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## 25<sup>th</sup> Annual IBA/IFA Joint Conference

### *Navigating Rough Financial Seas in International Franchising*

May 19-20, 2009  
JW Marriott \*\* Washington, DC

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# Financial Performance Representations

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**Financial Performance Representations:  
Where and When Are They Required And  
In What Form May They Be Made?  
When Is It A Good Idea To Disclose And When Is It Not?**

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### **Introduction**

This paper supplements the roundtable discussion on financial performance representations that the authors are conducting at the 2009 IBA/IFA Legal Symposium. Our objective in this paper is to broadly discuss how foreign jurisdictions regulate what U.S. law identifies as “financial performance representations” or what previously had been called “earnings claims” before the Amended FTC Rule took effect in July, 2007 and changed the nomenclature. Since foreign laws have not adopted the name change, we refer broadly to claims subsumed by both U.S. and foreign franchise sales laws as “Financial Claims.” In this paper, we address formal, written Financial Claims, and we do not address claims that may be made, whether with or without the franchisor’s approval, in other settings, whether written or unwritten.

### **Background**

We liberally refer to, and explore the topic against, the backdrop of U.S. law.<sup>1</sup> We happen to be two U.S. lawyers who are intimately familiar with the regulation and

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<sup>1</sup> By U.S. law, we mean the FTC Franchise Rule, 16 C.F.R. Part 436, referred to in this paper as the “Amended FTC Rule,” and the general rubric of state franchise laws. The Amended FTC Rule establishes the basic disclosure policy and requirements pertaining to preparing a franchise disclosure document (or “FDD”) in the U.S., including the portion of the FDD (Item 19) that deals with Financial Claims. While states may adopt requirements that impose greater disclosure obligations upon franchisors than under the Amended FTC Rule, none have formally done so specifically with respect to the preparation and presentation of Financial Claims. The Amended FTC Rule regulates franchise sales throughout the U.S. by requiring pre-sale disclosure by means of the FDD, but not registration with a federal agency. In fourteen states ~ California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin ~ franchisors must also meet various registration requirements before offering or selling franchises in that state.

\* The authors express their appreciation to and wish to thank Halima Madjid, of Plave Koch PLC, for her assistance in preparing portions of this paper.

preparation of Financial Claims under U.S. law. U.S. franchise sales laws are also the most well-tested of any in the world, having been enacted years before the next country to do so, and subjected to considerable public and private scrutiny and enforcement in our courts.

It is also important to note that there are various components to what generally does and does not constitute a Financial Claim in the U.S. regulatory environment:

**Does not constitute a Financial Claim:**

- Capital cost information
- Ongoing expense data
- Operating results of an operating unit that the franchisor is selling to a franchisee
- Information that a franchisee provides to a prospective franchisee
- Information that a franchisor provides to a party that has already signed a franchise agreement

**Constitutes a Financial Claim:**

- Operating results
  - Revenue
  - Cost
- Presentation
  - Historical
  - Projected

It is also probably fair to say that all countries with a franchise sales law at least consulted the U.S. regulatory approach in adopting their own law. Some jurisdictions, like Malaysia and the Canadian Province of Alberta, borrowed heavily from the U.S. franchise sales laws in place when they fashioned their own franchise sale rules. Borrowing by jurisdictions is not atypical: the Vietnam franchise law that became effective in 2006 was consciously modeled after Australia's franchise law. Australia, in turn, studied the U.S. experience when it adopted its Franchising Code of Conduct in 1998, fashioning its pre-sale disclosure document after the U.S. Uniform Franchise Offering Circular (the predecessor to today's Franchise Disclosure Document – or "FDD"), while avoid certain perceived barriers in the U.S. regulatory scheme that might discourage an international franchisor from entering, like registration.<sup>2</sup>

We are not aware of any definitive empirical research demonstrating a clear public benefit from the pre-sale disclosure rules that have proliferated around the globe. There is no proof, for example, that franchisees prosper more, or that there is greater fraud, or less fraud, in jurisdictions with franchise sales laws compared to those without. But an increasing number of countries seem to believe that franchise sales regulation benefits their citizens, or that some form of "regulation" is necessary to legitimize the practice of franchising (as in China), so there is every reason to believe that additional countries will join the regulatory bandwagon.

