TRIARC
RESTAURANT GROUP
Arby's® Pasta Connection™ T.J. Cinnamons®

December 15, 1999

Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room 159
Washington, DC 20580

Re: 16 CFR Part 436 – Franchise Rule Comment

Dear Sir/Madam:

Set forth herein are the comments of Arby's, Inc. d/b/a Triarc Restaurant Group ("TRG") addressing the Notice of Proposed Rulemaking released by the Federal Trade Commission on October 22, 1999. TRG is the franchisor of over 3,000 Arby's® restaurants in the United States. TRG is also the franchisor of the T.J. Cinnamons® concept, of which there are more than 300 units, most of which are dual branded with Arby's units, and the Pasta Connection™ concept, of which there are over 50 units dual branded with Arby's units.

Specifically, TRG wishes to comment on (i) the "sophisticated investor" exemptions and (ii) the requirement for disclosure of litigation and other matters involving a franchisor's parent.

Sophisticated Investor Exemption

While we believe that the proposed exemptions for sophisticated investors are a step in the right direction, we believe that the proposed rule needs to be revised.

It is fairly simple for a large corporate franchisee that would otherwise meet the large franchisee exemption (five years experience and $5.0 million of net worth) to deprive the franchisor of the benefit of the exemption by setting up a new corporation. We have one franchisee who owns 700 Arby's units and is one of the largest privately owned restaurant operators in the world; why should we have to give disclosure to that franchisee merely because he sets up a new corporate entity to own his next Arby's store? It is certainly no answer to suggest that the franchisor should not permit large corporate franchisees to put new units

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into new corporate entities; for various reasons (tax, financing, limited liability), it may be advantageous to the franchisee to put new units into a new entity, and since the rule is primarily designed to protect franchisees, surely the FTC would not want to encourage franchisors to adopt that sort of limitation. Accordingly, I would suggest that if the franchisee and its affiliates, taken as a whole, satisfy the applicable thresholds, the exemption should apply. Of course, that would also necessitate a change to proposed Section 436.1(b), wherein "affiliate" is proposed to be defined as "an entity controlled by, controlling, or under common control with the franchisor." Why not define "affiliate" in more generic terms so that both franchisees and franchisors can be deemed to have affiliates?

Secondly, it seems to us that the net worth threshold is also misguided. We have many large operators who are highly leveraged. For many experienced operators, 100% financing is currently available. If a franchisee with ten years of experience and 50 units has chosen to finance his operations with debt rather than equity, and as a result he flunks the net worth test, why should he be deemed not "sophisticated?" What if a large corporate franchisee with $20.0 million of net worth declares a $16.0 million dividend to its shareholders or otherwise does a recapitalization which takes its net worth below the threshold? Is that entity any less sophisticated? Over the years, some gigantic companies that are financially healthy have had huge negative net worths and negative earnings (e.g., Time Warner). Indeed, our own ultimate parent company, with such well-known brands as Snapple, Mistic, RC Cola, Stewart's and Arby's and consolidated revenues approaching $1.0 billion, has a negative net worth of approximately $175.0 million. We would suggest that net worth is often an indicator of how a company chooses to finance itself rather than of sophistication. We believe that a more appropriate test for the large franchisee exemption would be the number of units operated by the franchisee and its affiliates, taken as a whole. We recommend that any franchisee group that operates five or more units should be exempt, regardless of net worth.

Overall, it seems to us that there should be an exemption for franchisees that either have substantial experience or substantial size. In our view, an entity that has a net worth of $5,000,000 or more is sufficiently sophisticated and a separate experiential requirement should not apply to such sizeable entities. By the same token, a franchisee that has operated units in a franchisor's system for at least two years hardly needs disclosure about the risks and costs of purchasing and operating another unit within the same franchise system.

Disclosure Regarding A Franchisor's Parent

We believe that the proposed requirement that the franchisor make disclosure regarding a franchisor's parent's background, experience, litigation and financial statements will unduly burden franchisors and will significantly expand the size of disclosure documents without providing any useful or relevant information to prospective franchisees.

First, with respect to litigation, in many cases a parent company is in a line of business completely unrelated to that of the franchisor subsidiary. If the parent is a holding company, or is not involved in franchising, litigation against the parent is not likely to be of any relevance to prospective franchisees of the franchisor subsidiary. Accordingly, we fail to understand the reason for requiring disclosure of the parent's litigation unless the parent is itself a franchisor.

Additionally, requiring disclosure of the parent's experience, background, litigation and financial statements may create the misleading impression that the parent is a guarantor of the franchisor's liabilities and obligations. Indeed, if the proposed rule were adopted, it would not be surprising to find a case where a plaintiff franchisee asserts that a parent should be responsible for its subsidiary franchisor's liabilities in which the court finds that extensive mentions of the parent company in the franchisor's disclosure documents create a triable question of fact as to the parent's vicarious liability. Obviously, such an anomalous result is unfair and surely the FTC did not intend enhanced disclosure to turn corporate law on its head. Unfortunately, that may well be the consequence of the proposed rule, with no discernible benefit to the franchisee.

We appreciate the FTC's granting an opportunity to comment on the NPR.

Very truly yours,

ARBY'S, INC. d/b/a TRIARC RESTAURANT GROUP

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c: David Kaufmann, Esquire

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