

Protecting Small Business Investments

Mr. Joyce moved that the proposed new text be amended by inserting after Section __ the following section:-

“SECTION __. (a) The Legislature makes the following findings:

(1) Franchise businesses represent a large and growing segment of the Commonwealth’s retail and service businesses and are rapidly replacing more traditional forms of small business ownership in the Massachusetts economy.

(2) Franchise businesses involve a joint enterprise between the franchisor and franchisees in which each party has a vested interest and equity in the franchised business.

(3) Most prospective franchisees lack bargaining power and generally invest substantial amounts to obtain a franchise business when they may be unfamiliar with operating a business, with the business being franchised and with industry practices in franchising.

(4) Many franchises reflect a profound imbalance of contractual power in favor of the franchisor, and fail to give due regard to the legitimate business interests of the franchisee, as a result of the franchisor reserving pervasive contractual rights over the franchise relationship.

(5) Franchisees may suffer substantial financial losses if the franchisor does not act in good faith in the performance of the franchise agreement.

(6) Traditional common law doctrines have not evolved sufficiently to protect franchisees adequately from fraudulent or unfair practices in the sale and operation of franchise businesses, and significant contractual and procedural restrictions have denied franchisees adequate legal recourse to protect their interests in such businesses.

(7) A franchisee's freedom to contract remains greatly limited by the disparity of bargaining power, lack of consistent legal standards, and other factors described above. This Act is necessary to restore freedom to contract, to remove restrictive barriers impeding entry into industries and markets dominated by franchise systems, and to protect franchisee investments.

(b) The General Laws are hereby amended by inserting after chapter 93I the following chapter:-

Chapter 93J. Regulation of Franchise Agreements.

Section 1. Title.

This chapter shall be known as the Massachusetts Fair Franchise Act.

Section 2. Purposes.

(a) This chapter shall be liberally construed and applied to promote its underlying remedial purposes and policies.

(b) The underlying purposes and policies of this chapter are:

(1) To promote the compelling interest of the public in fair business relations between franchisees and franchisors;

(2) To protect franchisees against unfair treatment by franchisors, who inherently have superior economic power and superior bargaining power in the negotiation of the business;

(3) To provide franchisees with rights and remedies in addition to those existing by contract or common law;

(4) To govern franchise agreements, including any renewals or amendments, to the full extent consistent with the constitutions of the Commonwealth of Massachusetts and the United States.

(c) The effect of this chapter may not be varied or waived by contract or agreement. Any contract or agreement purporting to do so is void and unenforceable to that extent only.

Section 3. Definitions.

For the purposes of chapter, the following words shall have the following meanings:

“Franchise” means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which: (i) the franchisor will exert or has the authority to exert a significant degree of control over the franchisee’s, method of operation, or provide significant assistance in the franchisee’s method of operation; (ii) the operation of the franchisee’s business pursuant to that plan or system is substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and (iii) as a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

“Franchisee” means a person to whom a franchise is granted.

“Franchisor” means a person that grants a franchise.

“Affiliate” an entity controlled by, controlling, or under common control with, another entity.

"Person" means an individual, a corporation, a partnership, a limited liability company, a joint venture, an association, a joint stock company, a trust or an unincorporated organization.

“Required payment” means all consideration that the franchisee must pay to the franchisor or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the franchise, continuing in, reinstating or renewing the operation of a franchise. A required payment does not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease.

"Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. As used in this Act, a duty of good faith shall obligate a party to a franchise to do nothing that will have the effect of destroying or injuring the right of the other party to obtain and receive the expected fruits of the contract and to do everything required under the contract to accomplish such purpose; and require honesty of fact and observance of reasonable standards of fair dealing in the trade.

Section 4. Applicability of Chapter.

Any person who engages directly or indirectly in purposeful contacts in the Commonwealth in connection with the offering or advertising for sale or has business dealings with respect to franchises in the Commonwealth shall be subject to this chapter and shall be subject to the jurisdiction of the courts of the Commonwealth, upon service of process in accordance with chapter 223A.