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<sup>2</sup> Ward, *Australia's Evolving Franchising Laws: Help or Hindrance?*, Franchising World (July 2007) (available at <http://www.allbusiness.com/retail-trade/4498271-1.html>).

For those non-US attorneys reading this paper who are not familiar with the U.S. approach to regulating Financial Claims, there are two good source materials:

- (i) The CCH *Business Franchise Guide*, commonly referred to as the “BFG,” which is a comprehensive and routinely updated compilation of U.S. and international franchise law. It is rather significant that the BFG is regularly updated, considering that most articles found online (e.g., through a Google or Lexis search) about international franchise regulations are a snapshot in time and, with the passage of time, may very well be outdated. Because the BFG dedicates space both to U.S. and international franchise laws, it facilitates country-by-country analyses and comparisons.
- (ii) A recent publication of the American Bar Association Forum on Franchising entitled *Financial Performance Representations*.<sup>3</sup> The paperback is exclusively devoted to U.S. law.

There are few resources that specifically address the use and regulation of Financial Claims in the context of international franchise transactions. Additionally, lawyers often find it difficult to research court and administrative decisions in every country, in part because not all countries make public their administrative and judicial rulings.<sup>4</sup> Moreover, underlying foreign judicial and administrative decisions adhere to different regulatory and philosophical policies. Consequently, despite globalization, regulatory values remain highly country-centric.

One thing is very clear about Financial Claims: franchise sales risk management and legal compliance must be approached on a jurisdiction-specific basis.

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<sup>3</sup> Published in 2008 and available for purchase from the American Bar Association Forum on Franchising. <http://www.abanet.org/forums/franchising/>.

<sup>4</sup> One of the difficulties in discerning trends in how international agreements are enforced is that disputes are quite frequently resolved by means of arbitration conducted under the auspices of the New York Convention, which lead to arbitral decisions that are not typically published.

## **Do Foreign Jurisdictions Regulate the Same Type of Information as Financial Claims as the U.S.?**

See **Appendix 1** for details.

Of the 23 jurisdictions in the world that have some type of statute regulating franchise sales (23 includes the Canadian provinces and the U.S.), only 6 jurisdictions (including the Canadian provinces of Alberta, Ontario, and Prince Edward Island, as well as the U.S.) address the subject of Financial Claims.

None of the 5 non-U.S. jurisdictions that address the subject of Financial Claims define a Financial Claim with the same degree of detail or as broadly as the U.S. definition which sweeps up any type of direct or indirect statement informing a prospect about past history or which implies or suggests future results.

Japan and Ontario confine their statutory definitions to projections only without expressly mentioning if special disclosure rules apply when a Financial Claim consists of purely historical data. As a result, it is not entirely clear in these two jurisdictions if historical information about actual earnings, sales, revenue, or profits requires any special disclosure or is even regulated by the country's franchise sales statute.<sup>5</sup>

### **Sampling Foreign Legislation: What is the Basic Regulatory Approach?**

See **Appendix 2** for details. We present at a glance 6 sample jurisdictions with statutes addressing Financial Claims to illustrate their regulatory approach.

