Trib. de Justiça de São Paulo, Processo No. 0025685-63.2024.8.26.0100, Judge Larissa Gaspar Tunala (Oct. 17, 2024). *See also* Trib. de Justiça de São Paulo, 1a Câmara Reservada de Direito Empresarial, Apelação No. 1031165-81.2014.8.26.0576, Rel. Des. Cesar Ciampolini (Apr. 25, 2018).
[19] The Brazil Superior Court of Justice has consistently held that franchising involves inherent business risk. The failure of a franchisee's business does not imply franchisor liability if profitability was never guaranteed. *See* Superior Tribunal de Justiça, AREsp 14,477/RS, Rel. Min. Sidnei Beneti (June 9, 2012). *See also* Trib. de Justiça de São Paulo, Processo No. 1115818-76.2020.8.26.0100, Judge Larissa Gaspar Tunala (Jan. 24, 2025).
[20] Large discrepancies may generate liability on the part of the franchisor. *See* Trib. de Justiça de São Paulo, 1a Câmara Reservada de Direito Empresarial, Apelação No. 1008026-65.2018.8.26.0704, Rel. Des. Cesar Ciampolini

financial data is omitted by the franchisor.

As noted above, when it is determined by court that a false FPR has occurred and there is material breach, the consequences include annulment or termination of the franchise agreement, refund of payments and fees (total or partial), equitable rebalancing of obligations, and/or penalties.

2.3. Switzerland

(i) Absence of Franchise Legal Regime or Regulation

Although franchising is a well-known distribution model in Switzerland, there is no franchise-specific legislation that regulates franchising activities in Switzerland.

Franchise agreements are mainly governed by the general provisions set out in the Swiss Civil Code and the Code of Obligations (the "CO"), as well as the United Nations Convention on Contracts for the International Sale of Goods, if not waived. Indeed, the franchise agreement is not governed by any specific set of statutory provisions but is an innominate contract or, depending on the circumstances, a "mixed" contract combining elements of several nominate contracts regulated by the CO, in particular the provisions on employment contracts, agency agreements or lease contracts. Therefore, depending on the structure of the relationship between a franchisor and a franchisee, relevant provisions on nominate contracts may additionally apply and govern some aspects of the transaction (e.g., termination and related consequences).

(ii) Disclosure Requirements under Swiss Law – "Soft Law"

There are no specific pre-contractual statutory disclosure regulations under Swiss law in the franchise context. The general provisions of the CO and the Swiss Civil Code are therefore applicable.

However, according to the principle of good faith, not only must all the information disclosed by the franchisor during the pre-contractual phase be true, but also the prospective franchisee must receive all the necessary information concerning the contemplated contractual relationship. As a general rule, for evidential reasons, it is recommended to keep a written record of the information transmitted.

Notwithstanding the foregoing, Swiss Distribution – a specialized organization and association in Switzerland focused on franchising, licensing, and distribution systems – stipulates specific pre-contractual disclosure obligations, which are binding for its members only (i.e., soft law). A franchisor member of Swiss Distribution is thus required to provide a prospective franchisee with a copy of the code of ethics of this association and full written information concerning the terms of the franchise agreement within a reasonable period before the execution of the franchise agreement. According to guidelines published by Swiss Distribution, the franchisee must in addition receive information on, *inter alia*, the relevant market for the franchise activity, the description of the products and services to be franchised, the franchisor's organization and business activity, the franchisor's experience in the franchised activity, and other distribution channels for the contractual products and services.

(Mar. 3, 2022). However, even exaggerated expectations may not invalidate contracts without proof of direct cause of failure. *See* Trib. de Justiça de São Paulo, Processo No. 1190100-46.2024.8.26.0100, Judge André Salomon Tudisco (June 18, 2025).

Swiss law recognizes and applies the *culpa in contrahendo* doctrine. If the franchisor, in breach of the principle of good faith, hides information that would have discouraged the franchisee from entering into the franchise agreement with the franchisor, the franchisee may rescind or cancel the agreement and claim for damages, which have to be evidenced. The franchisee's damage is equivalent to the difference between the current wealth of the franchisee in its capacity as the injured party and the wealth of which the franchisee would hypothetically dispose without the damaging event (i.e., the conclusion of the franchise agreement). Claims based on *culpa in contrahendo* are only admitted exceptionally by the Swiss courts. The experience and knowledge of the franchisee in business remain a key criterion when assessing those claims.

(iii) Nature and Content of the FPR Depends on the Franchisor/Franchisee

Absent any specific provision on FPRs or a legal definition under Swiss law, the nature and the content of any FPR provided by the franchisor and expected by the franchisee will merely depend on the parties themselves and their respective positioning during the negotiation of the franchise agreement, subject to the following limitations:

- *Good faith*: Imposes an obligation on the franchisor to disclose to the prospective franchisee all the necessary information concerning the contemplated contractual relationship, which necessarily includes some form of FPR as well as historical information, if available.

- *Validity of the agreement*: The consent to an agreement is defective in case of fundamental mistake,[21] and the agreement can be invalidated. There is also a defect in consent where one party intentionally misleads the other (through deception, lies, or willful silence) to induce them to enter into a contract.[22]

- *Liability based on the "culpa in contrahendo" principle*: In addition to the validity of the agreement itself, the violation of the principle of good faith may trigger the civil liability of the defaulting party, subject to indemnification, in addition to the remedies relating to the validity of the agreement itself.

- *Unfair practices*: *The Federal Act against Unfair Competition* applies in principle to the relationship between a franchisor and a franchisee. The purpose of the law is to ensure, in the interest of all parties concerned, fair and undistorted competition. A party acts unfairly when it *"provides inaccurate or misleading information about themselves, their business, their trade name, their goods, their works, their services, their prices, their inventory, their sales methods, or their business operations; or who, through such claims, gives third parties an advantage over their competitors."*[23]

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[21] Under Swiss law (Code des Obligations [CO] art. 23 *et seq.*), a fundamental mistake is a defect in consent that may invalidate a contract if it relates to a decisive element (both subjectively and objectively) that, in light of good business practice, could be considered essential. It must be raised within one year of its discovery.
[22] CO art. 28.
[23] *Loi fédérale contre la concurrence déloyale [LCD] [Federal Act Against Unfair Competition]* Dec. 19, 1986, SR 241, art. 3(1)(b) (Switz.).

