

HOUSE BILL No. 2321

By Committee on Commerce and Labor

1-31

9 AN ACT concerning contracts; relating to franchise agreements; enact-
10 ing the Kansas responsible franchise practices act.

11

12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. (a) Sections 1 through 24, and amendments thereto, shall
14 be known and may be cited as the Kansas responsible franchise practices
15 act.

16 (b) Except as otherwise provided, this act applies to:

17 (1) Franchisors domiciled in Kansas or the principal place of business
18 is in Kansas, which have outstanding more than 100 franchises anywhere
19 in the United States, or franchises providing cumulatively for the estab-
20 lishment of more than 100 discrete locations or business units anywhere
21 in the United States;

22 (2) all franchises which require or contemplate the operation of a
23 franchised business or location in this state; and

24 (3) all franchises offered or sold by a franchisor domiciled in this state
25 or the principal place of business is in this state.

26 (c) Sections 5, 6, 7 and 8, and amendments thereto, may be super-
27 seded in whole or in part by contract provisions negotiated in good faith
28 and at arms length between the franchisor and an independent association
29 of its franchisees, except as otherwise provided herein.

30 Sec. 2. (a) "Act" means the Kansas responsible franchise practices
31 act.

32 (b) "Advertisement" means an oral or written communication dis-
33 seminated by mail, print or electronic media, or otherwise, to the public,
34 in connection with an offer or sale of a franchise.

35 (c) "Association" means an incorporated trade association which:

36 (1) Has as its members more than half of the franchisees of the fran-
37 chisor, or franchisees of the franchisor who own more than half of the
38 franchised business units or locations in the franchise system; and

39 (2) is governed by a board of directors or equivalent governing body
40 that is elected by its members.

41 (d) "Administrator" means the attorney general.

42 (e) "Business days" are all days other than Saturday, Sunday and fed-
43 eral and state holidays.

- 1 (f) Subject to subsection (g), “franchise” means:
- 2 (1) An express or implied agreement or commercial relationship,
3 whether oral or written, by which:
- 4 (A) A person is granted the right to offer, sell or distribute goods,
5 including intangibles, or services;
- 6 (B) under a marketing plan or system prescribed or suggested in sub-
7 stantial part by a franchisor;
- 8 (C) operation of the business is allowed to be substantially associated
9 with a trademark, service mark, trade name, logotype, advertising or other
10 commercial symbol owned or used by, or designating, the franchisor or
11 its affiliate; and
- 12 (D) the franchisee is required to pay, directly or indirectly, a franchise
13 fee;
- 14 (2) An area franchise, unless specifically stated otherwise in this
15 section;
- 16 (3) a subfranchise, unless specifically stated otherwise in this section;
- 17 (4) any commercial relationship entered into in reasonable reliance
18 on the franchisor’s representations, either oral or written, that the criteria
19 of paragraph (1) have been or will be met; or
- 20 (5) any commercial relationship explicitly referred to as a franchise
21 by the seller.
- 22 (g) The term “franchise” does not include:
- 23 (1) A nonprofit organization operated on a cooperative basis by and
24 for independent retailers which wholesales goods and services primarily
25 to its member retailers, including an organization that qualifies as a sub-
26 chapter T cooperative pursuant to the federal internal revenue code of
27 1986, as amended;
- 28 (2) any contract regulated by the federal petroleum marketing prac-
29 tices act, 15 U.S.C. 2801 et seq., and amendments thereto;
- 30 (3) any franchise agreement as defined by K.S.A. 8-2401, and amend-
31 ments thereto;
- 32 (4) any franchise granted by a city pursuant to K.S.A. 12-2001 et seq.,
33 and amendments thereto;
- 34 (5) any contract to maintain stock of farm equipment pursuant to
35 K.S.A. 16-1001 et seq., and amendments thereto;
- 36 (6) any farm equipment dealership agreement pursuant to K.S.A. 16-
37 1201 et seq., and amendments thereto;
- 38 (7) any outdoor power equipment dealership agreement pursuant to
39 K.S.A. 16-1301 et seq., and amendments thereto; or
- 40 (8) any lawn and garden dealership agreement pursuant to K.S.A. 16-
41 1401 et seq., and amendments thereto.
- 42 (h) “Franchise fee” means a payment of, or agreement to pay, con-
43 sideration for the right to enter into or continue in a franchise, including,

- 1 but not limited to, any payment for goods and services. The following
2 shall not be considered payment of a franchise fee:
- 3 (1) The purchase of or agreement to purchase inventory goods at a
4 bona fide wholesale price if the purchaser has no obligation to purchase
5 more goods than a reasonable person normally would purchase as a start-
6 ing inventory or to maintain a going inventory or supply;
- 7 (2) payment of a reasonable service charge to the issuer of a credit
8 card by an establishment accepting or honoring such credit card; or
- 9 (3) payment to a trading stamp company by a person issuing trading
10 stamps in connection with a retail sale.
- 11 (i) “Franchisee” means a person to whom a franchise is granted.
12 Franchisee includes:
- 13 (1) A subfranchisor with regard to its relationship with the franchisor;
14 and
- 15 (2) a subfranchisee with regard to its relationship with the
16 subfranchisor.
- 17 (j) “Franchisor” means a person who offers to grant, grants or has
18 granted a franchise, or an affiliate of such a person. Franchisor also in-
19 cludes a subfranchisor of a franchisor with regard to its relationship with
20 a subfranchisee, unless stated otherwise in this section.
- 21 (k) “Area franchise” means a franchise between a franchisor and a
22 franchisee whereby the franchisee is granted the right to operate more
23 than one unit, location or business within a specified geographic area.
- 24 (l) “Subfranchise” means an agreement in which a franchisor pro-
25 vides another person the right to sell or negotiate the sale of franchises.
26 A contract or agreement which is a franchise does not become a subfran-
27 chise merely because under its terms a person is granted the right to
28 receive compensation for referrals to a franchisor or subfranchisor or to
29 receive compensation for acting as a sales representative on their behalf.
30 Subfranchise includes agreements pursuant to which the subfranchisor,
31 as agent or otherwise, solicits offers to buy a franchise granted or issued
32 directly by the franchisor.
- 33 (m) “Subfranchisee” means a person who is granted a franchise from
34 a subfranchisor.
- 35 (n) “Subfranchisor” means a person to whom a subfranchise is
36 granted from a franchisor.
- 37 (o) “Fraud” and “deceit” are not limited to common law fraud or
38 deceit.
- 39 (p) An “offer” or “sale” of a franchise is made in this state under any
40 of the following circumstances:
- 41 (1) When the offer either originates from this state or is directed by
42 the offeror to this state;
- 43 (2) when acceptance is directed to the offeror in this state by an

