Are Disclosures Really Standardized? An Empirical Analysis

Uri Benoliel

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Securities Law Commons

Recommended Citation

Uri Benoliel, Are Disclosures Really Standardized? An Empirical Analysis, 62 Vill. L. Rev. 1 (2017). Available at: https://digitalcommons.law.villanova.edu/vlr/vol62/iss1/1

This Article is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
Articles

ARE DISCLOSURES REALLY STANDARDIZED?
AN EMPIRICAL ANALYSIS

Uri Benoliel*

I. Introduction

A major goal of federal disclosure laws is to ensure that pre-contractual disclosure documents, in each industry, are standardized. Disclosure standardization has the potential to produce several important social benefits. To begin with, standardized disclosures may help disclosees make effective “apples-to-apples” comparisons between competing products and services. The ability to conduct effective comparisons enables disclosees

---

* Faculty of Law, College of Law & Business. J.S.D., U.C. Berkeley; LL.M., Columbia University. I am grateful to Oren Bar-Gill, Rupert Barkoff, Lisa Bernstein, Christopher Drahozal, Alon Harel, Gideon Parchomovsky, Renana Peres, Ariel Porat, Ari Reichel, Eyal Zamir, and Tal Zarsky for invaluable comments on earlier drafts of this Article.


to choose a product or service more easily “with the best combination of price [and] features [ ] to meet their individual needs.” In addition, disclosure standardization has the potential to reduce the reading and learning costs for disclosees and third-party intermediaries by enabling them to read and learn a basic structure of a single, uniform disclosure format, rather than multiple diverse formats. Standardized disclosures may thus assist third-party intermediaries to “establish easy-to-use mechanisms,” with which disclosees could “compare data quickly across several different [disclosers].” Examples of such tools include comparison-shopping websites and mobile applications designed to assist people in comparing between


4. See Bainbridge, supra note 2, at 1032 (“Investors and managers only need [to] learn how to deal with a single set of disclosure standards . . . . Individual firms, however, may lack incentives to develop or comply with such standards.”); Kurt Eggert, Truth in Gaming: Toward Consumer Protection in the Gambling Industry, 63 Md. L. Rev. 217, 263 (2004); Joseph A. Franco, Why Antifraud Prohibitions Are Not Enough: The Significance of Opportunity, Candor and Signaling in the Economic Case for Mandatory Securities Disclosure, 2002 Colum. Bus. L. Rev. 223, 288 n.137; Geiger, supra note 2, at 1795; Schwartz & Wilde, supra note 2, at 1460.

various providers of services and goods. By facilitating comparison shopping, standardization has the potential to increase competition among disclosers hoping to attract well-informed disclosees.

Given both the federal government’s goal of ensuring that disclosure documents are standardized and the multiple potential social benefits of disclosure standardization, an important question arises: are disclosure documents, in reality, standardized? To my knowledge, there has been no empirical research-based examination of this question to date. The purpose of this Article is to address this research gap. This article examines, as a case study, a collection of 109 financial performance disclosures, provided by franchisors to prospective franchisees, in the quick service restaurant industry.

The quick service franchise industry plays a dominant role in the U.S. economy. It has approximately 157,000 franchise establishments; employs approximately 3,340,000 employees; and has a yearly nominal output of approximately of $233 billion. This industry is governed by a federal disclosure law known as the Franchise Rule (Rule). The Rule was enacted by the Federal Trade Commission (FTC), an agency that aims, inter alia, to “enhance informed consumer choice.” The Rule requires each franchisor, in each industry, to provide potential franchisees

6. See, for example, CreditCards.com, for a website that compares credit cards’ key factors such as interest rates, annual fees, and other important features.


8. See infra Part III.


10. See id. at 17.

11. See id. at 18. “Nominal output is the gross value of goods and services produced—a concept that is comparable with ‘sales’ for most industries.” Id. at 5 n.4.


with a franchise disclosure document (FDD) “containing . . . information about the offered franchise, its officers, and other franchisees.” The FDD, the subject of this Article’s empirical analysis, is intended to allow potential franchisees “to weigh the [expected] risks and benefits” of the offered franchise before making a purchasing decision.

This Article is structured as follows: Part II will provide context by reviewing the federal government’s efforts to ensure that disclosure documents are standardized. Part III will present data and discuss the methodology for empirically testing whether disclosure documents in the quick service restaurant franchise industry are standardized. Part IV will discuss normative implications of the empirical results.

II. The Federal Goal of Standardization

A. Disclosure Laws

A major goal of federal disclosure laws is to ensure that disclosure documents, in each industry, are standardized. Through standardization, disclosure laws aim to assist disclosees in making effective comparisons between competing products and services, thereby increasing competition among disclosers hoping to attract well-informed disclosees.


17. See supra note 1.

For example, a central goal of the Franchise Rule is to ensure that franchise disclosure documents are standardized. As the FTC’s Coordinator of the Franchise Rule, Craig Tregillus, stated: “The Franchise Rule is designed to ensure that prospective franchisees receive the information they need to make an informed investment decision, and to make that information available in a *uniform format that facilitates comparison shopping* among different franchise offerings.”

In order to achieve the goal of disclosure standardization, the Franchise Rule requires that an FDD, provided by each franchisor, *uniformly* include the same 23 prescribed items. For example, item three focuses on the disclosure of litigation involving the franchisor. Item 7, as another example, concerns the disclosure of the franchisee’s “[e]stimated initial investment[s],” such as “[t]he initial franchise fee” and “[t]raining expenses.” Item ten, as another illustration, deals with disclosure of the financing arrangement that the franchisor offers to the franchisee. In addition, a central item, item 19, the focus of the empirical test of this article, concerns the disclosure of the financial performance of franchise outlets.

