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COMBINING DIFFERENT CONCEPTS INTO ONE FDD: DISCLOSING MULTIPLE BRANDS AND DIFFERENT FRANCHISE FORMATS IN THE SAME FDD

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I. INTRODUCTION

Multi-brand and multi-format franchise offerings are nothing new. Through multi-brand and multi-format franchise offerings, franchisors offer prospective franchisees a smorgasbord of options to consider when making a franchise investment.

In a multi-format franchise offering, franchisors afford prospective franchisees the opportunity to select the most suitable franchise format through which to develop and operate their franchised business. For example, in the restaurant industry, multi-franchise format may offer prospective franchisees the choice to operate a standard brick-and-mortar restaurant, a food truck or a self-serve food kiosk. With a multi-brand offering, franchisors can offer prospective franchisees the option of either: (i) selecting from two or more distinct brands commonly owned by the franchisor or its parent to serve as the business model for their franchised business or (ii) operating a co-branded franchised business from a single location where the prospective franchisee will offer the goods and services of two or more brands commonly owned by the franchisor or two or more distinct brands that were married together through the partnership of unaffiliated franchisors.

For some time, franchisors have offered more than one franchise format and brand in their Franchise Disclosure Documents (FDD), as a form of expanding their brand. But with technological advances and changes across industries, the number of franchisors who offer multiple brands and different franchise formats to prospective franchisees is steadily increasing. For franchisors with multiple brands and/or franchise formats, the use of a single FDD not only helps address prospective franchisees' desire for an array of options from which to choose, bur it allows franchisors to efficiently leverage their financial and operational resources across several businesses. Although franchisors, for primarily convenience and cost reasons, may choose to include multiple brands and different franchise format offerings in the same FDD, as will be discussed in this paper, it may not make sense to do so and may, more importantly, violate one of the core requirements of the FTC Franchise Rule—that the information in the FDD be disclosed in a manner such that all material facts are presented "accurately, clearly, concisely, and legibly in plain English."

This paper will examine different franchising formats and co-branding arrangements, and address when it may or may not make sense to combine multiple franchise formats and/or brands within the same FDD from both a practical and legal standpoint. It will also discuss specific Items of the FDD that should be considered when franchisors evaluate whether to include multiple format and/or brand offerings in one FDD.

II. COMBINING MULTIPLE FRANCHISE FORMATS IN THE SAME FDD

A. Types of Franchising Formats That May be Combined

Franchisors often use and offer multiple franchise formats to increase brand awareness and pursue opportunities for growth. Offering multiple franchise formats can

allow brands to access venues, sites and potential customers that they would not otherwise have access to with their core single franchise model. There are numerous franchise formats that franchisors may offer within their FDDs.[1]

1. Traditional Venues

The most basic form of a franchise offering is the typical, traditional venue franchise. However, even the basic franchise offering may have more than one format. For example, a traditional venue may be in an in-line or stand-alone location, with or without a drive-thru, may have a "standard" footprint or a smaller one, or may be a full service or express/satellite location where the full product or service offerings are not available. These deviations from the typical, traditional venue franchise format are often dealt with in the same FDD and, though common, may still present challenges in the FDD.

2. Non-Traditional Venues

Some franchisors offer franchisees the opportunity to open in non-traditional locations such as sports arenas and stadiums, airports, casinos and food courts. However, because these locations are often based on available opportunities and are not usually part of a franchisor's franchise offering, they are not often dealt with at all in the FDD, which by itself, may be problematic. It is common that these non-traditional locations are only available by a bid process (some airports) or through one-off relationships with or solicitation by concessionaires (most food courts and arenas/stadiums). As a result, there are franchisors that will allow their franchisees to open in a non-traditional location but are not in a position to make a non-traditional venue franchise a part of their standard FDD franchise offering. Such a franchisor will not know the different costs and requirements associated with opening in the non-traditional venue or whether a franchisee would even be able to get a contract with such non-traditional venue.

However, there are other franchisors who may have agreements in place to open non-traditional locations and are, therefore, able to offer non-traditional location offerings in their FDDs. Cinnabon, Jamba, Huddle House and Wing Boss, for example, include non-traditional location offerings in their FDDs.

3. Other Formats

Besides traditional and non-traditional venues, there are numerous other franchise formats that franchisors commonly offer: food trucks, kiosks, mobile carts, pop-up stores, delivery and carryout only, virtual/ghost kitchen opportunities, and add-ons. Food trucks, kiosks and mobile carts may be offered as the only available franchise format for certain concepts, but they are more typically offered as either an additional way for a franchisee with a brick-and-mortar store to offer its products to its customers within its territory, or as an alternative format to a brick-and-mortar location. Food trucks and mobile carts are

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[1] Copies of the 2021 Franchise Disclosure Documents for these franchise systems were downloaded from the DFPI Self Portal for the California Department of Financial Protection & Innovation, which can be accessed at https://docqnet.dfpi.ca.gov/search.

usually allowed to operate anywhere within a defined territory and are popular formats to service special events. Kiosks are usually non-moveable structures offered in non-traditional venues such as indoor and outdoor malls, transportation hubs and other shopping facilities. Pop-up stores may also be offered as an additional model for a franchisee with a brick-and-mortar store to offer its products and services or as an alternative format to a brick-and-mortar location. Pop-up stores can take the form of a very temporary setup that is easily moveable or a more permanent, but still moveable, structure such as a shipping container, and are a popular way to test a brand and reach new customers. Delivery and carryout franchised restaurants only offer delivery and carryout orders, as its name suggests, and are an alternative format to a traditional location that has a dining area for customers. Some other formats that franchisors may offer in the same FDD are the option of having a restaurant alone or with a kitchen commissary, having a retail store alone or with a warehouse, and having a retail store alone or with an office.

Virtual/ghost kitchen opportunities and add-ons are emerging as popular, new ways to expand a franchise system's brand awareness and their franchisees' revenue streams. With delivery through third party applications, such as Uber Eats, Postmates, Delivery Dudes, DoorDash, Grubhub and the like changing how restaurants do business, franchisors are increasingly offering ghost kitchen opportunities and virtual add-ons to their franchise offerings. A ghost kitchen offering is typically an alternative format where the franchisee opens and operates a kitchen or commissary that is not identified to the public as the franchisor's brand, but from which kitchen or commissary the franchisee prepares and sells franchisor's branded products through third party delivery services only. There are no in-store customers of the franchisor's branded products. Virtual add-ons are similar but are usually offered as an add-on opportunity to a franchisee operating a brick-and-mortar franchise location. Such virtual add-ons are opportunities for franchisees to prepare and offer other branded food items that are prepared in the franchisee's kitchen and delivered through third party delivery services. In-store customers would not be able to purchase these other branded food items, as they are only offered through the third-party delivery services.