- 1 offeree reasonably believing the offeror to be in this state, or is received
2 by the offeror in this state; or
- 3 (3) when the franchised business is or will be operated in this state.
- 4 (q) “Offer” or “offer to sell” includes every attempt to offer to dispose
5 of, or to solicit an offer to buy, a franchise or interest in a franchise for
6 value. An offer to sell is not made in this state merely because of:
- 7 (1) Circulation in this state of a bona fide newspaper or other pub-
8 lication of general, regular and paid circulation which has had more than
9 $\frac{2}{3}$ of its circulation during the past 12 months outside this state;
- 10 (2) a radio or television program originating outside this state is re-
11 ceived in this state; or
- 12 (3) a web site not specifically addressed to persons in this state is
13 accessible by persons in this state.
- 14 (r) “Sale” or “sell” includes every agreement of sale of, contract to
15 sell, or disposition by lease or otherwise of, a franchise or interest in a
16 franchise for value.
- 17 (s) (1) The terms “offer” and “sale” do not apply to or include the
18 renewal or extension of an existing franchise where there is no interrup-
19 tion in the operation of the franchised business by the franchisee and no
20 material alteration of the franchise agreement, except that a material
21 modification of an existing franchise, other than one that has been ne-
22 gotiated with an association, whether upon renewal or otherwise, is a
23 “sale” within the meaning of this section.
- 24 (2) The sale of an existing franchise by the franchisee is not a “sale”
25 within the meaning of this section if:
- 26 (A) Neither the franchisor nor its affiliates has any ownership interest
27 in the selling party; and
- 28 (B) the sale is not effected by or through the franchisor or its affili-
29 ates. A sale is not effected through a franchisor if the franchisor’s involve-
30 ment is limited to approving and training the prospective new franchisee,
31 and receiving a transfer fee.
- 32 (3) Any requirement, other than one that has been negotiated with
33 an association, that a franchisee agrees to modify the terms of another
34 franchise from the franchisor or its affiliate as a condition of transfer or
35 renewal of an existing franchise or as a condition of acquiring an additional
36 franchise:
- 37 (A) Is an offer of a material modification hence a sale of a franchise
38 subject to this act; and
- 39 (B) shall not be imposed as a condition of transfer, renewal or ac-
40 quisition of a franchise without:
- 41 (i) The consent of the franchisee, which may be withheld with or
42 without cause; or
- 43 (ii) approval of the condition by an association.

- 1 (t) "Person" means a natural person, partnership or any legal or com-
2 mercial entity.
- 3 (u) "Rule" means any adopted rules and regulations or standard of
4 general application issued by the administrator.
- 5 (v) "Affiliate" means a person controlling, controlled by, or under
6 common control with another person, every officer or director of such a
7 person, and every person occupying a similar status or performing similar
8 functions including an agent of the franchisor.
- 9 (w) "Franchise broker" means a person, other than a franchisor, fran-
10 chisee or subfranchisor, who for consideration sells, offers for sale or
11 arranges for the sale of franchises for more than three different
12 franchisors.
- 13 (x) "Marketing plan" means a plan or system concerning a material
14 aspect of conducting a business. Indicia of a marketing plan include any
15 of the following:
- 16 (1) Price specification, special pricing system or discount plans;
17 (2) sales or display equipment or merchandising devices;
18 (3) sales techniques;
19 (4) prescribed or shared promotional or advertising materials or co-
20 operative advertising;
- 21 (5) training regarding the promotion, operation or management of
22 the business;
- 23 (6) operational, managerial, technical or financial guidelines or
24 assistance;
- 25 (7) prescribed structures or appearance of the physical facility at or
26 from which the franchised business is operated;
- 27 (8) a location designated by the franchisor for the franchised business,
28 or a prescribed territory restricting where a party to a franchise may or
29 must solicit or make sales; or, a prescribed territory within which the
30 franchisor agrees, conditionally or unconditionally, to limit its, or its af-
31 filiates' or licensees', competition with a franchisee;
- 32 (9) minimum sales or purchase quotas; or
33 (10) restrictions on the sources from which a franchisee may procure
34 equipment, goods or services for the conduct of the franchised business.
- 35 (y) "Material" and "material fact" include any fact, circumstance or
36 set of conditions which:
- 37 (1) A reasonable person would consider important in making a de-
38 cision relating to forgoing the purchase of, entering into, remaining in or
39 relinquishing a franchise; or
40 (2) has, or may have, a significant financial impact on a franchisor,
41 franchisee or prospective franchisee.
- 42 Sec. 3. (a) In connection with the advertising, offering, sale or other
43 promotion of a franchise, it shall be unlawful for any person:

