

IFA 2018

CONVENTION

TOGETHER

WE

ARE

FRANCHISING

IFA 2018
CONVENTION

TOGETHER

WE

ARE

FRANCHISING

**Best Practices for Effective Financial Performance
Representations Under New Item 19 Standards**

IFA 2018

CONVENTION

TOGETHER

WE

ARE

FRANCHISING

Jania Bailey

FranNet Franchising, LLC
CFE, CEO

Leonard MacPhee

Gardere Wynne Sewell LLP
Partner, Co-Chair Global Supply
Network Industry Team

Ralph Yarusso

Grease Monkey
International, LLC
CFE, COO

OBJECTIVES FOR TODAY'S SESSION:

- **Identify changes under the new North American Securities Administrators Association (“NASAA”) commentary**
- **Identify some best practices and strategies for effective and compliant FPRs in light of new NASAA commentary**
- **Identify some risks and pitfalls and how to avoid them**

Background/context of FTC Rule, Item 19, New Commentary

What is a Financial Performance Representation, or FPR:

A statement (express or by implication) setting forth a specific level or range of actual or potential sales, income, gross profit, or net profit to a prospective franchisee.

Background/context of FTC Rule, Item 19, New Commentary

If a franchisor elects not to make an FPR in Item 19, it may not provide a prospective franchisee with any financial performance information.

If a franchisor elects to make an FPR in Item 19, it may not make other FPRs, except:

- 1. With respect to actual operating results of a particular outlet**
- 2. Supplemental FPR about a particular location or variation (i.e., a particular market (Denver) or type of location (strip malls)).**

Background/context of FTC Rule, Item 19, New Commentary

Rules and Guidance

- **The FTC Franchise Rule**
- **Franchise Rule Compliance Guide**
- **FAQs**
- **Statement of Basis and Purpose**
- **NASAA Franchise Rule and Compliance Guidelines
and new FPR Commentary**

Background/context of FTC Rule, Item 19, New Commentary

Reasonable basis and substantiation (16 C.F.R. S 436.5(s))

Basis for historical:

Group of outlets measured

Time period measured

The number of outlets measured

The number of outlets reporting

The number and percentage of outlets that achieved the stated level of performance

Any distinguishing characteristics of the outlets measured

From Franchise Rule Compliance Guide

Background/context of FTC Rule, Item 19, New Commentary

**Substantiation—must be available and
must include statement that available**

Background/context of FTC Rule, Item 19, New Commentary

- **In assessing risks of non-compliant FPRs**
 - **FTC enforcement**
 - **State examiners**
 - **State enforcement**
 - **Private litigation**
 - **Compliance is not necessarily “a safe harbor”**

Background/context of FTC Rule, Item 19, New Commentary

Why new commentary—purpose and intent

A need for additional guidance, primarily with respect to what is a “reasonable basis”

Address technically-compliant but arguably misleading FPRs

Impact on franchisors and did new commentary achieve the desired goals?

How many franchisors did an item 19 FPR last year?

How many of those franchisors are not providing an FPR this year?

How many are changing the content of what providing?

What to include: Gross vs. Net

New Commentary:

- Still permitted to provide gross-only, if choose
- Must define specifically and describe the terms in the FDD [Section 19.4]
- What about different definitions in other sections of the FDD (e.g., gross sales in calculating royalty)?
- **Martinez v. Stratus Franchising, LLC, 2016 WL 3402546 (Ind. Ct. App. June 21, 2016)**

What to include: Gross vs. Net

Company-owned and franchised outlets

- If franchisor has operational franchisees, it cannot disclose gross sales of company-owned outlets without also disclosing data from franchised outlets
- If franchisor has no operational franchisees, it may disclose gross sales, as long as reasonable basis
- Franchisor may disclose net profit or gross profit of only company-owned outlets, even if it has operational franchisees

What to include: Gross vs. Net

Company-owned and franchised outlets

If it does:

Must include gross sales data from operational franchise outlets, actual costs incurred by company-owned outlets, and supplemental disclosures or adjustments to reflect differences between company-owned and franchised (e.g., royalties/fees and any differences in costs of goods)

What to include: Gross vs. Net

Costs only

Providing costs alone is not FPR*, but franchisor making gross sales FPR alone may not separately provide cost data outside FDD if prospect could use to calculate net profits