A. When is Combining Multiple Franchise Formats in the Same FDD Permitted?

The FTC Franchise Rule,[2] the accompanying Franchise Rule Compliance Guide,[3] and NASAA's 2008 Franchise Registration and Disclosure Guidelines,[4] as well as

[2] 16 C.F.R. § 436 (2007). The FTC Franchise Rule may be found in the Federal Register, Vol. 72, No. 61 at pages 15544-15563 (March 30, 2007) and at https://www.ftc.gov/sites/default/files/070330franchiserulefrnotice.pdf.

[3] FTC Franchise Rule Compliance Guide (May 2008). May be found at https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf.

[4] North American Securities Administrators Association, Inc ("NASAA"), 2008 Franchise Registration and Disclosure Guidelines. May be found at https://www.nasaa.org/wp-content/uploads/2011/08/6-2008UFOC.pdf.

subsequent NASAA commentaries[5] do not expressly address inclusion of different franchise formats or models in the same FDD. So, when is combining multiple franchise formats in the same FDD permitted?

The FTC Franchise Rule requires that the information in the FDD be disclosed in a manner such that all material facts are presented "accurately, clearly, concisely, and legibly in plain English."[6] Therefore, while there is no rule that expressly prohibits the practice of multi-format disclosure in one FDD, franchisors need to ensure that disclosing multiple franchise formats in the same FDD is not so confusing as to render the FDD unclear and not concise. Indeed, the Federal Trade Commission promulgated these very rules over four decades ago in 1978[7] for public policy reasons, because it "found widespread deception in the sale of franchises and business opportunities through both material misrepresentations and nondisclosures of material facts . . . that led to serious economic harm to consumers. To prevent deceptive and unfair practices in the sale of franchises . . . the Commission adopted the original Franchise Rule, which is primarily a pre-sale disclosure rule."[8] Thus, the FTC Franchise Rule is geared toward protecting prospective franchisees and making sure they get complete information about the franchised businesses they are buying; the FDD is not meant to be used as a sales tool for franchisors or for their convenience. Accordingly, in determining whether to include multiple franchise formats in the same FDD, it is important that franchisors prioritize what makes sense and works for prospective franchisees in understanding exactly what they will be purchasing, including what fees, costs and requirements are applicable to the franchise format the prospective franchisee wishes to purchase.

As will be discussed in Section II.C below, besides the FDD generally needing to be clear and concise, there are several Items of the FDD that must adequately address and disclose the different formats. Often times, there are challenges in doing so.

Besides complying with the FTC Franchise Rule requirement that FDD disclosures be presented clearly and concisely, franchisors need to also consider whether disclosing all of their different formats in the same FDD makes sense. For example, is having a traditional stand-alone franchise location similar enough to having a non-traditional concessionaire stand in a sports arena or a mobile cart? Some factors to consider are whether the offered franchise formats are add-ons or each an individual franchise. If they are truly add-ons, it will make sense to include the add-ons in the same FDD. On the other hand, it may not make sense to include the different franchise formats in the same FDD if (i) the formats are each an individual franchise offering, which in most cases they are, and (ii) the different formats are sought out by prospective franchisees with materially different purchasing requirements (i.e., mobile vs. brick-and-mortar, full time vs. part time, and different initial investments), (iii) a particular format will not be available to the average

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[5] While NASAA's Multi-Unit Commentary provides guidance on disclosing different multi-unit franchising arrangements such as area development, subfranchise rights and area representation, these are different franchising structures that are not discussed in this paper.
[6] 16 C.F.R. § 436.1(d).
[7] 16 C.F.R. § 436, Statement of Basis and Purpose, 72 Fed. Reg. at 15445 (March 30, 2007), FN 11.
[8] 16 C.F.R. § 436 and 437, Introduction.

franchisee (such as, for example, non-traditional outlets that are only available by bid process or through one-off relationships with or solicitation by concessionaires), or (iv) the formats are so different that the franchisor has a different franchise agreement for each type of franchise format. However, while it may be confusing for the prospective franchisee to review an FDD with multiple franchise format offerings such that franchisors should have a different FDD for each type of format, in practice, most franchisors include multiple franchise formats in the same FDD. One example, though, of a franchisor that separates its offerings is Dog Haus. It has an FDD that offers Dog Haus franchises for (i) a fast casual restaurant and (ii) a Biergarten restaurant that has a bigger footprint and bar. It has another FDD that offers (i) its remote kitchen program, which operates a partially equipped commercial kitchen within a multi-kitchen facility for delivery only, and (ii) its Haus Market program, which only offers take-out and delivery through food delivery services.[9]

B. Advantages and Disadvantages of Combining Multiple Franchise Formats in the Same FDD

While most franchisors combine their different franchise formats in the same FDD, there are advantages and disadvantages of doing so.

1. Advantages

One of the most basic advantages of combining different franchise formats in the same FDD is cost. Franchisors will save money, both in state registration fees and outside counsel fees, if they combine their different franchise formats in one FDD. A practical advantage to maintaining just one FDD for different franchise formats is just that—having only one FDD. Having multiple FDDs may get confusing and cumbersome for franchisors' salespeople and, arguably, may overwhelm prospective franchisees who want to consider different formats but do not want to review multiple FDDs to compare different formats for the same franchise system. Having only one FDD for multiple formats will also lessen the chance for inconsistencies between documents and will save franchisors time in registering and updating just one FDD each year. However, as discussed below under "Disadvantages," these factors should not be the primary drivers of the franchisor's decision to combine multiple formats in one FDD and are likely to be outweighed by a franchisor's legal disclosure obligations and the public policy behind franchise disclosure laws.

Another advantage to offering multiple formats in a single FDD is providing franchisees with more than one revenue stream for their businesses. Particularly with virtual add-ons, franchisees with restaurant franchises are able to use their kitchens to prepare other food products not necessarily offered on the menu within their locations for delivery, which will cast its potential customer base wider without having to invest much

[9] A copy of the Franchise Disclosure Document for Dog Haus was downloaded from the DFPI Self Portal for the California Department of Financial Protection & Innovation, which can be accessed at https://docqnet.dfpi.ca.gov/search.

additional time or money. That is because the same kitchen, equipment, employees and supplies are used. For example, Huddle House offers its franchisees a virtual product add-on through an unrelated third party, which allows franchisees to prepare specific products and menu offerings at their Huddle House restaurants, using the same kitchen and equipment, for customers to order via third-party delivery applications under separate trademarks. Huddle House also offers its franchisees another virtual product add-on by making available to its franchisee the opportunity to offer for delivery via third-party delivery applications a limited product line offering for "Papa Corazon's Quesadillas," a brand that was developed by an affiliate of the Huddle House franchisor. For other add-ons, franchisees can add a food truck or mobile cart to their restaurant franchise business and reach additional customers at special events or other locations due to their mobile nature.