Apart from civil remedies, *The Federal Act against Unfair Competition* contemplates also some criminal law provisions that are rarely applied in a purely commercial context such as a dispute between a franchisor and a franchisee connected to FPR considerations.

It is important to keep in mind that Switzerland is a small territory that is surrounded by Member States of the European Union where, in general, retail prices are significantly lower (20% to 30%) compared to Switzerland. Apart from attempts to prevent parallel trade from the European Union into Switzerland and geo-blocking measures for Internet sales that are prohibited by antitrust law, there is clearly a trend for the consumer, at least in the border areas to practice so-called "shopping tourism," i.e., purchasing in France or in Germany products that are cheaper than in Switzerland. A franchisor must take this phenomenon into consideration when preparing and providing an FPR to a prospective franchisee, as the performance of Swiss-based franchised or company-owned businesses might be positively affected by this above-described phenomenon, in particular where the franchisor has also franchisees on the other side of the border.

(iv) Judicial Remedy

In Switzerland, there is no specific procedure or industry practice for franchising disputes, including those arising out of invalid FPRs. Typically, proceedings may be conducted successively in three levels of courts, with the cantons being the first two levels and the Swiss Federal Court, the highest court in Switzerland, acting as the final ordinary Swiss court of appeal.

With respect to disputes arising out of the validity or the performance of a franchise agreement, or a claim based on the *culpa in contrahendo* principle discussed above, it can easily take between 12 and 18 months to obtain a first instance judgment and much longer in complex cases. In the context of this contribution, a franchisor may be subject to interim or permanent injunctions (including the obligation to sell at certain commercial conditions), as well as damages or the invalidity of the agreement.

Losses are generally recoverable as damages if they are caused by a breach of contract or a breach of law. To qualify, losses must meet the test of natural and adequate causation: in light of general experience, the alleged breach of contract or a legal obligation is generally of a nature to cause the loss at stake. Under certain conditions, loss of profit might be subject to damages.

Under Swiss law, the party claiming damage must generally quantify and substantiate in detail the specific damage suffered. In exceptional circumstances, where such quantification is not possible, the court or arbitral tribunal may estimate the damage suffered, provided that the claiming party has proven that it suffered some loss.

Importantly, a court will not conduct an *ex ante* review of what was disclosed or not disclosed in the franchisor's FPR, whether in terms of timing or content. Rather, any review would be conducted *ex post*, primarily on the basis of the principle of good faith or in the context of an alleged *culpa in contrahendo*. Such a review would assess the overall conduct of the franchisor and, more broadly, both parties, during the precontractual period, as well as the consequences of that conduct during the contractual period, taking into account the full factual circumstances.

3. Practical Considerations for Preparing FPRs

3.1. Evaluating Available Data and Suitability for Market

Generally, factors involved in evaluating whether to make an FPR and what information to present include the following: (1) assessing the comparability of the franchisees operating in the system at that time, and whether their businesses are sufficiently similar to form the basis of a combined representation; (2) identifying and sufficiently describing in the FDD, COF or other disclosure any distinguishing characteristics of the reported franchised units (common examples include size of units and territories; the prototypes and features of physical locations; respective age of units and years in operation; and geographic and demographic traits); and (3) assessing the reliability of the available data regarding franchisee performance, and the ways in which common practices (such as the use of point-of-sale systems) may impact that reliability.

From a practical perspective in Switzerland, two key distinctions must be drawn. First, does the franchise system already operate in Switzerland, or has it not yet been established there? Second, are the materials used by the franchisor relevant to the Swiss market?

With respect to the first distinction, where a franchise system is already operating in Switzerland, any available financial performance data relating to that existing franchise should be disclosed, subject to applicable rules regarding the protection of the former franchisee's trade secrets. Where such data are not available (e.g., because the franchise has not yet been established in Switzerland), generic information such as industry standards and key performance metrics should be used instead. This approach avoids creating expectations based on financial performance data collected from a market that is not directly comparable or equivalent to Switzerland.

With respect to the second distinction, there is no clear prevailing trend. It should be noted, however, that using materials prepared for other jurisdictions may increase the franchisor's exposure to liability, based on the principle that the more a party discloses, the greater its potential liability, particularly in a jurisdiction such as Switzerland where there are no minimum disclosure requirements. If a franchisee were to ask a franchisor to confirm whether existing materials prepared for another jurisdiction are valid for Switzerland, the franchisor would be well advised to respond that it is the franchisee's responsibility to make that assessment independently.

That said, the value of the practical considerations discussed in this Section 3 should not be underestimated from a Swiss law perspective. Although these considerations crystallize rules that primarily apply in foreign jurisdictions with franchise disclosure laws, they reflect information that a prospective franchisee would legitimately expect to receive from a franchisor in Switzerland. Accordingly, a Swiss franchisor that follows the practical considerations described in this Section 3 – and who provides correct and accurate FPR information – will be unlikely to be found to have violated the principle of good faith under Swiss law.

(i) Distinguishing Characteristics and Comparability of Results, Particularly if Applying Results Across Jurisdictions

The presence of "distinguishing characteristics" and the degree to which businesses are comparable are overarching considerations in satisfying the "reasonable basis" or "good faith" requirements, and require specific disclosures.[24] As noted earlier, using the U.S. perspective as an example, FTC staff has observed that there is "the implicit assumption" underlying a historic financial performance representation "that a prospective franchisee may achieve at least the same level of performance."[25] While the "implicit assumption" comment is not included in the law, it nevertheless highlights the importance that the units forming the basis of the FPR be relevant to the new franchise being offered. With that in mind, it is clear that comparability of the businesses included in the FPR and the franchises being offered is a core aspect whether the franchisor has a "reasonable basis" for making the representation or has made the representation in "good faith." If the businesses are not substantially comparable, it raises the question of whether there is a reasonable or good faith basis for making the FPR based on those businesses; and this is particularly true if the differences cannot be adequately identified and explained in the FDD, COF or other disclosure.

There are numerous questions and issues associated with assessing the comparability and similarity of franchised businesses that are often located in many geographic locations and operated by a collection of independent operators with differing levels of experience, resources and personal qualities. In some cases, these questions become only more salient for a franchisor looking to break into another international market. Far from an exhaustive list, the following are some issues that apply on a regular basis.

