



116th MAINE LEGISLATURE

SECOND REGULAR SESSION-1994

Legislative Document

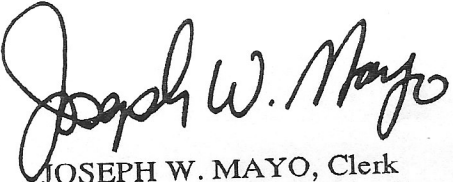
No. 1916

H.P. 1407

House of Representatives, February 18, 1994

An Act to Create a Franchise Practices Act.

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 26.
Reference to the Committee on Business Legislation suggested and ordered printed.


JOSEPH W. MAYO, Clerk

Presented by Representative HOGLUND of Portland.
Cosponsored by Representatives: AHEARNE of Madawaska, CARROLL of Gray, CLEMENT of Clinton, CLOUTIER of South Portland, DEXTER of Kingfield, DONNELLY of Presque Isle, DORE of Auburn, FARNSWORTH of Hallowell, GEAN of Alfred, GOULD of Greenville, GWADOSKY of Fairfield, JACQUES of Waterville, KERR of Old Orchard Beach, MacBRIDE of Presque Isle, MITCHELL of Vassalboro, PARADIS of Augusta, PINEAU of Jay, PINETTE of Fort Kent, RAND of Portland, ROTONDI of Athens, RUHLIN of Brewer, TARDY of Palmyra, Senators: BALDACCI of Penobscot, BUSTIN of Kennebec, CAHILL of Sagadahoc, CARPENTER of York, ESTY of Cumberland, KIEFFER of Aroostook, PARADIS of Aroostook, TITCOMB of Cumberland, WEBSTER of Franklin.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 10 MRSA c. 211-A, as enacted by PL 1993, c. 195, §1,
is repealed.

Sec. 2. 10 MRSA c. 212-B is enacted to read:

CHAPTER 212-B

FRANCHISE PRACTICES ACT

§1391. Short title; purpose

1. Short title. This chapter may be known and cited as the
"Franchise Practices Act."

2. Purpose. This Act is established to promote greater
fairness and equity in franchise relationships; to establish
minimum standards of conduct in franchise practices; to
strengthen private remedies against fraudulent or unlawful
actions; and to provide consumers the greater benefits that flow
from equitable franchise relationships.

§1392. Definitions

As used in this chapter, unless the context otherwise
indicates, the following terms have the following meanings.

1. Franchise. "Franchise" means a contract or agreement,
express or implied, whether oral or written, between 2 or more
persons by which:

A. 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;

B. The operation of the franchisee's business pursuant to
such a 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

C. The franchisee is required to pay, directly or
indirectly, a franchise fee.

"Franchise" does not include any franchise or contract regulated
under chapter 204, 215 or 308 or Title 28-A, chapter 57.
"Franchise" does not include lease departments, licenses or
concessions at or with a general merchandise retail establishment

2 when that lease department, license or concession is incidental
and ancillary to the general commercial operation of that retail
4 establishment. Sales of a leased department, license or
concession are incidental and ancillary to the general commercial
6 operation of a retail establishment if they amount to less than
10% of that establishment's sales.

8 **2. Franchisee.** "Franchisee" means a person to whom a
franchise is offered or granted. "Franchisee" includes:

10 A. A subfranchisor with regard to its relationship with a
12 franchisor; and

14 B. A subfranchisee with regard to its relationship with a
subfranchisor.

16 **3. Franchise fee.** "Franchise fee" means a direct or
18 indirect payment to purchase or operate a franchise. "Franchise
fee" does not include any of the following:

20 A. Payment of a reasonable service charge to the issuer of
22 a credit card by an establishment accepting the credit card;

24 B. Payment to a trading stamp company by a person issuing
trading stamps in connection with a retail sale;

26 C. An agreement to purchase at a bona fide wholesale price
28 a reasonable quantity of tangible goods for resale;

30 D. The purchase or agreement to purchase, at a fair market
value, any fixtures, equipment, leasehold improvements, real
32 property, supplies or other materials reasonably necessary
to enter into or continue a business;

34 E. Payments by a purchaser pursuant to a bona fide loan
36 from a seller to the purchaser;

38 F. Payment of rent that reflects payment for the economic
value of leased, real or personal property; or

40 G. The purchase or agreement to purchase promotional or
42 demonstration supplies, materials or equipment furnished at
fair market value and not intended for resale.