We offer these observations:

1. No jurisdiction with franchise sales legislation mandates that franchisors make Financial Claims. During the lengthy process leading to issuance of

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<sup>5</sup> Some may argue that historical information should be regulated as a Financial Claim even in the jurisdictions that only define projections alone as constituting a Financial Claim. Proponents of this view would claim that actual results of other franchised or company outlets that are given to a prospective franchisee are tantamount to projecting to that franchisee what its likely results will be. While there are flaws in such an argument, a company can use carefully worded disclaimers (e.g., "no representation" and "no reliance" clauses) to make clear that historical information is just that – and to deflect a claim that historical information is inherently a projection. As noted in the text, whether disclaimers can defeat the challenge would depend on the particular facts (including the relevant agreements), the law, relative equities, and the judicial philosophy in the relevant jurisdiction. In the U.S., courts have held that disclaimers may be considered to support a claim that the franchisee did not reasonably rely upon Financial Claims – whether alleged to have been made lawfully or not – in actions brought under state franchise disclosure laws and general common law, which typically require that a franchisee have reasonably relied on a representation in order to recover money damages for alleged statutory violations.

the Amended FTC Rule, the Federal Trade Commission considered – and rejected – making “earnings claims” a mandatory disclosure.<sup>6</sup>

2. The overarching standard for a Financial Claim, though expressed differently, is fundamentally the same in the countries we reviewed: the information must fairly represent what it purports to show. The key words are similar in various nations’ regulatory schemes:

<b>Country</b>	<b>Standard</b>
Australia	“reasonable grounds”
Canada (Ontario)	“reasonable basis”
China	“true, accurate, and complete”
Spain	“sufficiently justified”
USA	“reasonable basis”

### **Has Any Foreign Jurisdiction that Regulates Financial Claims Amended its Law Since the Amended FTC Rule Changes to the Regulation of Financial Claims?**

Not that we know of. We raise this question because when the FTC amended its Rule in 2007, it made three significant changes to the previous regulation of earnings claims in the U.S. with the goal of encouraging franchisors to make Financial Claims.

First, the FTC clarified that supplying location-specific cost data is not a Financial Claim eliminating confusion on that subject. Second, it allowed franchisors to base historical Financial Claims on subsets of franchisor-owned or franchised outlets when in the past franchisor-only data had been suspect when it excluded franchisee results. Finally, it eliminated the requirement that Financial Claims be geographically relevant to the franchises offered for sale or based on information prepared in compliance with GAAP. The 2007 amendment did not, however, change the overarching standard that franchisors must have a reasonable basis for making the claim and disclose all material facts and assumptions relevant to the claim, including variations attributable to factors such as demographics, socioeconomic characteristics, climate, or location.

Although none of the other countries that address Financial Claims in their sales laws approach their definitions with the same degree of specificity as U.S. law, the U.S. lead in modifying how it regulates Financial Claims may influence how other countries interpret their own rules given the regulatory borrowing by countries that we note earlier. We would not be surprised if the 2007 amendments to U.S. law loosen up the kinds of Financial Claims made by franchisors in selling franchises outside of the U.S. – especially because the Amended FTC Rule specifically provides that the Rule does not

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<sup>6</sup> FTC Statement of Basis and Purpose, 72 Fed. Reg. 15444, 15487, 15497-98 (Mar. 30, 2007).

apply to outbound international franchise transactions, *i.e.*, those for the establishment of a franchise outside the United States.<sup>7</sup>

### **What Kind Of Financial Claims Should a Franchisor Make Or Not Make?**

In the U.S., the estimated 25% of all franchisors that make Financial Claims “almost universally” do so on the basis of historical data.<sup>8</sup> Projections or forecasts of future results may be made if the Financial Claim discloses “the significant factors upon which a franchisee’s future results are expected to depend.”<sup>9</sup> As examples of “significant factors” the Amended Rule cites “economic or market conditions that are basic to a franchisee’s operation, and encompass matters affecting, among other things, a franchisee’s sales, the cost of goods sold, and operating expenses.”<sup>10</sup>

Compared to historical results, projections – which present expected, future financial results to a prospective franchisee – are inherently riskier for franchisors. The risk associated with making a projection is, in large measure, in the sense of exposing the franchisor to a lawsuit by a franchisee who may allege that it did not achieve the financial results suggested by the franchisor’s predictions. “By their very nature as future predictors, these types of claims are prone to close scrutiny and constant second-guessing by failed franchisees and their lawyers and accountants.”<sup>11</sup>