- 1 (1) To employ any device, scheme or artifice to defraud;
- 2 (2) to engage in an act, practice, course of business or pattern of
3 conduct which operates or is intended to operate as a fraud or deceit on
4 any person;
- 5 (3) to obtain money or property, or assist others to obtain money or
6 property, by means of any untrue statement of a material fact, or any
7 omission of a material fact, or any failure to state a material fact necessary
8 in order to make the statements made, in the light of the circumstances
9 under which such statements are made, not misleading; or
- 10 (4) to represent or imply in any manner that a franchise has been
11 endorsed, recommended or approved by the administrator or any other
12 agency or officer of this state or of the United States.
- 13 (b) In connection with any presale franchise disclosure document,
14 notice or report required by state or federal law or rules and regulations,
15 it shall be unlawful for any franchisor or franchise broker, either directly
16 or indirectly, through any officer, employee, agent, representative or
17 attorney:
- 18 (1) To make or cause to be made an untrue statement of material
19 fact, omission of a material fact, or failure to state a material fact necessary
20 in order to make the statements made, in the light of the circumstances
21 under which such statements are made, not misleading;
- 22 (2) to fail to furnish to a prospective franchisee all information re-
23 quired to be disclosed, at the time and in the manner required by appli-
24 cable law;
- 25 (3) to make any claim or representation to a prospective franchisee,
26 whether orally or in writing, which is materially inconsistent with or con-
27 tradicts any information provided to the prospective franchisee in any
28 required disclosure document; or
- 29 (4) except as permitted by law or rules and regulations in a required
30 disclosure document, to make a statement of fact which has the intent or
31 effect of misrepresenting the profitability or rate of return on investment
32 of a franchise opportunity, the rate of success of franchises or franchisees
33 associated with the franchise opportunity, the expected market value of
34 the franchise, the equity the franchisee will accumulate in the franchised
35 business, or the rate of success of franchises generally.
- 36 (c) For purposes of this section, the burden of proof shall be on the
37 franchisor to show that any claim, statement or representation made orally
38 or in writing to a prospective franchisee in connection with the advertis-
39 ing, offering, sale or other promotion of a franchise complies with this
40 section and that there was a reasonable basis in fact for each such claim,
41 statement or representation at the time it was made.
- 42 Sec. 4. (a) Recognizing the needs of both franchisor and franchisees
43 to make reasonable and mutually acceptable changes to the franchise

1 system to incorporate new and mutually advantageous products, facilities,
2 technologies and methods of doing business, and to accommodate and
3 meet evolving competitive challenges in the industry, field or market in
4 which franchisees operate, and except as provided further, no change to
5 the obligations of the franchisee pursuant to the franchise, whether set
6 forth in operating manuals or other ancillary documents, or to the form
7 of the renewal or successor franchise agreement offered to a franchisee,
8 shall:

9 (1) Change the franchisee fee, royalty rates or other material financial
10 terms of the franchise relationship;

11 (2) operate to materially change, abrogate or deprive the franchisee
12 of the intended fruits of the franchise agreement; or

13 (3) alter any provision of the franchise in a way that is materially
14 detrimental to the franchisee.

15 (b) A change to such obligations may be made if the alteration has
16 been negotiated between the franchisor and an association, or willingly
17 agreed to by the franchisee.

18 Sec. 5. (a) A franchisor shall not directly or indirectly prohibit or
19 restrict a franchisee from obtaining equipment, fixtures, supplies, goods
20 or services used in the establishment or operation of the franchised busi-
21 ness from sources of the franchisee's choosing, including an independent
22 franchisee-owned cooperative, provided that such:

23 (1) Items or services meet established uniform system-wide standards
24 as to their nature and quality; and

25 (2) standards as to nature and quality are not promulgated or en-
26 forced arbitrarily or discriminatorily by the franchisor.

27 (b) This section shall apply to all goods or services that the franchisee
28 is required to obtain whether or not they are related to a trademark, trade
29 name, trade secret or patent owned by or licensed to the franchisor or its
30 affiliates, except for goods actually manufactured by or for the franchisor
31 solely for sale through the franchisees, and equivalent non-franchised
32 outlets owned by the franchisor or its affiliate, and which incorporate a
33 trade secret owned by the franchisor or its affiliate, and which constitute
34 or are an integral part of the principal line of goods offered through the
35 franchise system.

36 (c) A franchisor shall provide its franchisees and continuously update
37 an inclusive list of all vendors it has approved for goods and services used
38 in the franchised business.

39 (d) A franchisor shall fully disclose to its franchisees, not less fre-
40 quently than annually, whether or not it receives any rebates, benefits or
41 other consideration, monetary or non-monetary, as a result of the pur-
42 chase from third parties of goods or services by franchisees, the dollar
43 amount of such rebates or benefits, and the uses to which such funds are

1 put.

2 (e) The franchisor shall report to its franchisees not less frequently
3 than annually the amount of revenue it earns, or receives from other
4 vendors or others, from the sale of goods and services to the franchisee
5 and to franchisees of the franchisor.

6 (f) A franchisor may satisfy its obligations under subsections (d) and
7 (e) by making the required disclosures to an association.