***some states (Illinois, Maryland, New York) prohibit providing cost. See also Minnesota regarding any estimate like pro forma or break even statements for a prospective franchisee included in FDD**

What to include: Gross vs. Net

Merging data of company-owned and franchised outlets

Generally cannot unless disclose both independently or if there are so few franchised outlets (less than 10 franchisees) the identity of the franchisee is discernible, and the gross sales are not materially different

EXAMPLE: Gross vs. Net / Company vs. Franchised

A. **Table 1: Annual Unit Volume of Select Franchised [REDACTED]**

Data for Franchised [REDACTED]⁽¹⁾ for 52-Week Period Ending December 25, 2016	
AAUV ⁽²⁾	\$3,879,134
Franchised [REDACTED] which attained or surpassed AAUV	47.5%
Franchised [REDACTED] below AAUV	52.5%
Median Annual Unit Volume	\$3,763,042
Highest Franchised [REDACTED] Annual Unit Volume	\$7,794,695
Lowest Franchised [REDACTED] Annual Unit Volume	\$1,955,976

(1) As of December 25, 2016, there were 48 franchised [REDACTED] operating in the US, of which 40 [REDACTED] were open and had been operating for at least the prior 52 weeks during fiscal year 2016. The 40 franchised [REDACTED] included in the data are located in the following states: Alabama, Arkansas, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee and Texas. The franchised [REDACTED] that were open and operating for less than 52 weeks are located in California, Florida, Michigan, Missouri, North Carolina, Texas and Washington.

(2) AAUV, median annual unit volume and high/low annual unit volumes include the total of all food sales and all beverage sales, including liquor, wine and beer sales and sales of promotional merchandise. Sales as shown in this Table 1 do not equate to "Gross Sales" as defined in the Franchise Agreement because the "Gross Sales" definitions provides for certain exclusions, including (as examples) customer refunds and complimentary products and services provided to customers in connection with resolving customer satisfaction issues, taxes and employee meal discounts.

EXAMPLE: Gross vs. Net / Company vs. Franchised

B. **Table 2: Annual Unit Volume of Select Company-Owned Restaurants**

Data for Company-Owned [REDACTED] ⁽¹⁾ for 52-Week Period Ending December 25, 2016	
AAUV ⁽²⁾	\$3,421,617
Company-owned [REDACTED] which attained or surpassed AAUV	37%
Company-owned [REDACTED] below AAUV	63%
Median Annual Unit Volume	\$2,959,059
Highest Company-owned [REDACTED] Annual Unit Volume	\$7,779,298 ⁽³⁾
Lowest Company-owned [REDACTED] Annual Unit Volume	\$1,944,689

EXAMPLE: Gross vs. Net / Company vs. Franchised

Table 3: Selected Expenses and Operating Profit for Select Company-Owned Restaurants(4)

Data for Company-Owned ██████████ for 52-Week Period Ending December 25, 2016	
Cost of Goods Sold ⁽⁵⁾	\$897,486
Food Cost:	30.4%
Bar Cost:	21.8%
Total Cost of Goods Sold:	26.1%
Gross Profit ⁽⁶⁾	\$2,524,131 73.9%
Rent/Cam/Tax ⁽⁷⁾	\$269,519 7.9%
Labor Cost ⁽⁸⁾	\$1,043,074
Hourly Staff:	16.7%
Manager:	8.7%
Payroll Taxes/Benefits:	5.0%
Total Labor Costs:	30.5%
Revenue Mix	
Food/Merchandise:	51.7%
Bar:	48.3%

EXAMPLE: Gross vs. Net / Company vs. Franchised

AAUV, costs and other results will vary between company-owned [REDACTED] and franchised [REDACTED] for a variety of reasons including the impact of other expenses that may not be reflected in Table 3 but will nevertheless apply to both company-owned and franchised [REDACTED]. These include terms of agreements with third party providers of credit card/gift card processing, utilities and insurance arrangements which may vary depending upon various factors, including credit history, risk history and ability to maximize economies of scale in acquiring services and coverage for multiple [REDACTED].