- *How does the size of the outlet potentially affect franchisee revenues and costs?* For franchised units with physical or retail units, a franchisor should consider whether the existing franchises are of similar size, as those being offered for sale. Similarly, if the franchisor offers protected or exclusive territories or if the franchisee provides mobile services within assigned geographic areas, the franchisor should consider the size of the franchisees' territories and any potential impacts on revenue and costs.

- *If there are physical units, how similar or different are the prototypes? How similar or different are the venues in which they operate?* There are virtually endless ways in which units across the myriad industries and businesses may vary. Using the example of fast food or quick service restaurants: do they have drive-through windows; is curb-side pick-up an option; do the units participate in online platforms for ordering and delivery; are the units free-standing, in strip malls, outdoor malls, enclosed malls, in food courts, kiosk format, or in other non-traditional or specific purpose venues (such as airports, travel plazas, universities, government centers, etc.); and are the units co-branded with other operations? These differences can have a meaningful impact on the revenues of the units, as well as the initial investment and ongoing operational costs.

- *What are the respective ages of the franchised units and operations, and does age have a potential impact on the financial performance?* Many businesses experience considerable variation in their revenues and costs during their different stages of development and operation. For example, some businesses benefit from a surge or rapid sales expansion during early phases of operations, particularly if they engage in significant opening marketing campaigns and promotions to drive early traffic; if so, their results may reflect relatively high revenue and growth in the early operations. Accordingly, the FPR should caution against assuming that the same growth rate will continue over the remainder of the life of the business. Conversely, other businesses may start with lower revenues and therefore require longer periods to mature,

[24] FTC Rule § 436.5(s)(3)(ii)(A), (F).
[25] FTC Compliance Guide, at 90.

develop their customer base, and achieve greater market penetration and revenue potential. By analyzing the data and characteristics of these disparate business types, the franchisor may be able to identify common patterns that are relevant to, among other things, developing and disclosing FPRs. One franchisor may conclude that it is most effective and reliable to organize the financial performance data in its FPR according to the age of the business operations; other franchisors may find that age is not a meaningful factor and may focus on other criteria.

- *Geographic and demographic differences.* It is no secret that geographic and demographic variances within local economies affect the costs of living, employee wages and other costs of doing business. As such, franchisors should consider the potential impact of geographic and demographic factors on business performance when preparing FPRs. For example, a franchisor should consider whether the reported units spread through geographically and/or demographically different regions, or whether they are concentrated in particular areas. If they are concentrated in certain regions, a franchisor should consider whether the nature of the franchised business and target customers are likely to be affected by the geographic and demographic differences. And, if the FPR will also include cost information, is that data likely to differ materially by region? Depending on many factors, including the types of products or services offered, the impact may be relatively small or very meaningful for any specific franchise system and the franchisor can appropriately craft its FPR.

- *Are there other factors that may skew the result?* This involves an assessment of whether the units have traits materially different from the franchises being offered. This consideration applies whether the businesses occupy retail locations, are home-based with mobile delivery, or are otherwise operated without significant physical space. Questions to consider include: are any of the businesses part of other operations that atypically drive business or off-set normal costs; are many of the franchisees conversion of existing businesses that boost their revenues (e.g., does the franchisee operate a sporting or youth entertainment facility next to its franchised pizza restaurant); are the businesses co-branded? If there are units with these sorts of materially different traits, franchisors should give additional consideration to whether those differences appear to impact the financial performance, and if so whether the units should be excluded from the FPR based on those atypical attributes (with appropriate disclosure regarding the exclusion), or whether the differences and any data disparities can be adequately addressed through disclosures about the different attributes.

(ii) Reliability of Data

When preparing an FPR, particularly when using only franchised units, a common question is whether the pool of available economic information is reliable. In the context of an FPR, the franchisor is, in essence, evaluating whether the available data, as a whole, is sufficiently sound to share with a prospective franchisee, who will use that data to inform its business decision whether to buy the franchise.

If some data is not deemed "reliable," the franchisor will need to decide whether it must exclude all the data from the units in question or whether the uncertainty is limited to certain aspects of the data (from some or all units), and whether there are alternative presentations that would allow the franchisor to excise the troubling data without compromising the overall accuracy and meaningfulness of the remaining data and representations. The decision factors impacting a preferred approach in these situations will certainly vary depending on the intended scope of the FPR (e.g., top line revenue only vs. gross sales minus key product costs vs. net profit or EBITDA[26]), but there are several common factors that routinely apply, including size of sample, percentage reporting, and methods of recording and reporting information.

As to the "*sample size*," the franchisor should consider how the number of franchisees in the system or within the specific segment of system (if the FPR will be limited to certain types of franchised units, or presented in subsets) are represented and accounted for within the FPR. The larger the number of participants, the less likely any single or small group unreliable result may skew the overall presentation. This is not to suggest that an FPR by a small franchisor is less accurate or reliable than a larger system, but it accentuates the importance of the accuracy of the underlying data from those limited number of units.

Whether the system is large or small, the reporting percentage (the percentage of target units that actually reported the relevant data) is also a significant factor. The fact that a franchisor does not receive data from every franchised unit does not, by itself, prevent the franchisor from making an FPR. However, an assessment should be made regarding why the non-reporting units failed to report, whether there are common traits among the non-reporters, and whether there is a reason to believe the performance data would be materially different if the results of the non-reporting franchisees were included.[27]

The method of recording and reporting information that franchisees use to document, record and report their performance, including revenues and costs (to the extent reported), is directly germane to the level of confidence in the data's reliability. This consideration is particularly acute in connection with franchisee expenses and when "reliability" is a function of the data being treated consistently by franchisees rather than simply a question of accuracy according to the standards applied by each franchisee. The methods of recording and reporting data can vary dramatically across franchise systems and even within franchise systems as franchisors change their standards and requirements over time.

