Chapter 1

Overview of the FTC Rule and Related Authorities

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I. INTRODUCTION AND OVERVIEW

The FTC Rule cannot be understood or interpreted in isolation. While it is at the center of all franchise laws and regulations in the United States, it is supplemented and clarified by numerous other authorities. This chapter focuses on the key Federal Trade Commission (FTC), North American Securities Administrators Association (NASAA), and state authorities that a practitioner must review in order to understand and interpret the FTC Rule.

Beyond the scope of this chapter and this book, but equally relevant to understanding and interpreting the FTC Rule, are innumerable federal and state court decisions that touch on or interpret the impact of the FTC Rule on franchise disclosure generally and on certain state laws in particular.

II. FTC AUTHORITIES

A. Background

Understanding and interpreting the FTC Rule requires a multi-step process involving review of the key FTC authorities discussed in this Section II, as well as the key NASAA and state authorities discussed in Sections III and IV.

The key FTC authorities are: Sections 5, 13(b), and 19 of the FTC Act;¹ the FTC Rule itself;² the Statement of Basis and Purpose issued in 2007;³ the Compliance Guide under the FTC Rule issued in 2008;⁴ FAQs published on the FTC’s
B. Sections 5, 13(b), and 19 of the FTC Act

The FTC makes clear in the Statement of Basis and Purpose that the FTC Rule must be interpreted in light of “long-established Commission jurisprudence” on deceptive and misleading practices under Section 5 of the FTC Act, and that enforcement of the FTC Rule will be handled in accordance with all applicable statutes and rules, including specifically Sections 5, 13(b), and 19 of the FTC Act.

For example, the FTC Rule does not contain definitions of “material,” “material fact,” or “material change.” This is because the FTC “believes that such definitions are not necessary.” As indicated in the Statement of Basis and Purpose:

An understanding of materiality under the final Amended Rule [the FTC Rule] can best be gained by looking to long-established Commission jurisprudence. “Materiality” is a cornerstone concept of that jurisprudence. To be clear on this important point, the Commission, when interpreting Section 5, regards a representation, omission, or practice to be deceptive if: (1) it is likely to mislead consumers acting reasonably under the circumstances; and (2) it is material; that is, likely to affect consumers’ conduct or decisions with respect to the product at issue. Accordingly, it is amply clear that “materiality” is determined by the reasonable consumer standard, or in franchise matters, by the reasonable prospective franchisee standard. Moreover, since violations of the Franchise Rule constitute violations of Section 5, we believe that the Section 5 deception jurisprudence provides adequate guidance on what the term “material” means in the Franchise Rule context.

In the FTC Rule, the FTC explicitly states that it will enforce the FTC Rule “according to the standards of liability under Sections 5, 13(b), and 19 of the FTC Act,” and that “franchisors may have additional obligations to impart material information to prospective franchisees outside of the disclosure document under Section 5 of the Federal Trade Commission Act.”

C. FTC Rule

The FTC Rule became effective on July 1, 2007, replacing the Original FTC Rule. Beginning July 1, 2008, all franchisors were required to comply fully with the FTC Rule, and were no longer permitted to use Disclosure Documents prepared under the UFOC Guidelines or the Original FTC Rule, because the UFOC
Guidelines “no longer afford[ed] prospective franchisees equal or greater protection as part 436.”

The FTC Rule defines terms, specifies the format and content of a franchisor’s Disclosure Document, requires a franchisor to follow certain disclosure procedures, permits electronic disclosure subject to certain conditions, requires a franchisor to follow certain record retention procedures, specifies exemptions, and prohibits certain franchise-related activities deemed to be unfair or deceptive.

However, the FTC Rule must be read in conjunction with the other key authorities referenced in this chapter, because those other authorities supplement and clarify what is stated in the FTC Rule.

Unilateral Alteration of Agreement. For example, part 436.2(b) in the FTC Rule states that it is an unfair or deceptive practice for a franchisor to “alter unilaterally and materially the terms and conditions of the basic franchise agreement or any related agreements” without furnishing the prospective franchisee with a copy of each revised agreement at least seven calendar days before the prospective franchisee signs the agreement. This raises the issue of what it means to “alter unilaterally and materially” the terms and conditions of an agreement.

Part 436.2(b) gives some guidance, stating that “changes to an agreement that arise out of negotiations initiated by the prospective franchisee” do not trigger the seven-calendar-day rule.