In addition, results may vary between company-owned [REDACTED] and franchised [REDACTED] depending upon prevailing economic or market area conditions, demographics, geographic location, interest rates, your capitalization level, the amount and terms of any financing that you may secure, the property values and lease rates, your business and management skills, staff strengths and weaknesses, the cost and effectiveness of your marketing activities, and weather/seasonal factors.

Other than the preceding financial performance representation, we do not make any financial performance representations. We also do not authorize our employees or representatives to make any such representations either orally or in writing. If you are purchasing an existing [REDACTED], however, we may provide you with the actual records of that Restaurant. If you receive any other financial performance information or projections for your future income, you should report it to our management by contacting [REDACTED] at [REDACTED], the Federal Trade Commission and the appropriate state regulatory agencies.

Dissette v. Pie Five Pizza Co, Inc.

- **Plaintiffs alleged**

- **Misleading profitability:** Use of misleading Company-owned outlet data by (1) disclosing select subsets of Company-owned outlets, and (2) not including any data on Operating franchise outlets to falsely represent profitability.
- **Failing to define and describe sources of data:** Failure to identify sources of data, including neglecting to differentiate material financial and operational differences between Operational franchise outlets and Company-owned outlets, pointing to the royalty fees paid by franchisees as a key difference the franchisor should have disclosed.

What to include: Averages and Medians

Must include both

Required to include both high and low performers in each set when doing average and media for gross sales

EXAMPLE: Averages and Medians

Set forth below is information showing historic Gross Margins of certain [REDACTED] during Our fiscal years 2016, 2015, and 2014.

A new franchisee's individual financial results may differ from the results stated below.

Table 1 – Monthly Averages for Units Opened during FY 2014, 2015 or 2016

Months of Operation	Sales	Gross Margin	Gross Receipts	Franchisee's Portion of GM & GR	Hours	Number of Units	Units Equaling or Exceeding Average GM & GR	
							Number	Percent
1	\$9,800.53	\$1,974.16	\$0.00	\$1,220.14	597.15	128	27	21.09%
2	\$28,103.07	\$5,623.51	\$144.44	\$3,551.36	1,664.67	126	34	26.98%
3	\$43,735.39	\$8,512.20	\$375.90	\$5,506.11	2,621.95	122	44	36.07%
4	\$59,752.13	\$11,413.56	\$777.50	\$7,610.15	3,525.20	119	43	36.13%
5	\$79,351.56	\$15,017.71	\$1,565.32	\$10,523.16	4,672.42	117	42	35.90%
6	\$88,427.04	\$16,827.65	\$1,437.93	\$11,476.31	5,250.54	115	48	41.74%
7	\$97,095.76	\$18,305.30	\$1,668.50	\$12,492.99	5,707.57	114	43	37.72%
8	\$107,829.44	\$20,648.62	\$1,395.88	\$13,739.17	6,347.25	112	46	41.07%
9	\$109,033.98	\$20,823.65	\$1,804.40	\$14,191.73	6,368.56	109	44	40.37%
10	\$125,781.87	\$23,958.11	\$1,998.31	\$16,106.42	7,315.08	105	40	38.10%
11	\$129,111.92	\$24,869.00	\$1,876.14	\$16,650.72	7,517.29	102	40	39.22%
12	\$138,537.36	\$26,753.93	\$1,362.41	\$17,500.52	8,201.15	100	42	42.00%
Total Months 1 - 12	\$1,016,560.06	\$194,727.40	\$14,406.75	\$130,568.78	59,788.82			
13	\$148,241.74	\$28,402.79	\$1,991.06	\$19,068.50	8,625.44	99	39	39.39%
14	\$154,578.97	\$30,173.59	\$2,272.79	\$20,375.21	8,948.94	96	41	42.71%
15	\$158,719.43	\$30,468.29	\$2,529.87	\$20,784.79	9,084.96	94	42	44.68%
16	\$172,047.84	\$32,683.68	\$2,527.05	\$22,074.95	9,768.05	93	41	44.09%
17	\$173,746.25	\$32,683.70	\$1,902.66	\$21,502.59	9,820.66	90	34	37.78%
18	\$171,644.37	\$32,195.23	\$2,015.04	\$21,194.72	9,741.76	86	36	41.86%
19	\$190,700.44	\$35,159.93	\$2,734.09	\$23,604.07	10,570.14	83	32	38.55%
20	\$186,284.04	\$35,333.58	\$2,157.69	\$23,083.36	10,593.70	75	28	37.33%
21	\$190,139.27	\$35,242.33	\$2,848.72	\$23,743.94	10,753.29	73	29	39.73%
22	\$193,755.80	\$36,586.23	\$1,338.75	\$23,165.29	11,052.53	67	27	40.30%
23	\$179,713.35	\$33,676.09	\$1,997.86	\$22,029.29	10,180.83	64	24	37.50%
24	\$173,912.22	\$33,865.19	\$1,780.49	\$21,947.12	9,929.98	60	20	33.33%
Total Months 13 - 24	\$2,093,483.71	\$396,470.64	\$26,096.08	\$262,573.83	119,070.29			
Total Months 1 - 24	\$3,110,043.77	\$591,198.04	\$40,502.82	\$393,142.61	178,859.11			

