

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Regulated Industries

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BILL: CS/SB 750

INTRODUCER: Regulated Industries Committee and Senator Latvala and others

SUBJECT: Franchises

DATE: April 4, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kraemer	McSwain	RI	Fav/CS
2.			JU	
3.			RC	

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 750 creates the “Protect Florida Small Business Act” (act). The act regulates the conduct of franchisors and their representatives to prevent fraud, unfair business practices, unfair methods of competition, impositions, and other abuses upon franchisees in Florida. The bill addresses requirements for sale, transfer, or assignment of franchises, and for the mandatory repurchase by a franchisor of a franchise or an interest in a franchise, and for the repurchase of certain assets, including inventory, supplies, equipment, goodwill, and furnishings, upon termination, nonrenewal, or expiration of a franchise.

The bill provides that a franchise agreement in violation of any provision in the act is void and unenforceable, as well as any provision that restricts the location (venue) of an action related to a claim arising under a franchise agreement that involves franchisees who are residents of Florida, or a business entity established in Florida, or a franchise either operating or to be operated in Florida. Furthermore, the bill provides the act does not apply to a franchise agreement between a Florida franchisor and a franchisee that was not a resident of Florida when the franchise agreement was signed or a business entity established in Florida or involving a franchise either operating or to be operated in Florida, even if the agreement says Florida law applies.

CS/SB 750 removes the applicability of the Florida Franchise Act (s. 817.416, F.S.) from franchises entered into, renewed, amended, or revised on or after the effective date of the act.

The bill has an indeterminate fiscal impact on state government. *See* Section V. Fiscal Impact Statement.

The bill is effective upon becoming law.

## II. Present Situation:

The regulation of franchising in Florida is addressed in multiple provisions of Florida law. Chapter 817, F.S. relating to Fraudulent Practices, includes provisions concerning False Pretenses and Frauds.<sup>1</sup>

### *Florida Franchise Act*

Section 817.416, F.S., deals with requirements for the relationship between a franchisee and a franchisor.<sup>2</sup> That statute defines the term “franchise or distributorship” to mean:

[A] contract or agreement, either expressed or implied, whether oral or written, between two or more persons:

1. Wherein a commercial relationship of definite duration or continuing indefinite duration is involved;
2. Wherein one party, hereinafter called the “franchisee,” is granted the right to offer, sell, and distribute goods or services manufactured, processed, distributed or, in the case of services, organized and directed by another party;
3. Wherein the franchisee as an independent business constitutes a component of franchisor’s distribution system; and
4. Wherein the operation of the franchisee’s business franchise is substantially reliant on franchisors for the basic supply of goods.<sup>3</sup>

The term “goods,” means “any article or thing without limitation, or any part of such article or thing, including any article or thing used or consumed by a franchisee in rendering a service established, organized, directed, or approved by a franchisor.”<sup>4</sup>

It is unlawful for any person selling or establishing a franchise or distributorship to intentionally:

- Misrepresent the prospects or chances for success of a proposed or existing franchise or distributorship;
- Misrepresent, by failure to disclose or otherwise, the known required total investment for such franchise or distributorship; or
- Misrepresent, or fail to disclose efforts to sell or establish more franchises or distributorships than is reasonable to expect the market or market area for the franchise or distributorship to sustain.<sup>5</sup>

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<sup>1</sup> *See* part I of ch. 817, F.S.

<sup>2</sup> Section 817.416, F.S. has not been amended since 1971. *See* ch. 71-61, Laws of Fla. While popularly referred as the “Florida Franchise Act,” the law does not cite s. 817.416, F.S., as such.

<sup>3</sup> *See* s. 817.416(1)(b), F.S.

<sup>4</sup> Section 817.416(1)(c), F.S.

<sup>5</sup> *See* s. 817.416(2), F.S.

The execution or carrying out of a scheme, plan, or corporate organization in violation of s. 817.416, F.S., if knowledge or intent is proved, is a second degree misdemeanor.<sup>6</sup>

In addition, a person who proves a violation of s. 817.416, F.S., may be granted a judgment for all moneys invested in a franchise or distributorship. Upon such a showing of proof, a court may award the successful plaintiff reasonable attorney's fees and must award reasonable costs incurred in bringing the action.<sup>7</sup>

The Department of Legal Affairs, or the Department of Legal Affairs and the Department of Agriculture and Consumer Services jointly, on behalf of the people of Florida, may sue for injunctive relief against franchise or distributorship plans or activities that engage in the intentional misrepresentations described above.<sup>8</sup>

### ***The Florida Sale of Business Opportunities Act***

The Florida Sale of Business Opportunities Act (SBOA)<sup>9</sup> requires persons offering business opportunities to make specified disclosures about the business to a prospective purchaser.<sup>10</sup> The required disclosures must be made if the purchaser is required to pay an initial fee or sum of money exceeding \$500 to the seller, and if the seller represents that the seller:<sup>11</sup>

- Will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases, currency or card operated equipment, or other similar devices or currency-operated amusement machines or devices on premises neither owned nor leased by the purchaser or seller;
- Will purchase any or all products made, produced, fabricated, grown, bred, or modified by the purchaser using in whole or in part the supplies, services, or chattels sold to the purchaser;
- Guarantees a partial or full refund to the seller; or
- Provides a sales program or marketing program, excepting a sales or marketing program made in conjunction with the licensing of a registered trademark or service mark.