44 **4. Franchisor.** "Franchisor" means a person who grants a
46 franchise or a master franchise, or an affiliate of such a
person. "Franchisor" includes a subfranchisor with regard to its
48 relationship with a franchisee, unless stated otherwise in the
chapter.

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2 5. **Fraud.** "Fraud" includes, in addition to its normal
4 legal connotation, a misrepresentation, whether intentionally
6 false or due to gross negligence, of a material fact, a promise
8 or a representation not made honestly and in good faith and an
10 intentional failure to disclose a material fact.

12 6. **Good cause.** "Good cause" means a failure by a
14 franchisee to comply with a reasonable provision of the franchise
16 agreement that is materially significant to the franchise
18 relationship.

20 7. **Good faith.** "Good faith" means honesty in fact and the
22 observance of reasonable commercial standards of fair dealing in
24 the trade as defined and interpreted in Title 11, section 2-103,
26 subsection (1), paragraph (b).

28 8. **Person.** "Person" means a natural person, corporation,
30 partnership, trust or other entity and, in the case of an entity,
32 includes any other entity in which it has a majority interest or
34 effective control as well as the individual officers, directors
36 and other persons in active control of the activities of each
38 entity.

40 9. **Sale, transfer or assignment.** "Sale, transfer or
42 assignment" means any disposition of a franchise or any interest
44 in a franchise, in trust or otherwise, with or without
46 consideration, including, but not limited to, a bequest, an
48 inheritance, a gift, an exchange, a lease or a license.

50 10. **Subfranchisee.** "Subfranchisee" means a person who is
 granted a franchise from a subfranchisor.

 11. **Subfranchisor.** "Subfranchisor" means a person who is
 granted the right to sell or negotiate the sale of franchises
 pursuant to an agreement with a franchisor.

§1393. Application

1. **Application to new or existing franchises operated in the State.** This chapter applies to any franchise agreement entered into after the effective date of this section and to existing franchise agreements in relation to conduct or transactions that occur after the effective date of this section. Any such new or existing franchise must be operated in the State. For purposes of this chapter, the franchise is operated in this State only if the premises from which the franchise is operated is physically located in this State. A franchise, including marketing rights in or to the State is deemed to be operated in this State only if the franchisee has a place of business physically located in this State. This chapter

2 does not apply to a franchise solely because an agreement
3 relating to the franchise provides that the agreement is subject
4 to or governed by the laws of this State. The provisions of this
5 chapter do not apply to any existing or future contracts between
6 state franchisors and out-of-state franchisees.

7 Written or oral agreements between a franchisor and a franchisee,
8 including, but not limited to, franchise offerings, franchise
9 agreements, agreements for sales of goods or services,
10 advertising, leases or mortgages of goods or services, promises
11 to pay, security interests, pledges, insurance contracts,
12 advertising contracts, construction or installation contracts,
13 servicing contracts and all other agreements in which the
14 franchisor has a direct or indirect interest, are subject to this
15 chapter.

16 **2. Limitations on application.** This chapter does not apply
17 to any agreement between a certificate of approval holder and a
18 wholesaler licensee pursuant to Title 28-A, chapter 57; to an
19 agreement between a motor vehicle dealer or franchisee and a
20 manufacturer, distributor, wholesaler, distribution branch or
21 division, factory branch or division, wholesale branch or
22 division or franchisor, pursuant to chapter 204; or to any
23 agreement pursuant to chapter 215 or 308 involving fuel
24 distribution or sales.