Another example of a disclosure law that aims to standardize disclosure documents is the Truth in Savings Act (TISA). TISA requires disclosure of the thermal performance characteristics of competing home insulation products (...); see also Truth in Savings Act, 12 U.S.C. § 4301(a) (2012) (“The Congress hereby finds that the Congress hereby finds that if there was uniformity in the disclosure of terms and conditions on which interest is paid and fees are assessed in connection with such accounts.”); 15 U.S.C. § 2302(a) (2012) (“In order to improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer shall disclose in simple and readily understood language the terms and conditions of such warranty.”).
pository institutions to disclose “the rates of interest which are payable on deposit accounts by depository institutions[,] and the fees that are assessable against deposit accounts.”27 A central underlying goal of the Act is to standardize the terms and conditions of depository institutions’ disclosure.28 Accordingly, Regulation DD, which implements TISA,29 requires that each disclosure document uniformly includes seven prescribed items, which incorporate detailed data about the account’s interest rate and fees.30 By requiring a uniform disclosure of seven prescribed items, TISA aims to allow consumers to “make a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts.”31 Through promoting effective comparison shopping, the TISA aims to increase competition among depository institutions hoping to attract well-informed consumers.32

Likewise, the Magnuson-Moss Warranty Act33 requires “any warrantor warranting a consumer product . . . by means of a written warranty” to disclose uniformly nine prescribed items that embody the central terms and conditions of the warranty.34 By standardizing the disclosure format, this Act aims to “ensure consumers could compare warranty coverage before [purchasing a product].”35 The Act’s central purpose is to “improve competition in the marketing of consumer products” by facilitating the consumers’ ability to compare products efficiently.36

Other prominent examples of federal disclosure laws that aim to promote consumer-comparison shopping through standardized disclosures include the FTC’s Rule Concerning the Labeling and Advertising of Home Insulation,37 the Securities and Exchange Commission’s (SEC) dis-
The federal goal of standardizing disclosure documents is reflected not only in existing disclosure laws, but also in the federal “smart disclosure” policy.41 In 2011, the Office of Information and Regulatory Affairs (OIRA), “a well-established institution within the Executive Office of the President,”42 issued an important memorandum for the heads of executive departments and agencies.43 “The purpose of this memorandum [was] to set out guidance for agencies to inform and facilitate the use of disclosures . . . .”44 Agencies were instructed to “give careful consideration to whether and how best to promote smart disclosure.”45 According to the memorandum, “the term ‘smart disclosure’ refers to the “timely release of complex information and data in standardized . . . formats in ways that enable consumers to make informed decisions.”46 The memorandum also

43. See Sunstein, supra note 2.
44. Id. at 2.
45. Id.
46. Id. (emphasis added).
instructed federal agencies that standardization of disclosures should be implemented “[t]o the extent feasible and appropriate . . . in a way that promotes useful comparisons.” Agencies were instructed further to “consider mechanisms to combat [disclosers’] attempts to evade standards” through means such as “categorizing [fees] under misleading headings” or other “attempts to conceal” fees.

In the same vein, the National Science and Technology Council (NSTC), an organization chaired by the President, established the “Task Force on Smart Disclosure” (Task Force) in 2011. The purpose of the Task Force was to “recommend approaches that [f]ederal entities can take to facilitate the ‘smart disclosure’ of data about consumer markets.” In May 2013, the Task Force published a report, which provided important “recommendations for expanding the use of smart disclosure and promoting effective smart disclosure policies across the [f]ederal [g]overnment.” The recommendations included that (1) “agencies should incorporate smart disclosure into all . . . policymaking related to . . . consumer issues” and (2) a governmental “forum for agencies to share smart disclosure strategies and tools” should be established.

Given the federal goal of disclosure standardization, as reflected by disclosure laws and the smart disclosure policy, an important question arises as to whether disclosure documents are, in reality, standardized. The purpose of the next Part of this Article is to address this question by empirically examining, as a case study, a collection of financial performance disclosures in the quick service restaurant franchise industry.

47. Id. at 5.
48. See id.
49. See Office of Sci. & Tech. Policy, National Science and Technology Council, White House, https://www.whitehouse.gov/administration/ostp/ostp/nstc [https://perma.cc/SSL3-W9LM] (last visited Dec. 28, 2016). “A primary objective of the NSTC is the establishment of clear national goals for Federal science and technology investments in a broad array of areas spanning virtually all the mission areas of the executive branch.” Id.
51. Id.
III. THE EMPIRICAL TEST: ARE FRANCHISE DISCLOSURES STANDARDIZED?

A. The Quick Service Restaurant Franchise Industry

The franchising business model plays a vital role in the U.S. economy. It includes around 780,000 establishments. These establishments, in turn, provide approximately 8.8 million jobs. Furthermore, they annually produce goods and services worth about $890 billion and contribute approximately $500 billion to the GDP.

This Article focuses on a sub-sector of the business model of franchising, the quick service restaurant industry. A quick service restaurant is defined as an "establishment[ ] primarily engaged in providing foodservice where patrons generally order or select items and pay before eating." Typical examples of quick service restaurants include limited-service eating places, cafeterias, fast-food restaurants, beverage bars, ice cream parlors, pizza-delivery establishments, carryout sandwich shops, and carryout service shops with on-premises baking of donuts, cookies, and bagels. Famous examples of quick service restaurants include Subway, McDonald's, and KFC.