A "business opportunity" does not include the sale of ongoing businesses to no more than five purchasers, the sale of not-for-profit demonstration equipment, materials, or samples for a price that does not exceed \$500 or any sales training course offered by the seller the cost of which does not exceed \$500, or the sale or lease of laundry and drycleaning equipment.<sup>12</sup>

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<sup>6</sup> Section 775.082, F.S., provides that a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S. provides that a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

<sup>7</sup> See s. 817.416(3), F.S.

<sup>8</sup> See s. 817.416(4), F.S.

<sup>9</sup> Part VII of ch. 559

<sup>10</sup> Section 559.803, F.S.

<sup>11</sup> Section 559.801(1)(a), F.S.

<sup>12</sup> Section 559.801(1)(b), F.S.

The sale of a franchise is exempt from the required disclosures if the franchise satisfies the Federal Trade Commission's (FTC) definition of a franchise<sup>13</sup> and applies for the exemption with the Department of Agriculture and Consumers (DACS).<sup>14</sup>

The FTC defines "franchise" to mean any continuing commercial relationship or arrangement in which the purchaser's business uses the trademark of the seller's business, the seller exercises significant control over how the business operates, and the purchaser pays a fee to the seller.<sup>15</sup>

The application for the exemption through the DACS requires only the name of the applicant, the name of the franchise and the name under which the applicant intends to, or does, transact business, if different, the applicant's principal business address, and the applicant's federal employer identification number.<sup>16</sup>

### ***Federal Trade Commission Regulations Affecting Franchises***

The Federal Trade Commission's rule on franchises gives prospective franchise purchasers information to weigh the risks and benefits of an investment in a franchise.<sup>17</sup> The rule requires franchisors to provide all potential franchisees with a disclosure document with 23 specific items of information about the offered franchise, its officers, and other franchisees.<sup>18</sup> The FTC Compliance Guide provides a sample disclosure document and general instructions concerning the mandatory disclosures.<sup>19</sup>

### **Florida Deceptive and Unfair Trade Practices Act**

Part II of ch. 501, F.S., the "Florida Deceptive and Unfair Trade Practices Act" (FDUTPA) addresses protection of the public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce. Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.<sup>20</sup>

Section 501.203(2), F.S., addresses who is authorized to enforce the FDUTPA (enforcing authority), which includes the:

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<sup>13</sup> See *Federal Trade Commission, Franchise Rule, 16 CFR, Part 436 Compliance Guide*, (FTC Compliance Guide) at : <https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf> (last visited Mar. 31, 2017). The FTC Compliance Guide provides a sample disclosure document and general instructions. See <https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf> (last visited Mar. 31, 2017), at pages 34-154.

<sup>14</sup> See s. 559.803, F.S.

<sup>15</sup> 16 C.F.R. s. 436.1(h) (2017).

<sup>16</sup> Section 559.803(3), F.S., and Florida Admin. R. 5J-10.002 (2012) The form for the application is available at the DACS website: <http://www.freshfromflorida.com/Business-Services/Sellers-of-Business-Opportunities> (last visited March 31, 2017).

<sup>17</sup> See 16 C.F.R. Part.436.1(h). See also <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/franchise-rule> (last visited Mar. 31, 2017).

<sup>18</sup> See <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/franchise-rule> (last visited Mar. 31, 2017).

<sup>19</sup> *Id.* at pages 34-154.

<sup>20</sup> See s. 501.2014(1), F.S.

- Office of the state attorney when a violation occurs in or affects the judicial circuit under the jurisdiction of that state attorney; or
- Department of Legal Affairs, if the violation occurs in or affects more than one judicial circuit, or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.

The enforcing authority may pursue actions:

- To obtain a declaratory judgment that an act or practice violates the FDUTPA;
- To enjoin any person who has violated, is violating, or is otherwise likely to violate, the FDUTPA; and
- For the actual damages caused by an act or practice in violation of the FDUTPA, on behalf of one or more consumers or governmental entities, except that damages are not recoverable against a retailer who has in good faith engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated the FDUTPA.<sup>21</sup>

Any person, firm, corporation, association, or entity, or any agent or employee of such persons, who is willfully using, or has willfully used, a method, act, or practice declared unlawful, or who is willfully violating any of the rules of the Department of Agriculture and Consumer Services (DACS) adopted under part II of ch. 501, F.S., is liable for a civil penalty of not more than \$10,000 for each such violation.<sup>22</sup>

Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive or prohibited by rule. The civil penalty may be recovered in any action brought under FDUTPA by the enforcing authority; or the enforcing authority may terminate any investigation or action upon the agreement to pay a civil penalty by the person, firm, corporation, association, or entity, or their agent or employee.<sup>23</sup>

The DACS or the court may waive a civil penalty if the person, firm, corporation, association, or entity, or the agent or employee of the foregoing, has previously made full restitution or reimbursement or has paid actual damages to the consumers or governmental entities who have been injured by the unlawful act or practice or rule violation.<sup>24</sup> If civil penalties are assessed in any litigation, the enforcing authority is entitled to reasonable attorney's fees and costs; a civil penalty accrues to the state.<sup>25</sup>

Violations of the FDUTPA involving senior citizens, those with disabilities and active duty or veteran members of the United States Armed Forces may result in penalties of not more than \$15,000 for each violation.<sup>26</sup>

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<sup>21</sup> See s. 501.207(1), F.S.