A further challenge arises when a franchisor would like to disclose FPR information in an international market it has not yet entered. In many cases, franchisors find themselves in the illogical position of depending on the knowledge and experience of their prospective franchisees or developers to understand local market conditions.[28] This dependence often extends to other critical considerations, such as the initial costs associated with establishing a new franchised business. These costs are shaped by a range of local factors that may not be readily apparent to a franchisor operating outside the country in question. This scenario begs the question of whether the data used by the franchisor is, inherently, unreliable. Indeed, a franchisor should be cautious about making an FPR in one country based on the actual results of its franchisees in its home country or another franchised jurisdiction. A franchisee may claim that the data in such FPR is not reliable, as the results are based on different economics, currency valuations, and, mostly likely, supply sources.[29] Even if the franchisor engages competent local advisors, there may be legitimate concerns over the reliability of the data in this case.

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[26] "Earnings Before Interest, Taxes, Depreciation and Amortization," used as surrogate for cash flow from the business before non-cash charges and financing costs.
[27] As discussed in other sections, under the U.S. law perspective, the franchisor also needs to describe certain information about the units that are excluded from the FPR (including the number and any distinguishing characteristics). Those disclosures do not, however, eliminate considerations as to how the performance of otherwise relevant units could affect the overall reliability of the FPR.
[28] Lee Plave & Shelley Spandorf, *Navigating Rough* Financial Seas in International Franchising, *in* Financial Performance Representations, 25th Annual IBA/IFA Joint Conference 7 (May 19-20, 2009).
[29] *Id*. at 7-8.

(iii) Translation and Localization

When a franchisor expands internationally, the translation and localization of an FPR presents a uniquely complex compliance challenge that extends well beyond linguistic conversion. The localization of an FPR requires not merely accurate translation of revenue figures, averages, and profit metrics, but also adaptation to local accounting standards, conversion of currencies at defensible exchange rates, alignment with jurisdiction-specific presentation of financial data, and careful attention to terminology so that defined terms carry the same legal effect. Cross-border franchisors are therefore best advised to build a controlled core disclosure position and then localize around it in coordination with qualified local counsel, ensuring that the FPR in each jurisdiction satisfies local mandatory provisions while maintaining the substantive integrity and reasonable basis or good faith principles required by the laws in the franchisor's home jurisdiction.

3.2. Determining Most Relevant Data and Metrics

(i) Data Points Most Relevant to the Business and Helpful to Prospective Franchisee Analysis

The type of FPR that a franchisor chooses to present depends on what the franchise system measures and reports with modest to high confidence. The prevalence of commonly-used or mandated point-of-sale systems offers confidence in gross sales or "top line" numbers. But, top line revenue does not paint a detailed picture for a franchisee, particularly where there is substantial variation in the cost of doing business, either as a result of variable unit size, controllable expenses or geography. So many franchisors provide more detail about gross profit or EBITDA and EBITDAR results. Another approach is to use industry standard key performance metrics data around which the industry's assessment of unit financial performance has coalesced. Examples of industry-focused metrics include: average room rates, average occupancy rates, and average revenue per available room in the hotel and lodging industry; number of customers served per day for the entire business or per relevant item of equipment/service method, or service provider; average revenue per customer visit; revenue per service route; and revenue per technician employed by the business.

As the frequency with which franchisors use FPRs has increased, so too has the number of FPRs incorporating historical operating expenses of the units in conjunction with the historical revenue. While the scope varies considerably, this accompanying historical cost data can provide meaningful insights in response to the ever present inquiry – how much money can I make in this franchise?

There are no set rules defining the types of historical cost information a franchisor may or must include in an FPR, or even the manner in which the cost data may or must be presented in a franchisor's FDD, COF or other disclosure (as applicable). As such, FPR disclosures incorporating cost data take many forms (e.g., gross margin results, gross margin plus additional specified costs, and comprehensive EBITDA and EBITDAR results); may be presented in multiple ways (e.g., text description, charts, graphs, and in comparative formats); and may be based solely on company-owned units (subject to certain conditions in the United States), solely on franchised units, or a combination of company-owned and franchised units. Each type presents some distinctive issues to consider, but the foundations for each, namely understanding the available cost data and determining whether the franchisor has a "reasonable basis" and possesses "good faith" to disclose some or all of that data, start with the same considerations.[30]

The first step is determining the pool of available cost and financial information. What operating costs and performance metrics are being collected at the unit level, and are all relevant units recording the same categories of expenses and according to the same criteria? For example, how are product and inventory costs being recorded; how are wages, employment and compensation expenses being recorded; and how are rent and occupancy expenses being recorded?

The next consideration is how often and by what means that information is being reported to the franchisor. Or put another way, does the franchisor require units to provide reports relating to operating or other costs on a regular basis? Units can report in a variety of ways and the various methods may impact both the quantity of data available and its reliability (particularly, regarding franchisee cost data). Moreover, if the units do not record expenses under the same standards, the franchisor's ability to make precise comparisons is limited, particularly when attempting to drill down to very specific performance metrics. The other consideration is whether franchisees report the information voluntarily or whether the franchisor electronically polls the data from the financial reporting systems of the franchisees.

From the pool of available information, the franchisor can assess which cost and financial data is the most relevant to the franchises being offered, and the franchisor's relative degree of confidence in each data set. As one would expect given the broad swath of businesses that franchise and that many systems have been in operation for decades, there exists a wide continuum of practices by franchisors, and even significant variations within some franchise systems, relating to cost and financial performance reporting. Fortunately, the franchise regulations (or the absence thereof) allow franchisors to, largely, chart their own path in this regard.

(ii) Historical vs. Projections

A franchisor presenting an FPR has a choice between presenting historical information gathered from actual operating results or creation of a projection. The inclusion of the former is the norm in the United States, Brazil and Switzerland, and the disclosure of a projection occurs radically less often. The franchisor should clearly state in the FDD, COF or other disclosure (as applicable) whether the FPR pertains to historic performance, whether it represents all or a subset of existing franchised outlets, or is a forecast of future potential performance.[31]

In large part, the disparity stems from the fact that there is a higher degree of uncertainty and liability exposure for projection or forecasts in the event actual performance of the franchises falls short of the performance levels envisioned by the franchisor. By contrast, historical FPRs are limited to presenting actual past performance and do not carry the same level of uncertainty inherent with predictions. It is more difficult to identify and clearly describe the material assumptions underlying a projection than it is to

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[30] In the United States, just as with revenue only FPRs, all revenue plus cost FPRs must disclose the material bases for the representation, including the six specific categories identified in the FTC Rule (i.e., whether the FPR covers all or a subset of existing units; the reporting period; the number of total existing units and (if different) the number with the selected characteristics; the number of units used in the FPR; and the number and percentage of units in the FPR attaining the reported results). *See* FTC Rule § 436.5(s)(3)(ii).
[31] FTC Compliance Guide, at 87.

describe present and past facts.

