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HOUSE BILL NO. 2086

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the House Committee on Commerce and Labor
on January 27, 2009)

(Patron Prior to Substitute—Delegate Purkey)

A BILL to amend and reenact §§ 13.1-559, 13.1-560, 13.1-563, 13.1-565, and 13.1-566 of the Code of Virginia, relating to the Virginia Retail Franchising Act; sale of franchise.

Be it enacted by the General Assembly of Virginia:

1. That §§ 13.1-559, 13.1-560, 13.1-563, 13.1-565, and 13.1-566 of the Code of Virginia are amended and reenacted as follows:

§ 13.1-559. Definitions; applicability of chapter.

A. As used in this chapter, unless the context otherwise requires:

"Commission" means the State Corporation Commission.

"Controlling person" means a natural person who is an officer, director, or partner, or who occupies a similar status or performs a similar function, of a franchisor organized as a corporation, partnership, or other entity, or any person who possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of a franchisor, whether through the ownership of voting securities, by contract, or otherwise.

"Franchise" means a written contract or agreement between two or more persons, by which:

1. A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services at retail under a marketing plan or system prescribed in substantial part by a franchisor;

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

3. The franchisee is required to pay, directly or indirectly, a franchise fee of \$500 or more.

"Franchise fee" means a fee or charge for the right to enter into or maintain a business under a franchise, including a payment or deposit for goods, services, rights, or training, but not including: (i) the payment of a bona fide wholesale price for starting and continuing inventory of goods for resale or (ii) the payment at fair market value for the purchase or lease of real property, fixtures, equipment, or supplies necessary to enter into or maintain the business.

"Franchisee" means a person to whom a franchise is granted *or sold*.

"Franchisor" means a person, including a subfranchisor, who grants *or sells*, or offers to grant *or sell*, a franchise.

"Offer" or "offer to sell" includes every attempt to offer to dispose of or grant, and every solicitation of an offer to buy, a franchise or an interest in a franchise for value.

"Place of business" means a building or portion thereof from which the goods or services authorized by the franchise are sold or offered for sale in person by the franchisee or employees or agents of the franchisee, or a truck or van used in the sale of such goods which is of a type designated by the franchisor and is equipped and marked in conformance with requirements of the franchisor.

"Preopening obligations" means the franchisor's obligations to provide to the franchisee, prior to the opening of the franchisee's business, real estate, improvements, equipment, inventory, training, or other items to be included in the offering.

"Sale" or "sell" includes every contract or agreement of sale or grant of, contract to sell, or disposition of a franchise or interest in a franchise for value.

"Subfranchisor" means a person who is authorized by a franchisor to grant a franchise within a particular geographic region.

B. This chapter shall apply only to a franchise the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the Commonwealth of Virginia.

A franchise does not include a contract or agreement by which a retailer of goods or services is granted the right either (i) to utilize a marketing plan or system to promote the sale or distribution of goods or services which are incidental and ancillary to the principal business of the retailer (sales under such a plan or system accounting for less than ~~twenty~~ 20 percent of the retailer's gross sales being deemed incidental and ancillary); or (ii) to sell goods or services within, or appurtenant to, a retail business establishment as a department or division thereof provided such retailer is not required to purchase such goods or services from the operator of such establishment.

§ 13.1-560. Registration required.

It shall be unlawful for any person to ~~grant~~ sell or offer to ~~grant~~ sell a franchise in this Commonwealth unless the franchise is registered under the provisions of this chapter or exempted from registration by rule or order of the Commission.

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§ 13.1-563. Unlawful offers.

It shall be unlawful for any person, in connection with the ~~grant sale~~ or offer to ~~grant sell~~ a franchise in this Commonwealth, directly or indirectly:

(a)1. To employ any device, scheme, or artifice to defraud;

(b)2. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to avoid misleading the offeree;

(c)3. To engage in any transaction, practice, or course of business ~~which~~*that* operates or would operate as a fraud or deceit upon the franchisee; or

(d) ~~[Repealed.]~~

(e)4. To fail to provide the franchisee a copy of (i) the franchise agreement and (ii) such disclosure document as may be required by rule or order of the Commission.

§ 13.1-565. Voidable franchises.

Any franchise may be declared void by the franchisee at his option by sending a written declaration of that fact and the reasons therefor to the franchisor by registered or certified mail if:

(a)1. The franchisor's offer to ~~grant sell~~ a franchise was unlawful, as provided in § 13.1-560 or § 13.1-563, provided that the franchisee send such written declaration within ~~seventy-two~~ 72 hours after discovery thereof but not more than ~~ninety~~ 90 days after execution of the franchise;

(b)2. The franchisee was not afforded the opportunity to negotiate with the franchisor on all provisions within the franchise, except that such negotiations shall not result in the impairment of the uniform image and quality standards of the franchise, provided that the franchisee send such written declaration within ~~thirty~~ 30 days after execution of the franchise; or

(c)3. The franchisee was not furnished a copy of the franchise agreement and disclosure documents at least ~~seventy-two~~ 72 hours prior to execution of the franchise, provided that the franchisee send such written declaration within ~~thirty~~ 30 days after execution of the franchise.

§ 13.1-566. Service of process on nonresident franchisor.

Every nonresident franchisor who has a franchise registered hereunder and which is not a corporation complying with § 13.1-759 or § 13.1-767 shall appoint in writing the clerk of the Commission as his agent upon whom may be served any process, notice, order or demand. Every nonresident franchisor who ~~grants sells~~ or offers to ~~grant sell~~ a franchise registered hereunder and every nonresident franchisor whose franchise is ~~granted sold~~ or offered to be ~~granted sold~~ in this Commonwealth shall be deemed to have appointed the clerk of the Commission as his agent upon whom may be served, in any matter arising under this chapter any process, notice, order or demand. Service may be made on the clerk in accordance with § 12.1-19.1.

2. That an emergency exists and this act is in force from its passage.