<sup>22</sup> See s. 501.2075, F.S.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See s. 501.2077, F.S.

### III. Effect of Proposed Changes:

**Section 1** of the bill provides that the act may be cited as the “Protect Florida Small Business Act” (act).

The act regulates the conduct of franchisors and their representatives to prevent fraud, unfair business practices, unfair methods of competition, impositions, and other actions taken as to franchisees in Florida.

**Section 2** of the bill sets forth legislative findings and intent that the welfare of franchisees, including the success and failure of their franchise businesses, affects the state economy and the public, and requires promotion of fair business relations between franchisees and franchisors, and protection of franchisees against unfair treatment by franchisors.

**Section 3** of the bill creates s. 686.103, F.S., to define the following terms:

“Affiliate” means a person controlling, controlled by, or under common control with another person or, in the case of a business entity, such entity’s officer, director, or other person in control of the activities of such entity.

- “Area franchise” means a contract or agreement, expressed or implied, written or oral, regardless of whether the contract or agreement is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, between a franchisor and another person through which that person is granted the right, for consideration in whole or in part for such right:
  - To sell or negotiate the sale of a franchise in the name or on behalf of the franchisor; or
  - To become an area developer and develop a franchise for the benefit of that person or that person’s affiliates.
- “Area franchisee” means the owner of an area franchise.

“Franchise” or “franchise agreement” means a contract or agreement, expressed or implied, written or oral, regardless of whether the contract or agreement is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, for a definite or indefinite time, between two or more persons by which:

- A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;
- The operation of the franchise business pursuant to that marketing 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
- The franchisee is required to pay, directly or indirectly, a franchise fee.
- “Franchise” or “franchise agreement” includes an area franchise.
- “Franchise” or “franchise agreement” does not include any of the following:
  - A franchise governed by the Agricultural Equipment Manufacturers and Dealers Act.

- Any activity governed by ss. 686.501-686.506, F.S., pertaining to art dealers.
  - A franchise governed by the Outdoor Power Equipment Manufacturers, Distributors, Wholesalers, and Servicing Dealers Act.
  - A motor vehicle franchise or agreement governed by ss. 320.60-320.70, F.S., including a recreational vehicle franchise or agreement governed by ss. 320.3201-320.3211, F.S.
  - A business relationship between a beer distributor and a manufacturer governed by s. 563.022, F.S.
  - A professional sports franchise as described in s. 288.11625(2)(c), F.S.
- “Franchise business” means a business unit that is owned or operated by a franchisee and that is subject to a marketing plan or system prescribed by the franchise.
  - “Franchise fee” means a fee or charge greater than \$100 annually which a franchisee is required to pay or agrees to pay, directly or indirectly, to the franchisor for the right to enter into or continue a franchise, including, but not limited to, a payment for goods or services. However, the term does not include a fee or charge that a franchisee pays or agrees to pay the franchisor for goods at a bona fide wholesale price, if no obligation is imposed upon the franchisee to purchase or pay for a quantity of goods in excess of that which a reasonable person normally would purchase by way of a starting inventory or supply or to maintain an ongoing inventory or supply.
  - “Franchisee” means a person to whom a franchise is offered or granted.
  - “Franchisor” means a person who grants a franchise to a franchisee.
  - “Fraud” means and includes actual fraud or constructive fraud as normally defined, in addition to the following:
    - A misrepresentation in any manner, whether intentionally false or arising from negligence, of a material fact.
    - A promise or representation not made honestly and in good faith.
    - An intentional failure to disclose a material fact.
    - Any artifice employed to deceive another.
  - “Person” means a natural person, corporation, limited liability company, association, partnership, trust, or other business entity and, in the case of a business entity, includes any other affiliate of such entity.
  - “Sale” means and includes the issuance, transfer, agreement for transfer, exchange, pledge, hypothecation, or mortgage in any manner or form, whether by transfer in trust or otherwise, of any goods or interest therein, or of any franchise related thereto, for a consideration, and any option, subscription or other contract, or solicitation, looking to a sale, or offer or attempt to sell in any form, whether in written or oral form, for a consideration.

**Section 4** of the bill creates s. 686.104, F.S., relating to terminations or nonrenewals of franchises. Except as otherwise provided in the act, a franchisor may not terminate or refuse to

renew a franchise except for good cause. If a franchise is terminated without good cause, then that action constitutes an unfair termination.

With limited exceptions, good cause is limited to the failure of the franchisee to substantially comply with the reasonable and material requirements imposed upon the franchisee by the franchise agreement after being given notice at least 90 days in advance of the termination and a reasonable opportunity of not less than 60 days after the date of the notice of noncompliance, to cure the failure. If the franchisee cures the failure within the time given to cure, the termination notice is void.