Every Financial Claim, whether based on historical data or projections, is a snapshot of assumptions at a particular moment in time. A franchisor offering forecasts or predictions about future results must constantly monitor the economic and competitive circumstances of each market where it has sales activities and update its snapshot accordingly. The franchisor must also constantly measure its franchisees’

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<sup>7</sup> 16 C.F.R. § 436.2. However, as specified in Section 436.10(a) of the Amended FTC Rule, the Commission retains its traditional jurisdiction under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), to investigate and take action to prevent, or remedy, unfair or deceptive acts or practices in interstate or foreign commerce. The FTC’s jurisdiction may extend to certain transactions involving non-U.S. parties, although one federal appeals court concluded otherwise in a case involving the FTC Franchise Rule, *Nieman v. DryClean U.S.A. Franchise Co.*, 178 F.3d 1126, 1130-31 (11th Cir. Fla. 1999) (“the Franchise Rule was not intended to protect franchisees in foreign countries”); *but cf. Branch v. Federal Trade Commission*, 141 F.2d 31 (7th Cir. 1944) (appellate court affirmed that the FTC had jurisdiction over a company’s transactions with non-US consumers where the company’s alleged violations of the FTC Act gave it an unfair advantage over its domestic competitors in the US). *See also infra*, note 16.

<sup>8</sup> Hershman and Mazero, *Financial Performance Representations*, American Bar Association Forum on Franchising, at 83 (2008).

<sup>9</sup> 16 C.F.R. § 436.1(s)(iii).

<sup>10</sup> *Id.*

<sup>11</sup> *Supra*, note 8, at 84.

actual experiences against the projected results to evaluate if its underlying assumptions remain sound or have materially changed. This involves a daily watch over this disclosure category which can occupy significant time and resources. It also requires knowing each time when a new disclosure document may be delivered. As a consequence, a franchisor making projections takes on a far greater disclosure burden than one making historically-based Financial Claims. The U.S. experience with formal Financial Claims is telling: few if any U.S. franchisors reportedly make projections because of what is required in order to minimize legal exposure.

Projections may be especially tempting to a franchisor anxious to break into a new international market. Yet it is the international setting where projections are most ill-advised. A franchisor that wishes to provide prospects with forecasted profits, sales, revenue or break-even numbers would need to be able to measure a host of external variables in an unfamiliar market. Even if the franchisor enlists capable local advisors, there may be legitimate concerns over the reliability of available local data. A franchisor compounds the risks when it turns over franchisee recruiting to independent sales brokers, since the franchisor may not know exactly when prospects are being disclosed and whether the fundamental underlying assumptions are still valid at that time. The gestation of a brand new international development deal may be as long as a year from initial contact to closing.<sup>12</sup> Staying on top of the assumptions underlying forecasts throughout the long courtship characteristic of most international franchise sales for some franchisors may not be worth the risk of liability.

Additionally, there is the conundrum of providing information about costs, expenses, and other factors for a market that the franchisor has not yet entered. Paradoxically, many franchisors must rely upon their prospective franchisees' or developers' expertise or experience on various local market factors. This reliance by the franchisor may extend beyond Financial Claims and include matters such as the initial costs likely in establishing a new franchised business, which largely depends on a variety of local issues that are not always obvious to a franchisor operating outside the country.

Consequently, there is merit to the prevailing wisdom that Financial Claims that project future results are riskier than ones based on historical results. A few additional observations about projections are noted:

1. A franchisor should be particularly cautious about making Financial Claims in one country based on the actual results of its franchisees in another country. A franchisee might claim, perhaps with justification depending on the circumstances, that a franchisor does not have a reasonable basis for making a Financial Claim when the results are based on different

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<sup>12</sup> In discussing best practices for recruiting international candidates, the Vice President of Outback Steakhouse International wrote that “[e]ven the most highly-motivated franchisees may move from first conversations to a sign-up in six months at best.” Weeks, *Determining the Best International Partner Match*, Franchising World (April 2009) (available at <http://www.franchise.org/Franchise-Industry-News-Detail.aspx?id=45096>).



economics, currency valuations and probably different supply sources. However, where a prospective franchisee is an experienced party, where the Financial Claim is clearly labeled and marked as relating to data from just one country, such an argument would seem to carry less weight. Additionally, as noted earlier, some may argue that a Financial Claim based exclusively on historical results in another country is tantamount to a projected Financial Claim in the new country and, therefore, fraught with risk.

