

November 8, 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 CHS, 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).

CHS is an integrated supply and grain-based foods system that links producers to consumers. A diversified Fortune 500 company, CHS provides essential grain, food and energy resources to businesses and consumers. Approximately 1,200 local cooperatives and 325,000 producers in more than two dozen states own CHS, and we have some type of business operation in nearly all 50 states.

While CHS itself is just over six years old, our cooperative history goes back more than 75 years. CHS was created by the combination of Cenex, an energy and crop inputs company, and Harvest States, which focused largely on grain marketing and processing. The services CHS provides help our members compete with larger public competitors.

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.

Because cooperatives may look to the Rule for clarity, CHS 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, CHS often spends time providing information to and educating current and potential members on the nature of our cooperative structure, and their roles 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.

The Commission's original conclusion—that co-ops could be perceived as franchises—still stands. The current co-op exclusion provided by the rule provides clarity on otherwise ambiguous terms. Eliminating it will only increase confusion over the Rule's scope.

Clarification in the Compliance Guides is Insufficient

CHS disagrees that providing clarification of the co-op exclusion in the compliance guides is sufficient to provide legal or regulatory clarity required due to the lack of familiarity with co-ops and the franchise rule mentioned above. Legal advisors first look

to statutory language and associated regulations on matters for surety on the application of a law or regulation to business entities.

The Staff Report also notes that questions concerning the definition of the term “franchise” can be addressed through staff advisory opinions on a case-by-case basis. However, because the Commission’s position hasn’t changed—that is, it continues to believe the cooperatives are not franchises—it seems unnecessarily burdensome and costly to cooperatives, their prospective members and the Commission to seek that level of surety through staff advisory opinions when the question can be answered unambiguously in the Rule itself.

Finally, CHS also urges that the co-op exclusion be maintained in the Rule to ensure that if the Commission’s current view that cooperatives are not franchises changes at a future date, CHS and other cooperatives will have the opportunity to comment on the Rule change. If the exclusion is merely clarified in the Compliance Guides, we have no assurance that public notice and comment procedures would be followed in the event of change in policy. Because any such shift in policy would represent a significant expansion of the Rule’s scope and would have enormous impact on cooperatives, it is appropriate that public notice and comment procedures be followed.

CHS believes that retaining the exclusion in the Rule itself continues to serve an extremely useful purpose in providing clarity to the regulated community, to cooperatives, to their members, and to regulators. The marginal gains in streamlining achieved by eliminating the four exclusions currently provided in the Rule, which total fewer than 150 words, are insignificant relative to the degree of clarity provided by maintaining them.

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

Sincerely,

A handwritten signature in black ink that reads "Allen J. Anderson". The signature is written in a cursive, flowing style.

Allen J. Anderson
Vice President, Governmental Affairs, CHS