2. Disadvantages

As noted earlier, there are disadvantages to combining multiple franchise formats in one FDD. By doing so, the FDD can become too long, complicated and confusing. Prospective franchisees may not understand what fees and requirements may or may not apply to the different formats, the differences between the formats or which one would best suit them. Franchisors should always keep in mind the primary reason that the FDD exists—the disclosure of information to the prospective franchisee that allows him or her to make an informed decision about the investment they are making. Therefore, saving time and money in preparing and registering the FDD and making things easier for franchisor's salespeople are not valid reasons for combining multiple franchise formats in one FDD if the FDD is long, confusing, and complicated. Having one long, complicated FDD may overwhelm prospective franchisees who are looking to only purchase one type of offering but have to sift through pages of disclosures that will not be relevant to their purchase. Even for those who may be considering and trying to compare different offerings, flipping back and forth or scrolling up and down between pages within one long FDD to compare the offerings may be more difficult than being able to review two FDDs side by side. Another disadvantage is the possibility that state examiners will reject the filing because the FDD is simply too long, complicated and confusing. There may be delays in state registrations due to having to address numerous state examiner comments seeking clarification regarding the various offerings and potentially being required to separate the offerings into separate registrations, which in turn, will delay franchisors from being able to offer in such state(s). In addition, from a practical standpoint, prospective franchisees who view multiple format offerings in the same FDD may be tempted to choose a less expensive format rather than a full offering simply due to cost rather than determining whether the less expensive format makes the most sense for the prospective franchisee.

C. <u>FDD Disclosure Challenges</u>

There are several disclosure challenges franchisors face when disclosing multiple franchise formats in the same FDD. Though not an exhaustive list, the following addresses common challenges and/or oversights that are often made in FDDs that

contain offerings for multiple franchise formats. Franchisors should, therefore, take these challenges into consideration when determining whether to include multiple formats in one FDD.

1. FTC Cover Page

On the FTC Cover Page, franchisors are required to disclose the total investment necessary to begin operation of the franchise and the amount that must be paid to the franchisor or affiliate.[10] Franchisors often omit a breakdown of this information for each type of franchise format offered. This disclosure is further complicated when franchisors also offer, in addition to multiple formats, area development rights, which need to be disclosed on the FTC Cover Page as well.

Franchisors should have separate statements disclosing total investment amounts for each format, which can be either in two separate paragraphs or in one combined paragraph. For example, a concept that offers a traditional restaurant and a delivery and carry out only restaurant may make the following disclosure on the FTC Cover Page:

> The total investment necessary to begin operation of a Concept A traditional restaurant built in stand-alone buildings or retail centers is $250,000 to $300,000, which includes $20,000 to $30,000 that must be paid to us or our affiliate. The total investment necessary to begin operation of a delivery or carry-out only restaurant is $200,000 to $250,000. This includes $20,000 to $30,000 that must be paid to us or our affiliate.

The challenge here is to present the information in a concise but non-confusing manner.

If in addition to a traditional retail restaurant and carry-out and delivery only restaurant there are other franchise formats with drastically different investment requirements and systems, such as a mobile food truck and pop-up kitchen restaurant, then it likely makes sense, and a state examiner may require franchisors, to include these other format offerings in a separate FDD.

2. Item 5

Franchisors must disclose in Item 5 all fees and payments, or commitments to pay, for goods or services received from the franchisor or an affiliate before the franchised outlet opens for business.[11] Franchisors that offer multiple franchise formats need to separate the different initial franchise fees for each type of format. Each type of format will typically require a different initial franchise fee and, if the franchisee must purchase different levels of opening inventory from the franchisor or an affiliate, depending on the franchise format, then the different costs for same will need to be separately disclosed in Item 5. There may also be initial fees and payments that are different, depending on the

[10] 16 C.F.R. § 436.3(e)(1).
[11] 16 C.F.R. § 436.5(e).

format, or that only apply to certain franchise formats. These differences need to be clearly stated in Item 5.

3. Item 6

In Item 6, franchisors are required to disclose all other fees, besides the fees set forth in Item 5, that the franchisee will have to pay to the franchisor or its affiliates, or that the franchisor or its affiliates impose or collect on behalf of a third party.[12] As with Item 5, Franchisors that offer multiple formats in the same FDD do not always clarify or distinguish when some fees apply to one format and not another, or if they differ depending on the particular format. For example, there may be POS fees and other technology fees that are different for a traditional restaurant as opposed to a mobile unit, or site evaluation fees that would only apply to brick-and-mortar locations and not mobile units. These differences need to be made clear in the FDD directly in the tables, and not merely in footnotes. Depending on how different the fees may be between formats, franchisors may need to provide different tables to more clearly distinguish the fees among the different formats, or offer the different formats in separate FDDs.

4. Item 7

Item 7 requires the disclosure of the franchisee's estimated initial investment.[13] Although the FTC Franchise Rule provides that "Franchisors may include additional expenditure tables to show expenditure variations caused by differences such as in site location and premises size,"[14] franchisors should provide separate estimated initial investment tables for each type of franchise format they offer. Franchisors should not add additional columns for such disclosures. Otherwise, it may be difficult for prospective franchisees to determine what their estimated initial investment will be for each format. Providing separate Item 7 tables for each format, however, will make the FDD much longer, depending on how many different formats the franchisor offers. Franchisors should also use footnotes to include supplementary remarks in Item 7 to explain the differences in the estimates for the different franchise formats.

5. Items 8 and 11

Disclosures in Item 8 set forth the franchisee's obligations to purchase or lease goods, services, supplies, furniture, fixtures, equipment, inventory, computer hardware and software, real estate or other items to establish or operate the franchised business from the franchisor, its affiliates, designee or approved suppliers or pursuant to the franchisor's specifications.[15] These disclosures need to distinguish when certain requirements only apply to certain franchise formats. Many franchisors require their franchisees to use only architects and designers approved by the franchisor in constructing their brick-and-mortar locations. Obviously, this would not apply to a

[12] 16 C.F.R. § 436.5(f).
[13] 16 C.F.R. § 436.5(g).
[14] Id.
[15] 16 C.F.R. § 436.5(h).

franchisee who chooses to operate a food truck instead. Not so obvious to the prospective franchisee, however, may be different computer hardware, software and equipment purchasing or leasing requirements that depend on the particular franchise format. Franchisors need to make sure that the different requirements are disclosed and that they distinguish the requirements in a manner that is clear to the prospective franchisee.