EXAMPLE: Averages and Medians

FINANCIAL PERFORMANCE REPRESENTATION WORKSHEET - 2016 (unaudited)
Mature Franchise [REDACTED] (open over 18 months)

	1		2		3		4		5	
	Dollars	%	Dollars	%	Dollars	%	Dollars	%	Dollars	%
Gross Revenue	1,336,161		1,566,908		1,014,340		2,054,248		1,037,040	
Payroll	556,030	42%	476,987	30%	407,271	40%	651,923	32%	385,696	37%
Occupancy	168,312	13%	212,700	14%	128,296	13%	244,775	12%	205,222	20%
Misc Items	385,444	29%	351,265	22%	293,282	29%	588,815	29%	287,105	28%
Total Expenses	1,109,786		1,040,952		828,849		1,485,513		878,023	
EBITDA	226,375	17%	525,956	34%	185,491	18%	568,735	28%	159,017	15%
	6		7		8		9		10	
	Dollars	%	Dollars	%	Dollars	%	Dollars	%	Dollars	%
Gross Revenue	1,631,956		2,211,494		1,070,734		1,623,729		1,249,349	
Payroll	423,403	26%	661,969	30%	416,663	39%	638,421	39%	455,683	36%
Occupancy	209,472	13%	196,420	9%	155,500	15%	226,593	14%	141,231	11%
Misc Items	340,690	21%	519,206	23%	279,727	26%	383,165	24%	330,239	26%
Total Expenses	973,565		1,377,595		851,890		1,248,179		927,153	
EBITDA	658,391	40%	833,899	38%	218,844	20%	375,550	23%	322,196	26%

EXAMPLE: Averages and Medians

██████████ AVERAGE AND MEDIAN GROSS REVENUES BY SERVICE BAY FOR FISCAL YEAR END DECEMBER 31, 2016 FOR ██████████ OPENED FOR MORE THAN 2 YEARS THAT HAVE A 3 STAR OR HIGHER RATING

Number of Bays	Number of ██████████ Centers	Average Gross Revenues	# of ██████████ Centers that Met or Exceeded the Average	Median Gross Revenues	Highest Gross Revenues	Lowest Gross Revenues
5 Bays	149	\$654,599	62 (42%)	\$604,895	\$1,695,130	\$251,037
6 Bays	222	\$698,345	93 (42%)	\$631,357	\$2,526,874	\$252,741
7 Bays	59	\$658,772	19 (32%)	\$565,808	\$1,487,635	\$235,004
8 Bays	51	\$783,783	20 (39%)	\$681,054	\$2,193,277	\$317,001
>8 Bays	7	\$901,148	4 (57%)	\$1,111,997	\$1,455,200	\$218,525
Total	488	\$692,042	193 (40%)	\$623,501	\$2,526,874	\$218,525

The 2016 Gross Revenues Statement included above omits all ██████████ with less than 5 bays because we recommend that all new ██████████ have 5 bays or more. Currently, you are required to open a ██████████ that has a minimum of 4 service bays. We still have locations in the system that only have 3 service bays; however these are franchised locations that were developed before ██████████ changed the required minimum number of service bays for a ██████████.