Section 5. Termination; Good Cause; Notice; Opportunity to Cure.

(a) A franchisor shall not, directly or through an officer, agent or employee, terminate or cancel a franchise, or substantially change the competitive circumstances of a franchise agreement except for good cause shown.

(b) Good cause shall be based upon legitimate business reason which shall include, but not be limited to, the franchisee’s refusal or failure to comply substantially with any material, reasonable and reasonably necessary express obligation of the franchise agreement, including repeated and intentional nonpayment of royalties or other payments clearly required by the franchise agreement.

(c) A default under one franchise agreement shall not in and of itself constitute a default under another franchise agreement to which the franchisee or an affiliate of the franchisee is a party.

(d) The franchisor shall bear the burden of proving good cause.

(e) Prior to termination or cancellation of the franchise, the franchisor shall give the franchisee written notice at least 90 days in advance of the termination. The notice shall state all of the reasons constituting good cause for termination or cancellation and shall provide that the franchisee has 60 days in which to rectify any claimed discrepancy.

(f) The requirement for 90 days advance written notice for termination shall not apply if the reason for termination is because: (1) the alleged grounds are voluntary abandonment by the franchisee of the franchise relationship, in which event, such notice may be given 15 days in advance of the termination or cancellation; or (2) conviction of the franchisee in a court of competent jurisdiction of an offense (a) punishable by a term of imprisonment in excess of 1 year, (b) directly related to the business conduct pursuant to the franchise, (c) which materially impairs the goodwill value of the franchise or the franchised trademark mark, and (d) which is no longer appealable. In that event, such notice may be given at any time following the date on which the conviction is no longer appealable and shall be effective upon delivery and written receipt of the notice. In no event shall any franchisor collect any financial penalty or fee, however delineated, as a consequence of such conviction.

(g) If the reason for termination or cancellation is nonpayment of sums due under the franchise agreement, the franchisee shall be entitled to written notice of such default, and shall have ten (10) days in which to cure such default from the date of such notice. A franchisee has the right to cure three (3) times in any twelve (12) month period during the period of the dealership agreement.

(h) If the reason for termination or cancellation is violation of any law, regulation or standard relating to an imminent danger to public health or safety, the franchisee shall be entitled to immediate written notice and shall have twenty-four (24) hours following receipt of such notice to cure such violation.

(i) A franchisee may terminate a franchise agreement for good cause shown, without penalty or fees. Good cause shall include but not be limited to changes to the franchise system or the competitive circumstances of the franchise agreement created or expressly required by franchisor which would cause substantial negative impact or substantial financial hardship to the franchisee in the operation of its franchise.

Section 6. Renewal of the Franchise; Notice.

(a) A franchisor shall not, directly or through an officer, agent or employee, fail to renew a franchise, except for good cause shown.

(b) Renewals shall not be subject to unreasonable fees. Fees shall not be deemed unreasonable if they do not exceed the amount of the average initial franchise fee or other Required Payment then being charged to all franchisees in the market.

(c) Good cause shall be based upon legitimate business reason which shall include, but not be limited to, the franchisee's refusal or failure to comply substantially with any material, reasonable and reasonably necessary express obligation of the franchise agreement, including repeated and intentional nonpayment of royalties, advertising or marketing fees clearly required by the franchise agreement.

(d) The franchisor shall act in good faith and shall not refuse to renew a franchise for arbitrary or capricious reasons or for solely the financial gain of the franchisor or any affiliate of the franchisor.

(e) Before non-renewal of the franchise, the franchisor shall give the franchisee written notice at least 90 days in advance of the non-renewal. The notice shall state all of the reasons constituting good cause for the non-renewal and shall provide that the franchisee has 60 days in which to rectify any claimed discrepancy and reinstate its right to renew the franchise.

Section 7. Unfair Acts and Practices.

(a) Unfair methods of competition and unfair or deceptive acts or practices are hereby declared to be unlawful.

(b) In construing subsection (a) the courts may be guided by but not bound to the interpretations of the Federal Trade Commission Act, 15 U.S.C. 45.