Item 11 requires the disclosure of the franchisor's assistance, advertising, computer systems and training.[16] Franchisor's assistance with respect to sites, leases, and territories will likely vary depending on the particular franchise format, especially where mobile and brick-and-mortar units are both offered in the same FDD. Franchisors must also generally describe in Item 11 the point of sale or other computer systems that franchisees will be required to purchase or lease, including the cost of purchasing or leasing these systems and hardware; any optional or required maintenance or support contracts; and the information the franchisor will have independent access to through these systems.[17] As with Item 8, franchisors need to take care to clearly distinguish the different POS, computer hardware and software required for the different franchise formats. It should also be noted that for ghost kitchens or other formats that use third-party delivery services, the franchisees will likely need to purchase such computer hardware, systems and software required by the third-party delivery services. These requirements should also be noted and clearly distinguished in Item 11. Franchisors may also have different initial training programs, depending on the type of franchise format. A ghost kitchen will likely require different training than a traditional restaurant. Franchisors, therefore, should make sure the different training programs are separately set forth in Item 11.

6. Item 12

Item 12 requires disclosures regarding the territorial rights (if any) granted to the franchisee. Franchisors will need to make sure to disclose the different territories that may be granted for different franchise formats. For example, a franchisee who purchases a traditional brick-and-mortar location may be granted a territory that is a certain radius of the location, whereas a franchisee who purchases a mobile food truck or cart may be granted a certain designated geographic area that the mobile unit may only operate in. A franchisee who purchases other formats, like a non-traditional venue franchise, may not be granted any territory at all due to the fact that their customers are there because they are visiting the non-traditional facility, like a mall, sports stadium or university. Franchisors must also make sure to include the required statement regarding whether the franchisor grants an exclusive territory for each offering separately.

[16] 16 C.F.R. § 436.5(k).
[17] 16 C.F.R. § 436.5(k)(5).

7. Item 17

Franchisors are required to summarize in Item 17, in a specified tabular format, common provisions of the franchise agreement, including those dealing with renewal, termination, transfers, non-competition and dispute resolution.[18] Not all provisions of the franchise agreement may apply to each type of franchise format offered in a franchisor's FDD. Franchisors should not simply ignore these and other differences in Item 17. They need to be noted and clarified in Item 17. For example, a mobile food truck franchise will likely not have the same term, renewal requirements (i.e., relating to possession and remodeling of premises) and defaults as a traditional brickand-mortar restaurant. Having separate Item 17 tables for each franchise format may be in order if there are many differences. If there are only a few differences and it will not make the disclosure confusing or too cumbersome, then it may be appropriate to have separate paragraphs within a line item or separate sub-line items to disclose the difference.

8. Item 19

If franchisors choose to make financial performance representations, then one of the most challenging Items in an FDD that combines different franchise formats will be Item 19. Item 19 financial performance representations are already challenging enough without different formats. Franchisors that offer multiple franchise formats and furnish Item 19 financial performance representations will need to make sure that they have a reasonable basis in making such representations as required by the FTC Franchise Rule[19] and, relatedly, differentiate among materially different franchise formats. For example, it would not be reasonable for a franchisor to make a financial performance representation without differentiating between ghost kitchens and a traditional location, or even a traditional location and a non-traditional location that only operates occasionally in a sports stadium or arena. Franchisors should also note those outlets that elected an add-on as an additional revenue stream. Indeed, it is likely misleading to not make these differentiations or notes for the prospective franchisees. Nor would it be proper for the franchisor to cherry pick the best performing franchise format and present the financial performance representation in such a way that would leave prospective franchisees to believe that such disclosures would be representative of any other format.

However, the FTC Franchise Rule does allow franchisors to disclose a subset of outlets that share a particular set of characteristics.[20] The examples of such subsets that are provided in the FTC Franchise Rule are "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."[21] Thus, franchisors that offer more than one franchise format may still be able to disclose only one of the franchise formats in their Item 19 if there is a reasonable basis to do so. For instance, a franchisor

[18] 16 C.F.R. § 436.5(q).
[19] 16 C.F.R. § 436.5(s)(3).
[20] 16 C.F.R. § 436.5(s)(3)(ii)(A).
[21] Id.

that has for some time offered franchises for traditional brick-and-mortar locations but recently started offering mobile unit franchises, may provide a financial performance representation for only the traditional brick-and-mortal locations if it does not yet have any mobile units in operation to disclose, or those mobile units have only been operating for a short period of time. But, the franchisor's Item 19 must make clear that it is only including traditional brick and mortar locations in its Item 19 because there are either no mobile units in operation or the mobile units in operation have only been open for a short period of time, and that the financial performance representation disclosure is not at all applicable to the mobile unit franchises it offers. The franchisor must clearly articulate why it is disclosing only a subset of the franchise formats it offers in its FDD. Many FDDs that offer multiple formats do not take care to ensure that their Item 19 includes financial performance representations for each of their different franchise formats offered in the same FDD. If franchisors do not want to include, or if it is not possible to include, all of their different format offerings in their Item 19, then the franchisor should strongly consider separating their offerings into different FDDs.

9. Item 20

Item 20 requires the disclosure of outlets and franchisee information.[22] In the Item 20 tables, franchisors must disclose the total number of, and changes to the total number of, franchised and company-owned outlets. Franchisors who offer different formats in the same FDD should not combine all types of outlets without either noting the makeup of the "total number" of outlets (e.g., 2 of the 4 outlets are non-traditional locations) or having different tables for each particular franchise format. As with other disclosures, in making this decision, franchisors should evaluate the best way to differentiate the formats while presenting the information clearly and in a non-confusing manner. Another challenge is defining an "outlet" where one or more of the franchise formats is a mobile unit, such as a mobile cart or truck, that a franchisee may only occasionally operate in addition to its brick-and-mortar location.

Item 20 also requires the disclosure of the franchisor's current and former franchisees.[23] It is recommended that franchisors note on their list of both current and former franchisees which type of franchise format the franchisee operates so that prospective franchisees have this additional information.

D. <u>Contractual and Practical Challenges</u>

There are also contractual and practical challenges franchisors face when trying to combine different franchise formats in the same franchise agreement and FDD. First, franchisors need to determine whether they should have a separate franchise agreement for each format or addenda to the franchise agreement to address the different obligations and rights of each format. To avoid an arduously long FDD, franchisors tend to address differences with addenda. The addenda, though, may still pose challenges to ensuring

[22] 16 C.F.R. § 436.5(t).
[23] 16 C.F.R. § 436.5(t)(4) and (5).

that all differences are being addressed. Franchisors should consider differences in territories granted, the term of the franchise, renewal requirements, defaults, site selection, lease requirements, post termination obligations and different fees when drafting these addenda.

III. COMBINING MULTIPLE BRANDS

A. Types of Multiple Branding

Single unit franchisees (while not at all extinct) are slowly beginning to wane. "According to a FRANdata analysis, more than 50% of all franchisees in the U.S. are now multi-unit operators."[24] Many multi-unit franchisees looking to diversify their franchise investment portfolio are purchasing franchises across different franchise brands, as a means to generate steady revenue growth, to diversify their portfolios to hedge against sector difficulties (such as, supply chain breakdowns and product shortages) and/or to compensate for the decline in revenue and profits caused by the seasonality of a brand. In an effort to attract this sophisticated group of franchisees, more and more franchisors are offering multi-brand franchising opportunities. The multi-brand franchise opportunities that are offered to prospective franchisees will typically arise under one of two contexts. The first is the franchisor that owns multiple brands and wishes to present the offering of such brands in either separate FDDs or one combined FDD. The second, multi-brand franchising opportunity, will arise through a co-branding arrangement between affiliate franchise brands under common corporate ownership or through two or more franchise brands owned by two or more unaffiliated franchisors.