EXAMPLE: Averages and Medians

**AVERAGE AND MEDIAN EXPENSE INFORMATION
FOR ██████████
REPORTING FOR FISCAL YEAR 2016**

	EBITDA Quartile ⁽¹⁾			
	4th	3 rd	2nd	Top
No. of ██████████	21	21	21	22
Sales (Average)	\$495,122	\$781,034	\$779,234	\$1,090,645
Sales (Median)	\$432,451	\$674,928	\$764,202	\$1,034,377
Sales (High)	\$1,150,786	\$1,163,364	\$1,085,808	\$1,691,028
Sales (Low)	\$186,773	\$502,566	\$425,480	\$701,009
COGS %	28%	28%	26%	25%
Direct Technician Labor %	22%	21%	16%	15%
Other ██████████ Variables ⁽²⁾	1%	1%	1%	2%
Fixed Expenses % ⁽³⁾	26%	19%	18%	16%
Royalty Fees	5.2%	5.2%	5.2%	5.2%
MAF Contributions	7.6%	7.6%	7.6%	7.6%
EBITDA % ⁽¹⁾ (Average)	10%	18%	26%	31%
EBITDA % ⁽¹⁾ (Median)	10%	17%	25%	31%
EBITDA % ⁽¹⁾ (High)	28%	26%	42%	40%
EBITDA % ⁽¹⁾ (Low)	-14%	11%	17%	21%

	All ██████████	5	6	7	8+
No. of ██████████	85	21	40	6	5
Sales (Average)	\$790,087	\$873,312	\$747,213	\$915,076	\$818,218
Sales (Median)	\$758,078	\$802,595	\$699,742	\$995,570	\$680,965
Sales (High)	\$1,691,028	\$1,691,028	\$1,409,592	\$1,163,364	\$1,150,786
Sales (Low)	\$186,773	\$267,157	\$186,773	\$508,227	\$502,566
COGS %	27%	26%	26%	28%	25%

EXAMPLE: Averages and Medians

Direct Technician Labor %	19%	17%	19%	23%	23%
Other ██████████ ██████████ Variables %⁽²⁾	1%	1%	1%	1%	2%
Fixed Expenses %⁽³⁾	20%	18%	21%	16%	21%
Royalty Fees	5.2%	5.2%	5.2%	5.2%	5.2%
MAF Contributions	7.6%	7.6%	7.6%	7.6%	7.6%
EBITDA %⁽¹⁾ (Average)	21%	24%	20%	18%	16%
EBITDA %⁽¹⁾ (Median)	22%	24%	23%	18%	21%
EBITDA %⁽¹⁾ (High)	42%	40%	36%	27%	23%
EBITDA %⁽¹⁾ (Low)	-14%	10%	-14%	12%	-4%

What to include: Subsets

Subsets

Group of outlets that share one or more common characteristics (e.g., type of location, geographic, length of operation)

Must disclose

The characteristics

How the outlets in the subset might differ from a prospect's outlet

Nature of the universe of outlets

The number of outlets in that universe that were measured

Total number of outlets in that universe

What to include: Subsets

Examples:

By performance

Best and worst outlets to prevent cherry picking

By geography (must describe how and why that geographic subset was selected)

10 Unit rule: if less than 10 units, presumed too few to base an FPR on a subset

EXAMPLES: Subsets

CHART II

The following results of operations of [REDACTED] (stated as an average or a range) should not be considered as the actual or potential results of operations of any particular Franchise.

SALES RANGE (Note 1)	Category "A" Less than \$400,000		Category "B" \$400,000 - \$600,000		Category "C" \$600,000 - \$800,000		Category "D" \$800,000 - \$1,000,000		Category "E" Greater than \$1,000,000	
Number of Centers	13		27		33		23		22	
Vehicle Count Range (Note 2)	7 - 17		16 - 30		20 - 33		23 - 40		31 - 68	
Ticket Range (Note 3)	\$53.49 - \$91.82		\$48.81 - \$91.27		\$51.69 - \$103.82		\$61.64 - \$98.45		\$58.66 - \$95.63	
Average Vehicle Count (Note 4)	13		20		26		31		42	
Average Ticket (Note 5)	\$70.13		\$69.93		\$76.02		\$82.49		\$77.67	
Operating Statement (Note 6)										
Net Sales	\$348,724	100%	\$553,850	100%	\$710,598	100%	\$916,539	100%	\$1,209,503	100%
Cost of Goods Sold (Note 7)	\$93,766	26.9%	\$145,856	26.3%	\$182,788	25.7%	\$231,193	25.2%	\$302,785	25.0%
Salaries, Wages and Benefits (Note 8)	\$118,760	34.1%	\$188,938	34.1%	\$229,958	32.4%	\$266,396	29.1%	\$337,672	27.9%
Gross Profit	\$136,198	39.1%	\$219,056	39.6%	\$297,852	41.9%	\$418,949	45.7%	\$569,046	47.0%
Retail	\$40,676	11.7%	\$53,719	9.7%	\$68,085	9.6%	\$77,308	8.4%	\$100,993	8.3%