25 **§1394. Jurisdiction and nonjudicial resolution of disputes**

26 A provision in a franchise agreement restricting
27 jurisdiction to a forum outside this State or excluding or
28 limiting either party's access to the courts of this State is
29 void with respect to a claim otherwise enforceable under this
30 chapter or the laws of this State.

31 **§1395. Waiver of liability prohibited**

32 Any condition, stipulation or provision requiring a
33 franchisee to waive compliance with or relieve a person of a duty
34 or liability imposed by or a right provided by this chapter or
35 ordered under this chapter is void. This section does not affect
36 the settlement of disputes, claims or civil lawsuits arising out
37 of or brought pursuant to this chapter.

38 **§1396. Prohibited conduct**

39 In addition to conduct specifically prohibited in section
40 1397, 1398, 1399 or 1399-A the following conduct is prohibited.
41 Violations of this section or section 1397, 1398, 1399 or 1399-A
42 constitute unfair methods of competition and unfair and deceptive
43 practices.
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2 1. Damage to public. A party to a franchise may not engage
4 in any action that is arbitrary, lacking in good faith or
 unconscionable and that causes damage to another party to a
 franchise or to the public.

6 2. Restrictions on independent sources. A franchisor may
8 not require a franchisee to purchase or lease goods, inventory,
10 equipment, fixtures, supplies or services used in the
12 establishment and operation of the franchise business exclusively
14 from the franchisor or sources designated by the franchisor,
16 provided that those goods and services meet standards as to their
18 nature and quality promulgated by the franchisor. This
 subsection does not apply to reasonable quantities of inventory,
 goods or services, including display and sample items, that are
 proprietary and central to the franchise business and either are
 manufactured or produced by the franchisor or its designated
 sources, or incorporate a trade secret owned by the franchisor or
 its designated sources.

20 3. Coercion involving deliveries and order. A franchisor
22 or an officer, agent or other representative of a franchisor may
24 not coerce or attempt to coerce a franchisee to order or accept
26 delivery of goods or services or other commodities, including
 modifications or accessories that are not included in the base
 price of those goods as publicly advertised by the franchisor,
 that the franchisee has not voluntarily ordered.

28 4. Coercion involving advertising. A franchisor or an
30 officer, agent or other representative of a franchisor may not
32 coerce or attempt to coerce any franchisee to participate in any
34 advertising campaign or contest, to offer goods or services at a
 price established by the franchisor, or to purchase any
 promotional materials, display devices or display decorations or
 materials at the expense of the franchisee.

36 5. Coercion involving contractual agreements. A franchisor
38 or an officer, agent or other representative of a franchisor may
40 not coerce or attempt to coerce a franchisee to enter into an
42 agreement with that franchisor or to act in a manner that is
44 prejudicial to a franchisee by threatening to terminate or not
46 renew a franchise or cancel a contractual agreement between the
 franchisor and franchisee. Notice in good faith to a franchisee
 of violations of any terms or provisions of a franchise or
 contractual agreement does not constitute a violation of this
 subsection.

48 6. Coercion involving restricting participation in other
50 business. A franchisor may not require a franchisee to refrain
52 from participation in the management of, investment in, or
 acquisition of any other line of products or any other franchise
 business.

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2 7. Restrict franchisee's right to association. A
3 franchisor may not restrict a franchisee from associating with
4 other franchisees or from participating in a trade association or
5 retaliate against a franchisee for exercising its right to
6 associate.

8 §1397. Termination, cancellation and nonrenewal

10 The following provisions govern the termination,
11 cancellation and nonrenewal of franchises.

12 1. Termination or cancellation; burden of proof; notice.
13 It is unlawful for a franchisor to terminate or cancel a
14 franchise prior to the expiration of its term except for good
15 cause and in good faith. The franchisor has the burden of proof
16 for showing that it has acted in good faith, that it has complied
17 with the notice requirements and that there was good cause for
18 terminating, cancelling or not renewing a franchise.