1. Multiple Brands Under Common Corporate Ownership

Franchisors that own multiple franchise brands will either offer those brands through separate FDDs or a combined FDD. The decision as to whether a franchisor will offer its multiple brands in a single FDD or through separate FDDs will be determined based on a myriad of factors, including (without limitation) (i) whether it is permissible to offer multiple brands in a single FDD, (ii) the similarities and the differences between each brand's business models, (iii) the practicality of offering multiple brands for the franchisor, (iv) the ease (or difficulty) in integrating each brand's business model and the rights and obligations thereunder and, most importantly, (v) whether the combined FDD is easily comprehensible and provides prospective franchisees with all of the material information necessary to make an informed investment decision. Typically, franchisors that offer multiple brands through one FDD will predominantly limit that offering to one industry (such as the restaurant and guest lodging sectors). For example, Marriott International, Inc. offers multiple Marriott hotel brands within one comprehensive FDD.

With private equity firms owning franchise companies as part of their portfolio of investments, multi-brand franchisors may also own multiple brands in diverse industry

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[24] Ritwik Donde, *Multi-Unit, Multi-Brand Franchisees are on the Rise*, https://www.frandata.com/multi-franchisees-are-on-the-rise (June 14, 2019).

sectors. There is also the case where two franchisors may elect to co-brand franchise concepts in differing industries. The question for these franchisors is whether it is practical and, more importantly, permissible to offer brands in different industries within one FDD given the differences in the nature of the industries and the regulations governing such industries.

Some franchisors seem to have answered this question in the affirmative and overcome the scrutiny of examiners to be able to offer multiple brands in differing industries through a single FDD. One such franchisor is Veronica's Insurance Franchise, LLC which offers prospective franchisees the opportunity to operate an insurance agency and brokerage that provides insurance products and services in the fields of property, casualty, vehicle, home, boat, RV, business, commercial, and renter's insurance. In its same FDD, it offers prospective franchisees the opportunity to co-brand their Veronica's Insurance agency with a Toro's Tax franchise that offers income tax services. While the two industries are quite different, the franchisor has navigated the complexities of combining these two brands into a single FDD by simply noting the existence of the co-branding offering and directing the franchisee to the FDD of the other brand.

2. Co-Branding Affiliate Brands Under Common Ownership or Multiple Brands with Different Franchisors

Companies that own multiple franchise brands may elect to "co-brand" their affiliate brands by offering prospective franchisees the opportunity to operate both brands under their distinctive marks from the same location. This form of affiliate co-branding is commonly seen throughout the franchising industry and customarily involves the use of separate FDDs for each brand within the co-brand and the franchisee executing separate franchise agreements for each brand. For example, Focus Brands, which owns brand franchisors Auntie Anne's, Carvel, Cinnabon, Jamba, McAlister's, Moe's and Schlotzsky's, offers prospective franchisees the opportunity to jointly operate a Cinnabon and Auntie Anne's co-brand or a Jamba and Auntie Anne's co-brand. Inspire Brands, which owns brand franchisors like Dunkin' and Baskin Robbins, offers prospective franchisees the chance to operate a Dunkin' and Baskin Robbins ice cream franchise from the same location. There are also franchisors that team up to co-brand their respective brands through the use of a multi-brand FDD; however, this is less common. One such example is Jamba and Bruegger's Bagels. Before Jamba was acquired by Focus Brands, it co-branded some locations with Bruegger's Bagels through separate FDDs and separate franchise agreements. Unfortunately, the arrangement reportedly did not work out for business reasons and the franchisors ceased co-branding.

B. Factors to Consider when Combining Multiple Brands in One FDD

Having a "one-stop-shop" FDD for multi-brand franchise offerings is undoubtedly and understandably appealing to franchisors for many reasons, including the ability to offer a smorgasbord of franchise brands to a broad audience of prospective franchisees hungry to diversify their franchise investment portfolios. However, franchisors must take a multitude of factors into careful consideration when deciding whether to combine their

multi-brand offering in one FDD. These factors include, without limitation, whether it is permissible to combine the multiple brands under federal and state franchise laws; the similarities and differences between the brand offerings; whether the brands are complementary; in the case of co-branding, the customer demand for pairing the brands; and the administrative ease or difficulty in co-managing the brands.

1. Is it Permissible to Combine Multiple Franchise Brands in One FDD

Similar to the issue of including multiple franchise formats in a single FDD, none of the FTC Franchise Rule, the accompanying Franchise Rule Compliance Guide, NASAA's 2008 Franchise Registration and Disclosure Guidelines, and subsequent NASAA commentaries expressly discuss whether franchisors can offer multiple franchise brands in one FDD. However, despite this and as with offering multiple franchise formats in the same FDD, franchisors offering multiple brands in one FDD must also at all times keep in mind (and be guided by) the purpose of disclosure, which must always outweigh the franchisor's desire (and ability) to combine multiple franchise brands in a single FDD. When the FTC Franchise Rule was first promulgated to after it was amended and to the present, the underlying purpose of the Rule—to protect prospective franchisees by providing them with the material information necessary for them to make an informed investment decision—has never changed. As previously noted above, the material information conveyed to a prospective franchisee must be done so "accurately, clearly, concisely, and legibly in plain English."[25]

Thus, franchisors combining multiple franchise brands in one FDD must always ensure that the material information being disclosed about the brands is accurate, concise and easily understandable, not only for prospective franchisees, but also for state examiners. If a state examiner finds the combination of multiple franchise brands in a single FDD to be too confusing, then the examiner is likely to require that the franchisor(s) amend the FDD to clarify any confusing disclosures or offer the multiple franchise brands in separate FDDs.

2. The Similarities and Differences Between the Franchise Brands

One major factor that franchisors must heavily weigh when deciding on whether to combine multiple franchise brands in one FDD is the number of similarities and differences between the brands. The more similarities that each brand shares with another (e.g., common ownership, similarity of industries, parallel approach to key business terms, similar fee structure, etc.), the more likely that franchisors will find it easier to integrate the disclosure of the material information concerning each brand into a single FDD.

However, to the extent that the brands drastically differ from one another, whether by business model, industry, the approach to key business terms, and the like, franchisors will find merging the brands into a single FDD to be a challenging (and possibly

[25] 16 C.F.R. § 436.1(d).

insurmountable) undertaking.