An immediate notice of termination may be given to a franchisee by a franchisor without an opportunity to cure if, during the period in which the franchise is in effect, any of the following events, relevant to the franchise, occurs:

- The franchisee has been judicially determined to be insolvent, has had all or a substantial part of its assets assigned to or for the benefit of any creditor, or has admitted its inability to pay its debts as they come due.
- The franchisee abandons, by failing to operate, the franchise business for 10 consecutive days during which, under the terms of the franchise, the franchisee is required to operate the franchise business, unless such failure to operate is due to an act of God; a work stoppage; a strike or labor difficulty; a fire, flood, hurricane, or sinkhole; or other causes beyond the franchisee's control.
- The franchisor and franchisee, within 30 days after termination or nonrenewal, agree in writing to terminate the franchise. The franchisee fails, for a period of 10 days after a notice of noncompliance, to comply with any federal, state, or local law or regulation, including, but not limited to, any health, safety, building, and labor law or regulation applicable to the operation of the franchise.
- A levy of execution has been made on the license granted by the franchise or on a property used in the franchise business and is not discharged within 5 days after such levy.
- The franchisee is convicted of a felony that significantly, directly, and adversely affects the operation of the franchise business.
- The franchisor makes a reasonable determination that continued operation of the franchise business by the franchisee will result in imminent and substantial danger to public health or safety.

**Section 5** of the bill creates s. 686.105, F.S., relating to expiration of a franchise agreement. A franchise agreement, regardless of its stated term of years, is deemed to be continuing, and a franchisor must provide written notice to the franchisee of the franchisor's intent not to extend the agreement beyond its expiration date at least 180 days before the expiration date unless:

- Termination of the franchise agreement is authorized under proposed s. 686.104, F.S., created by the bill.
- The franchisor and franchisee agree in writing, before the expiration of the franchise agreement, not to extend the franchise.
- The franchisor completely withdraws from directly or indirectly distributing its products or services in the geographic market served by the franchisee.
- The franchisor may permit the franchise agreement to expire, if upon 180 days written notice before the agreement's expiration, the franchisor agrees not to enforce against the franchisee

any covenant not to compete with the franchisor or with other franchisees of the franchisor, and the nonrenewal of the franchise is not for the purpose of converting the franchise business to operation by an employee, affiliate, or agent of the franchisor.

As a condition of an extension of a franchise agreement, the franchisor may require that the franchisee meet the reasonable qualifications for new franchisees that exist at the time of extension and execute a new franchise agreement incorporating terms and fees for new franchises that exist at the time of extension.

**Section 6** of the bill creates s. 686.106, F.S., concerning sales, transfers, and assignments of franchises, including rights of first refusal.

A franchisor may not deny the surviving spouse, heir, or estate of a deceased franchisee (the survivors), or of the person controlling a majority interest in the franchisee, the opportunity to participate in the ownership of the franchise or franchise business under a valid franchise agreement for at least 180 days after the death of the franchisee or a person controlling a majority interest in the franchisee (the status quo period). During the status quo period, the survivors must either meet all of the existing reasonable qualifications for a purchaser of a franchise or must sell, transfer, or assign the franchise to a person who meets the franchisor's existing reasonable qualifications for new franchisees. The surviving spouse, heir, or estate must maintain all standards and obligations of the franchise.

With the prior written consent of the franchisor, a franchisee may sell, transfer, or assign a franchise, all or substantially all of the assets of the franchise business, or an interest in the franchisee. The franchisor's consent may not be withheld unless the purchaser, transferee, or assignee does not meet the qualifications for new or renewing franchisees, or the franchisee and the purchaser, transferee, or assignee fail to comply with other reasonable transfer conditions specified in the franchise agreement.

To invoke the protections of the act, before the sale, transfer, or assignment of a franchise, all or substantially all of the assets of the franchise business, or an interest in the franchisee, the franchisee must notify the franchisor in writing of the franchisee's intent to sell, transfer, or assign.

The franchisor must, within 60 days after receipt of such written notice from a franchisee, or any shorter period required by the franchise agreement, notify the franchisee of the approval or disapproval of the proposed sale, transfer, or assignment. If the proposed sale, transfer, or assignment is disapproved, the franchisor must include in the notice of disapproval a statement specifying the reasons for the disapproval. A proposed sale, transfer, or assignment is deemed approved unless disapproved by the franchisor in the manner provided in proposed s. 686.106(3), F.S., created in the bill.

In a claim against the franchisor for disapproval of a sale, transfer, or assignment, the reasonableness of the franchisor's decision is a question of fact requiring consideration of all existing circumstances. The act does not prohibit entry of a summary judgment when the reasonableness of the disapproval of a sale, transfer, or assignment can be decided as a matter of law.

In addition, the act does not prohibit a franchisor from exercising the contractual right of first refusal to purchase a franchise, all or substantially all of the assets of a franchise business, or an interest in a franchisee after receipt of a bona fide offer from a proposed seller to purchase the franchise, assets, or interest. A franchisor exercising the contractual right of first refusal must offer the seller payment at least equal to the value offered in the bona fide offer.