2. The risks associated with making a projected Financial Claim, as discussed earlier in this paper, are obviously more profound in a setting that is, literally, foreign to the franchisor. A franchisor should therefore be extremely cautious about making Financial Claims in the nature of projections to a prospect in a country where the franchisor's concept has no track record.

### **Is The Regulation Of Financial Claims Exclusively A Matter Of Statute?**

No. As in the U.S., the inquiry into foreign regulation of Financial Claims does not end with determining if the foreign country has a franchise statute that addresses the subject. Financial Claims, like all other statements that a franchise seller may make to induce a franchise sale, are subject to general principles of law. Generally speaking, every representation must be true, complete and not misleading; otherwise the representation may be subject to challenge as fraudulent, give rise to legal liability, and possibly provide the unhappy franchisee with a way out of an unprofitable franchise contract.

The inquiry into the regulation of franchise contracts in a particular jurisdiction should always consider the general law of contracts, any applicable common law or similar jurisprudence, and whether the relationship will be governed by the country's sales agency law, which may be another source of rights for an injured franchisee. Foreign courts may differ on the weight given to disclaimers and "no representation" acknowledgements signed by the local franchisee at a closing. Just as laws within the U.S. differ on a state-by-state basis on what a plaintiff must prove in terms of "reliance" in order to plead a claim for fraud, laws in other countries inevitably vary on this crucial point. Available remedies for alleged fraud may differ among foreign jurisdictions.<sup>13</sup> Foreign courts may not be equally receptive to awarding rescission to a party that is able to demonstrate that fraud or the equivalent induced the franchise sale.

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<sup>13</sup> Of course, in an international franchise agreement where the governing law is designated as U.S. law, the inquiry will likely circle back to the prevailing U.S. law if the matter is arbitrated or the courts honor the governing law clause. However, in cases where the franchisor seeks emergency relief, such as an injunction, in local courts, or where a local court declines to enforce a choice of law provision or an arbitral award on the basis that there is a strong public policy reason not to do so, it is nonetheless possible that local law will play an important role in determining the outcome of the claim.

The point is well-illustrated by *Van Camp v. Muffin Break Pty Ltd.*,<sup>14</sup> a recent Australian trial court decision which awarded rescission to a muffin shop franchisee who was able to prove that the franchisor had made various sales projections about the anticipated performance of a particular site that failed to hold true. According to the decision, both the franchise agreement and disclosure document included customary disclaimers and warnings that oral representations should be ignored. The franchisee also signed a statement at the closing acknowledging that it had received no information about earnings. Australian law, according to the court, is well-settled that “no representation” acknowledgements do not bar claims that misleading or deceptive representations were made. When the facts are to the contrary, “the terms of the contract are irrelevant,” the court concluded, relying on Australian judicial precedent. While it is difficult to draw broad conclusions from any one case, given that the decision invariably reflects the judge’s conclusions as to the facts of that case and the probity of the evidence, the outcome in *Muffin Break* is a stark reminder that courts may ignore contractual disclaimers where the judge believes that the facts warrant doing so. This judicial philosophy is not universally embraced by all jurisdictions. In the U.S., for example, courts have been willing to rely on contract integration clauses and the parol evidence rule to block claims based on allegations of false earnings representations.<sup>15</sup>

**Must A Franchisor Respond To A Buyer’s Request  
For Information Amounting To  
A Financial Claim? Can A Franchisor Be  
Held Liable For Remaining Silent?**

In the U.S., a franchise seller has no duty to speak beyond what franchise sales laws require it to disclose.<sup>16</sup> As there is no duty to provide prospective franchisees with Financial Claims, a franchisor incurs no liability under U.S. law for refusing to answer a prospective franchisee’s specific request for information that would constitute a Financial Claim.