3. Are the Brands Complementary?

Another factor that franchisors take into consideration when deciding whether to prepare a multi-brand FDD is the cohesiveness of the brands. Do the franchise brands complement one another to the extent that the prospective franchisee (and the state examiner) can easily understand why the franchisor chose to combine the multiple franchise brands in a single FDD? What value or benefit does combining complementary brands (or co-branding) in one FDD provide to the franchisor's target customer base? For example, SafeSplash Brands LLC offers prospective franchisees the opportunity to operate swim schools under the SafeSplash and Swimastic brands and an add-on option for an advanced swimming instruction franchise under the SwimLabs name.[26] Combining these brands into one FDD makes logical sense, since prospective franchisees interested in that market would want to have the ability to also offer advanced swimming instruction to those students who wish to continue honing the swimming skills that they learned in the more basic swim lessons. The same logical thought process is interwoven in Marriott International, Inc.'s FDD, which offers prospective franchisees the option of purchasing a Marriott Hotel, Marriott Resort, Marriott Suites Hotel, JW Marriott Hotel, Marriott Marquis, or Marriott Hotel & Conference Center franchise. [27] Prospective franchisees interested in joining the Marriott franchise family are given (in one FDD) an array of Marriott hotel brands to choose from, thereby circumventing the need to review separate FDDs for each hotel brand. In this case, the FDD becomes a "one stop shop".

However, franchisors that offer franchises across industries may not be able to seamlessly combine multiple brands into a single FDD. For instance, more and more private equity firms are entering into the franchise arena by acquiring franchisors. These firms tend not to restrict their acquisitions to one industry. As such, it would be illogical for a private equity firm that owns franchise brands in the restaurant market and the financial services sector to combine those brands into one FDD. These industries have substantially different business models, are governed by vastly distinctive bodies of law and in no obvious way complement each other. To attempt to merge brands in these two starkly different industries into a single FDD would result in a cumbersome, convoluted FDD that would likely be rejected by state examiners and be incomprehensible to prospective franchisees.

4. Ease of Co-Managing Brands

A factor that may tilt a franchisor's decision on whether to combine its multiple franchise brands into one FDD or offer them in separate FDDs is the ease (or difficulty)

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[26] A copy of the 2021 Franchise Disclosure Document for this franchise system was downloaded from the DFPI Self Portal for the California Department of Financial Protection & Innovation located which can be accessed at https://docqnet.dfpi.ca.gov/search.

[27] A copy of the 2021 Franchise Disclosure Document for this multiple brand offering was downloaded from the Online Franchise Filing Portal for the Wisconsin Department of Financial Institutions located which can be accessed at https://www.wdfi.org/apps/FranchiseSearch/MainSearch.aspx.

of co-managing the brands being offered. This may be more of a determinative factor for franchisors that co-brand unaffiliated third-party brands. When two franchisors decide to team up to co-brand their franchise systems, they must overcome the challenge of how to co-manage their brands. This is especially true for franchisors that have two distinct management teams overseeing the operation of each brand. Can these two management teams come to a consensus on how to uniformly address the range of issues that may arise when co-branding two unaffiliated franchise brands?

5. Customer Demand

One of the first factors that franchisors need to consider when deciding whether to combine multiple brands in one FDD, specifically in the context of co-branding, is whether there is a market demand for the combination of the two brands. Will these two brands attract sufficient customer demand to outweigh the additional costs and complexities that marketing multiple brands simultaneously will present? This cost analysis is essential as it will help franchisors assess how the pair of these brands will affect their bottom line.

6. Can Resources be Shared

An upside that would lean franchisors towards choosing to combine their multiple brands in one FDD is the ability to share resources across the multiple franchise brands. Whether it is the ability to (i) cross-market the multiple brands, (ii) utilize one centralized operational infrastructure, (iii) pool overhead expenses, (iv) share external professional expenses (like, accounting or legal fees) or (v) leverage supply chain negotiations, the benefit of these efficiencies to franchisors makes combining multiple brands in a single FDD that much more appealing.

7. Preparation of the FDD

Franchisors that elect to co-brand, particularly in the case where the brands are unaffiliated, must determine who will take on the responsibility of preparing the FDD. There are two options here. Each franchisor can prepare their own separate FDD, which offers prospective franchisees the opportunity to operate both brands from the same location. As previously noted, Dunkin' and Baskin Robbins offer prospective franchisees the chance to operate both brands from the same location. Each brand has its own FDD that offers prospective franchisees the opportunity to solely operate a Dunkin' or Baskin Robbins franchise or to jointly operate the two brands from the same location. The second option would be to have one franchisor prepare the FDD and offer the co-branding option. The Veronica's Insurance FDD affords prospective franchisees the opportunity to exclusively operate a Veronica's Insurance franchise or to co-brand their franchise with a Toro Taxes franchise. The Toro Taxes FDD does not include a co-branding option with Veronica's Insurance.

C. Advantages and Disadvantages for Combining Multiple Brands in One FDD

Like most companies trying to figure out the most efficient and effective way to market their products and services to their target customer base, multi-brand franchisors must weigh the advantages and disadvantages of combining multiple brands in one FDD. Below are some of the advantages and disadvantages for using a multi-brand FDD.

As previously noted, having a "one stop shop" document that franchisors can use to promote their multiple offerings is an attractive and powerful marketing tool. By combining multiple brands in one FDD, franchisors can market multiple franchise brands across diverse prospect bases. Instead of having the option of only purchasing one franchise, prospective franchisees will have the convenience and accessibility to consider an array of brands and decide which brand is best for them. As described in more detail above, franchisors with multiple brands may, if the business models are compatible, share resources creating a centralized administrative, operational, sales and marketing scheme across brands. One of the most compelling advantages to offering multiple brands in one FDD, particularly in the case when franchisors are offering brands to be sold for the same location, is the ability to expeditiously expand two brands with one sale, thereby increasing revenues under two franchise brands simultaneously.

While the advantages to combining multiple brands in one FDD are numerous, there are serious disadvantages that franchisors must consider. The first and most important is whether combining multiple brands in the same FDD will result in a document that is incomprehensible and confusing to prospective franchisees because the disclosures cannot be seamlessly integrated. If a state examiner determines that a multi-brand FDD is too confusing, then franchisors will likely find themselves having to amend their FDD to the examiner's satisfaction resulting in delays in registration. And, if those amendments cannot pass the examiner's scrutiny, then the franchisor may have to abandon the registration process and register the brands separately. Should this happen, the franchisor will have to incur additional filing fees as well as additional legal and accounting expenses associated with preparing separate FDDs for each brand. Another disadvantage that franchisors must consider (and which is discussed further below) are the potential disclosure issues that franchisors may encounter when combining multiple brands in a single FDD.

D. Disclosure Issues with Combining Multiple Brands in One FDD

While a multi-brand FDD may seem like a more efficient FDD model, franchisors desiring to combine multiple brands in one FDD may find it more difficult drafting certain disclosure items, especially if there are significant disparities between the brands' business models. Below are some of the disclosure items that franchisors may have to give special consideration to when drafting a multi-brand FDD.

