

May 10, 2022

Hon. April Tabor  
Acting Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B)  
Washington, DC 20580

Re: Earnings Claims ANPR, R111003

Dear Secretary Tabor:

The International Franchise Association (IFA) appreciates this opportunity to submit its views to the Federal Trade Commission in connection with the Commission's March 11, 2022 request for comments in connection with the ANPR for the proposed "Deceptive or Unfair Earnings Claims" rulemaking (87 Fed. Reg. 13951 (2022), in connection with proposed 16 CFR Part 462).

The IFA.

By way of background, the IFA is the world's oldest and largest organization dedicated to representing and protecting the interests of franchising worldwide. The IFA's members include franchisors, franchisees, and professionals who supply goods and services to the franchise sector of the U.S. economy. IFA is the world's oldest and largest organization representing franchising worldwide.

Celebrating over 60 years of excellence, education, and advocacy, IFA works through its government relations and public policy, media relations, and educational programs to protect, enhance, and promote franchising. Through its media awareness campaign highlighting the theme, "Franchising: Building Local Businesses, One Opportunity at a Time," IFA promotes the economic impact of more than 775,000 franchise establishments, which support nearly 8.2 million jobs and \$787.7 billion of economic output for the U.S. economy.<sup>1</sup> Additionally, over 26% of franchise businesses are minority-owned, compared to less than 20% of non-franchised businesses.<sup>2</sup> IFA members include over 1,300 member franchise companies in over 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law, and business development.

From May 16-17, 2022, IFA will convene the 54<sup>th</sup> Annual IFA Legal Symposium here in Washington. That symposium will bring together lawyers from all over the country – and the world – to review and discuss legal developments in various facets of the sector. The attendees and speakers will include regulators, lawyers who primarily represent franchisees, and lawyers who primarily represent franchisors. Immediately following, IFA and the International Bar Association will jointly host the 37<sup>th</sup> Annual IBA/IFA Joint Conference, also in Washington, to

---

<sup>1</sup> [https://franchiseeconomy.com/files/Franchise\\_Business\\_Outlook\\_Jan\\_2018.pdf](https://franchiseeconomy.com/files/Franchise_Business_Outlook_Jan_2018.pdf).

<sup>2</sup> [https://www.franchise.org/sites/default/files/Franchise%20Business%20Ownership%202018\\_0.pdf](https://www.franchise.org/sites/default/files/Franchise%20Business%20Ownership%202018_0.pdf).

further address cross-border issues, regulatory considerations, and other international aspects of the franchise sector.<sup>3</sup>

We note these details to illustrate a key point: the franchise sector of the US economy, and indeed the global economy, is highly regulated, highly professional, and dedicated to the betterment of the sector.

### The ANPR

We note that the proposed rulemaking is intended to clarify and codify into a trade regulation rule the Commission's past challenges to deceptive earnings claims in a wide range of areas in the U.S. economy. These include "multilevel marketing schemes that lure in aspiring entrepreneurs, false marketing from for-profit schools targeted at hopeful students, or deceptive representations from "gig" platforms that draw workers," as articulated by Chair Khan in her written statement of Feb. 17, 2022, accompanying the ANPR. Commissioner Slaughter also noted in her statement that a significant thrust behind the proposed rule is to address false earnings claims directed at workers in the relatively unregulated gig economy including schemes targeting workers during (and in the recovery from) the COVID-19 pandemic. 87 Fed. Reg. at 13957. Commission Wilson noted in her statement that there are "significant information asymmetries between consumers and the entities that make earnings claims." Id. at 13958.

IFA observes that these unregulated areas of the economy merit attention and, where the Commission finds fraudulent schemes to deceive workers through false earnings claims, IFA applauds the Commission's efforts to exercise its Section 5 authority to investigate and remediate those wrongful actions.

Again, we note this point to contrast the types of activities to which the proposed Earnings Claim rulemaking is directed with the highly regulated franchise sector.

### The Franchise Sector

The franchise sector of the U.S. economy, of course, is already highly regulated by the Commission and also at the state level. The Commission's Franchise Rule, 16 CFR Part 436, is well-established and properly credited with accomplishing its primary purpose: providing, through the disclosure requirements that have been in place for over four decades, relevant, comprehensive, and material information to prospective franchisees.

Franchisors are also highly regulated at the state level. In fourteen states, "registration" laws require a franchisor to apply for and obtain state approval – on an annual basis – before offering or awarding franchises in that state. Other states also require disclosure and in some cases registration of a similar nature (e.g., under state business opportunity laws).