8 Sec. 6. (a) A franchisor shall not establish or license another to es-
9 tablish a new outlet, point of sale, or a new channel of distribution for
10 goods or services similar to those offered by a franchisee and identified
11 by the same or any other trademark, trade name, logotype, commercial
12 symbol or advertising, in unreasonable proximity to an outlet or business
13 owned or licensed to such franchisee so that the effect or probable effect
14 of establishing such new franchise, outlet or point of sale is to cause a
15 reduction in gross sales of the existing franchise.

16 (b) A franchisee may make a prima facie showing of violation of sub-
17 section (a), and amendments thereto, of section 8 by showing a temporal
18 correlation between the establishment of a new outlet, point of sale of
19 channel of distribution and a reduction in the franchisee's dollar volume
20 of sales.

21 (c) A franchisor shall establish and make available to its franchisees
22 a written policy setting forth the reasonable criteria used by the franchisor
23 to determine whether an existing franchise is eligible for a franchise for
24 an additional outlet or location.

25 (d) The franchisor, before establishing or licensing another to estab-
26 lish a new outlet or point of sale, shall provide reasonable written notice
27 to all of its franchisees who own franchised businesses located within 10
28 miles of the proposed outlet or point of sale.

29 (e) If a franchisor establishes or licenses another to establish an out-
30 let, point of sale or channel of distribution in violation of subsection (a),
31 the franchisee of the existing franchise shall have a cause of action for
32 monetary damages, including, but not limited to, actual loss of income
33 resulting from the reduction in gross sales caused by the opening and
34 operation of the new franchise, outlet or point of sale, anticipated loss of
35 income caused by the continued operation of such franchise, outlet or
36 point of sale, costs of litigation and reasonable attorney fees, and such
37 other relief including temporary and permanent injunctive relief as may
38 be appropriate.

39 Sec. 7. (a) A franchisee may transfer the franchised business oper-
40 ated by the franchisee, and its franchise, to a transferee, provided that
41 the transferee satisfies the reasonable qualifications of the franchisor for
42 successor franchisees. If the proposed transferee does not meet the rea-
43 sonable qualifications of the franchisor, the franchisor may exercise a right

1 reserved to it in the franchise to refuse to consent to the transfer, provided
2 that the franchisor can show that its refusal to consent to the transfer is
3 not punitive, arbitrary or capricious. The franchisor shall act promptly to
4 evaluate and notify the franchisee of its determination concerning a pro-
5 posed transfer.

6 (b) It is not unreasonable under this section for a franchisor to require
7 of a transfer any of the following:

8 (1) That the transferee successfully complete a reasonable training
9 program;

10 (2) that a reasonable transfer fee be paid to reimburse the franchisor
11 for the franchisor's reasonable and actual expenses directly attributable
12 to the transfer;

13 (3) that the franchisee pay or make provision reasonably acceptable
14 to the franchisor to pay any amount then due to the franchisor or the
15 franchisor's affiliate; or

16 (4) that the franchisee provide information reasonably sufficient to
17 allow the franchisor to determine whether the proposed transferee is
18 qualified.

19 (c) A franchisee may assign the franchisee's interest in the franchise
20 for the unexpired term of the franchise agreement, and a franchisor shall
21 not require the franchisee or the transferee to enter into a new or dif-
22 ferent franchise agreement as a condition of the transfer.

23 (d) A franchisee shall give the franchisor no less than 30-days written
24 notice of a transfer which is subject to the provisions of this section which
25 notice shall include a statement of the proposed transferee's identity,
26 financial qualifications and business experience.

27 (e) A transfer by a franchisee is deemed to be approved 30 days after
28 the franchisee submits a request for consent to the transfer that complies
29 with this section, unless within that time the franchisor withholds consent
30 to the transfer in writing, specifying the reason or reasons for withholding
31 the consent. Any such notice is privileged and is not actionable based
32 upon a claim of defamation. The franchisee shall be afforded a reasonable
33 opportunity, in accordance with the terms of subsection (c) of section 18,
34 and amendments thereto, to rectify the bases on which the franchisor
35 withheld consent to the transfer.

36 (f) The following occurrences shall not be considered transfers re-
37 quiring the consent of the franchisor under a franchise, and shall not
38 result in the imposition of any penalties or make applicable any right of
39 first refusal or right to terminate by the franchisor:

40 (1) The succession of ownership of a franchise upon the death or
41 disability of a franchisee, or of an owner of a franchise, to the surviving
42 spouse, heirs or a partner active in the management of the franchisee
43 unless the successor fails to meet, within one year, the reasonable current

1 qualifications of the franchisor for franchisees and the enforcement of
2 the current qualifications is not punitive, arbitrary or capricious;

3 (2) incorporation of a proprietorship franchisee, provided that the
4 franchisor may require a personal guaranty by the individual franchisee
5 of obligations of the incorporated franchisee related to the franchise;

6 (3) a transfer within an existing ownership group of a franchise pro-
7 vided that more than 50% of the franchise is held by persons who meet
8 the franchisor's reasonable current qualifications for franchisees. If less
9 than 50% of the franchise would be owned by persons who meet the
10 franchisor's reasonable current qualifications, the franchisor may refuse
11 to consent to the transfer, provided that enforcement of the current qual-
12 ifications is not punitive, arbitrary or capricious;

13 (4) a transfer of less than a controlling interest in the franchise to the
14 franchisee's spouse or child or children, provided that more than 50% of
15 the entire franchise is held by persons who meet the franchisor's reason-
16 able current qualifications. If less than 50% of the franchise would be
17 owned by persons who meet the franchisor's reasonable current qualifi-
18 cations, the franchisor may refuse to consent to the transfer, provided
19 that enforcement of the current qualifications is not punitive, arbitrary or
20 capricious;

