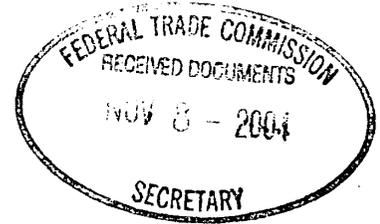




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November 5, 2004

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FEDERAL EXPRESS

Secretary  
Federal Trade Commission  
Room H-159 (Annex W)  
600 Pennsylvania Avenue  
Washington, D.C. 20580

Re: Franchise Rule Staff Report

Gentlemen:

We offer the following comments on the proposed revised Trade Regulation Rule on Franchising:

One of our clients has entered into a small number of trademark licenses in the United States under which the licensee is granted the right to operate a microbrewery and restaurant at a single location under the client's trademarks. The client expects to enter into an additional handful of similar licenses in the U.S. over the next few years. The typical term is 10 years with the licensee having the option to extend the term for up to three additional five-year terms. The client's only obligation under the license is to provide certain consulting services before the restaurant is opened and within ten weeks after the execution of the license agreement. The licensee is expected to pay a substantial fixed license fee for each contract year. The fee is generally payable in arrears at the end of each quarter, but the fee for the first two quarters is not payable until six months after the restaurant opens for business.

Our client has been relying on the "minimum payment" exemption contained in section 16 C.F.R. section 436.2(a)(3)(iii) of the current Rule, because no payments are due within the first six months of the relationship.

The Final Interpretive Guides for the existing Rule provide: "A commitment entered into during the first six months which requires a payment later than six months after commencing operation is not counted towards the \$500 minimum, such as a promissory note or that portion of lease payments made after six months."



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Under the existing Rule, the Commission has also issued a series of advisory opinions explaining that the goal of the Rule was to allow the franchisee to protect itself in case the franchisor failed to fulfill its obligations. Hence, a promissory note (as long as it was not negotiable and not assignable in a manner that would cutoff defenses) entered into during the first six months would not count against the \$500 minimum payment if no payments were due during the first six months. See, for example, advisory opinions number 6382, 6475 and 6480.

The proposed Rule would revise the minimum payment exemption to provide an exemption only if: “The total of the required payments, or commitments to make a required payment, to the franchisor or an affiliate that are made at any time before to within six months after commencing operation of the franchise business is less than \$500” (emphasis added).

We believe that this change in the scope of the exemption to cover “commitments” to make payments is unwarranted. The staff commentary points to nothing in the record that identifies any abuses that have followed from the existing Rule as interpreted by the final Interpretive Guides or the listed advisory opinions. We believe that the analysis set forth in the advisory opinions has stood the test of time over the last 20 years and that no justification exists for such a severe limitation on the scope of the existing exemption.

Applying the exemption to “commitments to make a required payment” of a specific amount in the future, effectively eliminates this exemption for most franchises. For example, a three-year franchise agreement requiring the franchisee to pay \$50 per month over the three-year term would no longer qualify for the exemption. It is not clear from the staff analysis whether the implications of this change were fully considered.

Accordingly, we respectfully submit that the language of the proposed exemption should be restored to the language set forth in the existing Rule at section 436.2(a)(3)(iii) and that the staff commentary be amended to reflect the language in the existing Interpretive Guides.



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Please do not hesitate to contact me if you have any questions in this regard.

Very truly yours,

Bruce W. McDiarmid