



The American Bar Association

31st Annual Forum on Franchising

Deep in the
Heart of Franchising



October 15 ~ 17, 2008

The Hilton, Austin, TX

Advanced Disclosure Issues Under The Amended FTC Rule

Lee Plave

Plave Koch PLC

Will K. Woods

DLA Piper LLP (US)

Dale Cantone

Office of the Attorney
General, State of
Maryland

Craig Tregillus

Federal Trade
Commission



Sources

- **FTC**
 - Amended FTC Rule
 - FTC Statement of Basis and Purpose
 - Franchise Rule Compliance Guide
 - Staff FAQs
 - FTC Staff Advisory Opinions
- **States**
 - State laws, regulations
 - NASAA - FDD Guidelines
 - NASAA – Draft Commentary (www.nasaa.org)



Delivery of disclosure “earlier upon reasonable request”

- Section 436.2 - franchisor must provide its FDD to prospect at least 14 calendar days before payment of money or execution of agreement.
- Section 439.9(f) requires franchisors to furnish their FDD earlier upon “reasonable request.”
- *What if request comes from a prospect in a registration state where the franchisor isn't yet registered?*



Pipeline Re-Disclosure

- Section 436.2(a): must deliver FDD to prospects
- Section 436.7: must prep. quarterly updates
- Section 436.7(b): must deliver FDD + any quarterly updates available @ time of disclosure
- *FTC: how to read together - must franchisor update to already-disclosed prospects in pipeline?*
- *State: must franchisor amend and re-disclose to prospects in pipeline?*



Electronic Disclosure and E-Receipts

- Section 436.6(i): must keep signed receipt for each franchisee that signs an agmt
- *Is a full receipt, signed by prospect, required when the prospect does not ultimately sign any agreement?*
- *Do automatically-generated “notices” from commercial services = a “receipt” ?*



What is “Extraneous Information”

- Section 436.6(d) instructs no “extraneous information”
- But franchisors have obligation to explain, be fulsome, accurate and complete
- Some non-mandated language is helpful
- *Can a franchisor provide useful information or data that is not “mandatory” without running afoul of Section 436.6(d)?*



Cover Page

- Section 436.3(e)(1) requires disclosure of certain data from Items 5 & 7
- *Please help clarify: can franchisor provide text to explain Item 5 & 7 data?*
- *How can a franchisor provide disclosure re availability of FDD in other formats?*



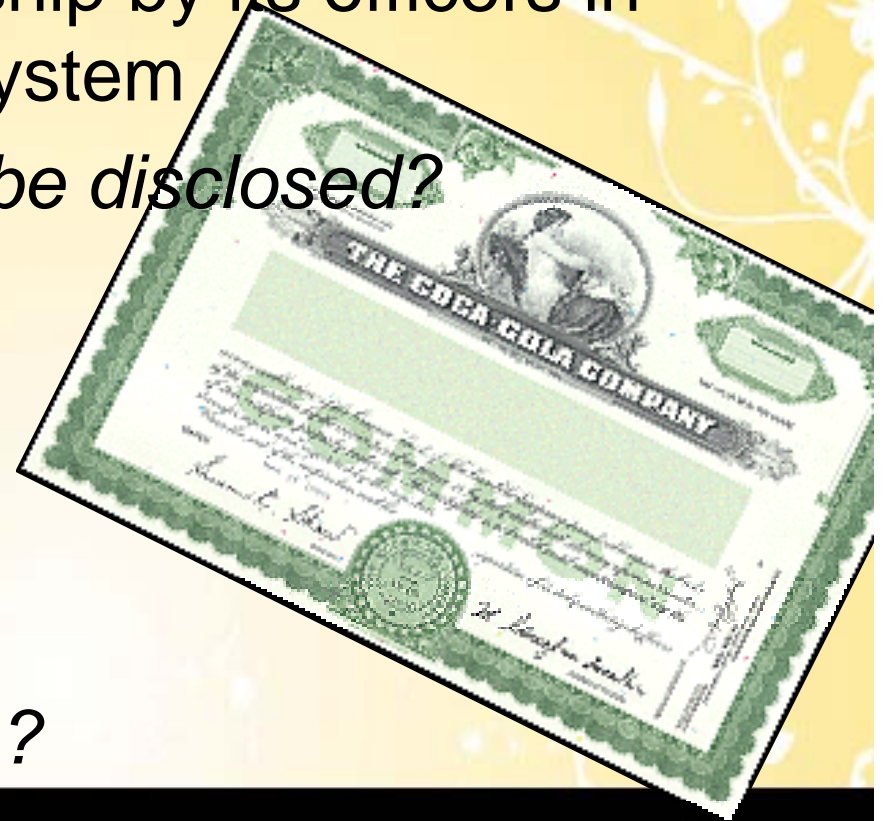
Cover Page

- Section 436.3(e)(1) requires disclosure of certain data from Items 5 & 7
- *If examiner in State A requests a “risk factor” be added to the state cover page - must the franchisor also add same risk factor in State B?*



Item 8 – Ownership of Suppliers

- Section 436.5(h)(3) requires franchisors to disclose data re ownership by its officers in suppliers to franchise system
- *What specifically must be disclosed?*
- *What about remote or indirect interests (e.g., officer owns mutual fund or 5,000 common shares of Coca-Cola Enterprises)?*