Given all this, why would a franchisor choose to make a forecast or projection of future performance?[32] Because disclosing potential results may be the only option for some franchisors, if they intend to make representations at all. The most likely situations arise when start-up franchisors lack a robust pool of units having sufficiently similar attributes, and when franchisors are adapting their franchises to feature new models and prototypes. In those situations, the franchisors may possess financial performance data that needs adjustment and reinterpretation to fit the circumstances of the new franchise offerings.

Additionally, projections may be especially attractive to a franchisor keen to start franchising in a new international market. However, a franchisor that wishes to provide prospects with forecasted profits, sales, revenue or break-even numbers would need to be able to measure a host of external variables in an unfamiliar market, which seems highly unrealistic. Indeed, the risks associated with making a projection of future performance are more profound in a foreign market that is unfamiliar to the franchisor. A franchisor should therefore be extremely cautious about making projection-based FPRs to a prospective franchisee in a country where the franchisor's concept has no track record.

3.3. Proformas and Worksheets for Prospective Franchisee Use

"Does this look right to you? Did I miss anything, or did I formulate the expenses to revenue relationships accurately?" These are only a few of the likely questions that prospective franchisees put to franchisors. The term "pro forma" is often used to refer generally to documents, worksheets, spreadsheets and similar items that identify categories of revenue and costs but do not include monetary amounts or estimates, or formulas.

Pro formas and worksheets, while they may be useful, present complications in practice. Examples include:

- A franchisor provided pro forma worksheet for the prospective franchisee to use in making its own assessment of the potential franchised business. Under U.S. law, to avoid being an FPR, the worksheet must be blank (meaning that it has not been populated with data, and (if in the form of an Excel spreadsheet), it does not have formulas embedded that by adding one number such as anticipated gross sales all of the other cells automatically populate with results).

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[32] Regardless of the reasons a franchisor selects the forecast/projection approach, as with any historical FPR, an FPR projection in the United States must have a reasonable basis, be provided in Item 19 of the franchisor's FDD, and must disclose the material bases and assumptions upon which the projection is based. FTC Rule § 436.5(s)(3)(iii). According to the FTC Rule, the material assumptions and significant factors include the "economic or market conditions that are basic to a franchisee's operation, and encompass matters affecting, among other things, a franchisee's sales, the cost of goods or services sold, and operating expenses." While neither the FTC Rule nor the Compliance Guide enumerate specific factors that must be addressed, the Compliance Guide articulates a disclosure standard for projections that is not found elsewhere: "[I]f a franchisor makes a performance projection, its Item 19 disclosures must include sufficient facts to enable a prospective franchisee to make an independent judgment as to the validity of the projection. The Item 19 disclosures should include a description of the material information on which the franchisor relied in making the representation. This may include market studies, statistical analyses, franchisee profit-and-loss statements, as well as other types of information that prudent persons customarily rely on in making business decisions." FTC Compliance Guide, at 91.

- A prospective franchisee providing its own pro forma to the franchisor and asking for the franchisor to comment on the calculations in that worksheet. Again, under U.S. law, virtually any response by the franchisor, whether written or oral, commenting on the prospective franchisee's figures runs the risk of being a projection FPR.

From the perspective of the U.S. franchise laws, or other laws in other countries with similar restrictions, if the franchisor wishes to provide a blank pro forma worksheet to a prospective franchisee, it should be made clear in writing to the prospective franchisee that, among other things: (1) the blank pro forma is being provided to assist the franchisee in conducting its own business analysis and only to help guide the type of information that may be needed for that analysis; it is not a complete list of information, (2) the franchisor will not provide any information or assistance with completing the pro forma, and it is up to the prospective franchisee to supply both its own revenue and cost information for the pro forma (discussions with other franchisees can be a valuable source of this information), (3) the prospective franchisee must conduct its own investigation and analysis of the business, and (4) the franchisor cannot discuss the completed pro forma with the prospective franchisee, and the prospective franchisee must not return the completed pro forma to the franchisor.

In Brazil, it is not unusual for a franchisor to provide pro formas or worksheets to prospective franchisees. Franchisors tend to present blank worksheets to a prospective franchisee and suggest that the prospective franchisee includes the estimated amounts it considers applicable in the case of its potential new franchised unit. Some of the figures the prospective franchisee can estimate and project, but the franchisor may need to assist the prospective franchisee with certain aspects of the business. It is expected that the franchisor would only cite examples of other franchisees in similar conditions.

A franchisor would most probably clearly disclaim its liability by having express written terms and conditions in the worksheets and other material disclosed to the franchisee. This practice of providing blank worksheets to prospective franchisees runs a high risk of being considered an attempt to lead the franchisees to close the deals based on misleading assumptions. The courts most probably would accept such waivers of liability to the extent that entering into a franchise business carries some risk, and the franchisee must run its own assessments. Nevertheless, if the franchisee can demonstrate that the franchisor guided its conclusions, there is a possibility that the court may find the actual behavior of the franchisor inconsistent with its disclaimers and therefore hold the franchisor liable.

Under Swiss law, any dispute regarding pre-contractual FPRs will be assessed *ex post* against the standard of good faith. With this in mind, the franchisor cannot entirely avoid providing some form of pro forma statement or financial worksheet to a prospective franchisee. However, the franchisor should strictly limit such documents to figures relating to sales, revenues, and costs that are directly linked to the franchise agreement itself. The pro forma should not address operational aspects of running the franchise, except to the extent the franchisor includes general statistical data.

If the franchisor is presented with a pro forma prepared by the prospective franchisee, it should confine its feedback to general observations only, e.g., noting that the franchisee has omitted a particular category of cost or revenue. The franchisor should not comment on the valuation or calculation of any specific line items in the franchisee's pro forma.

Finally, the foregoing guidance is always subject to the relative bargaining power of the parties. Courts will presume that the franchisor holds the stronger negotiating position, and this presumption will ultimately be factored into any assessment of whether the franchisor acted in good faith during the pre-contractual phase.