The quick service restaurant franchise industry is the focus of this paper for two central reasons. First, this industry consistently leads among all other franchise industries in a number of important categories. To begin, the quick service restaurant franchise industry regularly has the highest share of franchise establishments, which stands at around “20% of all franchise establishments” today. In addition, the industry frequently has the highest share of employees, which currently comprises around 38% of all franchise employees. Finally, this industry consistently has

54. See Outlook for 2015, supra note 9, at 2. “An establishment is a single physical location at which business is conducted or services or industrial operations are performed . . . . An establishment may be owned by the franchisor or the franchisee.” Id. at 5 n.2.
55. See id. at 2.
56. See id.
58. See Outlook for 2015, supra note 9, at 23.
60. See id.
61. See id.
62. Other franchise industries include automotive, business services, commercial and residential services, lodging, personal services, and real estate. See Outlook for 2015, supra note 9, at 5.
63. See id. at 15, 19.
64. See id. at 17, 19.
the largest share of nominal output among all franchise industries; its output has been estimated to comprise 26% of total output.65

This Article focuses on only a single franchise industry, namely the quick service industry, for a second reason. By using a single industry, this study controlled for industry-specific disclosure characteristics. The type of financial information contained in a franchise disclosure document may vary by industry.66 For example, franchisors in the lodging industry prepare financial performance disclosures based on industry indicators of success, “such as average room rates . . . average occupancy percentage and ‘RevPar’ (revenues per available room).”67 In the quick service restaurant industry, however, financial performance disclosures are often based on indicators such as monthly or annual dollar sales volume or profit.68

65. See id. at 18, 19. Specifically, “[t]his business line [was] expected to contribute 26% of total output in 2015.” Id. at 19.

66. See Stuart Hershman & Joyce G. Mazero, Historical Development of Earnings Claims (New Financial Performance Representations) Regulations, in FINANCIAL PERFORMANCE REPRESENTATIONS 1, 16–17 (Stuart Hershman & Joyce Mazero eds., 2008) (“[I]ndustries involved in franchising vary widely and one form of disclosure (e.g., gross sales) might not be relevant or applicable to all industries (e.g., the lodging industry, which is concerned with occupancy rates).”); Debra M. Bollinger, S.D. Div. of Sec., et al., Earnings Claims—The Disclosure Most Franchisors Do Not Want to Make—And a Report from NASAA, Presentation at the International Franchise Association’s 29th Annual Legal Symposium, 8 (May 1996) (“[The] type of information useful to a franchisee varies by industry.”); Brian B. Schnell, Faegre & Benson LLP, et al., Financial Performance Representations—Shield or Sword?, Presentation at the American Bar Association’s 31st Annual Forum on Franchising 33 (Oct. 2008) (“The type of financial information contained in a financial performance representation varies by industry.”).


B. Methodology

In order to ascertain the level of standardization among financial performance disclosures in the quick service restaurant industry, this study took four steps. First, the author located, via the 2015 Entrepreneur magazine’s dataset, a list of 179 quick service restaurant franchisors. It should be noted that previous studies have estimated that the Entrepreneur’s annual datasets capture, on average, around a third to a half of all franchisors. Importantly, some studies have also estimated that Entrepreneur datasets are representative of the population of franchisors operating in the United States. Therefore, Entrepreneur datasets are widely used as a source of data for empirical legal research on franchising.

Second, the author excluded from the list of the 179 quick service franchisors thirty-six new franchisors that began franchising after 2010.

69. See Franchise 500, supra note 59.

70. The entire dataset covers 927 franchisors from various industries, of which 179 are quick service franchisors. See Franchise 500, supra note 59; 2016 Top Franchises from Entrepreneur’s Franchise 500 List, ENTREPRENEUR, https://www.entrepreneur.com/franchise500 (last visited Dec. 29, 2016) (located under “Understanding the Rankings”). Notably, since 1980, Entrepreneur Magazine has published the annual dataset of North American franchisors, known also as “The Annual Franchise 500.” See, e.g., John E. Clarkin & Robert B. Hashbrouck, The Franchise 500® as A Research Tool: How Objective and Reliable Is It?, 14 J. SMALL BUS. & ENTER. DEV. 144, 144–45 (2007). Each annual dataset includes, inter alia, the following facts: how long a franchisor has been in business, how long the franchisor has been franchising, how many units are owned by the franchisor, how many units are owned by franchisees, and what are the total startup costs needed to open a franchise. See, e.g., Franchise 500, supra note 59.

71. See Francine Lafontaine, A Critical Appraisal of Data Sources on Franchising, 4 J. MKTG. CHANNELS 5, 20 (1995); Scott Shane & Maw-Der Foo, New Firm Survival: Institutional Explanations for New Franchisor Mortality, 45 MGMT. SCI. 142, 146 (1999) (noting “[Entrepreneur’s] list includes only information from firms which choose to respond to the survey”); see also Scott Shane et al., The Effects of New Franchisor Partnering Strategies on Franchise System Size, 52 MGMT. SCI 773, 778 (2006) (“According to previous researchers, the Entrepreneur Magazine records capture most franchise systems.” (citing Francine LaFontaine, Contractual Agreements as Signaling Devices: Evidence from Franchising, 9 J.L., ECON. ORG. 256 (1993))).

72. See Shane & Foo, supra note 71, at 146 (“Entrepreneur Magazine’s list is representative of the population of business format franchisors operating in the United States.”); see also Shane et al., supra note 71, at 778.

These new franchisors have relatively few franchisee-owned units. Therefore, these franchisors may find it difficult, as opposed to older franchisors, to disclose meaningful information about their units’ financial performance to potential franchisees.

Third, for each of the remaining 143 franchisors, attempts were made to locate its publicly-available 2015 FDD, via three major FDDs governmental databases: the Wisconsin Department of Financial Institutions, the Minnesota Department of Commerce, and the California Department of Business Oversight. Through these databases, this study located the FDDs of 109 quick service restaurant franchisors. These franchisors serve as the final sample of this empirical study and are listed in Appendix I.

Fourth, among all the FDDs of the franchisors in the sample, the author compared a disclosure item, entitled “Item 19: Financial Performance Representations” (Item 19). It should be noted that, under Item 19, each franchisor is entitled, according to the Franchise Rule, “to provide information about the actual or potential financial performance of its franchised [or] franchisor-owned outlets.” The purpose of Item 19 is to assist prospective franchisees in assessing the potential profitability of the franchise they may open.

