

**BLOGS**

Legislation and Rulemaking

**FTC Posts New FAQs**

On May 18, 2009, the FTC posted five new Frequently Asked Questions on its website (FAQs 29-33). All 33 FAQs and the FTC staff's respective responses can be found at <http://www.ftc.gov/bcp/franchise/amended-rule-faqs.shtml>. The release of the new FAQs occurred on the same day that Craig Tregillus, FTC Franchise Rule Coordinator, participated in an "Ask the Regulators" session at the International Franchise Association's 42nd Annual Legal Symposium. Consequently, Mr. Tregillus was able to give those in attendance a first-hand introduction to these important new FAQs.

FAQ 29 is most welcome to franchisors and their attorneys. Recognizing the costs of revising FDDs and that FAQs are intended to provide guidance on gray issues (i.e., issues not directly addressed by the amended FTC Franchise Rule, the Statement of Basis and Purpose, or the Compliance Guide), the FTC staff has taken the position that even if an FAQ necessitates a change to a franchisor's FDD, the franchisor will not be obligated to amend its FDD until it is otherwise required to do so under the Rule or state law. In other words, as a matter of policy, the FTC will not recommend an enforcement action against a franchisor based on a new FAQ, provided the franchisor updates its FDD, as appropriate, before any new filing in a registration state, before any quarterly updates required under the Rule, and, in any event, no later than its next annual update mandated under the Rule. To facilitate the process outlined in FAQ 29, all new FAQs will include an issuance date.

Included below is a summary of the other new FAQs.

- **FAQ 30** – The FTC staff clarifies that a franchisor must include the financial statements of its parent in Item 21 if that parent is the sole supplier of a good or service without which a franchise cannot be operated.
- **FAQ 31** – While the Rule requires a franchisor to update its FDD within 120 days of the close of its fiscal year, as a matter of enforcement policy, the FTC staff would not recommend enforcement against a franchisor who continues to use a validly registered FDD in a particular franchise registration state after the 120-day period, provided the state registration remains in effect.
- **FAQ 32** – Franchisors may not use audited financial statements in Item 21 if an auditor has issued a qualified opinion because those statements do not comply with FIN 46R, issued by the Financial Accounting Standards Board. In that case, the financials are not prepared in accordance with U.S. GAAP, as required.
- **FAQ 33** – Despite the long-standing, state-accepted practice by some franchisors of including financial performance representations (FPRs) or, previously, "earnings claims", in an attachment to the FDD, all FPRs must be in Item 19 itself, rather than in an attachment.

While this article provides an overview of new FAQs 29-33, franchisors and their attorneys should review the full text, as well as the other FAQs posted by the FTC.