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VIA UPS DELIVERY

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:

We 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." Our comments relate to the proposed elimination of the cooperative exclusion provided under 16 CFR §436.2(a)(4)(ii).

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 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 Federal Trade 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 Federal Trade 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 Federal Trade Commission policy. The Report suggests that identifying the exclusions in Compliance Guides rather than in the Rule itself is sufficient for demonstrating the Federal Trade Commission's intent that these four relationships be excluded from the definition of franchise.

Because cooperatives and their attorneys may look to the Rule for clarity, we disagree that such explanation in the Compliance Guides will provide sufficient clarity. We 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 Notice of Proposed Rulemaking 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" as 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, and without the express cooperative exclusion in the Rule, they likely will be confused about its application to cooperative enterprises. In fact, many cooperatives spend significant time with potential new members educating them on the nature of their cooperative structure, and their potential role in it as owners. Few business owners initially understand the role they play as members and owners of a cooperative. Many cooperatives provide services to their members that bear some similarities to franchises. To those independent business owners unfamiliar with the distinct difference between the role they play as a member of a cooperative compared to the role of a franchisee, the lack of an explicit cooperative exclusion in the Rule may be confusing.

The Federal Trade Commission's original conclusion, that cooperatives could be perceived as franchises, still stands. The current cooperative 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

We disagree that providing clarification of the cooperative exclusion in the Compliance

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Guides is sufficient to provide the legal or regulatory clarity required due to the lack of familiarity with cooperatives 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.

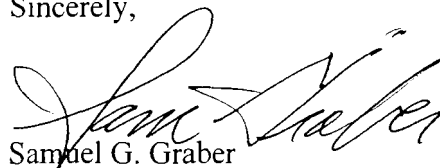
The Staff Report also notes that questions concerning the definition of the term "franchise" can be addressed through staff advisory opinions on a case-by-case basis. However, because the Federal Trade Commission's position has not changed (that is, it continues to believe the cooperatives are not franchises),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

Finally, we also urge that the cooperative exclusion be maintained in the Rule to ensure that, if the Federal Trade Commission's current view that cooperatives are not franchises changes at a future date, cooperatives and their representatives 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.

We believe 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.

We urge the Federal Trade Commission to maintain the cooperative exclusion in the Rule itself, rather than in the Compliance Guides. Thank you for the opportunity to comment on the Staff Report.

Sincerely,



Samuel G. Graber

cc: William V. Holden
R. James Straus

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