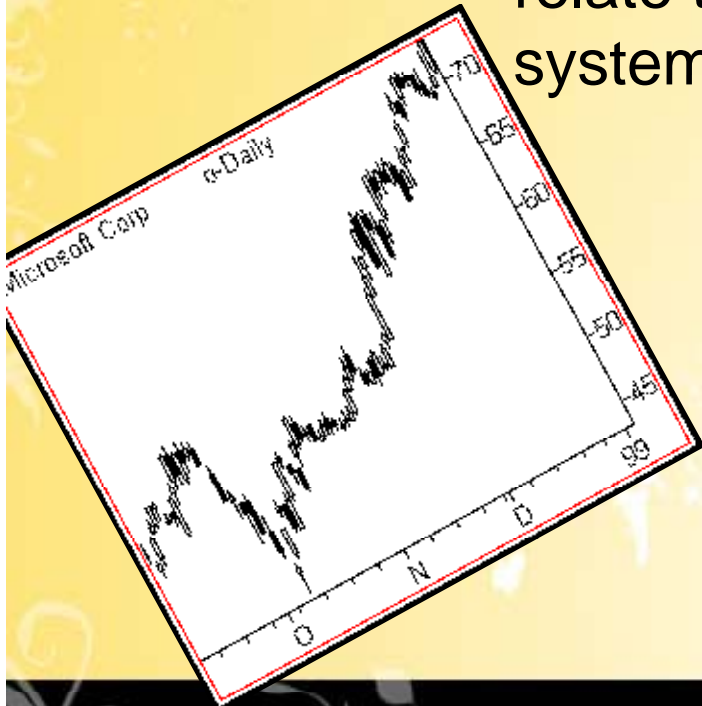
Item 12

- Section 436.5(l)(5) requires a boilerplate disclosure where the franchise agreement doesn't grant an "exclusive territory."
- There are virtually no agreements that grant "exclusive" territories or rights.
- *What does the term "exclusive territory" mean for this purpose?*



Item 19

- Section 436.5(s)(3) permits FPRs that relate to subsets of the total franchise system, with the proper preparation.
- *Can a franchisor prepare an FPR and include historic financial data for only a subset of company-owned outlets?*



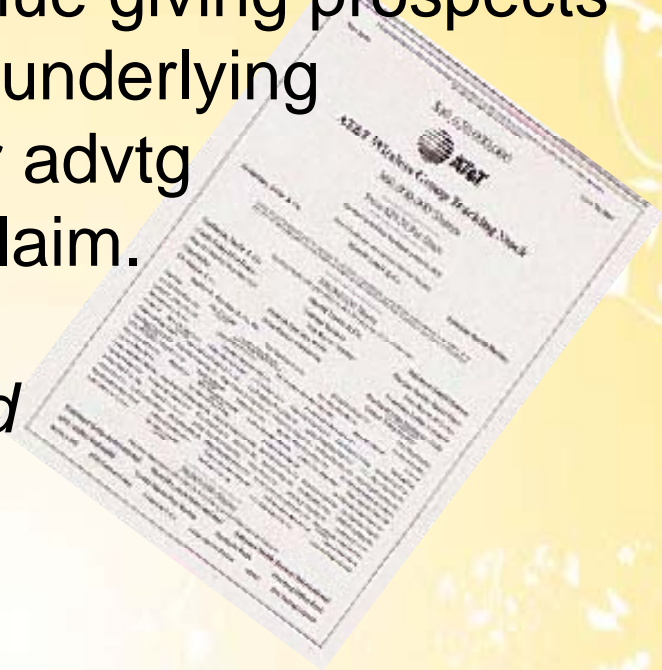
Item 19

- Section 436.7(d) requires franchisors to “notify” prospects of material changes that the seller knows or should have known occurred in the data in the FPR.
- *Does a franchisor have to “update” information in an historical FPR if conditions change in the next FY?*
- *What would the franchisor update?*



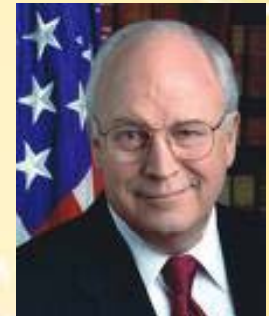
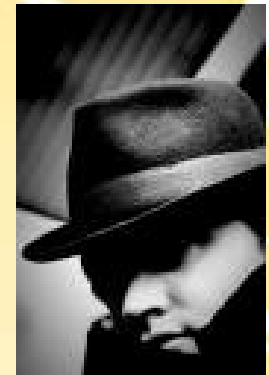
Item 19

- Compliance Guide: If franchisor makes a media claim, it must continue giving prospects the FDD that contains the underlying information for 6 mos after advtg last runs with that media claim.
- *What if the FDD changes before the 6 mo period end (e.g., annual renewal) or franchisor decides to stop making FPR?*



Item 20 – Former Franchisee Data

- Section 436.5(t)(5) requires disclosure re former franchisees – current business, or last known home, address & phone number
- *What if franchisor doesn't have home info and franchisee listed the franchised unit as its business address? Must the franchisor hire a ...*



Item 23

- Section 436.5(w)(2) requires disclosure of the “franchise sellers” in the FDD presented to the prospect.
- Section 436.5(w) relates to Item 23 - the receipt page



- *But how can you provide information before the closing may change up until the closing?*
- *How to provide “franchise seller” info to the prospect/franchisee?*



Q & A

- Questions
- Answers
- Thank you

