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

Re: Franchise Rule Staff Report

Dear Mr. Secretary:

Please include the following comments for consideration regarding the Federal Trade Commission (FTC) proposed revised trade regulation Rule (16 P CRF P436) “Disclosure Requirements and Prohibitions Concerning Franchising”.

Kindly note that I am an attorney admitted to practice in New Jersey and New York and have represented franchisees and franchisors for the past fifteen years.

Thank you for your consideration.

Respectfully submitted to the FTC,

Gerald A. Marks, Esq.
Marks & Associates, Esqs.

The Tyranny of Arbitration: Biased, Limiting and Economically Burdensome Arbitration Clauses

Arbitration is used in many franchise agreements to resolve disputes.

In many cases it is unfair because it imposes unreasonable costs and restrictions on franchisees who find themselves unable to vindicate their rights.

First off, arbitration is expensive. It is not unusual for fees of at least $5,000 to have to be paid to the arbitration provider, such as the American Arbitration Association (AAA) just to get the process going. Then additional fees must be paid to the arbitrator for each day of hearing (and pre-hearing preparation) that takes place. Fees to the arbitrator can cost tens of thousands of dollars.

If arbitration is to be utilized as a form of fair dispute resolution, the cost to the economically inferior ("Mom and Pop") franchisee should be no more than what it would cost to go to court, usually $100 - $200.

Further, arbitration clauses can require that arbitration take place in the home state of the franchisor, imposing travel and witness difficulties on the franchisee that might make it impracticable, if not financially impossible, for the franchise to seek redress against the franchisor. A simple rule should be adopted. If a franchisor does business in a particular state, it must arbitrate any disputes with its franchisees in that state in which it is doing business.

Arbitration has an even darker side. Consider the "cozy" relationship between Snap-on Tools and the American Arbitration Association.

All of the Snap-On franchised dealers are required to submit all disputes with Snap-On to resolution by arbitration through the American Arbitration Association (AAA).

Since 1987, Snap-On has used the AAA arbitration, **exclusively,** as the sole method of dispute resolution.

The **AAA** ***acquiesces*** in unfair requirements imposed by Snap-On on its franchisees, and is therefore not acting in an unbiased fashion, which alternative dispute resolution organizations are required to do.

For example, the arbitration provisions imposed on Snap-on franchised dealers impose limiting discovery procedures that prevent the gathering of necessary and damaging information about Snap-On that the dealers would otherwise be able to obtain if the disputes were either tried in the usual court setting, or arbitrated through court sponsored arbitration, or even another commercial arbitration service. Snap-On's arbitration clause unfairly limits discovery by requiring that "pre-hearing discovery [be] limited to . . . not more than two depositions per side".

The arbitration provisions imposed on franchised dealers also impose limiting joinder procedures that prevent the bringing of class actions which prevent the economically inferior and disadvantaged Snap-On dealers from effectively mounting a collective effort to redress wrongs done by Snap-On against all dealers.

These restrictive joinder rules would not be prohibited if the disputes were either tried in the usual court setting, or arbitrated through court sponsored arbitration, or even another commercial arbitration service.

This economic “divide and conquer” tactic imposed by Snap-On is nothing more than a thinly veiled device to deny justice by pitting the massive economic resources of Snap-On, a “Fortune 500 Company”, against a franchised dealer who, at best, is a middle income individual who has already lost a significant amount of their savings because of Snap-On.

The arbitration provisions imposed on the franchised dealers impose limiting “preclusive effect” that prevent findings reached in other arbitration proceedings regarding Snap-On’s wrongful conduct from being used in any other arbitration proceeding.

This “legal handcuffing” is totally contrary to the ability of a party in a court or other arbitration setting from showing a pattern of wrongful conduct as well as making it less expensive to prove wrong doing. Snap-On does not want its repeated acts of wrong doing to be used against it in other similar actions. It forces the franchisee to prove the case of wrong doing at each hearing over and over again - a decided disadvantage to the dealer, which would not be present if the disputes were either tried in the usual court setting, or arbitrated through court sponsored arbitration, or even arbitrated at another commercial arbitration service.

The arbitration provisions impose are a shortened one (1) year statute of limitations as opposed to normal statute of limitations periods that give up to six years to bring suit or arbitration.

The arbitration provisions restrict spouses from bringing an action against Snap-On even though they have been emotionally and economically damaged because of their husband’s Snap-On dealership, even though the spouse was not a party to the franchise agreement.

The arbitration provisions imposed on the franchised dealers prohibit the awarding of “punitive or exemplary damages” . Franchised dealers would be able to obtain “punitive or exemplary damages” and attorney’s fees if the disputes were either tried in the usual court setting, or arbitrated through court sponsored arbitration, or even another commercial arbitration service. Dealers would be able to obtain “punitive or exemplary damages” if the disputes were either tried in the usual court setting, or arbitrated through court sponsored arbitration or another commercial arbitration service, other than the AAA.

Moreover, the AAA's lists from which to pick the third party "neutral", who really decides the matter, represents a further disadvantage to the dealer and Special Rep as these "neutrals" either are biased in favor of Snap-On, or have the appearance of bias in favor of Snap-On, as the panel of neutrals are created and pre-selected by the AAA which has receives significant money and assignments from Snap-On. Simply stated, the AAA is tainted in its neutral selection process as it panels consist of "high priced" business oriented lawyers, rather than other franchisees, employees or everyday business owners who not only would charge less for their arbitration services - a critical factor in itself to an aggrieved dealer - but would also possess a more practical and complete business understanding of the difficulties facing sales persons such as Snap-On dealers .

It is repugnant to all concepts of fair play to have economically advantaged corporate professionals and lawyers judge the merits of a claim against Snap-On without having had the real business experience of being a sales person, an independent business person, or a franchisee in another franchise system. Such a "tainted panel" would not be present if the disputes were either tried in the usual court setting, or arbitrated through court sponsored arbitration, or even arbitrated at another commercial arbitration service.

Upon information and belief, the AAA has been used by Snap-On, virtually exclusively during the past 15 years. Upon information and belief, the AAA has received over millions of dollars in arbitrator and administrative fees from Snap-On, during the past 15 years.

The AAA has further permitted Snap-On to impose the limiting discovery and precedent tactics without regard to its fairness and effect on dealers. The AAA is in a conflict of interest situation and has been manipulated by Snap-On in exchange for receiving an on-going and exclusive referral of virtually all Snap-On dealer disputes.

If arbitration provisions are to be included in franchise agreements, the FTC must make sure that they are fair. The arbitration provisions should include the full array of rights that a franchisee would have if it brought suit in court, not be financially prohibitive to the franchisee, and not require the franchisee to travel great distances to prove its case. Fairness in dispute resolution should be the hallmark if franchisors want to continue to make the assertion that there is fairness in franchising.