(c) The attorney general may make rules and regulations interpreting subsection (a). The rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts interpreting the Federal Trade Commission Act, 15 U.S.C. 45.

(d) It shall be an unfair or deceptive act or practice, within the meaning of sections 2 and 11 of chapter 93A of the General Laws to violate any of the provisions of this chapter.

(e) A franchisor shall not terminate, cancel or fail to renew a franchise for the failure or refusal of the franchisee to do any of the following:

(1) Failure to meet sales quotas suggested or required by the franchisor not expressly set forth in the franchise agreement.

(2) Refusal to keep the franchised premises open and operating during hours which are unprofitable to the franchisee or to preclude the franchisee from establishing its own hours of operation or non-operation between the hours of 10 p.m. and 6 a.m.

(3) Refusal to give the franchisor or any supplier financial records of the operation of the franchise which are not directly related or necessary to the performance of franchisee's express obligations under the franchise agreement

(f) A franchisor, directly or indirectly, through any affiliate, officer, agent, or employee shall not do any of the following:

(1) Restrict a franchisee from associating with other franchisees or from joining, leading or otherwise participating in a trade or other association, or retaliate against a franchisee for engaging in these activities.

(2) Require or prohibit any change in management of any franchise unless the requirement or prohibition of the change shall be for good cause, which cause shall be stated in writing by the

franchisor and be based on violations of material, reasonable and reasonably required express provisions of the franchise agreement. Good cause shall include, but be limited to, requiring that management of the franchise be conducted by personnel who have been trained in the manner required of all franchise managers in the system or are legally eligible for employment in the United States of America.

(3) Impose on a franchise by contract, manual, policy, rule or regulation, whether written or oral, a standard of conduct or performance where the franchisor, its agents or representatives, cannot sustain the burden of proving the standard to be reasonable and necessary and uniformly enforced and applied throughout its system of similarly situated franchisees, franchisor-owned units and licensees in substantially the same manner. Notwithstanding the foregoing, it shall not be a violation of this chapter for a franchisor to provide forbearance to any franchisee as a means of assistance to the franchisee in performing its obligations under the franchise agreement or in operating its franchise in exigent circumstances.

(4) Fail to deal fairly and in good faith or fail to exercise due care with a franchisee or any association or other aggregation or incorporation of franchisees in all matters, including, without limitation, transfer of the franchise, administration of advertising funds, rewards programs, marketing funds and the interpretation, administration and performance of franchise and area development or territory agreements.

(5) Sell, rent or offer to sell to a franchisee any product or service for more than a fair and reasonable price or without the reasonable expectation that the sale or rental of the same will promote the profitability of the franchisee's business.

(6) Discriminate between franchises in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing, unless (A) that discrimination between franchisees would be necessary to allow a particular franchisee to fairly meet competition in the open market, (B) does not adversely affect the business of any existing franchisee, and (C) to the extent that the franchisor satisfies the burden of proving that any classification of or discrimination between franchisees is reasonable, is based on franchises granted at materially different times and the discrimination is reasonably related to the difference in time or on other proper and justifiable distinctions, and is not arbitrary or intended to be for the benefit of the franchisor at the expense of any franchisee. Nothing in this subsection shall be construed as granting to a franchisor any right which may be limited by any other state or federal statute.

(7) Notify the franchisee of a claimed breach of franchise agreement for good cause later than 180 days from the date good cause arises or 180 days after the franchisor knew or in the exercise of reasonable care should have known of the claimed good cause.

(8) Require a franchisee to sell any product or service for a price at a loss or otherwise not reasonably acceptable to the franchisee in the franchisee's good faith discretion.

(9) Fail to make readily available to franchisees, without charge, true, accurate and complete copies of all records of marketing, rewards programs, advertising funds and fees that have been paid by franchisees, vendors, suppliers and licensees.

(10) Coerce a franchisee to assent to a release, assignment, novation, waiver or estoppel which would prospectively relieve any person from liability imposed by this chapter.