74. Each of the new thirty-six franchisors has, on average, about eleven franchisee-owned units. Conversely, each of the remaining 143 franchisors has, on average, 1,227 franchisee-owned units. See Schnell et al., supra note 66, at 36 (“New franchisors will not have any franchisee information to include in a FPR . . . .”).

75. See Leslie D. Curran, Plave Koch PLC, et al., Current Hot Topics in Franchise Registration and Disclosure, Presentation at the International Franchise Association’s 47th Annual Legal Symposium 1 (May 2014) (“But complying with the FTC Rule’s disclosure requirements for an FPR may be complicated, time consuming, and a bit tricky for new and start-up franchisors who do not have a long operational history of large source of financial data from which to pull.”); see also Bollinger et al., supra note 66, at 7 (“Start up franchisors do not have sufficient history/information.”); Hershman & Seidler, supra note 67, at 7 (“[I]n new or small franchise systems, franchisors often do not have sufficient data to compile a meaningful earnings claim.”); Lowell & Swartz, supra note 67, at 15 (“[S]tart up franchisors may lack the data to provide [earning] claims.”).

76. For a brief comparison between these three databases, see Tom Pitegoff, How to Get Free Franchise Disclosure Documents, FRANCHISE ALCHEMY (Sept. 22, 2014), http://franchisealchemy.com/how-to-get-free-fdds/ [https://perma.cc/Z89P-B9T6].


80. See 16 C.F.R. § 436.5(s) (2016).

81. See Marisa D. Faunce, Plave Koch PLC, & Jan S. Gilbert, Haynes and Boone, LLP, Weighing the Risks and Benefits of Financial Performance Representations, Presentation at the International Franchise Association’s 45th Annual Legal Symposium 1 (May. 2012) (“Prospective franchisees often request this
Out of the twenty-three disclosure items contained in each FDD, this study focuses solely on Item 19 as a comparative benchmark for two central reasons. To begin, comparing each of the 23 FDD items across all 109 disclosure documents in the sample would be too complex and time-consuming a task. Each FDD, including its 23 disclosure items, is generally more than 150 pages long, and many exceed 350 pages in length. In addition, the financial performance disclosure provided under Item 19 is one of the most significant pieces of information for prospective franchisees. "Most franchisees buy a franchise either as the start of a new career or as an investment opportunity." Unsurprisingly therefore, one of pro-

---

82. The FDD’s 23 items are regulated in 16 C.F.R. §§ 436.5(a)–(w).


84. See Hershman & Mazero, supra note 66, at 12 ("The franchise investment’s potential financial performance is the critical piece of information for any sensible investor."); Hershman & Seidler, supra note 68, at 5 ("[T]he franchise investment’s potential financial performance is the critical piece of information for any sensible investor."); David L. Cahn & Will K. Woods, Item 19 Earnings Claims—A Disclosure Most Franchisors Should Try to Make, 20 FRANCHISE L.J. 122, 124 (2001) (stating Item 19 "provides the information that every sensible person wants when deciding whether to purchase a franchise"); Thirty Years of Franchising, 27 FRANCHISE L.J. 85, 100 (2007) ("[E]arnings information [in Item 19] is not only critical to an informed investment decision but also the single most important piece of information that prospective franchisees need to make a truly informed purchasing decision."); Dale Cantone, Md. Att’y Gen. Office, et al., Mandatory Earnings Claims—What, When and How?, Presentation at the International Franchise Association’s 31st Annual Legal Symposium 15 (May 1998) ("State franchise regulators, franchisees, and franchisee representatives . . . believe that earnings information is the most material information prospective franchisees need to make an informed investment decision."); Lowell & Swartz, supra note 67, at 15 (stating "[o]ne of the most important disclosures for a franchisee is an earnings claim"); Schnell et al., supra note 66, at 2 ("For prospective franchisees, financial performance information often is critical . . ."); Don Sniegowski, The Elusive Earnings Claims, BLUE MAUMAU (Sept. 8, 2009, 5:42 PM), http://www.bluemauimau.org/7899/elusive_earnings_claim [https://perma.cc/3GKC-AAS5] ("[A] track record of financial results . . . is the [ ] most vital item of information a potential investor needs to have." (internal quotation marks omitted) (quoting Susan Kezios, President of American Franchisee Association)).

85. Cahn & Woods, supra note 84, at 124.
spective franchisees’ most basic and frequent questions is “how much can I reasonably expect to earn if I buy the franchise?” Item 19 deals with this important question.

C. Data

Tables 1 and 2 show, by percentage, some basic characteristics of the franchisors in the sample. Table 1 summarizes the products offered by the franchisors studied. Those products are varied. The most common type of product studied is sandwiches. The sample, however, does include other products, such as pizza, frozen desserts, baked goods, hamburgers, chicken, Mexican food, and smoothies.

### Table 1 Products Provided

<table>
<thead>
<tr>
<th>Product</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sandwiches</td>
<td>16.51%</td>
</tr>
<tr>
<td>Pizza</td>
<td>15.6%</td>
</tr>
<tr>
<td>Frozen Deserts</td>
<td>15.6%</td>
</tr>
<tr>
<td>Baked Goods</td>
<td>11.01%</td>
</tr>
<tr>
<td>Hamburgers</td>
<td>7.34%</td>
</tr>
<tr>
<td>Chicken</td>
<td>7.34%</td>
</tr>
<tr>
<td>Mexican Food</td>
<td>6.42%</td>
</tr>
<tr>
<td>Smoothies</td>
<td>5.5%</td>
</tr>
<tr>
<td>Coffee</td>
<td>4.59%</td>
</tr>
<tr>
<td>Miscellaneous Products</td>
<td>10.09%</td>
</tr>
</tbody>
</table>

Table 2 summarizes the year in which the franchisor began franchising. It illustrates that the franchisors studied are normally long-standing, well-established franchisors. Most franchisors have been franchising for more than twenty-three years. The newest franchisors in the sample are Orange Leaf Frozen Yogurt, Fuzzy’s Taco Shop, and Fresh Healthy Café, which began franchising in 2009. The oldest franchisor in the sample is Dairy Queen, which began franchising in 1944. The 1990s and the 2000s were the most common decades for the franchisors in the sample to begin franchising, with 27.52% of franchisors each, followed by the 1980s with 22.94% and the 1970s with 8.26%.

