



[Boston](#) [Chicago](#) [New Jersey](#) [New York](#) [Philadelphia](#) [San Antonio](#)

NASAA Adopts Multi-Unit Franchising Commentary

Part I: Area Development and Area Representation

On September 16, 2014, the North American Securities Administrators Association ("NASAA") officially adopted a Multi-Unit Commentary that provides direction on required disclosures for multi-unit franchise arrangements - particularly, area development, area representative and sub franchising arrangements. NASAA adopted the commentary to clarify ambiguities that have existed since the Federal Trade Commission's issuance of its Amended Franchise Rule in 2008.

Franchisors with a currently effective Franchise Disclosure Document ("FDD") must comply with the Commentary within 120 days after the franchisors' next fiscal year end. New franchisors must comply with the Commentary by March 2015. State regulators, however, will likely refer to the new Commentary in their reviews going forward, so franchisors should review their FDDs as soon as possible to ensure compliance.

Part I of this article focuses on certain disclosure

Recent Press Releases

PIB Law Announces Opening of New Boston Office

[Read more.](#)

PIB Law Expands Into the Southwest with Opening of San Antonio Office

[Read more.](#)

James M. Behmke Named PIB Law's Managing Partner of New Boston Office

[Read more.](#)

Former Senior Wells Fargo Litigator Michael B. Goldberg Joins PIB Law as Managing Partner of New San Antonio Office

[Read more.](#)

requirements for area development and area representative arrangements. Part II will focus on sub franchising arrangements.

Although franchisors are not required to use terms identical to those used by NASAA in the Commentary, we suggest using such terms to facilitate reviews by state examiners, since the examiners will likely use them in their reviews.

Area Development

An "area development" arrangement involves a person that is granted the right (for consideration paid to the franchisor) to open and operate multiple unit franchises, generally within an outlined geographic area. The franchisor and area developer enter into an area development agreement specifying the number of units to be developed and a development schedule. Separate unit franchise agreements are then executed for each location. The area developer does not have the right to grant or sell unit franchises to third parties. Under this structure, the area developer is sometimes called an area franchisee, multi-unit developer or regional developer.

The Commentary confirmed that a franchisor may offer area development arrangements within the same FDD for single unit franchises, since area developers are required to become unit franchises pursuant to the area development agreement. Most of the remainder of the Commentary on area development arrangements focuses on the required disclosures in Item 20 regarding "outlets." The Commentary clarifies that the franchisor is neither required nor permitted to: (a) include separate tables for area developers; (b) separately state information on area developers; or (c) include the number of franchised outlets that area developers have agreed to open.

If, however, an area developer is a current owner of a franchised outlet, the franchisor must identify the area developer in the Item 20 lists of current and former franchisees. They can be identified by a footnote or symbol next to their name with a notation that they are an

Sanjay Ibrahim Speaks at ACI Events

- [November 20-21, 2014](#) - 3rd Bank Non-Bank Forum on Mortgage Servicing Compliance in Washington, D.C.

- [January 15-16, 2015](#) - 16th National Forum on Residential Mortgage Litigation and Regulatory Enforcement in Los Angeles, CA

PIB Law Gives Back

[Raul Jimenez Thanksgiving Dinner](#) -

PIBs San Antonio office will be participating this year in the Raul Jimenez Thanksgiving Dinner. This event is designed for senior citizens and those less fortunate who are alone and cannot afford to prepare a holiday meal for themselves, and provides a place to enjoy a hot and nutritious turkey dinner with all the trimmings on Thanksgiving Day. Attendees will dine at a "community dinner table",

area developer. Further, an area developer that has a currently effective area development agreement but does not yet have (or has never had) an existing franchised outlet must be disclosed as a current franchisee. Also, if a franchisor offers area development arrangements but has no area developers as of the close of its fiscal year, it must disclose this fact in a footnote. Finally, if an area developer loses its area development rights, even if it never opened a franchised outlet, that area developer must be disclosed as a former franchisee.