EXAMPLES: Subsets

SALES RANGE (Note 1)	Category "A" Less than \$400,000		Category "B" \$400,000 - \$600,000		Category "C" \$600,000 - \$800,000		Category "D" \$800,000 - \$1,000,000		Category "E" Greater than \$1,000,000	
Operating Expenses (Note 9)										
Office and G&A Expenses (Note 10)	\$41,398	11.9%	\$78,004	14.1%	\$82,459	11.6%	\$98,018	10.7%	\$110,297	9.1%
Earnings Before Interest, Taxes, Depreciation, Amortization and Occupancy Costs (Note 11)	\$54,125	15.5%	\$87,333	15.8%	\$147,308	20.7%	\$243,623	26.6%	\$357,756	29.6%

EXAMPLE: Subsets

- ***LMP Enter., LLC v. Papa Murphy's Int'l LLC***

- **Misleading methodology:** Alleges that the franchisor grouped performance of outlets into tiers made up of data having materially different characteristics, and that the tier system concealed poor performance based on the location of an outlet and/or the newness of the outlet.
- **Fraudulent use of geographical data:** Alleges that the franchisor knew that the success of a store depended on where it was located in the U.S., and thus fraudulently failed to disclose material differences in data based on geography. For example, franchisees allege that outlets in certain regions had to incur two or three times the amount in marketing costs compared to outlets in other regions, and outlets in certain regions achieved 30% less in sales compared to outlets in the rest of the system.
- **Failing to describe sources of data:** Alleges that the franchisor neglected to disclose the sources and integrity of data, particularly claiming the franchisor omitted information that would inform them that struggling outlets had failed to submit P & L statements, and were not represented in the performance data disclosed.

EXAMPLE: Subsets

RISKS TO AVOID

Dissette v. Pie Five Pizza Co, Inc.

- **Misleading geographical subsets. Failure to explain differences in geographic markets by concealing data related to the difficulty of achieving sales in new markets.**
- **Misleading high and low data. Use of tiers to group performance into categories intended to disguise weak performance.**

Avon Hardware Co. vs. Ace Hardware

- **Only data from 37% of all franchised units**
- **Court said ok, because disclosed (and Item 19's disclaimer)**

What to include

New outlet data and new brand with few outlets

What do when company is new and has only a few outlets operating for a short period of time?

- ***Hanley v. Doctors Express Franchising, LLC, 2013 WL 690521 (D. Md. Feb. 25, 2013)***

How to obtain and what is sufficient data—substantiation

Financial statements from franchisees

How obtain?