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<sup>14</sup> 2008 WL 1875984 (Fed Magistrates Ct) 2008.

<sup>15</sup> See, e.g., *California Bagel Co. v. American Bagel Co.*, Bus. Fran. Guide (CCH) ¶ 11,880 (C.D. Cal. 2000); but see *Randall v. Lady of America Franchise Corp.*, 532 F. Supp. 2d 1071 (D. Minn. 2007) (denying summary judgment to a franchisor in an earnings claim action).

<sup>16</sup> In its Statement of Basis and Purpose accompanying the issuance of the Amended FTC Rule, the Federal Trade Commission made clear that: “[n]o franchisor need worry that it may violate the Rule for failing to include material information not specifically required or permitted by the Rule or state law. As [is the case] for every other person over which the Commission has jurisdiction, franchisors must not engage in unfair or deceptive acts or practices.” 72 Fed. Reg. 15444, 15537 (Mar. 30, 2007).

## Conclusion

Attorneys counseling clients engaged in franchise sales outside of the U.S. should inquire whether the prevailing common law judicial principle of *caveat emptor* applies in that foreign country. For example, do the courts of that country, as a general principle of interpreting private contracts, take the view that a seller is duty-bound to respond to a buyer's specific inquiry about material facts regarding the business opportunity, which would include questions directed at the historical performance of franchise outlets or likely future results, or otherwise risk civil liability to the buyer? In other words, if a prospective franchisee in a foreign country specifically asks the franchise seller for information that would amount to a Financial Claim, is the franchisor obligated under that country's judicial law to provide a truthful and complete answer? If so, of course, there would still remain the issue of how a franchisor would provide information that would not run afoul of the principles discussed above.

## Appendix 1

<b>Countries With Franchise Sales Laws That Do Not Specifically Address Financial Claims</b>		
Belgium	Kazakhstan	South Korea
Brazil	Lithuania	Sweden
China	Malaysia	Taiwan
France	Mexico	Venezuela
Germany	Romania	Vietnam
Indonesia	Russia	

<b>Countries With Franchise Sales Laws That Specifically Address Financial Claims</b>	
Australia	<p>“Earnings information includes information from which historical or future financial details of a franchise can be assessed.”</p> <p>If given, the earnings information must be based on “reasonable grounds.” When the earnings information is a projection or forecast, the franchisor must disclose: (a) the facts and assumptions on which the projection or forecast is based; (b) the extent of “enquiries and research” undertaken to compile the projection or forecast; (c) the time period covered; (d) why that time period was chosen; (e) if the projection or forecast includes depreciation, franchisee salary and loan costs; and (f) assumptions about interest and tax.</p>
Canada – Alberta	<p>“... information ... from which a specific level or range of actual or potential sales, costs, income or profit from franchisee outlets or franchisor outlets can be easily ascertained” ....</p> <p>If given, the information must (a) have a “reasonable basis;” (b) disclose material assumptions; (c) if based on actual results of existing outlets, the percentage of outlets that meet or exceed each range of results, and (d) where a franchisee may go to inspect substantiating information. If the information pertains to a franchisor outlet, the disclosure must state that franchisee results may differ.</p>
Canada – Ontario	<p>“If an earnings projection for the franchise is provided ....”</p> <p>The franchisor must disclose the “reasonable basis” for the projection, its underlying assumptions, and where a franchisee may go to inspect substantiating information.</p>
Canada – Prince Edward Island	<p>“If an earnings projection for the franchise is provided directly or indirectly, a statement specifying: (a) the assumptions and bases underlying the projection, its preparation and presentation; (b) that the assumptions and bases underlying the projection, its preparation and presentation are reasonable; (c) the period covered by the projection; (d) whether the projection is based on actual results of existing franchises or of existing business of the franchisor, franchisor's associates or affiliates of the franchisor of the same type as the franchise being offered and, if so, the locations, areas, territories or markets of such franchises and businesses; (e) if the projection is based on a business operated by the franchisor, franchisor's associate or affiliate of the franchisor, that the information may differ in respect of a franchise operated by a franchisee; and (f) where information that substantiates the projection is available for inspection.”</p>
Japan	<p>“If the franchisor provides the franchisee with the projected sales or profits ...”</p> <p>The projection must be made in a “reasonable manner” and on the basis of “reliable data.” The franchisor must disclose the underlying data and its assumptions.</p>