**Section 7** of the bill creates s. 686.107, F.S., concerning the repurchase of inventory upon termination, nonrenewal, or expiration of a franchise agreement.

The bill requires that a franchisee must have an opportunity to monetize any equity that the franchisee may have developed in the franchise business before the termination, nonrenewal, or expiration of the franchise agreement. The bill provides that equity in the franchisor's intellectual property is not transferred to the franchisee. Therefore, upon termination, nonrenewal, or expiration of a franchise agreement, a franchisor must, if the franchisee requests it, repurchase at fair market value the inventory, supplies, goods, fixtures, equipment, and furnishings of the franchise business. The franchisor must also either purchase the goodwill of the franchise business, or waive all noncompete obligations of the franchisee so that the franchisee may continue in business at its option.

This section of the act does not apply if:

- The franchisee declines a bona fide offer of renewal from the franchisor which is consistent with proposed s. 686.105, F.S., as created by this bill, and the franchise agreement between the franchisor and franchisee.
- The franchisor and franchisee agree in writing within 30 days of the termination, nonrenewal, or expiration of the franchise to terminate or not renew the franchise or to allow the franchise to expire.

This section of the bill does not apply to inventory, supplies, goods, fixtures, equipment, or furnishings sold by the franchisee between the date of the notice of termination, nonrenewal, or expiration and the date the franchisee ceases to operate the franchise business pursuant to a termination, nonrenewal, or expiration.

If a franchisor fails or refuses to repurchase any inventory, supplies, goods, fixtures, equipment, goodwill, or furnishings required to be repurchased within 60 days after the termination, nonrenewal, or expiration of a franchise, the franchisor is civilly liable for the entire value of those items, in addition to the franchisee's reasonable attorney fees, court costs, and interest on the value of those items computed at the legal interest rate<sup>27</sup> from the 61st day after termination.

**Section 8** of the bill creates s. 686.108, F.S., concerning the rights and prohibitions that govern the relations between a franchisor or subfranchisor and its franchisee, to require that the parties must deal with each other in good faith and in a commercially reasonable manner.

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<sup>27</sup> See s. 687.01, F.S.

A person may not, during the selling or establishing of a franchise, intentionally misrepresent or fail to disclose:

- The prospects or chances for success of the proposed or existing franchise;
- The known required total investment for such franchise; or
- Any effort to sell or establish more franchises than is reasonable to expect the market or market area for the particular franchise to sustain.

The act prohibits, as an unfair and deceptive act or practice, or an unfair method of competition, in violation of the act, a franchisor or its representative from directly or indirectly:

- Terminating or failing to renew a franchise agreement in violation of the act.
- Allowing a franchise agreement to expire without complying with the act.
- Failing to repurchase inventory, supplies, goods, fixtures, equipment, goodwill, and furnishings in violation of the requirements in the act for repurchase of inventory.
- Preventing a sale, transfer, or assignment of a franchise in violation of the requirements regarding sales, transfers, and assignments.
- Violating the Florida Deceptive and Unfair Trade Practices Act<sup>28</sup> in connection with its business as a franchisor, or an officer, agent, or other representative thereof.
- Resorting to or using false or misleading advertising in connection with its business as a franchisor, or an officer, agent, or other representative thereof.
- Imposing, directly or indirectly, an unreasonable restriction on a franchisee relative to transfer, renewal, termination, location, or site control.
- Without prior written disclosure to a franchisee, obtaining vendor rebates, kickbacks, or other similar payments from another person with whom the franchisee does business or employs on account of or in relation to the transactions between the franchisee, the franchisor, and the other person,
- Requiring a franchisee to assent to a release, assignment, novation, waiver, or estoppel that would relieve any person from liability imposed under the act, including, but not limited to, through the use of a disclaimer or checklist designed to avoid a protection under the act.
- Requiring a franchisee to assent to the use of a choice of law provision by selecting a different state's law to govern the relationship of the parties.
- Restricting or inhibiting, directly or indirectly, the right of a franchisee to join a franchisee association or the free association for any lawful purpose among franchisees.
- Imposing upon a franchisee, by contract or rule, written or oral, any unreasonable standard of conduct.
- Requiring a franchisee to waive its rights to a jury trial or waive any procedure or remedy otherwise available in this state, although binding arbitration is enforceable if it complies with the act.

A person who executes or carries out a scheme, plan, or organization that violates any provision of proposed s. 686.111, F.S., created by the bill, if knowledge or intent is proved, commits a misdemeanor of the second degree.

A person who proves in court that a violation of this section has occurred is entitled to the remedies set forth in proposed s. 686.112, F.S., created in this bill (*see Section 12* below).

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<sup>28</sup> See ss. 501.201-.213, F.S.

The Department of Legal Affairs, by itself or jointly with the Department of Agriculture and Consumer Services, may sue on behalf of the people of this state for injunctive relief against any franchisor plan or activity that is in violation of the act.

**Section 9** of the bill creates s. 686.109, F.S., and provides that a franchise agreement or other contract, any part thereof, or any practice under such contract, that violates any provision of the act is deemed against public policy and is void and unenforceable. The bill provides that an aggrieved party may choose to seek to void only the unenforceable portion of a franchise agreement and continue to enforce the remainder of the agreement.

