



National Grocers Association

November 10, 2004

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



Re: Franchise Rule Staff Report, R511003
69 Fed. Reg. 53661 (September 2, 2004)

Dear Sir or Madam:

On behalf of the National Grocers Association (N.G.A.) the following comments are being submitted on the Federal Trade Commission's Franchise Rule Staff Report R511003 entitled "Disclosure Requirements and Prohibitions Concerning Franchising." N.G.A. takes this opportunity to express its strong opposition to the staff's proposed revised trade regulation that would eliminate the current exclusions from the rule as provided under 16 CFR Section 436.2 (a)(4)(ii).

N.G.A. is the trade association representing the retail and wholesale grocers that comprise the independent sector of the food distribution industry. An independent retailer is a privately owned or controlled food retail company operating in a variety of formats. Most independent operators are serviced by wholesale distributors, who may be either retailer-owned cooperatives or voluntary wholesalers. The National Grocers Association was created as the result of a merger in 1982 between the National Association of Retail Grocers of the United States (NARGUS) and the Cooperative Food Distributors of America (CFDA.)

During the comment period on the franchise rule in the 1970s N.G.A.'s predecessor organization, CFDA took a strong leadership role in advocating for the explicit exclusion of grocery cooperatives from the franchise rule. The exclusion was affirmatively adopted by the FTC in 1978. Under the present franchise rule, 16 CFR Section 436.2 (a)(4)(ii) excludes membership in a bona fide "cooperative association" from coverage under the definition of a franchise. Further, Section 436.2 (l) defines a cooperative association as "an organization operated on a cooperative basis by and for independent retailers which wholesales goods and furnishes services primarily to its member retailers."

N.G.A. represents 20 cooperative organizations that service thousands of member retailers with food and grocery related products as wholesale food distributors. Many of the retailers who are members of these cooperatives are also members of the National Grocers Association. These retailer-owned cooperatives and their retail members have a vital interest in maintaining the explicit exclusion for cooperative associations in the franchise rule.

While N.G.A. agrees with the current rule and the Commission that cooperatives serving farmers and independent retailers are not franchises, N.G.A. joins with the National Cooperative Business Association and other cooperative associations to strongly oppose the staff report and proposed revised rule that would eliminate the explicit exclusion for cooperatives. The specific exclusion was included in the rule to make it clear to businesses, regulators and judicial interpreters that no franchise relationship exists because the cooperatives are owned by their members. In the case of purchasing cooperatives, retailers themselves are the shareholders that own and control the purchasing of goods and shared services. The retailer members elect the board of directors that set policies, budgets, the strategic directions of the company, as well as retain the authority to hire and fire management. Any attempt to include a member of a cooperative in the definition of a franchise would be analogous to calling an orange and apple.

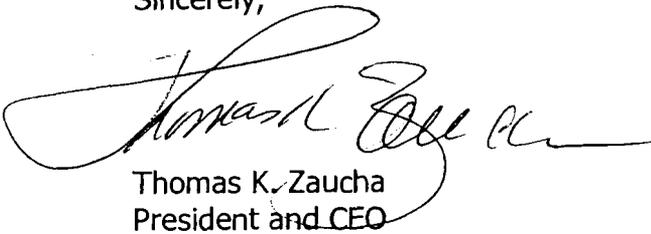
The elimination of the existing exclusion provision contained in 16 CFR Section 436.2 (a)(4)(ii) will do little to streamline the existing franchise rule which occupies roughly 12 pages in the Code of Federal Regulations. In fact the staff's proposal will have a counterproductive result by making the rule more complicated and confusing. N.G.A. strongly urges the retention of the exclusion provision so that it will not be misinterpreted and have precisely the opposite effect of the present rule, that is making the current exempt entities subject to the rule for the first time. In fact while the staff recommends the commission remove the current language it stated, "Nonetheless, we recognize the exclusions may still serve a useful purpose, explaining to practitioners the distinctions between business arrangements that may appear to be franchises."

N.G.A. can not emphasize strongly enough that such clarity is important as a matter of law. Removing the exclusions that are expressed explicitly in the current rule, and placing them in the Compliance Guide would be analogous to removing provisions from a statute and placing it in a committee report. The substance and effect would be open to question by legal practitioners, regulators and judicial interpreters. The effect in law would be to remove the exclusion from an explicit FTC regulatory standard that is subject to strict interpretation by a court of law and establish a nonbinding secondary advisory that is not controlling.

The effect of the staff's recommendation is to open the door to misapplication of the rule and it will impose additional and unnecessary costs on exempt cooperatives to defend themselves, most of whom are small businesses. As a matter of sound policy, the Commission's intent that cooperatives are not covered by the rule should remain explicitly spelled out in the text of the rule itself, not solely in the Compliance Guide which does not have the same legal force as the text of the rule.

In conclusion N.G.A. urges the FTC to retain the specific language that excludes cooperative associations in the revised franchise rule. In addition, N.G.A. urges the FTC to include in the Statement of Basis and Purpose accompanying the final revised rule an unambiguous restatement that the § 436.2(a)(4)(ii) clearly does not subject entities therein identified to the revised Rule's requirements.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas K. Zaucha", written in a cursive style. The signature is positioned above the printed name and title.

Thomas K. Zaucha
President and CEO