1. Item 1

Item 1 requires franchisors to disclose background information on the franchisor and any parents, predecessors, and affiliates that offer franchises in any line of business or provide products or services to franchisees of the franchisor.[28] While such disclosure is unlikely to present a problem for franchisors that offer multiple brands under common ownership, franchisors that team up to co-brand their franchise systems will have to disclose the details of their respective corporate ownership structure. For large sophisticated multi-brand franchisors (or even private equity-owned franchisors), disclosing the intricacies of their corporate structure, in conjunction with the corporate structure of another franchisor, may prove to be a challenging undertaking.

2. Item 5

Item 5 requires disclosure of all initial fees that franchisees must pay to franchisors or the franchisor's affiliates before the franchisee opens its franchised business.[29] With multiple offerings, franchisors need to make clear which initial fees apply to which brand(s). While the initial franchise fee may be the same, the cost for opening inventory and equipment that franchisees are required to purchase from the franchisor may differ across the brands. For example, a franchisor offering multiple hotel brands may require that franchisees purchase and/or more higher-end products for their luxury hotel brand as compared to a franchisee that is opening one of the franchisor's more lower-end hotel brands.

3. Item 6

In Item 6, franchisors are required to disclose the other fees that franchisees must pay to the franchisor in connection with the operation of their franchised businesses.[30] When offering multiple brands in one FDD, franchisors that have differing fee structures may need to prepare separate Item 6 tables to clearly inform prospective franchisees of the fees that are applicable to each brand. To the extent that the fee structures are basically similar, then the franchisor may use a single table that includes separate line items for any brand-specific differences between the brands. For example, if the brands have a different marketing fee (but all the other fees are the same), then the franchisor can include separate line items for the marketing fee for Brand A and the marketing fee for Brand B. If the fee differences are not as simple as just described, then franchisors may be tempted to use footnotes to disclose differences between brands, but the use of footnotes in that manner is not sufficient disclosure. Footnotes should be used to provide prospective franchisees with any additional information about the fee or the requirements associated with that payment of that fee but it should not be used in place of the franchisor's obligation to disclose the brand-specific fees in tabular formation as required by the FTC Franchise Rule.

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[28] 16 C.F.R.§ 436.5(a).
[29] 16 C.F.R.§ 436.5(e).
[30] 16 C.F.R.§ 436.5(f).

Another issue that may arise with the preparation of Item 6, particularly with respect to co-branding, is how the fees are payable under the co-branding concept. Are franchisees required to pay the fees disclosed in the Item 6 tables for each brand -- which means that the franchisee may be paying certain fees duplicatively? To avoid any confusion, it is advisable that franchisors that offer a co-branding option prepare a second Item 6 table that clearly delineates which fees are payable under the co-branding structure.

4. Item 7

Item 7 requires that franchisors disclose the estimated initial investment that a franchisee can expect to make in establishing its franchised business.[31] Franchisors offering multiple brands under one FDD should prepare separate Item 7 tables for each brand being offered. Additionally, if prospective franchisees will have the opportunity to co-brand from the same location, then Item 7 should also include a separate table setting forth the estimated initial investment to jointly operate both brands. Merely disclosing the Item 7 initial estimates for Brand A and Brand B is insufficient. Offering a co-branded location is appealing because it allows a single franchisee to combine overhead and administrative costs, like renting only one location and potentially sharing equipment. If that is the case, then it is important (and necessary) for franchisors to include a separate co-branding Item 7 table that will account for such shared costs between the two offerings. Therefore, franchisors must separately disclose the costs and other requirements of the co-branded offering as necessary throughout the FDD.

5. Item 8

In Item 8, franchisors must disclose the franchisee's obligations to purchase or lease goods, services, supplies, fixtures, equipment, inventory, computer hardware and software, real estate, or comparable items related to establishing or operating the franchised business either from the franchisor, its designee, or suppliers approved by the franchisor, or under the franchisor's specifications.[32] When offering multiple brands under one FDD, the sources of supply may vastly differ especially if the brands' business models are dissimilar. In this case, it is advisable for franchisors to explain (in separate sections) which sources of supply franchisees must use for each brand. In the case of franchisors that offer a co-branding option, Item 8 should explain what happens if a franchisee's obligations to purchase or lease goods, services, supplies, fixtures, equipment, inventory, computer hardware and software, real estate, or comparable items for one brand are inconsistent or conflict with the purchase obligations for the other brand.

6. Item 12

Franchisors must disclose in Item 12 the territorial restrictions which franchisees must comply with, as well as address any competition from competitive affiliate brands

[31] 16 C.F.R.§ 436.5(g).
[32] 16 C.F.R.§ 436.5(h).

(also referred to as "intra-brand competition").[33] Specifically, franchisors are obligated to disclose if it or an affiliate operates, franchises, or has plans to operate or franchise a business under a different trademark and that business sells or will sell goods or services similar to those the franchisee will offer; and more importantly, how the franchisor will resolve conflicts between the franchisor and franchisees and between the franchisees of each system regarding territory, customers, and franchisor support.[34]

This aspect of the disclosure places special emphasis on the policies, if any, that franchisors should have in place to limit intra-brand competition, especially the concern that an affiliate brand may encroach upon the territory of another affiliate brand. As such, franchisors with multiple brands that target a similar customer base need to assess whether it is advisable to adopt an internal policy restricting intra-brand competition or whether such a policy is unnecessary because the brands each serve a distinctive customer base that is separate and distinguishable from the other.

To better assess whether an internal policy is necessary, franchisors should ask themselves: what customer demographic does each brand target? Are they distinguishable? Do the brands compete against each other or do they complement each other? Will the existence of two affiliate brands in the same market dilute the sales of each brand? Is there a need to implement territorial restrictions to avoid not only competition from franchisees of the same brand but also competition from franchisees of affiliate brands? Should the franchisor grant protected territories to limit the possibility of intra-brand encroachment? The answers to these questions will dictate the franchisor's need to adopt and implement an internal intra-brand competition policy. As with multiple formats, franchisors should clearly disclose the exclusivity requirements for each brand separately if they are not identical.