The Statement of Basis and Purpose (discussed in Section II.D below) provides clarification and additional guidance. It clarifies that “changes to an agreement” not triggering the seven-calendar-day rule are “instances where deviations from the standard agreement are initiated at the franchisee’s request.” The Statement of Basis and Purpose also specifies that completing “fill-in-the-blank” items such as the date or name and address of the franchisee (called “noncontractual items”) does not trigger the seven-calendar-day rule, but completing “substantive contractual details—such as geographic area of a protected territory and interest rates . . . not disclosed in the basic Disclosure Document or its attachments” does trigger the seven-calendar-day rule.

The Compliance Guide (discussed in Section II.E below) further clarifies that substantive changes include adding “the actual number of stores to be opened pursuant to an area development agreement, . . . or other contractual terms that were not previously disclosed in the basic disclosure document or its attachments.” The Compliance Guide states that whether “a particular change benefits one party or the other is irrelevant,” and that a change benefiting the franchisor does not trigger the seven-calendar-day rule if “the prospective franchisee has initiated the process of revising documents” and knows about the change.

The FTC’s FAQs (discussed in Section II.F below) advise, at FAQ 10, that filling in the name of a county to identify a territory does not “necessarily consti-
tute a substantive change” if the Disclosure Document explained that the territory
would be countywide.30

These explanations in the Statement of Basis and Purpose, the Compliance
Guide, and FAQ 10 are significant and helpful clarifications of the language used
in part 436.2(b) of the FTC Rule.

Confidentiality Clause. Similarly, part 436.1(c) of the FTC Rule defines a “con-
fidentiality clause” to be “any contract, order, or settlement provision that directly
or indirectly restricts a current or former franchisee from discussing his or her
personal experience as a franchisee in the franchisor’s system with any prospec-
tive franchisee.” Part 436.5(t)(7) then requires a franchisor to disclose whether
franchisees have signed confidentiality clauses during the last three fiscal years.
This definition and the related disclosure requirement raise issues as to what are
and are not confidentiality clauses. Part 436.1(c) offers some guidance, explain-
ing that confidentiality clauses “do not include clauses that protect franchisor’s
trademarks or other material information.”

The Statement of Basis and Purpose provides additional guidance, stating that
they are not “clauses that prohibit communications between current and former
franchisees and, for example, the media,”31 and do not include clauses that protect
the confidentiality of specific negotiated settlement terms “if the franchisee is oth-
erwise free to discuss his or her experience within the franchise system, including
the existence of a litigated action with the franchisor.”32 The Compliance Guide,
using the term “confidentiality agreements” instead of “confidentiality clauses,”
states that the “requirement to disclose confidentiality agreements is narrow,” and
adds that the term does not apply if a franchisee who is also employed as a man-
ger is prohibited “from discussing her experience as a manager (as opposed to a
franchisee),” or if a franchisee is prohibited from speaking with a competitor.33

These examples make it clear that, in order to understand and interpret the
FTC Rule, at a minimum, all related FTC authorities must be reviewed.

D. Statement of Basis and Purpose

The Statement of Basis and Purpose (100 pages in the Federal Register), with
its 975 footnotes, offers a wealth of information for understanding and interpret-
ing the FTC Rule.

The Statement of Basis and Purpose supplements and clarifies, and arguably
even adds to or modifies, almost all the definitions, requirements, exemptions,
and prohibitions in the FTC Rule. The Statement of Basis and Purpose should be
reviewed whenever a practitioner interprets any provision of the FTC Rule.

E. Compliance Guide

The Compliance Guide to the FTC Rule was issued by the FTC Staff in May
2008. The Compliance Guide entirely supersedes the Interpretive Guides issued
by the FTC Staff in 1979 under the Original FTC Rule.34
The Statement of Basis and Purpose offers guidance on how the FTC expects the FTC Staff to maintain the Compliance Guide. In the Statement of Basis and Purpose, the FTC indicates that it expects the FTC Staff to coordinate updates to the Compliance Guide and other interpretations of the FTC Rule with “NASAA’s Franchise and Business Opportunity Project Group in order to minimize differences between FTC and state Rule interpretations.”