19 A. A franchisor must provide a franchisee with written
20 notice at least 90 days prior to termination or cancellation
21 of a franchise for good cause. After service or written
22 notice, the franchisee has a reasonable period of time to
23 cure, which may not be less than 60 days.

24 B. Notwithstanding paragraph A, a franchisor must provide a
25 franchisee with written notice at least 15 days prior to the
26 termination or cancellation of a franchise and without an
27 opportunity to cure if any of the following apply:

28 (1) The franchisee or the business to which the
29 franchise relates is declared bankrupt or judicially
30 determined to be insolvent;

31 (2) The franchisee voluntarily abandons the franchise
32 by failing to operate the business for 7 consecutive
33 business days during which the franchisee is required
34 to operate the business under the terms of the
35 franchise, unless that failure to operate is due to
36 circumstances beyond the control of the franchisee;

37 (3) The franchised business or business premises of
38 the franchisee are lawfully seized, taken over or
39 foreclosed by a government authority or official;

40 (4) The franchised business or business premises of
41 the franchisee are seized, taken over, or foreclosed by
42 a creditor, lienholder or a lessor, other than the
43 franchisor; and

2 (5) The franchisee is convicted of or pleads nolo
3 contendere to any Class A, Class B or Class C crime, as
4 defined in the Maine Criminal Code, Title 17-A, in
5 which a sentence of imprisonment of one year or more is
6 imposed under Title 17-A, sections 1251 and 1252.

8 2. Nonrenewal; notice. It is unlawful for a franchisor to
9 refuse to renew a franchise unless the franchisee has been
10 notified in writing of the franchisor's intent not to renew at
11 least 6 months prior to the expiration date or any extension of
12 the franchise agreement and one of the following circumstances
13 exists:

14 A. Good cause exists as that term is defined in section
15 1392, subsection 6; and

16 B. The franchisor completely withdraws from directly or
17 indirectly distributing its products or services in the
18 geographic market served by the franchisee.

19 3. Fair and reasonable compensation; good will. Upon
20 termination, cancellation or nonrenewal of a franchise agreement,
21 the franchisee is entitled to fair and reasonable compensation by
22 the franchisor for the franchisee's inventory, supplies,
23 equipment and furnishings purchased by the franchisee from the
24 franchisor or its designated source or approved supplier under
25 the terms of the franchise or any ancillary agreement. This fair
26 and reasonable compensation may not be less than the acquisition
27 price and must be paid by the franchisor within 90 days of the
28 effective date of the termination, cancellation or nonrenewal, as
29 long as the franchisee has clear title to the inventory and other
30 items and is in a position to convey that title to the
31 franchisor. In addition, the franchisor shall pay to the
32 franchisee a reasonable amount for the good will of the
33 franchised business. This subsection does not apply to
34 personalized items that have no value to the franchisor.

35 4. Covenant not to compete; void. Upon termination,
36 cancellation or nonrenewal of a franchise agreement, a franchisor
37 may not enforce any covenant not to compete with the franchisor
38 or any franchisees of the franchisor. Any such covenant is void
39 as contrary to public policy.

40 §1398. Encroachment

41 1. Substantially identical or similar business.
42 Notwithstanding the terms, provisions or conditions of an
43 agreement or franchise, if a franchisor seeks to relocate or
44 establish a new point of sale, outlet, kiosk, company-owned
45 establishment, the franchisor shall give the franchisee written
46 notice of its intent to do so at least 60 days prior to the
47 relocation or establishment.

store, carry-out store, distribution source or any other business substantially identical or similar to that of the franchisee within the relevant marketing area of an existing franchisee, the existing franchisee, at the option of the franchisee, has either a right of first refusal with respect to the proposed new point of sale, outlet, kiosk, company-owned store, carry-out store or distribution source or a right to compensation for market share diverted by that new business. For the purposes of this subsection, relevant marketing area includes but is not limited to that area within a radius of 5 miles around an existing franchise in the cities of Auburn, Bangor, Biddeford, Brewer, Falmouth, Lewiston, Portland, Saco, South Portland, Waterville and Westbrook, or within 10 miles of any existing franchise in any other city or town.