Area Representation

An "area representation" arrangement involves a person that is granted the right (again, for consideration paid to the franchisor) to solicit third parties to enter into unit franchise agreements with the franchisor and/or provide support services to third parties entering into unit franchise agreements with the franchisor. The franchisor and the area representative enter into an area representative agreement, but the area representative is not a party to the unit franchise agreements executed by third parties. The area representative's payment of consideration to the franchisor for the area representative's rights is the main element that makes an area representation arrangement different from arrangements with franchise brokers or selling agents. Further, the Commentary does not address disclosure issues relating to franchise brokers or selling agents.

The most burdensome requirement of the Commentary regarding area representation is that the franchisor must provide an FDD regarding its area representative offering that is separate from its FDD regarding its single unit offering. It had been the practice of many franchisors to include both offerings within the same FDD. This requirement will likely increase a franchisor's cost of compliance because franchisors that offer area representation arrangements will need to maintain and manage two separate FDDs in the various registration states.

The Commentary also increases the disclosure burden for

celebrate the holiday with their peers, and enjoy live music and entertainment. The Dinner currently serves over 24,000 senior and needy citizens from San Antonio and the surrounding areas, and has grown to be one of the largest Thanksgiving benefits in the country.

November through December - [bostonCANshare](#) -

Our Boston office will be donating cans toward the bostonCANshare program, benefiting the Greater Boston Food Bank. Last year, the CANshare program raised over \$53,000 and over 50,000 pounds of food to support hungry people in Boston. The collection at One Financial Center (where our firm is located) will continue through November 17, 2014, however, donations can still be made to the Greater Boston Food Bank or the bostonCANshare program through December 6th.

December - Adopt-A-Family - All Offices

Last holiday season, our Somerset office participated in The Children's Home Society of New Jersey's Adopt-A-Family program. It was a huge success and made a big difference. This year we are doing it again throughout all of the PIB offices! Adopt-A-Family

the franchisor's single unit FDD, as any area representative that exercises management responsibility relating to the sale or operation of franchises must be included in the disclosures required in Item 2 (business experience), Item 3 (litigation), Item 4 (litigation) and Item 11 (training). While franchisors may not think that they are granting any "management responsibility" to area representatives, the Commentary states that if a franchisor uses an area representative to provide service or support to unit franchisees, it is granting the area representative "management responsibility." This is a low threshold that is probably met in most area representative relationships. If the franchisor is truly not granting any management responsibility to the area representative, it must say so in Item 1. Further, in Item 8, the franchisor must disclose any rebates that it arranges for its area representatives to receive based on required purchases by franchisees, as well as any revenues based on required purchases by franchisees that franchisor knows the area representative is receiving.

If, however, a franchisor has area representatives that only operate in specific states, the Commentary allows any required disclosures regarding such individual area representatives to be made either in the body of its single unit FDD or in addenda to such FDD. The addenda can be state specific or include all area representatives in the system. That being said, the franchisor cannot pick and choose where to include disclosures. If it uses an addendum, it must include all the disclosures in that addendum - e.g., it can't include the litigation disclosures in the addendum and the business experience in the body of the FDD. In addition, if a disclosure also involves the franchisor (e.g., the franchisor is a party to litigation in which the area representative is also a party), it must be disclosed in the body of the FDD.

With respect to Item 20's required disclosures relating to "outlets," the franchisor's area representative FDD need only disclose information relating to the area representatives (and not the franchisor's unit franchisees), and the franchisor's single unit FDD need only disclose information relating to the unit franchisees (and not the franchisor's area representatives).

helps bring happiness to children and families who have fallen on hard times due to recent loss of employment or unforeseen hardship through donations of clothes, toys, and non-perishable items.

Recent Blogs

Supreme Court Preview: Omnicare Decision to Address Section 11 Liability for Opinion Statements

[Read more.](#)

Sixth Circuit Takes the Middle Road on Corporate Scierter Required in Securities Fraud Actions

[Read more.](#)

Fed Chief Outlines Plans for New Bank Funding Rules

[Read more.](#)

OCC Final Rule on Heightened Standards for Large Financial Institutions Issued

[Read more.](#)

Court Holds Reinsurance Certificates of Reinsurance U.S. Customs and Border Protection Announced Mobile Passport Control App

[Read more.](#)

The full text of the commentary can be found at:

<http://www.nasaa.org/wp-content/uploads/2011/08/Franchise-Multi-Unit-Commentary-effective-Adopted-Sept.-16-2014.pdf>.