In the Statement of Basis and Purpose, the FTC indicates that the Compliance Guide is to have multiple purposes. One purpose is to “explain or interpret various provisions” of the FTC Rule. Another purpose is to address limits to the term “franchise,” and to distinguish “non-franchise relationships,” such as the employment, general business partnership, cooperative association, certification, and single trademark license relationships addressed as exclusions in the Original FTC Rule, in an explanatory manner, rather than in the text of the FTC Rule. A third purpose is to recognize and validate “historic industry practices” that are consistent with the FTC Rule. As stated by the FTC:

The Commission . . . recognizes that over the years, franchisors have developed specific language approved by the states for compliance with the UFOC Guidelines. The Commission anticipates that part 436 of the final Amended Rule will be interpreted, where consistent with the public interest, in a manner that conforms with historic industry practices.

In the Statement of Basis and Purpose, the FTC indicates that it expects the Compliance Guide to address the following types of issues:

- the meaning of “general media financial performance representations” under the FTC Rule;
- clarification that a “parent entity is an affiliate, but is separately defined because certain requirements apply to a parent, but not to other types of affiliates”; 
- “[f]urther detail about who may accept disclosures for a prospective franchisee”; 
- clarification that “the 14-day deadline for disclosure is not triggered by a confidentiality agreement [that] does not bind the prospective franchisee to purchase the franchise or to undertake other obligations, such as the signing of a lease”; 
- greater detail about what should be included in, and what may be excluded from, “additional funds” in Item 7, and confirmation that the franchisee owner’s salary may be excluded; 
- how franchisors should look to the Federal Reserve’s Regulation M (Commercial Leasing Act) and the Consumer Credit Protection Act’s Truth in Lending Provisions “in crafting their disclosures under Item 10”;
confirmation that franchisors and prospective franchisees may freely negotiate franchise terms, including financing terms; and whether a person is a “subfranchisor,” and whether “subfranchising” is occurring, with hypothetical examples.

The 144-page Compliance Guide issued by the FTC Staff in May 2008 fulfills the purposes identified in the Statement of Basis and Purpose and addresses many of the issues mentioned in it. Most helpfully, the Compliance Guide provides specific commentaries and sample answers for Items 1-23 in a Disclosure Document; general guidance on preparing and updating a Disclosure Document; commentary on the disclosure procedures that must be followed by franchisors; commentary on the types of relationships that are and are not “franchises” under the FTC Rule; commentary on the exemptions in the FTC Rule; guidance on financial performance representations, including general media representations; and commentary on the prohibitions in the FTC Rule. The Compliance Guide leaves for subsequent updates more extensive commentary on whether a person is a “subfranchisor” and whether “subfranchising” is occurring, with hypothetical answers.

F. FAQs on FTC’s Website

The FTC Staff has established a page on the FTC’s website, titled “Amended Rule FAQs,” for the posting of questions and answers about the FTC Rule. At the end of 2017, the FTC Staff had posted 38 questions and answers on the page. New FAQs will continue to be posted periodically and will remain on the page until incorporated into any subsequent updates to the Compliance Guide. The FAQ answers are similar to informal Staff Advisory Opinions (discussed in Section II.G below), in that they reflect the opinions of the FTC Staff charged with enforcement of the FTC Rule. Also, like Staff Advisory Opinions, FAQ answers are not binding on the FTC, because they have not been reviewed, approved, or adopted by the FTC.

The first 38 questions and answers posted on the “Amended Rule FAQs” website cover a wide range of issues: disclosure timing and related requirements (FAQs 1, 2, 6, 10, 14, 22, 23, 24, and 31); Disclosure Document revision requirements (FAQs 1, 6, 29, and 31); exemptions (FAQs 3 and 26); disclaimers and releases by prospective franchisees (FAQs 21 and 34); “development agent” and “subfranchisor” disclosures (FAQ 9); “franchise seller” disclosures (FAQs 7, 12, 20, and 23); “parent” disclosures in Items 1, 3, 4, and 21 (FAQs 16 and 30); litigation disclosures in Item 3 (FAQ 5); supplier disclosures in Item 8 (FAQ 18); financing disclosures in Item 10 (FAQ 35); “exclusive territory” disclosures in Item 12 (FAQs 25 and 37); franchise agreement disclosures in Item 17 (FAQ 13); financial performance representations in Item 19 (FAQs 8, 27, 33, and 38); fran-
chisee and company-owned outlet disclosures in Item 20 (FAQs 19, 28, and 36); financial statement requirements in Item 21 (FAQs 4, 9, 11, 17, 30, and 32); and Disclosure Document receipt requirements in Item 23 (FAQs 12, 15, and 23).