2. Price and terms; compensation for market share diverted. With respect to a right of first refusal, the parties shall in good faith seek to establish a mutually agreeable price and terms. If the franchisor does not offer a right of first refusal, the franchisor must compensate existing franchisees for market share diverted by the establishment of the new point of sale, outlet, kiosk, company-owned store, carry-out store or distribution source.

§1399. Transfer of franchise

1. Transfer of interest by franchisee. The following provisions govern the transfer of a franchise business and franchise by a franchisee.

A. A franchisor may not prohibit the transfer of the franchise business and franchise by a franchisee to another person if the transferee satisfies the reasonable current qualifications of the franchisor for new franchisees. For purposes of this section, a reasonable current qualification for a new franchisee is a qualification based upon a legitimate business reason. The burden of establishing reasonableness is on the franchisor. If the proposed transferee does not meet the reasonable current qualifications of the franchisor, the franchisor may refuse to permit the transfer.

B. A franchisee may transfer the franchisee's interest in the franchise for the unexpired term of the franchise agreement, and a franchisor may not require the franchisee or the transferee to enter into a new or different franchise agreement as a condition of the transfer.

C. A franchisee shall give the franchisor written notice at least 30 days prior to a transfer that is subject to the

provisions of this section. The notice must contain the prospective transferee's name, address, financial qualification and business experience.

D. A transfer by a franchisee is deemed to be approved 60 days after the franchisee submits the written notice, unless the franchisor objects to the transfer in writing, specifying a material reason or reasons for the objection. The written objection must be delivered to the franchisee prior to the expiration of the 60-day period. Any such notice is privileged and is not actionable based upon a claim of defamation.

E. A franchisor may not discriminate against a proposed transferee of a franchise on the basis of race, color, national origin, sex, religion or physical disability.

F. A franchisor, as a condition to a transfer of a franchise, may not obligate a franchisee to undertake obligations or relinquish any rights unrelated to the franchise proposed to be transferred, or to enter into a release of claims broader than a similar release of claims by the franchisor against the franchisee that is entered into by the franchisor.

G. A franchisor, after a transfer of a franchise, may not seek to enforce any covenant of the transferred franchise against the transferor that prohibits the transferor from engaging in any lawful occupation or enterprise. This paragraph does not prohibit the franchisor from enforcing a contractual covenant against the transferor not to exploit the franchisor's trade secrets or intellectual property rights, unless otherwise agreed to by the parties.

2. Transfer of interest by franchisor. A franchisor may not transfer its interest in a franchise unless the franchisor makes reasonable provision for the performance of the franchisor's obligations under the franchise agreement by the transferee. A franchisor shall provide the franchisee with notice of a proposed transfer of the franchisor's interest in the franchise.

§1399-A. Survivorship

The right of a designated family member to succeed in ownership of the franchise is not a transfer under this chapter, and is governed by the following provisions.

1. Right of succession. A family member of a deceased or incapacitated franchisee, who has been designated in writing to

the franchisor, may succeed the franchisee in the ownership or operation of the franchise if the designated family member gives the franchisor written notice of the intention to succeed to the franchise within 120 days of the franchisee's death or incapacity and unless there exists good cause for refusal to honor the succession on the part of the franchisor. The franchisor has the burden of establishing that good cause exists to refuse to honor the succession.

2. Data. The franchisor may request and the designated family member shall provide upon the request on forms provided for that purpose, personal and financial data reasonably necessary to determine whether the succession will be honored.