The foregoing information is provided only as a guide. It is not a full summary of requirements relating to multi-unit offerings under franchise and business opportunity laws. Legal advice may be provided based only on specific facts. Accordingly, please check with us before relying on the general information stated herein.

Recent U.S. District Ruling Will Protect Insurers from Disparate Impact Lawsuits

In a ruling that was a win for the property and casualty insurer industry, the U.S. District Court for the District of Columbia recently held in *American Insurance Association v. United States Department of Housing and Urban Development*, No. 1:13-cv-00966-RJL (D.D.C. Nov. 3, 2014), that the Fair Housing Act ("FHA") does not permit claims based on disparate impact. Disparate impact claims encompass facially neutral practices that have a discriminatory effect rather than intent.

Ruling Out Disparate Impact

In *American Insurance Association*, the Court [granted plaintiffs' motion for summary judgment](#), striking down disparate impact rules that the Department of Housing and Urban Development ("HUD") had promulgated. The Court ruled that the FHA only prohibits intentional discrimination and that HUD exceeded its authority by impermissibly expanding the scope of the FHA to allow for claims based on disparate impact. The Court stated that HUD's creation of rules providing for liability based on disparate impact was outside the scope of Congress's intent in passing the FHA, because nothing in the FHA's legislative history or in its express language suggests that the reach of the FHA should extend beyond the prohibition of intentional discrimination. Under the Court's ruling, housing practices, such as the pricing of homeowners' insurance, that have a disparate impact on minorities will not be considered violative of the FHA absent proof of discriminatory intent.

The Decision's Impact on the Insurance Industry

The recognition of disparate impact claims under the FHA through HUD's rules made a

broad range of housing-related business decisions subject to civil rights litigation. By opening the floodgates to disparate impact litigation, the rules HUD promulgated could have forced companies offering homeowners' insurance to abandon the use of risk-based underwriting standards in favor of race-based standards due to concerns of potentially incurring disparate impact liability.

Allowing disparate impact claims under the FHA in the context of insurance also raises [concerns](#) about federal encroachment upon state insurance regulation. The McCarran-Ferguson Act exempts the insurance industry from most federal regulation, making insurance regulation a state matter. Therefore, subjecting insurance companies to increased liability under the FHA could have violated the McCarran-Ferguson Act.

It is expected that HUD will appeal the ruling. The Supreme Court has never ruled on the issue of disparate impact liability under the FHA, but it is expected to address it in 2015 in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, [13-1371](#), 2014 WL 4916193 (Oct. 2, 2014).

[PIB Law](#) represents national banks, retailers, reinsurers/insurers, mortgage lenders and financial services companies from its offices in New Jersey, New York City, Philadelphia, Boston, San Antonio, and Chicago. For more information on reinsurance/insurance issues, [contact](#) PIB Law at 908-725-9700.



Our practice areas include:

- Mortgage Banking
- Bankruptcy
- Reinsurance / Insurance
- Repurchase Solutions / Mortgage Fraud
- Consumer Finance
- Fair Lending
- Commercial Litigation
- Corporate Matters
- Regulatory & Supervisory Matters



- General Counsel
- Securities Litigation
- Design Professionals
- Intellectual Property



To read more click [here](#)

Confidentiality: This email message is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is strictly prohibited. If you are not the intended recipient, contact the sender via reply email and destroy all copies of the original message.

IRS Circular 230 Disclosure: Any tax advice contained in this message (including any attachments and enclosures) was not intended or written to be used, and cannot be used (i) by any taxpayer for the purpose of avoiding any penalties that may be imposed on the taxpayer, or (ii) to promote, market or recommend to another party any transaction or matter addressed herein.

[Forward this email](#)



This email was sent to cindys@therainmakerinstitute.com by pib_news@piblaw.com | [Update Profile/Email Address](#) | Rapid removal with [SafeUnsubscribe™](#) | [Privacy Policy](#).



Parker Ibrahim & Berg | 270 Davidson Avenue | Somerset | NJ | 08873