The FTC Staff will continue to issue FAQs as it deems appropriate.

G. Informal Staff Advisory Opinions Issued under FTC Rule

Under the Original FTC Rule, the FTC Staff issued more than 100 informal Staff Advisory Opinions from 1979 through 2006. Under the FTC Rule, the FTC Staff issued only two informal Staff Advisory Opinions from 2007 through 2017, but has the authority to issue informal Staff Advisory Opinions whenever it deems them to be appropriate.51

The first two informal Staff Advisory Opinions issued under the FTC Rule address the following issues: whether a Disclosure Document may be used in both English and a foreign language (Opinion 07-1); the definition of an “affiliate” (Opinion 07-2); and the use of an affiliate’s financials in a Disclosure Document (Opinion 07-2).

To the extent that the FTC Staff grants future requests for informal Staff Advisory Opinions under the FTC Rule, it will follow a procedure somewhat different than it followed under the Original FTC Rule. Under the Original FTC Rule, the FTC Staff issued Staff Advisory Opinions without the mandate or the need, for the most part, to seek input from the NASAA Franchise and Business Opportunity Project Group or the states. Under the FTC Rule, the FTC has stated its intent that the FTC Staff “coordinate with NASAA and the states in issuing future . . . informal staff advisory opinions.”52

H. Original Statement

The FTC states in the FTC Rule that the Original Statement, published in December 1978, “remains valid, except to the extent of any conflict with the final FTC Rule. In the event of any conflict, the Statement of Basis and Purpose, published in January 2007, supersedes the Original Statement.”53 The FTC impliedly invites members of the public concerned about whether any part of the Original Statement conflicts with the FTC Rule to seek clarification from the FTC Staff.54 As a result, interpretation of the FTC Rule should involve a review of the Original Statement and may require the exercise of judgment as to whether any relevant portion “remains valid” or has been superseded.

I. Informal Staff Advisory Opinions Issued under Original FTC Rule

The FTC states that “all former informal staff advisories remain a source of Rule interpretation, except where [the Statement of Basis and Purpose, or impliedly, the FTC Rule, the Compliance Guide, or an FAQ on the FTC’s website]
contradicts a staff advisory. The FTC invites members of the public “concerned that a previous advisory may no longer be applicable” to seek clarification from the FTC Staff. Therefore, in addition to reviewing the Original Statement to interpret the FTC Rule, franchisors and their lawyers should review the more than 100 informal Staff Advisory Opinions issued by the FTC Staff under the Original FTC Rule, and must exercise judgment as to whether a Staff Advisory Opinion remains applicable. In this regard, as time passes, a practitioner will need to consider the possibility of changes in FTC Staff opinions on certain issues, due to FTC Staff personnel changes, in evaluating whether to rely on older informal Staff Advisory Opinions.

III. NASAA AUTHORITIES

A. Background

Even though, with the issuance of the FTC Rule and NASAA’s 2008 Franchise Guidelines, NASAA lost its previous role as the primary organization responsible for maintaining, interpreting, and modifying the rules specifying the content of Disclosure Documents, NASAA continues to have a significant role in this area of franchise law regulation. In response to the FTC’s adoption of the FTC Rule, the NASAA Franchise and Business Opportunity Project Group, under authority granted by the NASAA Board of Directors and after regular consultation with the FTC Staff, has promulgated various authorities, including NASAA’s 2008 Franchise Guidelines, a Commentary on NASAA’s 2008 Franchise Guidelines adopted in April 2009, a NASAA Multi-Unit Commentary adopted in September 2014, and a NASAA Financial Performance Representation Commentary adopted in May 2017.

NASAA is expected to promulgate additional commentaries in the future. In addition, NASAA continues to give input to the FTC Staff on interpretations of the FTC Rule that are issued by the Staff through any new updates to the Compliance Guide, any new FAQs, and any new informal Staff Advisory Opinions.

B. NASAA’s 2008 Franchise Guidelines


NASAA’s 2008 Franchise Guidelines were contemplated by the FTC in the Statement of Basis and Purpose, which specifically acknowledges that the FTC Rule does “not preclude consideration of any new or revised UFOC Guidelines promulgated by the states.” NASAA’s 2008 Franchise Guidelines are not a full-fledged set of new or revised UFOC Guidelines. Rather, they adopt the Disclosure
Document format required in the FTC Rule, with some supplementation, such as a continued state cover page requirement, limited supplemental definitions, and limited supplemental disclosure requirements. NASAA’s 2008 Franchise Guidelines also specify the registration application documents to be used with the states.