Spain	<p>“In the event that the franchisor should provide the potential individual franchisee with sales forecasts or trading results ...”</p> <p>They must be based on “experience or studies and shall be sufficiently justified.”</p>
United States	<p>“any representation, including any oral, written, or visual representation, to a prospective franchisee, including a representation in the general media, that states, expressly or by implication, a specific level or range of actual or potential sales, income, gross profits, or net profits. The term includes a chart, table, or mathematical calculation that shows possible results based on a combination of variables.”</p>

**Appendix 2**  
**Summary of Selected International Laws Regulating Financial Claims**

A	B	C	D	E	F
	<b>Pre-Sale Disclosure or Registration?</b>	<b>Mandatory/Voluntary Financial Claim?</b>	<b>Duty to Disclose All Material Information?</b>	<b>Specific Rules re: Media Claims?</b>	<b>Definition; Additional Comments</b>
<b>Australia</b>	Yes.  Disclosure only; registration not required.	Voluntary. If a franchisor provides “earnings information for the franchise, if it is given, must be based on reasonable grounds” and include information from which historical or future financial details of a franchise can be assessed.	Yes. However, duty does not compel disclosure of FPR information.	No.	The Australia Franchising Code of Conduct, as amended in 2008, contains mandatory disclosures concerning Financial Claims under Section 19 of the Code, as amended in 2008.

\* The authors express their appreciation to and wish to thank Halima Madjid, of Plave Koch PLC, for her assistance in preparing portions of this paper.

A	B	C	D	E	F
	Pre-Sale Disclosure or Registration?	Mandatory/Voluntary Financial Claim?	Duty to Disclose All Material Information?	Specific Rules re: Media Claims?	Definition; Additional Comments
China	Yes	Mandatory concerning the results of <u>other franchisees already operating in China</u> under Art. 6(VIII) of Administrative Measures on Information Disclosure for Commercial Franchise Operations Ministry of Commerce Order No. 2007 (16): "The franchisor shall disclose the franchisees' actual or estimated average sales volume, cost, gross profit, net profit, and simultaneously explain the source of the aforesaid information, time span, franchise stores/outlets concerned, etc. If such information is an estimate, the franchisor shall explain the basis of such estimate, and explicitly warn potential franchisees that the actual operating circumstances may be different from the estimate."	Information provided by the franchisor must be "true, accurate, and complete." Unlawful for the franchisor to "conceal the relevant information or provide any false information" – can give rise to rescission among other remedies.	No	<p>2007 Regulations on Administration of Commercial Franchise (Regulations) reflect the Chinese government's willingness to adopt a more liberal regulatory regime.</p> <p>Duty to notify franchisee of material changes in information provided. Unclear if the duty is owed only to prospective franchisees or if the duty ends when the prospect signs the franchise agreement.</p>

A	B	C	D	E	F
	<b>Pre-Sale Disclosure or Registration?</b>	<b>Mandatory/Voluntary Financial Claim?</b>	<b>Duty to Disclose All Material Information?</b>	<b>Specific Rules re: Media Claims?</b>	<b>Definition; Additional Comments</b>
<b>France</b>	Yes. Pre-contract disclosure at least 20 days before signing any contract or payment of any money.	Not specifically addressed in any decree regulating franchise sales.  However, in Article I (2d para.), the statute requires that the disclosure document must disclose “the current condition and the prospects for the development of the relevant market...”	Same as Column C	Same as Column C	