21 (5) a transfer of less than a controlling interest in the franchise to an
22 employee stock ownership plan, or employee incentive plan, provided
23 that more than 50% of the entire franchise is held by those who meet the
24 franchisor's reasonable current qualifications for franchisees. If less than
25 50% would be owned by persons who meet the franchisor's reasonable
26 current qualifications, the franchisor may refuse to consent to the trans-
27 fer, provided that enforcement of the current qualifications is not puni-
28 tive, arbitrary or capricious; or

29 (6) a grant or retention of a security interest in the franchise, fran-
30 chised business or its assets, or an ownership interest in the franchisee,
31 provided the security agreement establishes an obligation on the part of
32 the secured party enforceable by the franchisor to give the franchisor
33 notice of the secured party's intent to foreclose on the collateral no later
34 than the secured party's formal notice of default to the franchisee, and a
35 reasonable opportunity to redeem the interests of the secured party and
36 recover the secured party's interest in the franchise or franchised business
37 by satisfying the secured obligation.

38 Sec. 8. (a) A franchisor shall not refuse to renew a franchise for the
39 purpose of converting the franchisee's business to operation by the fran-
40 chisor or by an employee, agent or affiliate of the franchisor.

41 (b) A franchisor shall not refuse to renew a franchise unless the fran-
42 chisor provides at least six-months prior written notice of its intent not to
43 renew, and:

- 1 (1) Termination of the franchise agreement would be permitted un-
2 der section 9, and amendments thereto;
- 3 (2) the franchisee and the franchisor agree in writing not to renew
4 the franchise agreement; or
- 5 (3) the franchisor withdraws from distributing its products or services
6 through franchises in the geographic market served by the franchisee, or
7 ceases to offer new franchises, in which event, upon expiration, any post-
8 term covenant limiting the business activity of the franchisee shall be null
9 and void and, subject to the provisions of subsection (c) of section 10,
10 and amendments thereto, the franchisor shall not enforce any in-term
11 covenant not to compete in any other franchise with that franchisee so as
12 to prevent or hinder the franchisee from conducting any business at the
13 locations or units for which the franchise was not renewed.
- 14 (c) A franchisor shall not unreasonably refuse, delay or condition the
15 renewal of a franchise. It is not unreasonable for a franchisor to condition
16 renewal upon requiring that the franchisee:
- 17 (1) Pay a reasonable fee;
- 18 (2) complete a reasonable retraining program; and
- 19 (3) bring any physical facility in which the franchised business is op-
20 erated into reasonable conformity with current system standards for sim-
21 ilarly situated franchised businesses.
- 22 (d) A franchisee shall be presumed to intend to exercise a right of
23 renewal, unless the franchisee gives the franchisor notice in writing of the
24 franchisee's intent to allow a franchise to expire.
- 25 (e) Nothing in this section prohibits a franchise from having a fixed
26 and definite term without right of renewal.
- 27 (f) For purposes of this section, "renewal" includes any extension,
28 renovation or continuation of substantially the same business, under the
29 same or a successor franchise.
- 30 Sec. 9. (a) A franchisor shall not unilaterally terminate a franchise
31 agreement before the expiration of its term except for good cause.
- 32 (b) Before termination for good cause, the franchisor shall provide a
33 written notice to the franchisee which:
- 34 (1) Specifies the precise basis for the proposed termination including
35 a description of those material terms of the franchise agreement with
36 which the franchisee is not in compliance;
- 37 (2) provides to the franchisee a reasonable period of time to cure any
38 non-monetary events of default, which period shall be not less than 30
39 days but not greater than 90 days;
- 40 (3) provides to the franchisee a reasonable period of time to cure any
41 failure to pay moneys due to the franchisor, which period shall not be
42 greater than 30 days; and
- 43 (4) includes an offer to purchase from the franchisee the franchisee's

1 current inventory meeting the franchisor's present standards and held for
2 sale in accordance with the franchise, at the higher of wholesale value or
3 franchisee's cost.

4 (c) A franchisor need not provide an opportunity to cure if any one
5 of the following apply:

6 (1) The franchisee voluntarily abandons the franchised business for
7 five consecutive days unless as the result of natural disaster or other cause
8 beyond the control of the franchisee;

9 (2) after reasonable notice the franchisee operates the franchised
10 business in a manner that imminently endangers public health and safety;

11 (3) the franchisee is convicted of a felony that materially impairs the
12 goodwill of the licensed trademark in the relevant market, provided the
13 franchisee is afforded not less than 90 days to transfer the franchise,
14 subject to the provisions of section 7, and amendments thereto; or

15 (4) repeated breaches of the franchise by the franchisee after notice
16 of breach such that further notices of breach and opportunities to cure
17 would be futile.

18 (d) A franchisee may terminate a franchise without liability to the
19 franchisor for breach or for post-term obligations under the franchise,
20 except as provided in subsection (c) of section 10, and amendments
21 thereto, if the franchisor:

22 (1) Fails to cure a breach of the franchise, or a violation of this act,
23 by it or its affiliate or subfranchisor, within a reasonable period of time
24 following a notice from the franchisee describing the breach with reason-
25 able specificity; or

26 (2) commits repeated breaches of the franchise after notice of breach
27 such that further notices of breach and opportunities to cure would be
28 futile.