C. Commentary on NASAA’s 2008 Franchise Guidelines

On April 29, 2009, NASAA adopted a Commentary on its 2008 Franchise Guidelines. The Commentary gives practical guidance on issues not directly or fully addressed in the FTC Rule, the Compliance Guide, the FTC’s FAQs, or NASAA’s 2008 Franchise Guidelines. The Commentary incorporates some commentary items from the UFOC Guidelines issued in 1993 and includes several new commentary items.

The Commentary contains 39 commentary items, with 12 items focusing on Item 20 of the Disclosure Document, five focusing on Item 3 of the Disclosure Document, four focusing on Item 1 of the Disclosure Document, and three each focusing on Items 10 and 19 of the Disclosure Document. The FTC cover page, Item 2, and Item 8 are the subject of two items each; the state cover page, state-specific addenda, Item 4, Item 17, Item 22, and state “material change” update requirements are the subject of one item each.

D. NASAA Multi-Unit Commentary

On September 16, 2014, NASAA adopted its Multi-Unit Commentary, which became effective on March 16, 2015. The Multi-Unit Commentary addresses disclosure issues relating to area development, sub franchising, and area representation.

The Multi-Unit Commentary gives definitions for “area development,” “subfranchise rights,” “area representation,” and “franchise brokers.” It contains 35 commentary items, with eight items focusing on area developers, 16 focusing on subfranchisors, and 11 focusing on area representatives. The items focusing on subfranchisors specify disclosures that must be in a franchisor’s Disclosure Document offering unit franchises, the franchisor’s separate Disclosure Document offering subfranchising rights, and a subfranchisor’s Disclosure Document offering unit franchises. The items focusing on area representatives specify disclosures that must be in a franchisor’s Disclosure Document offering unit franchises and the franchisor’s separate Disclosure Document offering area representation rights.

E. NASAA Financial Performance Representation Commentary

On May 7, 2017, NASAA adopted its Financial Performance Representation (FPR) Commentary, which became effective, for a franchisor, the later of 180
days after adoption or 120 days after the franchisor’s next fiscal year-end, if it had an effective Disclosure Document when the FPR Commentary was adopted. The FPR Commentary addresses disclosure issues relating to financial performance representations in Item 19 of a franchisor’s Disclosure Document.

The FPR Commentary gives definitions for terms such as “average,” “company-owned outlet,” “gross profit,” “median,” and “net profit,” and republishes three commentary items in the 2008 Franchise Guidelines. It contains 20 new commentary items, with four items focusing on financial performance representations generally, four focusing on the use of data from company-owned outlets, four focusing on the use of subsets, three focusing on the use of averages and medians, two focusing on the use of forecasts, and three focusing on the use of disclaimers.

IV. STATE AUTHORITIES

A. Background

The FTC Rule does not preempt state laws and regulations relating to franchise disclosure that are equally or more protective of prospective franchisees than the FTC Rule. As a result, any franchisor or lawyer determining requirements for franchise law compliance must consult not only the FTC Rule and related FTC and NASAA authorities, but also state franchise and business opportunity laws. As a practical matter, state franchise examiners, not the FTC Staff, regularly review Disclosure Documents, interpret the disclosure requirements in the FTC Rule and under state law, and either accept or reject registrations of Disclosure Documents based on those interpretations.

B. State Laws and Regulations

The states have a varied mix of laws relating to franchise disclosure that apply to franchisors. Ten states have franchise registration and disclosure laws. One state has a franchise disclosure law. Nine states have franchise or business opportunity notice and disclosure laws that apply to franchisors whose offerings fall within their franchise or business opportunity definitions. Six states have business opportunity disclosure laws that apply to franchisors who do not have state or federally registered trademarks, and that sometimes require registrations, notice filings, or other filings.

The laws and related regulations of those states differ widely on numerous issues, including, for example, registrations and notices, disclosure format, disclosure timing, and exemptions and exclusions. Some of the differences regarding registrations and notices, disclosure format, and disclosure timing are discussed below.
1. **Registrations and Notices**

   The FTC Rule does not require franchisors to register, file notices, or make any other filings. As indicated above, however, ten states have franchise laws that require franchisors to register, nine states have franchise or business opportunity laws that require franchisors to file notices, and six states have business opportunity laws that may require franchisors without state or federal trademarks to register, file notices, or make other filings. These laws are not preempted, because they provide equal or greater protection to prospective franchisees than the FTC Rule.