**Section 10** of the bill creates s. 686.110, F.S., to provide that provisions in a franchise restricting the venue to a forum outside of Florida or selecting the law of any other state or jurisdiction other than Florida, are void with respect to any claim arising under or relating to a franchise agreement involving a franchisee that was, at the time of signing, a resident of this state or a business entity established in this state or a franchise business either operating or planning to be operated in Florida.

The bill also provides the act does not apply to a franchise agreement between a Florida franchisor and a franchisee that was not, at the time of signing, a resident of Florida, or a business entity established in Florida, or involving a franchise operating or to be operated in Florida, even if the agreement says Florida law applies.

**Section 11** of the bill creates s. 686.111, F.S., and provides that the act does not limit the right of a franchisor and franchisee to agree, before or after a dispute arises, to binding arbitration to settle a claim under the act if the standards applied and the remedies available are not less than the requirements specified in the act, and each arbitrator an impartial person or is chosen from a list of impartial arbitrators provided by the American Arbitration Association.

**Section 12** of the bill creates s. 686.112, F.S., and provides that if a franchisor terminates, fails to renew, or allows a franchise to expire in violation of the act, the franchisor must pay the franchisee the fair market value of the franchise business and franchise assets, in addition to any other damage caused by the violation. Any person aggrieved or injured in his or her business or property by a violation of the act may bring an action in state or federal court in Florida, to recover the damages sustained and the costs of such action, including reasonable attorney fees.

In addition to any other remedy or relief to which a person is entitled, any person aggrieved by a violation of the act also may bring an action to obtain a declaratory judgment stating that an action or a practice violates the act, and injunctive relief enjoining a franchisor that has violated, is violating, or is otherwise likely to violate the act from committing the violation.

In an action for monetary damages, upon a finding that the franchisor acted maliciously, the bill authorizes a judge or jury to award punitive damages as authorized by Florida law.

The Department of Legal Affairs or the state attorney may bring an action for injunctive relief or other appropriate civil relief for a violation of the act if the violation occurs in the judicial circuit of the department or the state attorney, respectively. The remedies are in addition to any other

remedies provided by law or in equity, including, but not limited to, the Florida Deceptive and Unfair Trade Practices Act.<sup>29</sup>

**Section 13** of the bill creates s. 686.113, F.S., and provides that any person or franchisor who engages directly or indirectly in an agreement or contract in Florida concerning a franchise, and any franchise whose franchisee is a Florida resident or is domiciled in Florida, or whose franchise business is, has been, or is intended to be operated in Florida, is subject to the act and to the jurisdiction of Florida courts, in accordance with Florida law.

The act expressly applies to:

- Any written or oral agreement between a franchisor and a franchisee, including, but not limited to, a franchise offering; a franchise agreement; a sale of goods, services, and advertising; a lease or mortgage of real or personal property; a promise to pay; a security interest; a pledge; an insurance contract; an advertising contract; a construction or installation contract; a servicing contract; and any other agreement in which the franchisor has a direct or indirect interest;
- Any franchise entered into, renewed, amended, or revised after the effective date of the act;
- Any existing franchise of an indefinite duration which may be terminated by the franchisee or franchisor without cause; and
- Any existing franchise entered into before the effective date of the act, only to the extent that the act does not significantly impair the existing contract rights between the parties.

The act is supplemental to, and does not preempt, local ordinances dealing with prohibited or unlawful conduct in the manufacturing, distribution, wholesaling, advertising, or sale of goods if such ordinances are not inconsistent with the act.

The bill provides that the act supersedes s. 817.416, F.S., with respect to any franchisee that signs a franchise agreement on or after the effective date of the act. Under the bill, s. 817.416, F.S., continues to govern the claims of all franchisees that signed franchise agreements or were victims of fraud perpetrated before the effective date of the act, as well as distributors and any other entities, past, present, or future, which would be covered by s. 817.416, F.S., but not by the act.

**Section 14** of the bill amends s. 817.416, F.S., to provide that s. 817.416, F.S., does not apply to a franchise entered into, renewed, amended, or revised on or after the effective date of the act and that a franchise entered into, renewed, amended, or revised on or after the effective date of the act is subject to the requirements of the act.

**Section 15** of the bill directs the Division of Law Revision and Information to replace the phrase “the effective date of the act” wherever it occurs in the act, with the date that the act becomes a law.

