

Richard Pu, P.C.

(fax)

November 9, 2004

By Federal Express

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

(877) FTC-HELP



Re: RF511003-- Proposed Revisions to Franchise Rule

Dear Sirs:

This letter sets forth my comments on the Staff's recommendations regarding revisions to the Franchise Rule. I am an attorney in New York, and a major part of my practice consists of representing franchisees in litigation against franchisors.

Proposed Section 436.5(c), Item 3, Litigation. First, the FTC should retain the Staff's recommendation of requiring disclosure of franchisor-initiated lawsuits against franchisees. If the franchisor has engaged in conduct violative of the Franchise Rule, such conduct will often be alleged by the franchisee in such litigation. Thus, knowing about litigation is a way of acquiring information relevant to assessing a prospective franchising opportunity. Indeed, the FTC should require that the franchisor supply the name, address and telephone number of the lawyer for franchisee in any such litigation.

Proposed Section 436.5(t), Item 20, Outlets and Franchisee Information; and 2(b), Confidentiality Clauses and 2(c), Franchisee Associations. The FTC should retain the Staff's recommendation of requiring disclosure of the use of confidentiality clauses with outgoing franchisees. The use of

such clauses is often an indication that facts embarrassing to the franchisor have been suppressed. Knowledge of such use is therefore a fact that warns a prospective franchisee that he or she may not have the entire story about the franchisor.

Proposed Section 436.8(a)(5), Sophisticated investor exemptions. The FTC should focus on the knowledge and sophistication of the investor, not on the amount of his or her investment. It is unsound to assume that an investor who parted with \$1.5 million is necessarily a sophisticated investor. Many franchising opportunities currently require investments of that size, but that doesn't necessarily mean that the franchisees were sophisticated investors.

Proposed Section 436.9(B)(2); Disclaimers and Contract Negotiations: (a) Integration clauses and waivers. The FTC should not permit franchisors to disclaim responsibility for the statements of "rogue" salespeople. Doing so invites franchisors to engage in misconduct and to insulate themselves from liability therefor through the use of boilerplate clauses disclaiming responsibility for the conduct of their sales people.

New York's Franchise Sales Act ("FSA") voids disclaimers that insulate the franchisor from liability for fraud. For example, § 687(4) provides:

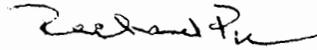
"Any ... provision purporting to ... waive compliance with any provision of this law ... shall be void."

Similarly, § 687(5) provides:

"It is unlawful to require a franchisee to assent to a release ... waiver or estoppel which would relieve a person from any duty or liability imposed by this article."

NY General Obligation Law § 687(4) and 687(5) (McKinneys 1996). The FTC should be heading towards the model set by New York, not away from it.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard Pu".

Richard Pu