7. Item 19

In Item 19, franchisors who elect to make a financial performance representation must have a reasonable basis and written substantiation for the representation at the time the representation is made.[35] As such, franchisors must assess whether they will make financial performance representations for each brand. And if not, then it must consider whether it is permissible to have a financial performance representation for one brand but not the other(s). The FTC Franchise Rule requires that franchisors state whether the representation relates to the performance of all of the franchise system's existing outlets or only to a subset of outlets that share a particular set of characteristics (for example, geographic location, type of location (such as free standing vs. shopping mall), 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). Therefore, it is possible that a franchisor may rely on such permitted "subset" disclosure to exclude the financial performance of an affiliate brand, but special care

[33] 16 C.F.R.§ 436.5(l).
[34] 16 C.F.R.§ 436.5(l)(6)(iii).
[35] 16 C.F.R.§ 436.5(l).

should be taken to explain that the representation only applies to one brand and the rationale for excluding the other brand. With that said, when a franchisor provides a financial performance representation for a subset, the franchisor must remember that the representation must be reasonable, non-misleading and accurate.[36] If a franchisor offers a financial performance representation for one brand (Brand A) and not the other (Brand B), that alone may be a good indication that the brands should be offered in separate FDDs. More importantly, the franchisor runs the risk that a prospective franchisee interested in purchasing a franchise from Brand A will mistake the representation in Item 19 as representative of the financial performance of franchisees of Brand B. The mere possibility that such confusion can result may lead an examiner to conclude that the inclusion of a financial performance representation for one brand and not another is misleading.

If the franchisor is making a financial performance representation for each brand, then it is advisable to separate each financial performance representation so that the prospective franchisee can clearly understand which financial performance representation applies to which brand.

8. Item 20

Item 20 requires that franchisors provide a summary of their franchised and company-owned outlets for each of the franchisor's last three fiscal years. For the purposes of this disclosure, "outlet" includes outlets of a type substantially similar to that offered to the prospective franchisee.[37]

Multi-brand franchisors using a single FDD must evaluate whether the brands being offered under the FDD are substantially similar and, even if so, whether it makes sense to include the outlets of all brands in one comprehensive table. In the case of a multi-brand FDD, it is advisable to create separate Item 20 tables for each brand so that the prospective franchisee has a clear view of the landscape of the franchisor's outlets. By using this rule of thumb, franchisors avoid causing any confusion as to which specific brand has what number of outlets and the number of outlets that opened, were terminated, were reacquired by the franchisor or otherwise ceased operating for each of the franchisor's last three fiscal years.

E. Contractual Issues with Combining Multiple Brands in One FDD

Besides the disclosure challenges that multi-brand franchisors must consider when deciding whether to offer multiple brands in one FDD, multi-brand franchisors must also address the contractual issues that this complex franchising offering presents. When it comes to the franchise agreement, multi-brand franchisors must ask themselves:

1. Will one franchise agreement be used to cover all brands being offered under the FDD? Can a single franchise agreement sufficiently address

[36] Amended Rule Statement of Basis and Purpose, 72 Fed. Reg. 15444, 15497-15501 (March 30, 2007).
[37] 16 C.F.R.§ 436.5(l).

the multitude of provisions that set forth the key rights and obligations under each brand? To use a single franchise agreement in a multi-brand franchise offering, the business models for each brand would need to share numerous significant similarities in order to accurately memorialize the rights and obligations of the franchisor and franchisee.

2. If a single franchise agreement cannot adequately address the differences between the multiple brands being offered, then multi-brand franchisors must consider if they can easily address those differences through the use of an addendum or addenda? However, the number of addenda should be kept to a minimum. The more addenda needed to supplement the franchise agreement signifies that the differences between the brands may be more significant and that combining the franchisor's multiple brands in a single FDD is not a suitable option. For example, if an addendum is being used to detail simple differences between the business models of each brand (such as, the initial fee, royalties, marketing fees, the franchise term and renewal rights), then combining multiple brands in a single FDD may be a viable option. But if an addendum is needed to address the simple differences as well as more complex issues like, noncompetition, site selection criteria, defaults and termination, confidentiality, and post-termination obligations, then this illustrates the possible need for separate franchise agreements for each brand, which means the necessity for separate FDDs for each brand.

   For multi-brand franchisors offering a co-branding option, the question is whether to use (i) two separate franchise agreements for each brand, (ii) a franchise agreement for the dominant brand with an "add-on" rider for the second brand, or (iii) a single franchise agreement that combines the two brands. SafeSplash uses a single franchise agreement for its three swim lesson franchise concepts and uses an exhibit thereto to specify which franchise concept that the franchisee will operate. In Dunkin's FDD, Dunkin' includes two different franchise agreements -- one for prospective franchisees who wish to solely operate a Dunkin' franchise and a "combo" franchise agreement to those prospective franchisees who desire to operate a Dunkin' and Baskin' Robbins franchise in the same location. It is more common to see multi-brand franchisors with a co-branding offering to use a combination franchise agreement, particularly, when both brands will be operated from a single location.

   Multi-brand franchisors that may wish to use separate franchise agreements in connection with their co-branding offering have practical challenges that they must address. For instance, how are any inconsistent provisions in the separate agreements to be reconciled?

What happens if the terms of one brand or more favorable to the franchisee? For example, if the noncompetition provisions for each brand have a different time restriction and/or geographical scope, then what terms govern?

3. A unique question that is germane to multi-brand franchisors that offer a co-branding option is: Who will be the franchisor? When the brands are owned by different business entities (whether or not those entities are affiliated), the franchisor must determine if both franchisor entities will be parties to the agreement as the franchisor or will the franchisor entities form a separate entity to serve as the franchisor. It is common in co-branding offerings to have both franchisor entities be parties to the franchise agreement.

This paper provides only a representative list of the questions that multi-brand franchisors should consider when determining if they can combine multiple brands in a single FDD. The authors do not answer the questions posed above, but instead list these questions to provide multi-brand franchisors with some food for thought.

IV. CONCLUSION

The growing demand by prospective franchisees for franchise offerings that offer multiple brands and/or multiple franchise formats, coupled with the changes across industries and the efficiency of leveraging resources across businesses have drawn more and more franchisors to entertain the idea of combining their multiple formats and/or multiple brands in a single FDD. However, combining multiple franchise formats and/or multiple brands in a single FDD adds layers of complexity that, unless properly addressed, can lead to a convoluted FDD that is so confusing as to render it ineffective for the purpose the legislatures and the FTC intended when they created the FTC Franchise Rule and state franchise registration/disclosure laws over 40 years ago.

Remember, the legislative intent of the FTC Franchise Rule is for franchisors to provide prospective franchisees with all of the material information necessary to allow the prospective franchisee to make an informed investment decision. Therefore, franchisors desiring to combine their multiple franchise formats or brands in a single FDD must meticulously peel each layer of complexity and sufficiently address the practical, disclosure and contractual issues that each layer presents. The end product must be an FDD (written in plain English) that furnishes prospective franchisees with full and complete material information about the franchise opportunity being offered. If a franchisor can peel through each layer, then the byproduct will be having a single FDD that not only plainly and completely conveys the material information necessary for a prospective franchisee to make an informed investment decision, but also conveniently markets the franchisor's multiple brands and/or franchise formats in one offering. If, however, the byproduct would be a convoluted, confusing FDD with cumbersome disclosures, then the franchisor should prepare a separate FDD for each offering.