29 (e) As used in this section, "good cause" means:

30 (1) Failure to cure a material breach of the franchise following deliv-
31 ery of written notice describing the breach and how it is to be cured, and
32 a reasonable opportunity to cure the noted breach;

33 (2) repeated breaches of the franchise by the franchisee after notice
34 of breach such that further notices of breach and opportunities to cure
35 would be futile;

36 (3) material misrepresentation in an application for a franchise, dis-
37 covered within one year after the date of the franchise; or

38 (4) complete withdrawal by the franchisor from distribution or sale,
39 anywhere in the state in which the franchise is located, and under any
40 brand, of the line or type of product or service offered through the fran-
41 chise system.

42 Sec. 10. (a) A franchisor shall not directly or indirectly prohibit a
43 franchisee from engaging in any business at any location after expiration

1 of a franchise or after termination of the franchise before its expiration
2 and, subject to the provisions of subsection (c), the franchisor shall not
3 enforce any in-term covenant not to compete in any other franchise with
4 that franchisee so as to prevent or hinder the franchisee from conducting
5 any business at the locations or units for which the franchise was termi-
6 nated or not renewed.

7 (b) This section shall not apply to enforcement of any such prohibi-
8 tion where the franchisor, not less than 20 days before the effective date
9 of such termination or expiration, offers in writing to purchase the fran-
10 chised business for its fair market value as a going concern, provided that:

11 (1) The fair market value of such business shall be determined as if
12 it were to be resold or renewed as a going concern under the expiring or
13 terminated franchise, for a period of years equal to the contract term
14 being offered by the franchisor for new or renewed franchisees;

15 (2) the fair market value of such business is ascertained by an impar-
16 tial appraiser, whose appointment is acceptable to both parties; and

17 (3) any forgiveness of debt shall not be considered a purchase of
18 assets by the franchisor for purposes of this section.

19 (c) Nothing in this section prohibits enforcement of any provisions of
20 a franchise obligating a franchisee after expiration, termination or transfer
21 of a franchise:

22 (1) To cease or refrain from using a patent, copyrighted material,
23 trademark, trade secret, trade dress or other intellectual property owned
24 by the franchisor or its affiliate, except that the existence of language in
25 the franchise agreement purporting to determine ownership of a trade-
26 mark, trade secret or other intellectual property shall not be binding upon
27 any court or arbitrator for purposes of this paragraph, but may be con-
28 sidered by such court or arbitrator as evidence of such ownership; or

29 (2) to alter the appearance of the premises and the manner of op-
30 eration of the franchised business to avoid any likelihood of confusion as
31 to the affiliation of the business with its former franchisor.

32 (d) Information constituting a trade secret, arising out of the own-
33 ership or operation of a franchise by a franchisee, is the property of the
34 franchisee. Neither the trade secret character of such information nor its
35 ownership is changed merely by virtue of the franchisee reporting or
36 furnishing access to such information to its franchisor, or to an association
37 of which the franchisee is a member.

38 Sec. 11. Whenever all or a major portion of the ownership or control
39 of a franchisor, or all or a major part of its ownership of the trademarks
40 licensed to the franchisee, or all or a major part of its assets, or its interests
41 as franchisor in its franchise agreements, is acquired by another person
42 through purchase, merger, consolidation, lease management agreement,
43 acquisition of assets, bankruptcy proceedings, any foreclosure or judicial

1 order, or otherwise, the person acquiring the franchise system shall as-
2 sume the obligations agreed to by the predecessor franchisor in contracts
3 with franchises and the franchisees shall be entitled to hold such trans-
4 feree legally responsible for the duties and responsibilities of, and all then
5 existing claims against, the predecessor franchisor under their respective
6 franchises.

7 Sec. 12. A franchisor shall not:

8 (a) Directly or indirectly prohibit or restrict the right of franchisees
9 to associate freely or to form, join or participate in any trade association;

10 (b) directly or indirectly penalize, or retaliate or discriminate against,
11 a franchisee for forming, joining or participating in any trade association;
12 or

13 (c) discriminate against any franchisee or prospective franchisee in
14 the administration, sale, renewal or approval of the transfer of a franchise
15 on the basis of race, color, religion, gender, sexual preference, age, be-
16 yond the age of majority, national origin or disability. Nothing in this act
17 shall be construed to prohibit or restrict the right of a franchisor to make
18 franchise opportunities available to persons lacking the capital, training,
19 business experience or other qualifications ordinarily required of its fran-
20 chisees, pursuant to a bona fide affirmative action or other similar pro-
21 gram adopted by the franchisor.

22 Sec. 13. (a) A franchise imposes on each party a duty to act in good
23 faith in its performance and enforcement.

24 (b) The duty of good faith includes the obligation of a party to a
25 franchise to do nothing that will have the effect of injuring or destroying
26 the right of the other party to receive the expected benefit and fruits of
27 the contract, and to do everything required under the contract to accom-
28 plish such purpose.

29 (c) A franchisor shall not hold franchisees to higher standards as to
30 facilities, advertising or business operations than the franchisor maintains
31 in its own non-franchised units.

32 (d) A court or arbitrator may find, as a matter of law, that a provision
33 of a franchise was unconscionable when made, or is being employed in a
34 manner that is unconscionable. The court or arbitrator may limit the
35 application of a provision of a franchise so as to prevent an unconscionable
36 result, or may enforce other provisions of the franchise without the un-
37 conscionable provision, or if necessary to avoid an unconscionable result
38 decline to enforce the franchise. Before making a finding of unconscion-
39 ability, the court or arbitrator, on motion of a party or on the court or
40 arbitrator's own motion, shall afford the parties an opportunity to present
41 evidence as to the circumstances in which the challenged provision was
42 drafted, negotiated and applied, and its setting, purpose, application and
43 effect.