3.4. Monitoring, Updating, and Recordkeeping

(i) When and How Often the FPR Must or Should be Updated

A franchisor's work does not end when it completes an FPR and issues its FDD or COF (as applicable). Rather, the franchisor must monitor performance of the units and periodically assess how those results compare to the FPRs it issued.

In the United States, under the FTC Rule, there are two primary requirements relating to updates and changes to FPRs. First, for annual updates, Section 436.7(a) requires a franchisor to update its FDD after the end of each fiscal year if it intends to continue offering and selling franchises.[33] As the annual update process encompasses Item 19, any FPRs must be brought current with results from the franchisor's prior fiscal year. It is during the annual update that franchisors typically reevaluate their FPRs anew, including whether to alter the format of presentations, selection of categories, break-downs, etc.

Second, there is a continuing notice requirement that applies only to FPRs. Under Section 436.7(d) of the FTC Rule, a franchisor must notify prospective franchisees of any material change to the information presented in Item 19 that the franchisor knows (or should have known) occurred.[34] The FTC has concluded that the separate notice requirement relating to the FPR is warranted in light of the "particular materiality of financial data to prospective franchisees" and that "false impression created by stale data at the time of sale is likely to cause significant injury to prospective franchisees who rely on financial data in making their investment decision."[35]

This "notice" requirement does not necessarily mean that a franchisor must furnish an updated FDD all over again. According to the FTC Compliance Guide: "A seller may inform the prospective franchisee of the material change underlying the Item 19 in any reasonable manner, such as by letter, telephone call, or email." This guidance reflects the emphasis placed on informing the prospective franchisee of the new information, and a franchisor has considerable discretion in determining the manner by which it will convey the necessary information. Although the FTC Compliance Guide even permits verbal notification, this is an approach most franchisors should avoid (at least as the sole means of notification) as the franchisor has the burden of proving that it in fact informed the prospective franchisee about the material change to the FPR data. It is worth noting that NASAA's written commentary and instructions do not specifically address the manner in which the notification may, or must, be made. As such, it is not clear how states with franchise laws will treat FPR update notifications made outside of the FDD as permitted by the FTC Rule.

Ultimately, every FPR is a snapshot of assumptions at a particular moment in time. A franchisor must constantly monitor the economic and competitive circumstances of each market where it has sales activities and update its FPR accordingly. These considerations are particularly relevant when a franchisor

[33] "All information in the disclosure document shall be current as of the close of the franchisor's most recent fiscal year. After the close of the fiscal year, the franchisor shall, within 120 days, prepare a revised disclosure document, after which a franchise seller may distribute only the revised document and no other disclosure document." FTC Rule § 436.7(a).
[34] *Id.* § 436.7(d).
[35] Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15,444, 15,519 (Mar. 30, 2007) (Section 436.7 Updating Requirements, part 3).

enters a new international market, and is testing not only its expectations of unit level financial performance, but also a host of operational, marketing and strategic decisions for the new market.

In Brazil, the COF must be updated constantly to keep the information accurate at the moment of the delivery to the prospective franchisee. Since there is no requirement to register the COF with any agency or government body, there is no statutory updating requirement. However, the fact that the COF is intended to allow the prospective franchisee to learn about and evaluate the potential business opportunities it is expected that the financial performance data reflects the reality at the moment of the COF delivery. There is no need to update the FPR in the COF after the moment of delivery as long as the data was accurate at the time.

The key aspect that the courts examine to test whether the FPR in the COF or in any other form is unlawful has been whether the franchisee agreed to enter into the franchise agreement as a result of any false or misleading information. In the event that the court believes that there is a plausible likelihood that the franchisee was misled by false or wrong information, the franchisor may be found liable for deceiving the franchisee.

In Switzerland, it must be assumed that the FPR will have been prepared in accordance with the standards of another jurisdiction and tailored to a different market. Accordingly, the question of whether the FPR has been updated for Switzerland is not directly relevant. What is critical, rather, is whether the existing FPR has been appropriately adapted to reflect Swiss market conditions and legal requirements. It is well established that franchisors will approach this adaptation on a transaction-by-transaction basis, with the objective, as noted above, of disclosing as much as necessary but as little as possible. From the prospective franchisee's perspective, the approach is precisely the reverse: seek to obtain as much information as possible, and in no event less than what is necessary to make an informed decision. Equally important, the prospective franchisee should maintain a careful record not only of what was disclosed, but also – and more critically – of what was not disclosed or what the franchisor expressly refused to disclose. Where such information exists or is otherwise accessible to the franchisor, a refusal to disclose may constitute a significant step toward establishing bad faith on the part of the franchisor in the event of a subsequent dispute.

(ii) Importance of Keeping Underlying Records Used to Prepare the FPR, for Substantiation or in Case of Litigation

Franchisors that elect to include FPRs in their FDDs, COFs or other disclosures should maintain the underlying records and documentation used to prepare those FPRs. As noted above, in the United States under the FTC Rule, a franchisor must possess written substantiation for any FPR at the time the representation is made, and the FTC Rule further requires that franchisors make such written substantiation available to prospective franchisees and to the FTC upon reasonable request. This obligation is not merely a technical compliance requirement; it serves critical functions in the event of regulatory inquiry or private litigation. The records that support an FPR – which may include financial statements, tax returns, profit and loss statements, point-of-sales data, and other documentation validating the claims – constitute a franchisor's primary defense against allegations of misrepresentation or fraud or, in a jurisdiction like Switzerland, liability arising under *"culpa in contrahendo"* principle. Without thorough and organized substantiating records, a franchisor may be unable to demonstrate that its representations had a reasonable basis or were made in good faith, potentially exposing the franchise system to liability under the franchise laws or other related laws, as well as, in the United States, common-law fraud and negligent misrepresentation theories. Accordingly, regardless of the jurisdiction, best practices dictate that franchisors implement rigorous document-retention policies specifically addressing the data underlying their FPRs, ensuring that such records are preserved, accessible, and capable of withstanding scrutiny by regulators, franchisee counsel, or a court for the duration of any applicable limitations period.

Under the Brazilian practice, it is paramount that a franchisor possesses written substantiation for any FPR at the time the representation is made in the COF or otherwise in a subsequent or separate document. In the event of a dispute, the franchisor will be required to show that it complied with its obligation, and the franchisee was provided with lawful and correct information. In a certain way, it will be a burden on the franchisor to demonstrate to the court that it complied with the COF requirements under the law and that any possible FPR was not only accurate but provided with a waiver of liability.