(11) Require or demand that a franchisee pay liquidated or other post termination damages in excess of the average monthly royalty fees paid by the franchisee during the prior 12 full calendar months (or the shorter time that the franchised location has been in the system), multiplied by the lesser of six (6) months or the number of months remaining in the term of the franchise agreement.

(12) Act to accomplish, either directly or indirectly through any affiliate or agent, what would otherwise be prohibited under this chapter on the part of the franchisor or an affiliate of franchisor.

(13) Require or demand that a franchisee pay the legal fees and related expenses of the franchisor or any affiliate of the franchisor in any dispute or proceeding, whether by contract or otherwise, unless the Franchisor is the prevailing party. All such provisions in violation of this clause are deemed void.

Section 8. Transfer of the Franchise.

(a) It shall be a violation of this chapter for any franchisee to transfer, assign or sell a franchise or interest therein to another person unless the franchisee shall first notify the franchisor of such

intention by written notice setting forth in the notice of intent the prospective transferee's name, address, statement of financial qualification and business experience during the previous 5 years.

(b) The franchisor shall within 30 days after receipt of such notice either approve in writing to the franchisee such sale to proposed transferee or by written notice advise the franchisee of the unacceptability of the proposed transferee setting forth material reasons relating to the character, financial ability or business experience of the proposed transferee. If the franchisor does not reply within the specified 30 days, its approval is deemed granted.

(c) No such transfer, assignment or sale hereunder shall be valid unless the transferee agrees in writing to comply with all the requirements of the franchise then in effect. Any fee imposed by the franchisor as a condition of such transfer shall be limited to the franchisor's reasonable out-of-pocket expenses incurred in reviewing and approving such transfer.

(d) It shall be a violation of this chapter for any franchisor to prohibit or interfere with:

(1) The transfer of a franchise and the rights of franchisee to a qualified purchaser, including, but not limited to family members or business partners, nor shall a franchisor impose unreasonable stipulations or penalties regarding such transfer

(2) The transfer by will, or other lawful probate or similar procedure of any franchise and the rights of any franchisee.

Section 9. Effect of Termination.

(a) Upon termination of a franchise for whatever cause or reason, except voluntary relinquishment or abandonment of the franchise by the franchisee or the expiration of the franchise agreement where the franchisee does not elect to renew, the franchisor shall fairly compensate the franchisee or franchisee's estate for the fair market value at the time of termination of the franchise, of the franchisees inventory, supplies, equipment and furnishings purchased by the franchisee from the franchisor or its approved sources and the fair market value of good will, if any, exclusive of personalized items which have no value to the franchisor and inventory, supplies, equipment and furnishings not reasonably required in the conduct of the franchise business; provided, however, that

(1) Compensation need not be made to franchisee of good will if the franchisor agrees in writing not to enforce a covenant which restrains the franchisee from competing with the franchisor in the same or substantially similar business in the same or substantially similar manner at the same location using the same property except the franchisor's registered trademark or trade name; and

(2) A franchisor may offset against amounts owed to a franchisee under this subsection any amount mutual agreed upon and owed by the franchisee to franchisor which is not the subject of a good faith dispute by the franchisee.

(b) The provisions of this section shall not be construed to permit the termination or nonrenewal of any franchise agreement except in accordance with the express terms of the franchise agreement and this chapter.

Section 10. Good Faith and Fair Dealing; Duty of Due Care.

(a) All franchisors owe a duty of good faith and fair dealing to each of its franchisees. A franchise agreement imposes on the franchisor a duty of due care. Unless a franchisor represents that it has great skill or knowledge in its undertaking with the franchisees, or conspicuously disclaims that it has skill or knowledge, the franchisor is required to exercise the skill and knowledge normally possessed by franchisors in good standing in the same or similar types of business.

(b) For purposes of this subsection , term "skill or knowledge" means something more than the mere minimum level of skill or knowledge required of any person engaging in a service or business and involves a special level of expertise –

(1) which is the result of acquired learning and aptitude developed by special training and experience in the business to be licensed under the franchise agreement, or the result of extensive use and experience with the goods or services or the operating system of such business;

(2) which is the experience in organizing a franchise system and in providing training, assistance and services to franchisees; and which a prospective franchisee would expect in reasonable reliance on the written and oral commitments and representations of the franchisor.