Carrot and stick

How obtain and what is sufficient data— substantiation

Issues with multi-unit owners and one P&L

Table 6 – 2016 Chairman’s Club

Rank	# of Units	Annual Sales	Annual Gross Margin	Annual Gross Receipts	Total Franchisee’s Share of GM/GR	Average Annual Hours Per Unit
Multi-Unit Franchisees						
1	11	\$46,419,087.53	\$10,117,051.94	\$1,351,959.12	\$6,721,802.74	215,770.25
2	6	\$55,162,063.94	\$9,966,782.41	\$303,026.97	\$6,191,605.12	598,296.78
3	3	\$39,484,813.86	\$8,567,816.65	\$474,985.50	\$5,986,556.50	693,729.75
4	2	\$31,752,639.45	\$6,403,034.07	\$28,163.89	\$4,185,982.29	968,867.91
5	4	\$27,848,797.66	\$5,601,626.46	\$212,024.40	\$3,577,599.45	429,220.01
6	2	\$29,826,398.55	\$5,501,439.70	\$138,396.51	\$3,410,182.76	838,107.43
7	4	\$21,851,959.00	\$5,398,284.98	\$918,989.31	\$3,688,645.87	253,137.46
8	3	\$23,441,420.62	\$5,270,464.25	\$250,414.70	\$3,488,762.41	400,533.39
9	2	\$23,069,515.78	\$5,035,034.35	\$145,007.37	\$3,305,526.70	660,467.04
10	3	\$18,137,255.46	\$4,974,328.19	\$514,761.86	\$3,455,251.14	345,135.66
Single Unit Franchisees						
1	1	\$17,186,060.05	\$5,273,216.69	\$301,414.78	\$3,628,238.55	883,553.14
2	1	\$29,274,523.36	\$5,168,245.03	\$64,814.06	\$3,135,175.52	1,796,817.09
3	1	\$18,666,652.55	\$3,828,075.03	\$49,122.16	\$2,361,562.06	1,184,471.50
4	1	\$19,976,193.27	\$3,180,652.59	\$89,594.30	\$1,943,253.11	1,431,596.25
5	1	\$11,758,437.66	\$2,961,355.59	\$197,765.00	\$1,969,051.99	352,146.81
6	1	\$11,020,532.66	\$2,790,975.91	\$323,960.76	\$1,858,243.43	545,179.06
7	1	\$12,961,636.73	\$2,607,739.96	\$28,585.50	\$1,664,066.75	741,387.11
8	1	\$12,334,998.16	\$2,414,447.47	\$43,045.44	\$1,517,398.77	651,526.53
9	1	\$11,840,301.09	\$2,413,637.83	\$49,208.73	\$1,515,314.83	673,696.00
10	1	\$11,224,064.84	\$2,350,369.39	\$52,939.89	\$1,665,568.46	593,192.63

What to Include: Non P&L Based FPRs

Non P&L based FPRs

Occupancy for hotels

Other demographics for territory/market

EXAMPLE: Non P&L Based FPR

Chart I-A Number of Vehicles Serviced: 1,898,390 Affiliate-Owned and Franchised Centers Operated at Least One Year Fiscal Year 2016			Chart I-B Number of Vehicles Serviced: 1,522,250 Franchised Centers – Opened at Least One Year Fiscal Year 2016		
Center Averages Per Day	Percent of Centers	Number of Centers	Center Averages Per Day	Percent of Centers	Number of Centers
20 or less	36.54%	76	20 or less	32.50%	52
Over 20 to 35	51.44%	107	Over 20 to 35	53.13%	85
Over 35 to 50	8.65%	18	Over 35 to 50	10.00%	16
Over 50	3.37%	7	Over 50	4.38%	7
Totals	100.00%	208	Totals	100.00%	160

The vehicle count ranges described in Charts I-A and I-B above are compiled from affiliate-owned Centers and franchisees located in the United States. The sales ticket, vehicle count, expense, and earnings levels described in chart II below are compiled averages or ranges of historical data from Centers operated by franchisees that have provided us with all the data necessary to complete Chart II. All Centers are not included in Chart II. These results should not be considered as potential sales, ticket, vehicle count, expense, and earnings levels that may be realized by you. There is no assurance you will do as well. Actual results vary from Center to Center and we cannot estimate the results of any particular Franchise. You are urged to consult with your financial, business, and legal advisers to conduct your own analysis of the information contained in this exhibit.

Disclaimers vs. Explanation

Commentary: limited disclaimer required; no other permitted. Cannot state things like franchisee cannot rely on Item 19.

Some outlets have earned this amount. Your individual results may differ. There is no assurance that you'll earn as much.

Explanations are permitted and required to present a non-misleading FPR

Disclaimers vs. Explanation

Rocky Mountain Chocolate Factory v. SDMS

“We do not have access to nor knowledge of the expenses and costs incurred by each of the 169 franchised stores”

Randall v. Lady of America

Negative disclaimer was false when evidence showed FPRs provided

CONCLUSION

OBJECTIVES FOR TODAY'S SESSION:

- **Identify changes under the new NASAA commentary**
- **Identify some best practices and strategies for effective and compliant FPRs in light of new NASAA commentary**
- **Identify some risks and pitfalls and how to avoid them**