In Switzerland, maintaining the underlying records used to prepare the FPR is essential. The "good faith test" requires identifying what a party intended or understood at the time of negotiations, and comparing that information against the party's actual conduct during those negotiations. Because Switzerland does not recognize the institution of discovery, maintaining thorough contemporaneous records is the most effective protective measure, as it ensures that a party has the material necessary to organize a defense if its good faith is later called into question.

4. Use of FPRs in Media and Advertising

4.1. United States

Under U.S. franchise law, FPR information may only be included in advertising or promotional materials (such as a printed brochure, a PowerPoint presentation made to a prospective franchisee, on the franchisor website, on other third-party sites advertising franchise opportunities, in magazines, etc.) if there is a corresponding FPR that was properly made in the company's FDD. Being "properly made" includes meeting all the criteria discussed in Section 2 above, which include: (1) the franchisor has a reasonable basis for the FPR; (2) the franchisor has written substantiation for the representation at the time the representation is made; and (3) the representation, including the material bases and assumptions, appears in Item 19 of the franchisor's most current FDD. Any FPR to be included in advertising or promotional materials must: (a) be consistent with the FPR in the FDD; and (b) be prepared in accordance with the applicable requirements for making such a claim. Among other things, financial performance representation information in such promotional materials must include certain disclaimers that are required for advertisements under the FTC Rule.[36]

In addition to the FTC Rule, five of the states with franchise registration laws specifically address the use of FPRs in franchise advertising (California, Illinois, Maryland, Minnesota, and Washington). Generally, these require that the statements in the advertising be consistent with disclosures made in Item 19 of the FDD, but some impose additional limitations. These additional limitations vary, from restricting statements that refer to the franchise as being a "safe investment" (or similar description) to more stringent restrictions against including any FPRs in advertising.

Under the FTC Rule and FTC Compliance Guide, FPRs and related statements used in advertising are referred to as "general media claims." The term "general media" is broad and includes all forms of advertising, such as television, radio, print (such as magazines and newspapers), billboards, and online and

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[36] FTC Rule § 436.1(e).

digital based advertisements.[37] In addition to the requirements that apply broadly to FPRs in advertising (as discussed above), if a franchisor includes an FPR in a general media claim it must disclose: (a) the number and percentage of outlets from which supporting data for the representation were gathered that actually attained or surpassed the represented level of financial performance; (b) the time period when the performance results were achieved; and (c) a clear and conspicuous admonition that a new franchisee's results may differ from the represented performance. Additionally, according to the FTC Compliance Guide (1) the franchisor "must furnish any prospective franchisees with the required Item 19 disclosures while the advertisement is running," and (2) after the advertisement is removed from circulation, the franchisor must continue to disclose information required by Item 19 for a "reasonable period," which is noted to be at least six months.[38]

4.2. Brazil

(i) False or Misleading Advertisement

Even though franchising is not a consumer relationship, pre-contractual advertising is subject to the Consumer Defense Code (the "CDC") in Brazil. The CDC prohibits misleading or abusive advertising. Advertising must be truthful and verifiable. PROCON – Brazil's public consumer protection agency – is usually the legal authority to address violation of the CDC.

Misleading practices in FPR advertising include: (1) unrealistic ROI claims; (2) omission of risks; and/or (3) inflated profitability projections.

(ii) Penalties for Fraudulent Advertisement

Penalties for fraudulent advertisement include: (1) administrative fines (imposed by PROCON); (2) the obligation to correct or withdraw advertising; (3) civil liability; and (4) criminal sanctions.

PROCON may investigate misleading franchise advertising, apply administrative sanctions, and require corrective disclosures.

This is particularly relevant when franchises are marketed to individual investors with consumer-like vulnerability.

In addition, the Conselho Nacional de Autorregulamentação Publicitária (CONAR), may recommend suspension or modification of ads and issue public decisions affecting reputation.

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[37] FTC Compliance Guide, at 132 ("The term 'general media' is to be read broadly to include all forms of advertising, including radio, television, magazines, newspapers, and billboards. It also includes electronic advertisements such as those placed on a franchisor's website or on a web site operated by a broker or some other third party. Electronic advertisements include both static advertisements, as well as pop-up screen and banner advertisements. Unsolicited bulk email sent to the public – sometimes referred to as 'spam' – is also a form of general media advertising since these messages are widely disseminated to create interest in the franchisor, possibly leading to franchise sales.").

[38] *Id.* at 134.

4.3. Switzerland

(i) False or Misleading Advertisement

False or misleading advertising conduct is primarily captured by the *Federal Act against Unfair Competition*, which prohibits, as a general rule "any commercial conduct or practice that is misleading or otherwise violates the principles of good faith and that affects relations between competitors or between suppliers and customers."

In addition, the following behaviors are potentially unlawful:

- to provide inaccurate or misleading information about himself, his business, his trade name, his goods, his works, his services, his prices, his inventory, his sales methods, or his business operations; or who, through such statements, gives third parties an advantage over their competitors;

- to make inaccurate, misleading, unnecessarily offensive, or parasitic comparisons of the person, goods, works, services, or prices of another with those of a competitor; or, through such comparisons, gives third parties an advantage over their competitors; and

- to provide information about itself, its goods, its products, or its services regarding their environmental impact that cannot be substantiated on an objective and verifiable basis.

In addition, the Swiss Commission for Loyalty is a self-regulation body established by the media and advertisement sector. Any consumer or competitor may file a complaint with this Commission, the decisions of which are mandatory for its members or members of other trade association with which the Commission has established a partnership. In any event, the "case law" of the Commission is duly taken into account by the courts while ruling an unfair conduct.

(ii) Consequences of Fraudulent Advertisement

The two main consequences of fraudulent advertisement are as follows:

- Fraudulent advertisement is subject to judicial remedies, i.e., permanent or interim injunctions, damages, periodic penalty payments until the infringement ceases; and

- While having to rule on a claim for *culpa in contrahendo* or violation of the good faith principle, the judge, at the request of the claimant, will certainly take into consideration the fraudulent advertisement as an element of the fact pattern in the assessment of the claim. The allegation, even if deemed to be fraudulent, will be taken into account as a statement on which the opposite party could base its own judgment, in good faith.