Section 11. Warranties; Indemnification.

(a) A franchisor shall indemnify and save harmless its franchisee from financial loss and expense, including legal fees and costs, arising out of any claim, demand, suit or judgment by reason of a defect in merchandise, methods or procedures prescribed by franchisor and required to be performed by the franchisee, except for the negligent act or willful misconduct of the franchisee which causes said loss or expense.

(b) No franchisee, franchisee association or cooperative of franchisees shall be liable for the negligence or misconduct of any supplier or distributor of products or services prescribed by the franchisor, or for the failure of any product or service prescribed by the franchisor which are not fit for the particular purpose for which they were prescribed or any purpose related thereto, and any contractual provisions to the contrary shall be void as against public policy.

(c) A franchisor shall reimburse its franchisee at the prevailing retail price for any services rendered or products or parts supplied by the franchisee in satisfaction of any warranty issued by the franchisor or any warranty issued by the franchisee which is mandated by the franchisor, and, and a franchisor shall not restrict a franchisee from rendering services or providing parts in accordance with standards of good workmanship in satisfaction of the warranty.

Section 12. Enforcement.

(a) If any franchisor violates any provision of this chapter, a franchisee may bring an action against such franchisor in any court of competent jurisdiction of the Commonwealth for damages sustained by the franchisee as a consequence of the franchisor's violation, together with the actual costs of the action, including reasonable actual attorneys' fees, and the franchisee also may be granted injunctive relief against unlawful termination, cancellation, or nonrenewal.

(b) Notwithstanding any term or provision of a franchise agreement to the contrary: (1) the laws of the commonwealth shall govern the interpretation of the franchise agreement of a franchise located in the commonwealth and the performance of the parties thereunder, and (2) the courts of the commonwealth and the federal courts with jurisdiction over cases filed in the district of Massachusetts shall have exclusive jurisdiction with respect to any action brought under this

chapter or any action brought by a franchisor concerning a franchise located in the commonwealth.

(c) Upon the written request of a franchisor or a franchisee, the attorney general may enforce compliance with this chapter in accordance with section 4 of chapter 93A.

Section 13. Void Provisions; Arbitration; Mediation; Class Action.

(a) A clause or provision in a franchise agreement requiring the parties to submit to arbitration shall be enforceable only if the parties have voluntarily entered into an agreement after the dispute arises to submit to arbitration and the proceeding is conducted at a location within the Commonwealth reasonably convenient to the franchisee; provided, however, that the provisions of this subsection shall not prohibit the enforceability of a clause or provision in a franchise agreement which requires the parties to submit to non-binding mediation conducted at a location within the Commonwealth reasonably convenient to the franchisee.

(b) No provision in a franchise agreement shall deprive the franchisee from participating as member of a class or in a consolidated action permitted under Rules 23 and 19, respectively, of the Massachusetts and Federal Rules of Civil Procedure.

Section 14. Time Limitations; Cause of action.

(a) Actions arising out of this chapter shall be commenced within 4 years next after the cause of action accrues; but if a person liable hereunder fraudulently conceals the cause of action from the knowledge of the person entitled to bring it, the period prior to the discovery of its cause of action by the person so entitled shall be excluded in determining the time limit for the commencement of the action. Any provision in a franchise agreement, which requires any party to a franchise agreement to commence an action within any shorter period than as provided in this section, shall be void as against public policy.

(b) If a cause of action accrues during the pendency of any civil, criminal or administrative proceeding against a person brought by the United States or any of its agencies under the anti-

trust laws, the Federal Trade Commission Act, or any other federal act, or brought by the Commonwealth or any of its political subdivisions under the laws of the Commonwealth related to anti-trust laws or to franchising, the actions may be commenced within 1 year after the final disposition of the civil, criminal or administrative proceeding.

Section 15. Severability.

If any provision or clause of this section or any application of this section to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.”