**Section 16** of the bill provides that the bill is effective upon becoming law.

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<sup>29</sup> See ss. 501.201-.213, F.S.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

CS/SB 750 creates provisions affecting persons who engage, directly or indirectly, in an agreement or contract in Florida in connection with a franchise, and any franchise whose franchisee is a Florida resident or is domiciled in Florida, or whose franchise business is, has been, or is intended to be operating in this state. Such persons are made subject to the act and to jurisdiction of Florida courts for violations of the act. With respect to *existing* franchise agreements or contracts, certain provisions of the bill may implicate constitutional concerns relating to impairment of contract.<sup>30</sup>

In *Pomponio v. Claridge of Pompano Condominium, Inc.*,<sup>31</sup> the Florida Supreme court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid application used by the United States Supreme Court. The Florida Supreme Court invalidated a statute, as an unconstitutional impairment of contract, which required the deposit of rent into a court registry during litigation involving obligations under a contract lease. The court set forth several factors to be considered in balancing whether a state law has in fact operated as a substantial impairment of a contractual relationship, stating “[t]he severity of the impairment measures the height of the hurdle the state legislation must clear.”<sup>32</sup>

The court stated that if there is minimal alteration of contractual obligations, the inquiry may end at its first stage. Severe impairment pushes the inquiry into a careful examination of the nature and purpose of the state legislation. The factors to be considered are whether:

- The law was enacted to deal with a broad, generalized economic or social problem;
- The law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- The effect on the contractual relationships is temporary, or whether it is severe, permanent, immediate, and retroactive.<sup>33</sup>

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<sup>30</sup> Article I, s. 10, U.S. Constitution and Art. I, s. 10, Fla. Const.

<sup>31</sup> *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (Fla. 1979).

<sup>32</sup> *Pomponio*, 378 So. 2d at 779.

<sup>33</sup> *Id.*

In *United States Fidelity & Guaranty Co. v. Department of Insurance*,<sup>34</sup> the Florida Supreme Court followed *Pomponio* and said that the method requires a balancing of a person's interest to not have his or her contracts impaired, with the state's interest in exercising its legitimate police power. The court adopted the method used by the U.S. Supreme Court, in which the threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."<sup>35</sup> The severity of the impairment increases the level of scrutiny.

Relevant to the extent of the impairment is whether the industry the complaining party had entered had been regulated in the past because if the party was already subject to regulation when the contract was entered, then it is understood that it would be subject to further legislation upon the same topic.<sup>36</sup> If the state regulation constitutes a substantial impairment, the state must have a significant and legitimate public purpose<sup>37</sup> and any adjustment of the rights and responsibilities of the contracting parties must be appropriate to the public purpose justifying the legislation.<sup>38</sup>

Furthermore, although retroactive application of a law may be constitutional in certain situations,<sup>39</sup> in 2011, the Florida Supreme Court unanimously held, in *Cohn v. The Grand Condominium Association, Inc.*,<sup>40</sup> that by changing the distribution of voting power between residential owners and other owners in a mixed-use condominium (i.e., a provision of an existing contract), the retroactive application of the law at issue in that case altered the rights of the unit owners in contravention of their contractual agreement and, thus, impaired the obligation of contract as applied.

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

CS/SB 750 may impact the financial interests of persons who engage, directly or indirectly, in an agreement or contract in Florida in connection with a franchise, and any franchise whose franchisee is a Florida resident or is domiciled in Florida, or whose franchise business is, has been, or is intended to be operating in this state.

### C. Government Sector Impact:

The bill amends s. 817.416, F.S., to state that the provision does not apply to a franchise entered into, renewed, amended, or revised on or after the effective date of the act.

<sup>34</sup> *United States Fidelity & Guaranty Co. v. Department of Insurance*, 453 So. 2d 1355 (Fla. 1984).

<sup>35</sup> *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (quoting *Allied Structural Steel Co., v. Spannaus*, 438 U.S. 234, 244 (1978)).

<sup>36</sup> *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 242, n. 13).

<sup>37</sup> *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (citing *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977)).

<sup>38</sup> *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1361.

<sup>39</sup> *Century Village, Inc. v. Wellington*, 361 So. 2d 128 (Fla. 1978).

<sup>40</sup> *Cohn*, 62 So. 3d. 1120, 1122 (Fla. 2011).

Notwithstanding the removal of certain franchises from the provisions of s. 817.416, F.S., the authority of the Department of Legal Affairs, or the Department of Legal Affairs and the Department of Agriculture and Consumer Services jointly, to sue for injunctive relief against franchise or distributorship plans or activities that engage in intentional misrepresentations pursuant to s. 817.416(4), F.S., (the intentional misrepresentation remedies) remains effective. There may be additional costs associated with enforcement of the intentional misrepresentation remedies deemed necessary in connection with activities conducted pursuant to the act.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

CS/SB 750 addresses expiration of franchise agreements in Section 5, in proposed s. 686.105(3), F.S., created in the bill, (lines 283-290), and states:

A franchisor may permit the franchise agreement to expire, if the franchisor provides written notice 180 days before the agreement's expiration, the franchisor agrees not to enforce any covenant against the franchisee not to compete with the franchisor or with other franchisees of the franchisor, and the nonrenewal of the franchise is not for the purpose of converting the franchise business to operation by an affiliate, employee, or agent of the franchisor.

The reference to the covenant not to compete does not address execution of a document by a franchisee containing a covenant not to compete. The term "nonrenewal" does not appear to fit within the topic of proposed s. 686.105, F.S., created in the bill. There is no method to document the franchisor's opting not to enforce a covenant not to compete, or that the expiration of a franchise agreement is "not for the purpose of converting" the franchise operations to a third party.