1 (e) A franchisor that formally or informally requires franchisees to
2 maintain a positive relationship, or the equivalent, with the franchisor as
3 a condition of renewal, expansion, compliance or good standing, must
4 apply such requirements in a consistent and commercially reasonable
5 manner, with documentation of any behavior by the franchisee that pur-
6 portedly violates the franchisor's policy or endangers the image and good-
7 will of the trademark licensed by the franchise. The franchisor shall give
8 the franchisee written notice of the behavior and a reasonable time to
9 cure before any penalty, sanction or prejudice is imposed.

10 (f) As used in this section, "good faith" means honesty in fact and the
11 observance of reasonable commercial standards of fair dealing in the
12 trade.

13 Sec. 14. (a) A franchise imposes on the franchisor a duty of due care.
14 The franchisor is required to exercise in the administration of the fran-
15 chise and of the franchise system the skill and knowledge normally pos-
16 sessed by franchisors in this state in the same or similar line or type of
17 business.

18 (b) The requirements of this section may not be abrogated or waived
19 by agreement or by conduct, but the franchisor may limit in writing the
20 nature and scope of its skill and knowledge, and of its undertaking with
21 a prospective franchisee, provided that no inconsistent representation,
22 whether written or oral, is made to the prospective franchisee.

23 (c) For purposes of this section:

24 (1) The phrase "skill and knowledge" means more than the mere
25 minimum level of skill and knowledge required of any person engaging
26 in a service or business and involves a special level of expertise:

27 (A) Which is the result of acquired learning and aptitude developed
28 by special training and experience in the business to be conducted under
29 the franchise, or the result of extensive use and experience with the prod-
30 ucts or services or the operating system of the franchise;

31 (B) which is the result of experience in organizing a franchise system
32 and in providing training, assistance and services to franchisees; and

33 (C) which a prospective franchisee reasonably would expect in reliance
34 on the written and oral commitments and representations of the
35 franchisor.

36 (2) A franchisor may show that it contracted for, hired or purchased
37 the expertise necessary to comply with the requirements of this subsec-
38 tion and that such expertise was incorporated in the franchise or com-
39 municated or provided to the franchisee.

40 Sec. 15. (a) A franchisor owes a limited fiduciary duty to its fran-
41 chisees and is obligated to exercise the highest standard of care when:

42 (1) Performing bookkeeping, collections, payroll or accounting serv-
43 ices on behalf of the franchisee. The franchisor may use information con-

1 cerning the franchised business gained while performing such services
2 only for bona fide and legitimate business purposes directly related to
3 administration of the franchise system and enforcement of the franchise.
4 Bona fide and legitimate business purposes do not include competition
5 with the franchisee;

6 (2) administering or supervising the administration of an advertising
7 or marketing fund to which the franchisee is required to make contri-
8 butions; or

9 (3) holding in the capacity of a custodian or escrow agent funds of a
10 franchisee or prospective franchisee that are refundable, conditionally or
11 unconditionally, to the franchisee or prospective franchisee.

12 (b) All such funds shall be kept in one or more segregated accounts
13 and shall not be subject to the claims of creditors of the franchisor. The
14 franchisor, at its expense, shall provide an independently certified audit
15 of such funds, including an examination and written opinion of the auditor
16 of the franchisor's compliance with this section within 60 days following
17 the close of the franchisor's fiscal year.

18 Sec. 16. Any provision in a franchise agreement or ancillary docu-
19 ment which requires the application of the law of another state in lieu of
20 this act to a franchise or to an offer or sale of a franchise which by its
21 terms is subject to this act shall be null and void.

22 Sec. 17. Any provision in a franchise agreement or ancillary docu-
23 ment which obligates a franchisee to mediate, arbitrate or litigate any
24 claim or controversy in a forum outside the state in which the franchised
25 business is located, or which places a limitation or exclusion on the cat-
26 egories of damages or other relief that a franchisee may recover, or which
27 limits arbitrarily the dollar amount of a franchisee's recoverable damages,
28 or which purports to prohibit multi-party or class-wide litigation or ar-
29 bitration, shall be null and void.

30 Sec. 18. (a) A franchisor or its affiliate or a person acting on their
31 behalf who violates any provision of this act or any rules and regulations
32 adopted hereunder shall be liable to the franchisee who may sue for
33 damages caused thereby, for rescission, or other relief as the court or
34 arbitrator may deem appropriate.

35 (b) Every person who directly or indirectly controls a person liable
36 under subsection (a), every partner in a firm so liable, every principal
37 executive officer or director of a corporation so liable, every person oc-
38 cupying a similar status or performing similar functions and every em-
39 ployee of a person so liable who materially aids in the act or transaction
40 constituting the violation is also personally liable jointly and severally with
41 and to the same extent as such person, unless the person who would
42 otherwise be liable hereunder shows that such person had no knowledge
43 of or reasonable grounds to know of the existence of the facts by reason

1 of which the liability is alleged to exist.

2 (c) Any suit authorized under this section may be brought to recover,
3 in addition to other remedies, the actual damages sustained by the plain-
4 tiff, together with costs and disbursements of the suit plus reasonable
5 attorney fees and expert witness fees.

6 (d) No action may be commenced pursuant to this section or this act
7 more than four years after the cause of action accrues.

8 (e) The remedies provided in this act shall be in addition to all other
9 remedies in law and equity.

10 (f) An association has standing to seek declaratory or injunctive relief
11 on behalf of its members for violation of this act, and to seek any available
12 relief in its own right and interest for injury or damage to it caused by
13 violation of this act.