<table>
<thead>
<tr>
<th>Year Begun Franchising</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000s</td>
<td>27.52%</td>
</tr>
<tr>
<td>1990s</td>
<td>27.52%</td>
</tr>
<tr>
<td>1980s</td>
<td>22.94%</td>
</tr>
<tr>
<td>1970s</td>
<td>8.26%</td>
</tr>
<tr>
<td>1960s</td>
<td>5.5%</td>
</tr>
<tr>
<td>1950s</td>
<td>4.59%</td>
</tr>
<tr>
<td>1940s</td>
<td>3.67%</td>
</tr>
</tbody>
</table>

D. Results

The empirical results of this study show that the financial performance disclosures in the quick service restaurant industry are far from being standardized. To begin with, the disclosures are not standardized in terms of the existence of any financial performance data. While 82.57% of disclosures provide some information about the financial performance of the franchise units, 17.43% of disclosures explicitly state that they do not provide any financial performance information whatsoever.

More importantly, among the majority of disclosures that do provide some financial performance information, at least five major variations exist. First, while 72.22% disclosures include some data about the units’ sales and costs, 27.78% of disclosures include data about only the units’ sales. This variation is important for prospective franchisees. Disclosures that address only the units’ sales and neglect to address their costs usually fail to “yield [meaningful information] on profitability.”

Second, while 75.56% of disclosures include distinguished data about the financial performance of units which are owned by franchisees, 24.44% of disclosures do not include such data. These latter disclosures either mix between the performance of franchisee-owned units and franchisor-owned units or provide data about only franchisor-owned units. This variation is important for prospective franchisees. Disclosures that address only the units’ sales and neglect to address their costs usually fail to “yield [meaningful information] on profitability.”

87. See Lowell & Swartz, supra note 66, at 10; see also David J. Kaufmann, Mandatory Earnings Claim Disclosure: The Case Against, 15 Franchise L.J. 3, 6 (1995) (“Learning about average unit gross sales tells one nothing about average unit profitability . . . .”).
ation between disclosures that include distinguished data about franchisees and those that do not is significant for potential franchisees because there are numerous prototypical differences between the financial performance of franchisee-owned and franchisor-owned units. First, “franchisor-owned units may not pay royalties” to the franchisor, while franchisee-owned units do. Moreover, franchisors, as opposed to franchisees, “may benefit from volume discounts” when purchasing goods or services made available to them due to their operation of multiple locations. In addition, “[franchisor-owned] units may have a much larger territory in which to operate than what a franchisee will be offered” by their franchisors. Furthermore, “[t]he franchisor may be more skilled and experienced at controlling costs and increasing revenues than the franchisee,” and franchisor-owned units may count in their revenue Internet sales or other sources of revenue that a franchisee “may be restricted from pursuing” by their franchisor.

Third, the disclosures differ in terms of the characteristics of the units that are included. While 2.22% of disclosures explicitly include co-branded units, 10% of disclosures explicitly exclude those units. Moreover, while 5.56% of disclosures explicitly include units who had multiple owners during their performance, 7.78% of disclosures explicitly exclude such units. Furthermore, 17.78% of disclosures exclude units that are located in certain types of locations, such as train stations and airports, while others do not. In addition, 21.11% of disclosures exclude certain types of units, such as express restaurants or kiosks. However, others do not. Additionally, 11.11% of disclosures exclude units at certain geographic locations in U.S. territories, while others do not. These disclosures also vary.

88. See Hershman & Seidler, supra note 67, at 34 (“There may be differences in the data between franchised and company-owned businesses.”).
89. See Cantone et al., supra note 84, at 11; Lowell & Swartz, supra note 67, at 11; Curran et al., supra note 75, at 12–13.
90. See Curran et al., supra note 75, at 13; see also Cantone et al., supra note 84, at 11; Hershman & Seidler, supra note 67, at 34; Lowell & Swartz, supra note 66, at 11. Relatedly, a franchisor may have a line of credit with “a lower interest rate than the rate available to franchisee.” See Curran et al., supra note 75, at 14.
91. Curran et al., supra note 75, at 13.
92. Hershman & Seidler, supra note 67, at 34.
93. See Curran et al., supra note 75, at 13.
among themselves, and exclude different locations, such as Florida, Hawaii, Alaska, Puerto Rico, or regions with less than ten units.

The disclosures differ in terms of the characteristics of the units in several other ways. For example, they are non-standardized regarding the length of the period in which the units performed. Eighty percent of disclosures explicitly state that they include information about units operated for a minimum of one year. However, 16.67% of disclosures explicitly state that they include data about units who operated for a minimum period other than a year. These disclosures also vary among themselves, and include minimum operating periods for their units ranging from twenty-six weeks to four years.

Relatedly, the disclosures are non-standardized in terms of the end date of their fiscal year. In 51.11% of disclosures, the ending date of the

94. See, e.g., Disclosure of Hungry Howie’s Pizza & Subs (2016), at 45.
95. See, e.g., Disclosure of Jack in the Box (2016), at 50.
The franchisor’s fiscal year is identical to the end date of the calendar year, namely, December 31. However, other disclosures include a different end date. The latter disclosures also vary and include different end dates ranging from January 31 to October 25. Comparing financial performance disclosures among franchisors with varying fiscal-year periods can be difficult for prospective franchisees, in that the dynamic economic conditions that exist in each fiscal year, such as inflation, recession, and unemployment, may vary.