3. Refusal. The refusal to honor the succession to ownership is governed by the following provisions.

A. If a franchisor believes that good cause exists for refusing to honor the succession to the ownership and operation of a franchise by a family member of a deceased or incapacitated franchisee under the existing franchise agreement, the franchisor may, within 60 days of receipt of the information requested in subsection 2, serve upon the designated family member notice of its refusal to honor the succession or its intent to discontinue the existing franchise agreement no sooner than 90 days from the date the notice is served.

B. The notice must state the specific grounds for the refusal to honor the succession and the franchisor's intent to discontinue the existing franchise agreement no sooner than 90 days from the date the notice is served. Any such notice is privileged and is not actionable based upon a claim of defamation.

C. If notice of refusal and discontinuance is not timely served upon the family member, the franchise agreement continues in effect subject to termination, cancellation or nonrenewal only as otherwise permitted by this chapter.

4. Designation of successor. A franchisee may designate any person as the franchisee's successor by written instrument filed with the franchisor.

§1399-B. Duty of good faith

A franchise imposes on the parties a duty of good faith in performance in enforcement of the franchise agreement.

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5 **§1399-C. Remedy for civil action**

6 A franchisee who has been damaged by reason of a violation
7 of a provision of this chapter may recover from the franchisor
8 damages caused by the violation, including, but not limited to,
9 costs and reasonable attorney's fees, regardless of the amount in
10 controversy, and other appropriate relief, including declaratory,
11 injunctive and other equitable relief. A final judgment, order
12 or decree rendered against a person in a civil, criminal or
13 administrative proceeding under the federal antitrust laws, the
14 Federal Trade Commission Act, this chapter or any other state law
15 is regarded as prima facie evidence of a violation of this
16 chapter against that person, subject to the conditions under the
17 federal antitrust laws, 15 United States Code, Section 16.

18 **§1399-D. Notice form, delivery and content**

19 All notices of termination and nonrenewal required by this
20 chapter must:

21 1. Required mail; delivery. Be sent by registered,
22 certified or other receipted mail or personally delivered to the
23 franchisee;

24 2. Statement of intent. Contain a statement of intent to
25 terminate or fail to renew the franchise together with the
26 reasons for termination or nonrenewal; and

27 3. Effective date. Include the effective date of the
28 termination, cancellation or nonrenewal.

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31 **§1399-E. Choice of law**

32 A condition, stipulation or provision requiring the
33 application of the law of another state in lieu of this chapter
34 is void.

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37 **§1399-F. Construction with other law**

38 This chapter does not limit any liability that may exist
39 under any other law or at common law.

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42 **§1399-G. Public policy**

43 Any contract or part of a contract or practice under a
44 contract in violation of any provision of this chapter is against
45 public policy and is void and unenforceable.

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STATEMENT OF FACT

Franchise business relationships represent a large and growing segment of the nation's retail and service businesses and are rapidly replacing more traditional forms of small business ownership. Franchise relationships involve a joint enterprise between the franchisor and the franchisees and each has a vested interest in the franchised business. Franchisees are required to make a substantial financial investment in equipment, inventory, goods, services, land and buildings or structures. Often this represents the investment of a franchisee's life savings.

Traditional common law doctrines have not evolved sufficiently to protect franchisees adequately from fraudulent or unfair practices, and significant contractual and procedural restrictions have denied franchisees viable legal recourse against franchisors.

It is the purpose of this bill to promote greater fairness and equity in franchise relationships; to establish minimum standards of conduct in franchise practices; to strengthen

2 private remedies against fraudulent or unlawful actions; and to
4 provide consumers the greater benefits that would flow from
6 equitable franchise relationships.

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10 This document has not yet been reviewed to determine the
12 need for cross-reference, stylistic and other technical
amendments to conform existing law to current drafting standards.