---

<sup>3</sup> IFA and the ABA each conduct an annual legal symposium in this area. Additional symposia are conducted through the International Bar Association as well as Asian, Canadian, and European bar groups.

In most of the “registration states,” examiners review franchisors’ applications for approval. In many instances, state examiners provide comments to and ask for changes in franchisors’ Franchise Disclosure Documents (FDDs).<sup>4</sup>

Of particular relevance to this rulemaking is that state examiners typically carefully scrutinize, comment upon, and sometime request changes to the financial performance representations that franchisors include in their FDDs.<sup>5</sup>

#### Questions Raised in the ANPR Request for Comments.

IFA wishes to address two questions posed in the request for comments: Questions 18 and 19.

Question 18 asked whether the proposed Earnings Claims Rule should exempt businesses covered by the FTC Franchise Rule.

- IFA believes that Financial Performance Representations (FPRs) – the term used under 16 CFR § 436.5(s) – are already properly and appropriately regulated in the Franchise Rule. As noted above, the franchise sector is highly regulated, highly professionalized, and already well-versed in the rules concerning the proper preparation and disclosure of FPR details.
- Of course, the Commission is conducting its decennial review of the Franchise Rule. Consequently, the Commission may determine that it is appropriate to change or adjust its regulatory approach to FPRs. However, IFA does not believe that an additional layer of regulation under the Earnings Claim Rule, as applied to businesses already regulated

---

<sup>4</sup> State regulators supplement the state statutes and regulations with policies that they apply, including those adopted by the North American Securities Regulators’ Association (NASAA). Of particular relevant to this matter, NASAA adopted a commentary on financial performance representations in franchising in May 2017 that is widely applied by state regulators when they review FPRs in franchisors’ FDDs.

State regulators are also frequently speakers at legal symposia on the topic and provide their views with respect to the proper preparation and disclosure of FPRs. See e.g., Dale Cantone, Lulu Gomez, and David Gurnick, “Promises, Promises: Financial Performance Representations - Advanced Issues,” ABA 43<sup>rd</sup> Annual Forum on Franchising (2020) (<https://www.americanbar.org/content/dam/aba/events/franchising/2020/w16.pdf>).

<sup>5</sup> A 2017 study showed that most franchisors were providing FPRs in their disclosure documents. The percentage of franchisors that included an FPR rose from just over 50% in 2014 to two-thirds by 2017. See Anya Nowakowski, “Financial Performance Representation: Market Demand Pushing for Higher Levels of Transparency,” “FRANdata and the IFA Franchise Education and Research Foundation” (April 2017) ([https://www.franchise.org/sites/default/files/2017-Financial\\_Performance\\_Representations\\_final.pdf](https://www.franchise.org/sites/default/files/2017-Financial_Performance_Representations_final.pdf)).

Hon. April Tabor  
Federal Trade Commission  
Re: Earnings Claims ANPR, R111003  
May 10, 2022  
Page 4

by the Franchise Rule, is necessary or that such added regulation would be useful to prospective franchisees.

- Indeed, the stark contrast between the Commission's focus on earnings claims in sectors such as the unregulated gig economy and the already-regulated franchise sector could not be more clear. We do not believe that the proposed Earnings Claim Rule should apply to franchised businesses already regulated under the Franchise Rule, and we urge the Commission to exclude those businesses from duplicate and potentially conflicting regulatory requirements.

Question 19 asks whether the Franchise Rule should be amended if the Earnings Claims Rule is adopted.

- As noted above, the Commission is already undertaking a decennial review of the Franchise Rule. In that context, we anticipate that the Commission will take up the issue of whether to review the requirements pertaining to FPRs and, if so, what changes if any should be made to the regulation.
- IFA believes that the issue of regulating FPRs – which are an integral consideration in the preparation and issuance of an FDD – should be discussed and addressed in the context of the Franchise Rule regulatory review process. That would ensure that franchise disclosure is considered as a whole, and that the regulatory structure is appropriate, beneficial to prospective franchisees, and not duplicative or overly burdensome to franchisors.

\*\*\*\*

Thank you for the opportunity to share our views with the Committee and for considering the points that we have raised. We welcome the opportunity to answer any questions that the Commission and its staff may have.

Respectfully submitted.

International Franchise Association

By: Michael Layman, Senior Vice President, Government Relations & Public Affairs,  
International Franchise Association