Fourth, the disclosures are non-standardized in their methods of grouping the financial performance data of their units. Approximately 14.44% of disclosures group the performance data by the units’ location-type, such as mall, train station, gas station or airport. Further, 8.89% of disclosures group the performance information by the units’ geographical region, such as Mid-Atlantic, Northeast and Southeast. In addition, 4.44% of disclosures group the performance data by the units’ size, as reflected in the unit’s square feet or number of seats. Moreover, 11.11% of disclosures group the performance facts by the type of unit, such as kiosk, drive thru, free standing and express. Additionally 3.33% of disclosures group the data by the units’ age. Other disclosures either use a different grouping method or do not group the data at all.

Fifth, the disclosures are not standardized regarding the statistical data that they provide about the units’ financial performance. Approximately 86.67% of disclosures provide data about the number or percentage of units that exceeded the average unit’s financial performance. Further, 15.56% of disclosures divide the units’ performance data by quartiles. Among these latter disclosures, 21.43% exclude the bottom quartile


from their data. In addition, 18.89% of disclosures number franchises by sales class. These disclosures also vary amongst themselves and include different number of classes ranging from two to fourteen.103 Furthermore, 30% of disclosures include longitudinal performance data spanning more than one year, which can assist potential franchisees in identifying performance trends. These disclosures also vary and include different numbers of years, ranging from three to twenty.104


IV. DISCUSSION AND NORMATIVE IMPLICATIONS

A major goal of the Franchise Rule, as stated by the FTC, is to ensure that franchise disclosure documents are standardized, thereby facilitating comparison shopping among competing franchise offerings. At first glance, the Rule seems to have achieved this goal, in that it requires each disclosure document to be based on a uniform framework, which includes a set of twenty-three specified items. However, a closer empirical examination of a central disclosure item, related to the franchisor’s financial performance, reveals that the substantive content of the disclosures, as opposed to their general framework, is far from standardized.

One possible explanation for this lack of standardization derives from the wording of the Franchise Rule. According to the FTC, because different industries—such as the quick service restaurant industry and the lodging industry—are governed by the same Franchise Rule, the Rule’s language should not mandate a particular set of financial performance disclosures. Accordingly, even franchisors within the same industry, such as those within the quick service restaurant industry, are governed by indiscisive disclosure rules, which, in turn, undermine the Franchise Rule’s ultimate goal of standardization in a number of ways. First, the Franchise Rule “permits” quick service restaurant franchisors to provide a financial

105. See supra Part II.A.
107. See supra Part III.D.
108. See Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities, 72 Fed. Reg. 15,444, 15,498 (Mar. 30, 2007) (“Given that many different industries are affected by part 436, what makes a financial performance disclosure reasonable, complete, and accurate is quite varied. Thus, the Commission will not mandate a particular set of financial performance disclosures.”); see also Dale Cantone, Md. Att’y Gen. Office, et al., Walking the FPR Tightrope: Managing the Expectations of Prospective Franchisees, Lenders and Regulators in Preparing Financial Performance Representations, Presentation at the International Franchise Association’s 48th Annual Legal Symposium 1 (May 2015) (“[D]isclosure of FPRs remains optional and unstructured . . . . [T]here still is relatively little guidance on how to prepare FPRs and what information to include.”); Stuart Hershman, DLA Piper, LLP, et al., Advanced FPRs: Writing, Using, Attacking and Defending Financial Performance Representations, Presentation at the International Franchise Association’s 46th Annual Legal Symposium 3 (May 2013) (“There are no set rules for the type of information that a franchisor may include in an FPR or the manner in which the franchisor presents that information within Item 19.”).
performance disclosure only under Item 19. Consequently, while the majority of franchisors provide financial performance disclosures, some franchisors do not. Second, the Franchise Rule’s definition of a financial performance disclosure is extremely flexible: A statement about the “sales, income, gross profits, or net profits.” Accordingly, some quick service restaurant disclosures include some data about the franchise sales and costs, while other disclosures include data only about the franchise sales. Third, the Franchise Rule allows quick service franchisors to provide information about the “financial performance of its franchised and/or franchisor-owned outlets.” Hence, some disclosures include distinguished data about the financial performance of franchisee-owned units, while other disclosures fail to distinguish between the financial performance data of franchisee-owned units and franchisor-owned units, or provide data about only franchisor-owned units. Fourth, the Franchise Rule does not specify what must be the standardized characteristics of the units that comprise the financial disclosures of a quick service franchisor. The Rule thus allows each franchisor to choose the units’ characteristics freely, including, for example, their geographic location (e.g., U.S. State) or type of location (e.g., airport or mall). Unsurprisingly, the characteristics of the units that are included and excluded from the disclosure documents vary significantly. Fifth, the Franchise Rule does not specify if and how disclosures in the quick service industry must group the units’ financial performance data (e.g., by geographic location, unit type, or size). Thus, disclosures significantly differ in their grouping method. Sixth, the Franchise Rule does not specify which statistical data quick service franchisors must present in their disclosure document, beyond the “number and percent” of units “that actually attained or surpassed the stated [financial] results.” Accordingly, disclosures differ in the statistical data that they provide regarding the restaurants’ financial performance (e.g., quartiles breakdown or sales breakdown).

In order to achieve the FTC’s central goal of standardization, the language of the Franchise Rule, relating to each central industry, must be decisive. Particularly, the dominant quick service restaurant industry

110. See supra Part III.D.
111. See 16 C.F.R. § 436.1(e) (emphasis added).
112. See supra Part III.D.
113. See 16 C.F.R. § 436.5(s)(1).
114. See supra Part III.D.
116. See id. § 436.5(s)(3)(ii)(A).
117. See supra Part III.D.
119. See supra Part III.D.
120. See supra Part III.D.
122. See supra Part III.D.
should be governed by a set of conclusive and standardized rules that promote uniformity among financial performance disclosures within this important industry. Similarly, other major franchise industries, including business services, personal services, and lodging, should be governed by particular sets of decisive disclosure rules, which promote standardization in each of these major industries.

