



# INDEPENDENT DISTRIBUTORS COOPERATIVE - USA®

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ORIGINAL

October 26, 2004

Federal Trade Commission/Office of the Secretary  
Room H-159 (Annex W)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580



**RE: Franchise Rule Staff Report, R511003**

To Whom It May Concern:

On behalf of Independent Distributors Cooperative-USA (IDC-USA), I submit the following comments on the Federal Trade Commission's Franchise Rule Staff Report R511003 regarding "Trade Regulation Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures." My comments relate to the proposed elimination of the co-op exclusion provided under 16 CFR §436.2(a)(4)(ii).

IDC-USA is a member owned cooperative of independent industrial distributors. Our members have approximately 200 locations across the nation. As a purchasing cooperative, the members are able to purchase in volume quantities in an attempt to level the playing field with the large public monopolistic chains. We are, in effect, the industrial version of the Ace Hardware cooperative designed to level the playing field for independently owned hardware stores against the national chains such as Home Depot, Lowe's, and Menards.

The services IDC-USA provides help our members compete with larger public competitors. In our industry, the large publicly traded national chains are: Motion Industries, Applied Industrial Technologies, and Kaman Industrial Technologies.

In order to reduce ambiguity of the Franchise Rule, 16 CFR §436.2(a) defines the term "franchise" and identifies commercial relationships it specifically excludes, including "membership in a bona fide 'cooperative association.' "

Cooperative associations are later defined in 16 CFR §436.2(l) as either "an association of producers of agricultural products authorized by section 1 of the Capper-Volstead Act, 7 USC 291; or (2) an organization operated on a cooperative basis by and for independent retailers which wholesales goods and furnishes services primarily to its member-retailers."

We agree with the Commission that cooperatives serving farmers and independent retailers are not franchises. Because cooperatives are businesses owned and governed by their members – in this case, retailers or agricultural producers – there is no franchisor/franchisee relationship. The power imbalance between franchisors and franchisees that the Rule attempts to address does not exist in cooperatives because the members receiving services are also the owners of the business providing those services.

The exclusions provided for in 16 CFR §436.2 make these structural distinctions clear for those who may not be familiar with the cooperative structure and the nature of member-ownership.

On pages 251-252, the Staff Report recommends that the Commission remove the Franchise Rule's four exclusions, including the cooperative exclusion, as originally proposed in the Notice of Proposed Rulemaking in 1999 (64 Fed. Reg. 57,294, Oct. 22, 1999).

The Staff Report explains that the removal of the exclusions is intended to streamline the rule rather than to terminate the exclusions or signal a shift in Commission policy. The Report suggests that identifying the exclusions in Compliance Guides rather than in the Rule itself is sufficient for demonstrating the Commission's intent that these four relationships be excluded from the definition of franchise.

As a cooperative that may look to the Rule for clarity, IDC-USA disagrees that such explanation in the Compliance Guides will provide sufficient clarity. I urge you to retain the exclusions in the Rule itself rather than in the accompanying guidance documents.

### **The Exclusions are Useful and Necessary**

The 1999 NPR noted that these exclusions were originally included in the Rule because they could be *perceived* as falling within the definition of a franchise. The NPR proposed eliminating these explicit exclusions because they “no longer serve a useful purpose” because the franchise community has become familiar with the rule, including the definition of “franchise.”

Unfortunately, while the franchise community already regulated under the Rule may be familiar with its provisions and application, the public, business owners and the legal community may not be. It is likely that without the express exclusion of cooperatives in the Rule, they will be confused about its application to cooperative enterprise.

In fact, IDC-USA often spends significant time with potential new members educating them on the nature of our cooperative structure, and their potential role in it as an owner. We can speak from experience that like the general public, few business owners initially fully understand the difference between a purchasing cooperative and a franchise opportunity.

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I urge the Commission to maintain the cooperative exclusion in the Rule itself, rather than in the Compliance Guides. On behalf of Independent Distributors Cooperative-USA, thank you for the opportunity to comment on the Staff Report.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Bailey", with a long, sweeping underline that extends to the right.

Jack L. Bailey  
President and CEO