Unless in the case of a criminal offense, the consequences will always take place in a civil procedure (or a complaint to the Swiss Commission for Loyalty, at the request of a party).

5. Conclusion

FPRs are a powerful tool for franchisors seeking to attract prospective franchisees, but their preparation, presentation, and use carry significant legal implications that vary meaningfully across jurisdictions.

Despite the differences in legal frameworks among the United States, Brazil and Switzerland, across all three jurisdictions, accuracy and honesty remain foundational requirements. Whether framed as a "reasonable basis" under U.S. law, a good faith obligation in Brazil, or the *culpa in contrahendo* standard in Switzerland, franchisors are universally expected to ensure that the financial information they provide is truthful, verifiable, and not misleading.

The practical considerations discussed in this paper underscore that preparing an effective FPR is far more than a legal compliance exercise. Franchisors must carefully evaluate the comparability of the units forming the basis of the FPR, the reliability of the underlying data, the relevance of the metrics selected, and the suitability of the presentation for the target market. These considerations become particularly acute when a franchisor seeks to expand internationally, where differences in market conditions, cost structures, currency valuations, accounting standards, and consumer behavior may render domestic financial performance data of limited relevance to a prospective franchisee in a foreign market. The challenges of translation and localization further compound these complexities, requiring not merely linguistic conversion but substantive adaptation to local legal and economic realities.

Ultimately, franchisors operating across borders must adopt a disciplined and jurisdiction-sensitive approach to FPRs. This includes engaging qualified local counsel in each jurisdiction to ensure that FPR practices satisfy both the letter and spirit of applicable laws. A franchisor that grounds its FPRs in reliable data, adapts them thoughtfully to local market conditions, and maintains comprehensive substantiating records will be well positioned to comply with the diverse regulatory requirements discussed in this paper.

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<u>Biographies</u>

Regina Amolsch is a partner at Plave Koch PLC, a franchise boutique in Northern Virginia. Regina concentrates her practice in franchising and licensing and has over 25 years of experience with a variety of franchise, corporate and business development matters across a diverse range of industries. Regina's experience includes advising on transactional, regulatory, and intellectual property issues important in developing and growing franchise programs; drafting and negotiating franchise, development, master franchise agreements, and related licenses for domestic and international franchise systems; and counseling franchisors with regard to regulatory compliance and franchisee relationship issues. Regina represents clients of all sizes, from start-ups to Fortune 200 companies, and has developed a particular interest in the growing field of healthcare franchising. Regina also advises franchisors and investors relating to franchise merger and acquisition transactions, private equity investments in franchise systems, and franchise issues in business securitization transactions. Regina regularly speaks at industry seminars and professional training programs. Regina has received industry recognitions, including being named to Who's Who Legal – Franchise, Lexology Index Thought Leaders, and The Best Lawyers in America©. Regina is a member of the ABA Forum on Franchising and the International Franchise Association.

Luiz Henrique Do Amaral is a Partner, member of the Board and coordinator of the Executive Committee of the law firm Dannemann Siemsen Advogados and of the industrial property firm Dannemann, Siemsen, Bigler & Ipanema Moreira; President of AIPPI (Association Internationale pour la Protection de la Propriété Intellectuelle) from 2020 to 2022 and Bureau member since 2013 and member of honor of AIPPI; President of the Brazilian Intellectual Property Association (ABPI) from 2010 to 2013 and Permanent Member of the Board of Directors of the ABPI; coordinator of the SEP (standard essential patent) committee of ABPI; Member of the board of the Brazilian Franchising Association (ABF) for many years and former General Counsel and nowadays general counsel of the ABF Rio for 2023-2025 term; Secretary General at World Franchising Council (WFC) from 2009 to 2011; Member and IP counsel of the Biotechnology Information Council (CIB); Mentor in Corporate Law at Endeavor Institute; former Member of the board of Director of LES Brasil (Licensing Executive Society); Former member of the Board of Directors of the International Trademark Association (INTA). Member of the Board for the Center of Dispute Resolution, mediation and arbitration of the ABPI. Attorney-at-Law graduated in 1985 and Intellectual Property Agent, Luiz is specialized in intellectual property (trademarks, patents and copyright), corporate law and franchising, licensing, unfair competition, computer law and AI, transfer of technology, consumer protection laws, litigation at the judicial and administrative spheres in the above-related areas. Luiz is a recipient in 2017 of the Award of Judicial Merit by the Court of Appeals of Rio de Janeiro for contribution to the improvement of the Judiciary Power and to the Legal Community and 2015 Commendation (Comendador) of the Order of the Judiciary Power awarded by the Federal Court of Appeals on Labor Matters – 2nd Region.

Christophe Rapin is a Senior Counsel at Kellerhals Carrard, one of the largest Swiss law firms, based in Lausanne, Switzerland. Christophe is qualified in Switzerland and in Brussels, Belgium. He practices international distribution, international trade and franchise law, both under Swiss and European Union law. Christophe assists Swiss clients in establishing their distribution/franchise networks internationally. He also assists European Union and international clients regarding their activities in Switzerland and in the European Union. Christophe also practices regulatory law. He is recognized as an expert in the field of bilateral relationships between Switzerland and the European Union in the field of regulatory cross border matters between both jurisdictions. Christophe serves as an Officer for the International Commerce & Distribution Committee of the International Bar Association. Christophe graduated from the University of Geneva and holds a DAS in European law.

Stephanie Zosak is a partner in the Franchise & Distribution Group of DLA Piper LLP (US), based in the firm's Chicago office. Stephanie has extensive experience in advising clients in the retail, food and beverage, and hospitality industries on their international expansion through various franchise and distribution models, including in Canada, Mexico, the Middle East, Europe, Asia, and South and Central America. Stephanie also has assisted several large franchisors in the food service and automotive sectors with franchise securitization transactions. Stephanie currently serves as the Membership Officer for the International Bar Association's International Franchising Committee. Stephanie earned her BA in Political Science and International Studies from Northwestern University, MSc in Human Rights from the London School of Economics and Political Science, and JD from Northwestern University Pritzker School of Law. Following law school, Stephanie was a Pro Bono Legal Advisor in the International Criminal Court and International Criminal Tribunal for the Former Yugoslavia in The Hague, the Netherlands.