In addition to the standardization of financial performance disclosures, the wording of the Franchise Rule demonstrates that the Rule should seek to promote another important goal: to allow potential franchisees to weigh the expected costs and benefits of a franchise offered to them effectively. For example, Item 19 should require each franchisor to disclose information not only about potential sales of the franchise units, as some franchisors do, but also about the costs of these units. Likewise, the Franchise Rule should prohibit franchisors to mix, in their disclosures, data about the financial performance of franchisee-owned units and franchisor-owned units. Such mixture risks blurring the potential costs and benefits of the unit offered to the potential franchisee.

Importantly, while this Article has empirically shown that the central disclosure item, Item 19, is non-standardized, other items regulated by the Franchise Rule likely suffer from the same deficiency due to the Franchise Rule’s indecisive language regarding other disclosure items. For example, under Item 3, each franchisor is required to disclose whether it was a party to any “material civil action involving the franchise relationship.” However, the Franchise Rule does not define the term “material.” Consequently, different franchisors might interpret the materiality requirement differently. As a result, the substantive content of Item 3 in each franchise disclosure may vary, thereby undermining the Franchise Rule’s goal of standardization.

123. See supra Part II.
124. The business services industry is the second-largest contributor to the value output in the franchise industry, following the quick service restaurant industry, with 19% of the total. See Outlook for 2015, supra note 9, at 21.
125. The personal services industry is the third largest contributor to the value output in the franchise industry, with 11% of the total. See id. It includes services such as health care and entertainment. See id. at 13.
126. The lodging industry is the fourth largest contributor to the value output in the franchise industry, with ten percent of the total. See id. at 21.
127. See 16 C.F.R. §§ 436.2(a), 436.5; Franchise Rule, supra note 15.
128. For empirical data about disclosures that include sales or costs, see supra Part III.D.
129. For the differences between the financial performance of franchisee and franchisor-owned units, see supra Part III.D.
130. See 16 C.F.R. § 436.5(c)(1)(i) (emphasis added).
131. See id. § 436.1 (omitting definition of word “material”).
Likewise, according to the Franchise Rule’s wording, franchisors are required, under Item 7, to “disclose the franchisee’s estimated initial investment” and “may include additional expenditure tables to show expenditure variations caused by differences such as in site location and premises size.” As a result of this wording, some disclosures may include additional expenditure tables, while others may not include this information. Standardization, again, is unlikely to be achieved.

Similarly, Item 10 of the Franchise Rule requires each franchisor to “[d]isclose the terms of each financing arrangement, including leases and installment contracts, that the franchisor . . . offer[s] . . . to the franchisee.” In addition, the Rule states that “[t]he franchisor may summarize the terms of each financing arrangement in tabular form, using footnotes to provide additional information.” As such, it is possible that only some franchisors may summarize the terms of each financing arrangement in accordance with the Rule. Here, too, standardization is unlikely to occur.

V. Conclusion

An important goal of the federal government, as reflected by disclosure laws and the smart disclosure policy, is to ensure that disclosure documents, in each regulated industry, are standardized. Through standardization, the government aims to allow disclosees to conduct effective comparison shopping between competing disclosers. Effective comparison shopping, in turn, has the potential to increase competition among disclosers hoping to attract well-informed disclosees.

At first glance, federal disclosure laws, including the Franchise Rule, appear to achieve the standardization goal in that they require each disclosure document to be based on a uniform framework that consists of a set of specified items. However, a deeper examination of disclosures tells a different story. As the empirical results of this case study show, the financial performance disclosures in the quick service restaurant franchise industry are far from being standardized. One central reason for this lack of standardization is that the wording of the Franchise Rule is highly indecisive. In order to promote the standardization goal, the language of the Franchise Rule must be much more conclusive and uniform.

133. 16 C.F.R. § 436.5(g) (emphasis added).
134. See id. § 436.5(j)(1).
135. Id. (emphasis added).
136. See supra Part II.
137. See supra Part I.
138. See supra Part I.
139. See supra Part II.
140. See supra Part III.D.
141. See supra Part IV.
142. See id.
While this Article focuses on quick service restaurant franchise disclosures regulated by the Franchise Rule, its normative conclusions have broader implications. All federal disclosure laws that aim to ensure industry standardization and meaningful comparison shopping must be drafted in decisive and uniform language. In order to achieve standardization, it is insufficient for disclosure laws to prescribe a uniform general framework, which includes a set of a specified number of items. It is essential that disclosure laws ensure that the substantive content of each disclosure item is standardized. Otherwise, as this empirical case study revealed, actual, substantive standardization is unlikely to occur.