A	B	C	D	E	F
	<b>Pre-Sale Disclosure or Registration?</b>	<b>Mandatory/Voluntary Financial Claim?</b>	<b>Duty to Disclose All Material Information?</b>	<b>Specific Rules re: Media Claims?</b>	<b>Definition; Additional Comments</b>
<b>Indonesia</b>	<p>Yes and must give franchisee sufficient time to examine the information.</p> <p>Franchisees must register franchise agreement and disclosure statements with the Ministry of Industry and Trade within 30 days of the effective date of the franchise agreements.</p>	<p>Not specifically addressed in any decree regulating franchise sales.</p>	<p>Same as Column C</p>	<p>Same as Column C</p>	<p>Same as Column C</p> <p>Franchise Agreement must be:</p> <ul style="list-style-type: none"> <li>(a) in Indonesian writing</li> <li>(b) governed by Indonesian law</li> <li>(c) at least five years' duration</li> <li>(d) franchisee given the right appoint sub-franchisees must own and manage its own outlet</li> <li>(e) franchisors and franchisees give priority to the use of local goods and raw materials</li> <li>(f) franchisor provide guidance and training to franchisee</li> </ul>

A	B	C	D	E	F
	<b>Pre-Sale Disclosure or Registration?</b>	<b>Mandatory/Voluntary Financial Claim?</b>	<b>Duty to Disclose All Material Information?</b>	<b>Specific Rules re: Media Claims?</b>	<b>Definition; Additional Comments</b>
<b>Spain</b>	Yes. Pre-contract disclosure at least 20 days before signing any contract or payment by prospect. Register of Franchisors which applies both to franchisor and master franchisee and requires public filing of additional information. Duty to update for material changes and file annual report even if no material changes.	Duty to disclose “an estimate of the investments and expenses required to establish the franchise business.”  Voluntary as to Financial Claims. If franchisor provides a “sale forecast, it must be based on a reasonable basis.”	Not specifically addressed in any decree regulating franchise sales.	Same as Column D	2006 Royal Decree articulates scope of mandatory disclosures, but made no significant changes.  General disclosure standard is that information must be “accurate and non-deceiving.” Sales forecasts voluntarily made must be based on “experience or studies” and must be “sufficiently justified.”

A	B	C	D	E	F
	Pre-Sale Disclosure or Registration?	Mandatory/Voluntary Financial Claim?	Duty to Disclose All Material Information?	Specific Rules re: Media Claims?	Definition; Additional Comments
<b>United States</b>	<p>Yes - Amended FTC Rule applies in all 50 states; requires pre-sale disclosure</p> <p>CA, HI, IL, IN, MD, MI, MN, NY, ND, RI, SD, VA, WA, WI have franchise sales laws requiring either full-review registration or a notice filing in addition to disclosure.</p> <p>Additional filings duties in other states to qualify for exemption from business opportunity law</p>	<p>Under the Amended FTC Rule, and all state laws, voluntary.</p> <p>A franchisor that chooses not to make a Financial Claim must make a negative disclosure.</p>	<p>Yes. However, duty does not compel disclosure of Financial Claim information. Public policy in US is to leave decision to make Financial Claim voluntary.</p>	<p>Yes. A franchisor may not make Financial Claim (called a Financial Performance Representation) in general media and direct media to prospective franchisee unless franchisor includes Financial Claim in its franchise disclosure document (FDD).</p> <p>OK to include content that might constitute a Financial Claim in general media, press release, or on website provided that franchisor does not <u>direct</u> that Financial Claim to a prospect's attention (it is OK for prospect to <u>discover</u> that information on its own).</p>	<p>Financial Claim: "any representation, including any oral, written, or visual representation, to a prospective franchisee, including a representation in the general media, that states, expressly or by implication, a specific level or range of actual or potential sales, income, gross profits, or net profits. The term includes a chart, table, or mathematical calculation that shows possible results based on a combination of variables."</p>