The bill requires that a franchisor notify a franchisee of approval or disapproval of a proposed sale, transfer, or assignment of a franchise within 60 days *after receipt of all of the written notice or any shorter period required by the franchise agreement*" (lines 339-342,; emphasis added). Substituting the phrase "after receipt from the franchisee of the written notice, or" may clarify the intended requirement.

The bill provides that the Department of Legal Affairs or the state attorney may bring an action for injunctive relief or other appropriate civil relief for a violation of the act, if the violation occurs in the judicial circuit of the department or the state attorney. The jurisdiction of the Department of Legal Affairs is not limited by judicial circuit.<sup>41</sup>

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<sup>41</sup> See s. 16.015, F.S.

**VIII. Statutes Affected:**

This bill substantially amends section 817.416 of the Florida Statutes.

This bill creates the following sections of the Florida Statutes: 686.101, 686.102, 686.103, 686.104, 686.105, 686.106, 686.107, 686.108, 686.109, 686.111, 686.112, and 686.113.

**IX. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Regulated Industries Committee on April 4, 2017:**

The committee substitute:

- Provides that the bill does not apply to recreational vehicle dealer franchises.
- Revises what constitutes a “franchise fee;” (by removing fees for purchases or rental of fixtures, credit card service charges, and trading stamps).
- Provides a franchisor may not refuse to renew a franchise except for good cause; refusal to renew without good cause is unfair termination of a franchise agreement.
- Provides a franchise agreement is a continuing agreement, even if it is limited to a certain term, unless the franchise is otherwise terminated, or the franchisor:
  - Agrees not to enforce any non-compete covenant by the franchisee; and
  - Provides written notice, at least 180 days before the agreement expires, of the intent not to extend the franchise agreement.
- Deletes:
  - The definition of “goods,” which provides that the term includes any article used or consumed by a franchise for services directed or approved by a franchisor; however, numerous references to “goods” are retained in the bill.
  - Requirements for a franchisee to provide a right of first refusal on premises occupied by a franchisee or to offer a franchisee a franchise on the same terms.
  - Authorization for a franchisor to notify a franchisee of an immediate termination when an appeal bond is not filed, a final judgment remains unpaid for 30 days, and the business premises are seized or foreclosed on by a creditor.
  - A requirement that if a franchisor determines to sell, transfer, or assign its interest in the marketing premises occupied by a franchisee whose franchise agreement is not renewed, the franchisor must provide the franchisee a right of first refusal of at least 30 days’ duration of a bona fide offer to purchase by a third party, or the franchisor or its assignee must offer the franchisee a franchise on substantially the same terms and conditions offered to other franchisees.
  - Authorization for a franchisee sent a notice of intent of a nonrenewal of a franchise to file a lawsuit or request arbitration to determine if such action is proper.
  - Requirements for the contents and transmittal of notices of termination, nonrenewal, or expiration.
  - A provision that the disapproval of a sale, transfer, or assignment by a franchisor is a question of fact and that the act does not prohibit entry of a summary

- judgment when reasonableness of the disapproval can be decided as a matter of law.
- A provision that franchisors are not required to purchase any personalized items, inventory, supplies, goods, fixtures, equipment, or furnishings not reasonably required to conduct the franchise business, or items whose title and possession are not able to be lawfully granted by the franchisee upon the franchisor's payment when the franchise ceases to operate.
  - Authorization that upon the termination, nonrenewal, or expiration of a franchise, a franchisor may offset money owed to the franchisee, with any amount owed by the franchisee to the franchisor.
  - A provision that proposed s. 686.107, F.S., created in the bill, does not apply to a termination, nonrenewal, or expiration of a franchise agreement if the franchisor does not prevent the franchisee from retaining control and continuing to operate the franchise.
  - Requirements that a franchisor repurchase inventory on the death or incapacity of a franchisee.
  - A requirement that a franchisor or subfranchisor not engage in any action that is arbitrary, capricious, in bad faith, or unconscionable and causes damage to a franchisee or to the public.
  - Requirements for the full indemnification of a franchisee by a franchisor arising from claims involving parts or accessories.
  - A prohibition against a franchisor engaging in arbitrary or bad faith that causes damage to a franchisee or to the public; provides parties must deal with each other in a commercially reasonable manner.
  - As unfair and deceptive practices by a franchisor that:
    - Coerce or compel a franchisee to take certain actions;
    - Willfully discriminate in pricing or terms of sale that provides a franchisee an advantage over other franchisees; or
    - Compete with a franchisee, or allow another franchisee to operate, in the franchisee's exclusive territory.
  - The specific items a franchisee must include when notifying a franchisor of a proposed sale or transfer of a franchise business.
  - Provides an alternate to mandatory purchase by a franchisor of the goodwill in a franchisee's business when a franchise agreement is not renewed or expires; authorizes the franchisor to allow the franchisee to continue in business despite any contractual obligations not to compete.
  - Provides certain remedies when a franchisee proves a franchisor has engaged in unfair and deceptive practices prescribed in the act rather than a judgment for all monies invested by a franchisee.
  - Provides the act does not apply to a franchise agreement between a Florida franchisor and a franchisee that was a nonresident of Florida when the franchise agreement was signed, or a business entity established in Florida or involving a franchise either operating or to be operated in Florida, even if the agreement says Florida law applies.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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