---

143. For major examples of federal disclosure laws that aim to promote standardization, see supra Part II.
<table>
<thead>
<tr>
<th>Franchise Name</th>
<th>Category</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auntie Anne’s Hand-Rolled Soft Pretzels</td>
<td>Fresh Healthy Cafe</td>
<td>Pizza Ranch</td>
</tr>
<tr>
<td>Baskin-Robbins</td>
<td>Fuzzy’s Taco Shop</td>
<td>Pizza Schmizza</td>
</tr>
<tr>
<td>Ben &amp; Jerry’s</td>
<td>Gigi’s Cupcakes</td>
<td>Pretzelmaker</td>
</tr>
<tr>
<td>Biggby Coffee</td>
<td>Great American Cookies</td>
<td>Qdoba Mexican Grill</td>
</tr>
<tr>
<td>Billy Sims BBQ</td>
<td>Great Harvest Franchising</td>
<td>Ritas Italian Ice</td>
</tr>
<tr>
<td>Blimpie Subs &amp; Salads</td>
<td>Great Wraps</td>
<td>Robeks Fresh Juices &amp; Smoothies</td>
</tr>
<tr>
<td>Bojangles’ Restaurants</td>
<td>Happy Joe’s</td>
<td>Rosati’s Pizza</td>
</tr>
<tr>
<td>Breadsmith</td>
<td>Hardee’s</td>
<td>Samurai Sam’s Teriyaki Grill</td>
</tr>
<tr>
<td>Buffalo Wild Wings</td>
<td>House of Bread</td>
<td>Smoothie Factory</td>
</tr>
<tr>
<td>Capriotti’s Sandwich Shop</td>
<td>Hungry Howie’s Pizza &amp; Subs</td>
<td>Smoothie King</td>
</tr>
<tr>
<td>Captain D’s</td>
<td>Hurricane Grill &amp; Wings</td>
<td>Sonic Drive-In Restaurants</td>
</tr>
<tr>
<td>Captain Tony’s Pizza &amp; Pasta Emporium</td>
<td>Jack in the Box</td>
<td>Steak Escape Sandwich Grill</td>
</tr>
<tr>
<td>Carl’s Jr. Restaurants</td>
<td>Jersey Mike’s Subs</td>
<td>Subway</td>
</tr>
<tr>
<td>Carvel</td>
<td>Jet’s Pizza</td>
<td>Surf City Squeeze</td>
</tr>
<tr>
<td>Charleys Philly Steaks</td>
<td>Jimmy John’s Gourmet Sandwiches</td>
<td>Taco Bell</td>
</tr>
<tr>
<td>Checkers and Rally’s Restaurants</td>
<td>KFC</td>
<td>TacoTime</td>
</tr>
<tr>
<td>Chesters</td>
<td>Kolache Factory</td>
<td>TCBY and Mrs. Fields</td>
</tr>
<tr>
<td>Chronic Tacos Enterprises</td>
<td>Kona Ice</td>
<td>Teriyaki Madness</td>
</tr>
<tr>
<td>Church’s Chicken</td>
<td>Krispy Kreme Doughnut</td>
<td>The Coffee Beanery</td>
</tr>
<tr>
<td>Cinnabon</td>
<td>Marble Slab Creamery</td>
<td>The Great Steak &amp; Potato</td>
</tr>
<tr>
<td>Cold Stone Creamery</td>
<td>Marcos Franchising</td>
<td>The Haagen-Dazs Shoppe</td>
</tr>
<tr>
<td>Corner Bakery Cafe</td>
<td>Maui Wowi Hawaiian Coffees &amp; Smoothies</td>
<td>The Original SoupMan</td>
</tr>
<tr>
<td>Cousins Subs</td>
<td>McAlisters Deli</td>
<td>Togo’s Franchisor</td>
</tr>
<tr>
<td>Franchising System</td>
<td>Brand</td>
<td></td>
</tr>
<tr>
<td>------------------------------------</td>
<td>--------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Culver Franchising System</td>
<td>McDonald’s</td>
<td></td>
</tr>
<tr>
<td>D.P. Dough</td>
<td>Menchie’s</td>
<td></td>
</tr>
<tr>
<td>Dairy Queen Treat Franchise</td>
<td>Moe’s Southwest Grill</td>
<td></td>
</tr>
<tr>
<td>Del Taco</td>
<td>Nathan’s Famous</td>
<td></td>
</tr>
<tr>
<td>Deli Delicious Franchising</td>
<td>Nestle Toll House Cafe by Chip</td>
<td></td>
</tr>
<tr>
<td>Dippin’ Dots Franchising</td>
<td>Nrgize Lifestyle Cafe</td>
<td></td>
</tr>
<tr>
<td>Donatos Pizza</td>
<td>Orange Leaf Frozen Yogurt</td>
<td></td>
</tr>
<tr>
<td>Dunkin’ Donuts</td>
<td>Orion Food Systems (Hot Stuff Pizza)</td>
<td></td>
</tr>
<tr>
<td>Dunn Bros Coffee</td>
<td>Papa John’s International</td>
<td></td>
</tr>
<tr>
<td>Elevation Burger</td>
<td>Papa Murphys</td>
<td></td>
</tr>
<tr>
<td>Erbert &amp; Gerbert’s Sandwich Shops</td>
<td>Penn Station East Coast Subs</td>
<td></td>
</tr>
<tr>
<td>Figaro’s Pizza</td>
<td>Pinkberry Ventures</td>
<td></td>
</tr>
<tr>
<td>Firehouse Subs</td>
<td>Pita Pit</td>
<td></td>
</tr>
<tr>
<td>Freddy’s Frozen Custard</td>
<td>Pizza Hut</td>
<td></td>
</tr>
<tr>
<td>Dairy Queen Treat Franchise</td>
<td>Villa Pizza</td>
<td></td>
</tr>
<tr>
<td>Del Taco</td>
<td>Wayback Burgers</td>
<td></td>
</tr>
<tr>
<td>Deli Delicious Franchising</td>
<td>Wetzel’s Pretzels</td>
<td></td>
</tr>
<tr>
<td>Dippin’ Dots Franchising</td>
<td>Which Wich Superior Sandwiches</td>
<td></td>
</tr>
<tr>
<td>Donatos Pizza</td>
<td>Wingstop Restaurants</td>
<td></td>
</tr>
<tr>
<td>Dunkin’ Donuts</td>
<td>Yogurtland Franchising</td>
<td></td>
</tr>
<tr>
<td>Dunn Bros Coffee</td>
<td>Your Pie</td>
<td></td>
</tr>
<tr>
<td>Elevation Burger</td>
<td>Z Pizza</td>
<td></td>
</tr>
<tr>
<td>Erbert &amp; Gerbert’s Sandwich Shops</td>
<td>Zaxby’s Franchising</td>
<td></td>
</tr>
<tr>
<td>Figaro’s Pizza</td>
<td>Zoup! Systems</td>
<td></td>
</tr>
<tr>
<td>Firehouse Subs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freddy’s Frozen Custard</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>