2. **Disclosure Format**

   Franchisors are permitted to use only FTC Rule Disclosure Documents, with the addition of any more extensive disclosures required by the states. Accordingly, the only Disclosure Document currently acceptable is one prepared in compliance with the FTC Rule, as modified to meet the additional requirements in NASAA’s 2008 Franchise Guidelines, Commentary on the 2008 Franchise Guidelines, Multi-Unit Commentary and Financial Performance Representation Commentary, and any applicable state-specific requirements.

   State-specific disclosures, in addition to the disclosures required under the FTC Rule, are explicitly required or contemplated in the franchise laws and regulations of several states, and often are required by state franchise examiners in comment letters after they have reviewed Disclosure Documents submitted for registration.

3. **Disclosure Timing**

   All franchisors are required to follow the disclosure timing and procedure requirements specified in the FTC Rule. All state law provisions with lesser timing or procedural requirements are preempted, and all state law provisions with greater timing or procedural requirements remain effective.

   After the FTC Rule became effective, NASAA recommended that all states with franchise laws revise them to achieve uniformity with the disclosure timing requirements in the FTC Rule. Some states (California for most franchisors, Illinois, Maryland, Rhode Island, South Dakota, and Washington) have so revised their laws.

   The remaining states with franchise laws containing greater timing requirements (California for large franchisors, Michigan, and New York) will, one hopes, amend their laws to conform to the timing requirements in the FTC Rule over the coming years. States with business opportunity laws containing greater timing requirements may also amend their laws.
V. CONCLUSION

The FTC, NASAA, and states with franchise and business opportunity disclosure laws all have important roles in developing and maintaining authorities that are relevant to understanding and interpreting the FTC Rule. The FTC Rule has changed and will continue to change—sometimes dramatically—not only for the public agencies and associations involved, but also for franchisors, prospective franchisees, and franchise lawyers. The result, one hopes, is improved disclosures and disclosure procedures for prospective franchisees and, over time, greater federal and state harmonization in the area of franchise disclosure regulation.