14 Sec. 19. The administrator shall have the power to enforce the pro-
15 visions of this act through the following legal and equitable actions:

16 (a) The administrator is authorized to promulgate rules and regula-
17 tions to interpret, clarify, apply and administer any word, term or provi-
18 sion of this act.

19 (b) Whenever it appears to the administrator that any person has
20 violated or is about to violate any provision of this act or any rules and
21 regulations adopted hereunder, the administrator may bring an action to
22 enjoin the violation and to enforce compliance with this act or any rules
23 and regulations adopted hereunder. The administrator may seek a per-
24 manent injunction, preliminary injunction, restraining order, writ of man-
25 damus and sequestration of assets. The administrator may also seek an-
26 cillary relief, including restitution, disgorgement or damages on behalf of
27 persons injured. The administrator is authorized to publish information
28 concerning the violation of this law or any rules and regulations adopted
29 hereunder.

30 (c) The administrator may investigate, publicly or privately, in any
31 state or nation, as the administrator deems necessary to determine
32 whether any provision of this act or any rules and regulations adopted
33 hereunder has been, or is about to be, violated or to aid in the enforce-
34 ment of this act. The administrator may cooperate with public agencies
35 in other jurisdictions to investigate violations of this act, to enforce or
36 administer this act, or for other purposes. To carry out such an investi-
37 gation, the administrator or the administrator's designee may administer
38 oaths and affirmations, subpoena witnesses, compel attendance, take evi-
39 dence and require the production of any books, paper, correspondence,
40 memoranda, agreements or other documents or records which the ad-
41 ministrator deems relevant or material to the inquiry. In case of contu-
42 macy by, or refusal to obey a subpoena issued to, any person, any com-
43 petent court, upon application by the administrator, may issue to the

1 person an order requiring the person to appear before the administrator,
2 or the officer designated by the administrator, there to produce docu-
3 mentary evidence, if so ordered, or to give evidence touching the matter
4 under investigation or in question. Failure to obey the order of the court
5 may be punished by the court as contempt. If any person objects to ap-
6 pearing, testifying or producing any document or record before the ad-
7 ministrator, or in obedience to the subpoena of the administrator or any
8 officer designated by the administrator, on the ground of that person's
9 privilege against self-incrimination, the person is not excused from com-
10 plying by raising such objection. Having validly raised that privilege, no
11 testimony or evidence the person may then provide subject to that ob-
12 jection may be used, directly or indirectly, to prosecute the person or
13 subject the person to any penalty or forfeiture. The individual testifying
14 is not exempt from prosecution and punishment for perjury or contempt
15 committed in testifying.

16 Sec. 20. Any conduct pertaining to the offer or sale of a franchise
17 subject to this act that constitutes a violation of any rule of the United
18 States federal trade commission applicable to the offer or sale of fran-
19 chises is an unfair trade practice and a violation of this act.

20 Sec. 21. Any provision in a franchise agreement or ancillary docu-
21 ment which requires a franchisee or prospective franchisee, upon the
22 purchase, renewal or transfer of a franchise, or at any other time, to assent
23 to a release, assignment, novation or waiver, which would relieve any
24 person from liability under this act, or waive compliance by the franchisor
25 with any provision of this act, shall be null and void except insofar as
26 contained in a bona fide settlement of a dispute expressed in writing and
27 signed by a party to a franchise with the advice of legal counsel.

28 Sec. 22. The provisions of this act shall apply to:

29 (a) The franchise agreement as well as all ancillary documents and
30 agreements, including, but not limited to, the franchise offering circular,
31 sales of goods and services, operating manuals and policies, leases and
32 mortgages of real or personal property, promissory notes, pledge and
33 security agreements, confidentiality agreements, preliminary agreements,
34 insurance and advertising contracts and installation or construction con-
35 tracts, and any other arrangement in which the franchisor has a direct or
36 indirect interest or over which the franchisor exercises material supervi-
37 sion or control; and

38 (b) all franchise agreements and ancillary documents otherwise sub-
39 ject to this act and which are entered into, renewed, amended or trans-
40 ferred on or after the effective date of the act, and to such agreements
41 of indefinite duration 120 days after the effective date.

42 Sec. 23. (a) Any person who violates any provision of this act, or who
43 violates any rules and regulations or orders made under this act, and any

1 person who controls such a person, shall be liable for a civil penalty of at
2 least \$2,500 for each violation. Such civil penalty which shall be assessed
3 and recovered in a civil action brought by the administrator in any court
4 of competent jurisdiction.

5 (b) The administrator may refer evidence concerning any violation of
6 this act, or of any rules and regulations or orders made under this act, to
7 a county or district attorney or other appropriate law enforcement agency.
8 A county or district attorney, with or without such a reference, may in-
9 stitute criminal proceedings under this law. Upon request of a county or
10 district attorney, the administrator may assist the county or district attor-
11 ney in presenting the law or facts at the trial.

12 (c) Any person who willfully violates any provision of this act shall be
13 guilty of a severity level 5, nonperson felony.

14 (d) As applied to the penalties for acts in violation of this act, the
15 remedies provided by this section and by other sections of this act are
16 not exclusive, and may be sought and employed in any sequence or com-
17 bination to enforce the provisions of this act.

18 Sec. 24. The provisions of this act are severable. If any provision of
19 this act or its application to any person or circumstance shall be held
20 invalid, that invalidity shall not affect other provisions or their application
21 which can be given effect without the invalid provision or application.

22 Sec. 25. This act shall take effect and be in force from and after its
23 publication in the statute book.