

Congress of the United States

Washington, DC 20510

December 17, 2020

The Honorable Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Franchise Rule, 16 CFR part 436, Comment, Matter No. R511003

Dear Chairman Simons:

We write to urge the Federal Trade Commission (FTC) to retain and strengthen the Franchise Rule to protect investors who seek to buy a franchise business. Most franchise agreements are very one sided in favor of the franchisor leaving franchise owners facing loss of assets, failed businesses and bankruptcy. The FTC's approach to only require voluntary disclosure of financial representation data and its lack of enforcement has failed to protect franchise owners.

We recommend that the FTC updated Franchise Rule include the following elements:

1. **Overview/Summary.** Provide an overview or summary on the first page of the Franchise Disclosure Document (FDD) that has the basics any franchisee should know, including franchise financial performance, store openings, store closings and sales and revenue information as well as what support is provided and responsibilities required. The FTC should convene a working group to develop this summary. The summary/overview should be available in addition to the FDD, not a replacement.
2. **Require Financial Performance (Item 19) be mandatory.** All FDDs must include historic financial revenue information for all franchise businesses in Item 19 in accordance with the North American Securities Administrators Association (NASAA) Financial Performance Representations Commentary. Item 19 should include disclosures on revenues, costs, and other data for both first-year stores and mature stores. Item 20 should include the number of outlets that closed during the first 12 months as this data would not be contained in Item 19. Any franchise corporation requesting a franchisee engaged in a decades-long agreement should be able to share historic revenue performance. Franchisors must provide a Financial Performance Representation and must expressly assume the burden of proving that it has a reasonable basis founded on historic performance. No part of the FDD and any documents required to be signed by the prospective franchisee, shall contain any limitation of the franchisee's right to rely on said Financial Performance Representation(s).
3. **Require FDDs be made available online and searchable.** FDDs must be available on the FTC or the franchisor website. Basic data regarding revenue, expenses and rules

should be easily searchable from within the document. The Securities and Exchange Commission's in-line XBRL provides a model.¹ Inline XBRL is a format that allows franchisors to embed XBRL data directly into a HyperText Markup Language (HTML) document.

4. **Protect Limited English Proficient investors.** If a franchise markets to people in a language other than English, the franchise company must provide the Franchise Disclosure Document in the language of the people to whom they are marketing. For example, some bubble tea, nail salons, and cleaning services market to potential franchise owners in languages other than English. The FTC should work with state governments to establish an oversight capacity for FDDs in languages that are not in English.
5. **Require fair contract terms.** Ban the inclusion of non-disparagement clauses and mandatory arbitration clauses in the Franchise Agreement and clauses that prohibit franchisee associations. Franchisees should not lose their free speech rights, their right to litigate a dispute or their right to free association with other franchise owners as part of their franchise agreement. In addition, franchisees should be given the private right of action, so that they can litigate violations of the Franchise Rule.
6. **Ban Some Disclaimers and Questionnaires.** The FTC should prohibit FDDs from including disclaimers that allow franchisors to amend their policies outside the specific language of the franchise agreement that has been disclosed in the FDD, such as by making changes to the Operations Manual that are contractual, not operational. Any disclaimer or questionnaire must be provided with the initial FDD. The FDD should also ban questionnaires and disclaimers that are used by franchisors to avoid responsibility for contract disputes. Any questionnaire or disclaimer should not be used to avoid a claim of deceptive practices of fraud.
7. **Prohibit disclosures outside of the FDD, made both informally or by certified third parties.** Franchise corporations should not be able to share information related to the franchise with lenders, consultants or others that are not available to the franchise owners. The FTC should also look at third-party franchise brokers, consultants, and salespeople that engage in the sale of franchises and whether there should be a licensing requirement and fiduciary responsibility to follow the requirements of the Franchise Rule when it comes to financial disclosures.
8. **Increase franchise staff and increase franchise enforcement actions.** The FTC should not only improve the Franchise Rule but enforce it. There have been hardly any enforcement actions taken against numerous franchises that have engaged in unfair and deceptive practices. Specifically related to COVID-19, the FTC should remind franchisors of their obligation to update the FDD quarterly as to any material changes and to notify the prospective franchisee at the time of delivering the FDD of any material change in any Financial Performance Information contained in the FDD. Of course, the Rule's updating requirements apply to the entire FDD, specifically including Item 21. We recommend that the FTC include a provision finding that it would be an unfair act or practice and thus a violation of Section 5 of the FTC Act (15 U.S.C. §45) for any

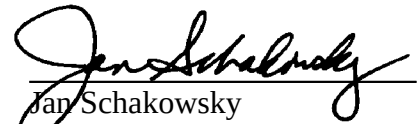
franchisor to condition any form of relief (including, but not limited to, fee reduction, fee deferrals, reduction in hours of operation, or deferrals for required store upgrades) granted to a franchisee on account of the COVID-19 pandemic or any declared national emergency, and the related economic downturn on the franchisee agreeing to material changes in the franchise agreement, operating contract, or on a general release of claims.

Thank you for considering our request for the FTC to proactively protect current and future franchise owners from inaccurate and outdated information as well as coerced acceptance of contract changes. The Franchise Rule should be modified quickly and enforced rigorously to improve investor protection.

Sincerely,



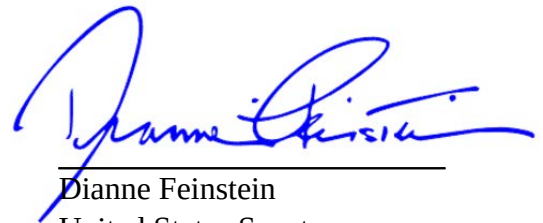
Catherine Cortez Masto
United States Senator



Jan Schakowsky
Member of Congress



Christopher S. Murphy
United States Senator



Dianne Feinstein
United States Senator

CC:

The Honorable Noah Joshua Phillips, Commissioner, Federal Trade Commission

The Honorable Rohit Chopra, Commissioner, Federal Trade Commission

The Honorable Rebecca Kelly Slaughter, Commissioner, Federal Trade Commission

The Honorable Christine S. Wilson, Commissioner, Federal Trade Commission

ⁱ <https://www.sec.gov/structureddata/osd-inline-xbrl.html>