Notes

1. 15 U.S.C. §§ 45, 53(b) and 57(b). Section 5 prohibits “unfair or deceptive acts or practices in or affecting commerce,” 15 U.S.C. § 45(a). Section 13 authorizes the FTC to seek temporary restraining orders and preliminary injunctions pending the issuance of complaints by the FTC under Section 5. 15 U.S.C. § 53(b). Section 19 authorizes the FTC to bring civil actions for violations of rules, such as the FTC Rule, respecting unfair or deceptive acts or practices. 15 U.S.C. § 57b.
2. 16 C.F.R. § 436; CCH Business Franchise Guide ¶ 6011.
10. 16 C.F.R. § 436.6(a), 436.10(a).
13. 16 C.F.R. § 436.6(a).
14. 16 C.F.R. § 436.10(a).
18. 72 Fed. Reg. 15448 n.46.
19. 16 C.F.R. § 436.1.
20. 16 C.F.R. § 436.3-436.5, 436.7.
21. 16 C.F.R. § 436.1(u)(w), 436.2, 436.6, 436.7, 436.9 (disclosure procedures).
22. 16 C.F.R. § 436.1(u)(w), 436.2, 436.6, 436.7 (electronic disclosure procedures).
23. 16 C.F.R. § 436.6(h)(i) (record retention procedures).
24. 16 C.F.R. § 436.8.
25. 16 C.F.R. § 436.9.
28. CCH Business Franchise Guide ¶ 6086 at 9129-204.
29. CCH Business Franchise Guide ¶ 6086 at 9129-204 and 9129-205.
32. 72 Fed. Reg. 15,454 n.82.
33. CCH Business Franchise Guide ¶ 6086 at 9129-255.
34. See 72 Fed. Reg. 15,449.
35. 72 Fed. Reg. 15,449. See also 72 Fed. Reg. 15,450 n.59, where the FTC states its “goal of federal and state harmonization.”
40. Id.
41. 72 Fed. Reg. 15,458. The FTC indicated that the Compliance Guide should confirm “that communications about financial performance made to the trade press and directly to lenders” and “SEC filings, speeches, and news releases” do not constitute general media performance representations. Id. The FTC also indicated that the Compliance Guide should confirm that if a franchisor directs “speeches or news releases to prospective franchisees or uses copies of speeches or news releases in marketing materials aimed at prospective franchisees, then such materials will constitute general media financial performance representations.” Id. According to the FTC, the Compliance Guide or informal Staff Advisory Opinions should address how to apply the “financial performance representation” definition “in various situations, such as representations based upon earnings of a franchisor’s affiliates or representations based upon industry data.” 72 Fed. Reg. 15,456 n.96.
42. 72 Fed. Reg. 15,463 n.189.
43. 72 Fed. Reg. 15,464 text and n.205.
44. 72 Fed. Reg. 15,470 n.266.
45. 72 Fed. Reg. 15,486 n.442.
46. 72 Fed. Reg. 15,489 n.469.
47. 72 Fed. Reg. 15,489 n.474.
52. 72 Fed. Reg. 15,450 n.59.
54. Id. The invitation relates directly to previous informal Staff Advisory Opinions, but applies equally to the Original Statement.
55. Id.
56. Id.
58. CCH Business Franchise Guide ¶ 5706.
62. www.nasaa.org/members-only/corporation-finance/franchise-training-materials-on-the-new-ftc-rule-after-july-1-2007-2/. NASAA's Interim Policy Statement, which was effective from 2007 to 2008, in summary, recommended that the states continue to require franchisors to file the same application documents “provided under the UFOC Guidelines … in the format required under the UFOC Guidelines,” except that those documents could include Disclosure Documents prepared under the FTC Rule. Further, NASAA’s Interim Policy Statement recommended that the states require the addition of a State Cover Page with specified language about “RISK FACTORS” and other matters, and required the addition of a paragraph on the receipt pages if applicable law required a franchisor to provide disclosure earlier than the 14-calendar-day period under the FTC Rule. NASAA’s Interim Policy Statement also included definitions mirroring 17 of the 23 definitions in the FTC Rule, the text of the disclosure format provisions of the FTC Rule (parts 436.3-436-5), and a sample State Cover Page. In response to NASAA’s Interim Policy Statement, all states with franchise registration laws adopted the recommended procedures, either through revision of their laws or regulations or through policy changes.
63. 72 Fed. Reg. 15,448 n.46, 15,537 n.949.
64. CCH Business Franchise Guide ¶ 5706.
67. 16 C.F.R. § 436.10(b).
68. California, Hawaii, Illinois, Maryland, Minnesota, New York, North Dakota, Rhode Island, Virginia, and Washington. A registration law may require a franchisor to submit a copy of its Disclosure Document to the state for a full review and approval.
69. Oregon.
70. Florida, Indiana, Kentucky, Michigan, Nebraska, South Dakota, Texas, Utah, and Wisconsin. A notice law may require a franchisor to submit just a notice to the state or a notice and a copy of the franchisor’s Disclosure Document. However, the state normally does not review or approve the franchisor’s Disclosure Document.
71. Connecticut, Georgia, Louisiana, Maine, North Carolina, and South Carolina. Connecticut, Maine, North Carolina, and South Carolina may require registration if a franchisor does not have a federally registered trademark. Of those four states, Connecticut does a full review of Disclosure Documents that are submitted; Maine, North Carolina, and South Carolina do not do a full review of Disclosure Documents that are submitted; and all issue effectiveness orders for registrations. Maine may require a surety bond. Georgia may require a notice to be filed if a franchisor does not have a state or federally registered trademark. South Carolina may require a South Carolina agent for service of process.
72. The Statement of Basis and Purpose explicitly recognizes the states’ rights to require additional disclosures. For example, footnote 295 states: “As discussed below, the final amended Rule does not preempt state laws that afford greater or equal protection to prospective franchisees. Indeed, states enjoy great latitude in fashioning franchise disclosure laws, including how and when state-specific information is to be included in disclosure documents. Therefore, franchisors must be permitted to add to an FTC Rule disclosure document in order to comply with non-preempted state law.” 72 Fed. Reg. 15,473 n.295. Similarly, footnote 949 states: “Examples of state and local laws not preempted by the original or amended Rule include registration of franchisors and franchise salespersons, escrow or bonding requirements, substantive regulation of the franchisor-franchisee relationship (e.g., termination practices, con-
tract provisions, and financing arrangements), and disclosure laws requiring more extensive disclosures than those provided by the amended Rule.” 72 Fed. Reg. 15,537 n.949.

