

October 13, 2016

VIA EMAIL

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Re: Comments on NASAA's Proposed FPR Commentary

Dear Mr. Beatty, Mr. Cantone, Ms. Coverman, and Mr. Stewart:

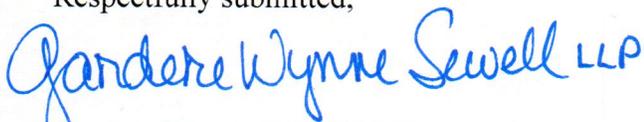
Thank you for giving us the opportunity to comment on the proposed FPR Commentary. As counsel experienced with representing both franchisors and franchisees, we believe NASAA should take steps to encourage franchisors to make robust FPRs by, for example, clarifying what constitutes a "reasonable basis" for a disclosure. On the other hand, unnecessary restrictions on the types of relevant, reliable data that a franchisor may disclose (such as information regarding company-owned units) will deprive prospective franchisees of valuable information not available from other sources. Without rehashing several of the thoughtful comments submitted last year, we wish to highlight three points and concerns below.

1. Rigid FPR Restrictions Conflict with the "Reasonable Basis" Standard. Franchising is not a uniform industry and does not lend itself to a "one size fits all" approach to measures of financial performance. Recognizing the need for flexibility, the FTC Franchise Rule permits a franchisor to make FPRs as long as "the franchisor [has] a reasonable basis and written substantiation for the representation at the time the representation is made." 16 C.F.R. § 436.5(s)(3). We believe additional guidance clarifying what constitutes a "reasonable basis" would be valuable. Unfortunately, the proposed FPR Commentary would restrict certain types of FPRs, even if the franchisor had a reasonable basis for the disclosure. Contrary to the implicit presumption underlying many of the proposed FPR Commentary items, there is nothing inherently unreasonable about sales, profit, or cost data regarding company-owned units, especially when the basis for the representations are properly disclosed and explained. It is important not to impose requirements that constrain the flow of helpful information to prospective franchisees. Further, by imposing rigid requirements, the proposed FPR Commentary could have the perverse, unintended effect of compelling franchisors that make FPRs to disclose specific types of information that may not accurately portray the financial performance of a unit in the franchise system generally. In short, as long as a franchisor has a reasonable basis and substantiation for a FPR, the guidance should promote flexibility without limiting the types of data that may be included in Item 19.
2. Robust Disclosures of Financial Data Benefit Prospective Franchisees. The stereotypical franchisee has transformed from an individual with an entrepreneurial spirit who seeks to own a business to sophisticated multi-unit developers (and increasingly, private equity or

multi-concept franchisees). In our experience, prospective franchisees (and their advisors) are capable of evaluating financial data in connection with due diligence of a franchise investment. Franchisees have always benefitted from the information disclosed in Item 19 and the trend toward increasing numbers of franchisors making FPRs in Item 19 has helped prospective franchisees make more informed decisions. As long as the information is accurate and the basis for any representation is properly disclosed, robust disclosures of financial information benefit prospective franchisees by providing relevant data that often is not available from other sources. Many of the proposed FPR Commentary items are likely to inhibit the inclusion of valuable financial information in Item 19. The proposed FPR Commentary unnecessarily restricts the types of relevant information a franchisor may disclose in Item 19 (such as data regarding company-owned units) and limits the number of franchisors that are able to make Item 19 disclosures (particularly emerging franchisors) to the detriment of franchisors and prospective franchisees alike. We believe NASAA should encourage, not restrict, full disclosure of relevant financial data to prospective franchisees.

3. Any Revised FPR Commentary Should Be Adopted as Flexible Guidelines, Not Regulatory Mandates. Because franchising is not “one size fits all” and franchisors should have flexibility in providing information relevant to their systems, we recommend that any changes to the FPR Commentary be adopted as discretionary guidelines—not mandatory requirements—for franchisors to consider in preparing Item 19 disclosures, with an acknowledgment that, while useful, the guidelines may not be suitable for all franchise systems—a determination that is best made by the franchisor with intimate knowledge of the operations and financial performance of its franchise system. Further, because increased restrictions regarding FPRs may trigger increased litigation, we request a clarification that FPRs issued before the effective date of any revised FPR Commentary should not be deemed to lack a reasonable basis in the event they do not comply with the subsequently adopted revised FPR Commentary.

Respectfully submitted,



Gardere Wynne Sewell LLP