73. See, e.g., California Franchise Investment Law, CAL. CORP. CODE, Div. 5, Parts 1-6, Section 31114, CCH Business Franchise Guide ¶ 3050.33, and California Franchise Investment Law Regulations, CAL. ADMIN. CODE, Title 10, Chapter 3, Subchapter 2.6, Sections 310.111(c) and 310.114.1, CCH Business Franchise Guide ¶ 5050.08 and 5050.23; Hawaii Franchise Investment Law Regulations, Dept. of Commerce and Consumer Affairs, Title III, Business Registration, Title 16, Chapter 37, Section 16-37-4(b), CCH Business Franchise Guide ¶ 5110.04; Maryland Franchise Registration and Disclosure Law, MD. BUS. REG. CODE ANN., Title 14, Section 14-216(a), CCH Business Franchise Guide ¶ 3200.16; Minnesota Franchises Law, Minnesota Statutes, Chapter 80C, Section 80C.06, Subdivisions 4 and 6, CCH Business Franchise Guide ¶ 3230.06, and Minnesota Franchises Law Regulations, Minnesota Rules, Dep’t of Commerce, Chapter 2860, Section 2860.3800, CCH Business Franchise Guide ¶ 5230.27; North Dakota Franchise Investment Law, N.D. CENT. CODE ANN., Title 51, Chapter 51-19, Section 51-19-08.1, CCH Business Franchise Guide ¶ 3340.08.

74. For example, the Hawaii, Minnesota, and North Dakota franchise registration and disclosure laws require only seven-calendar-day presale disclosure. Hawaii Franchise Investment Law, HAW. REV. STATS, Title 26, Chapter 482E, Section 482E-3(a), CCH Business Franchise Guide ¶ 3110.03; Minnesota Franchises Law, MINN. STATS., Chapter 80C, Section 80C.06, CCH Business Franchise Guide ¶ 3230.06; North Dakota Franchise Investment Law, N.D. CENT. CODE ANN., Title 51, Chapter 51-19, Section 51-19-08.6, CCH Business Franchise Guide ¶ 3340.08. Similarly, the Indiana franchise notice and disclosure law requires only ten-calendar-day presale disclosure, and the Florida business opportunity notice and disclosure law requires only three-working-day presale disclosure. Indiana Franchises Law, IND. CODE, Title 23, Article 2, Chapter 2.5, Section 9, CCH Business Franchise Guide ¶ 3140.09; Florida Sale of Business Opportunities Act, FLA. STATS., Chapter 559, Section 559.803, CCH Business Franchise Guide ¶ 3098.03. The disclosure timing provisions in these laws are preempted under the FTC Rule.

75. For example, the Michigan and New York franchise laws require Disclosure Document delivery at least “10 business days” before any consideration is paid or any binding agreement is signed. Michigan Franchise Investment Law, MICH. COMP. LAWS § 445.1508(1), CCH Business Franchise Guide ¶ 3220.08; New York Franchises Law, N.Y. GEN. BUS. LAW, Article 33, Section 683.8, CCH Business Franchise Guide ¶ 3320.04. The New York franchise registration and disclosure law requires Disclosure Document delivery at the “first personal meeting” with a prospective franchisee. New York Franchises Law, N.Y. GEN. BUS. LAW, Article 33, Section 683.8, CCH Business Franchise Guide ¶ 3320.04. The Iowa, Maine, and Nebraska business opportunity laws require the same. IOWA CODE, 1999, Title XIII, Chapter 523B, Section 551A.4.1.h, CCH Business Franchise Guide ¶ 3158.04; MAINE REV. STATS., Title 32, Chapter 69-B, Section 4692, CCH Business Franchise Guide ¶ 3198.02; Nebraska Seller-Assisted Marketing Plan Act, NEB. REV. STATS., Chapter 59, Article 17, Section 59-1732, CCH Business Franchise Guide ¶ 3278.32 (“first in-person communication” or “first written response to an inquiry”). Since these state-imposed “10 business days” and “first personal meeting” requirements afford prospective franchisees greater protection than the FTC Rule, they are not preempted by the FTC Rule and must be adhered to by franchisors unless they are revised.