S T A T E O F N E W Y O R K

4880

2015-2016 Regular Sessions

I N A S S E M B L Y

February 9, 2015

Introduced by M. of A. SCHIMMINGER -- read once and referred to the Committee on Economic Development

AN ACT to amend the general business law, in relation to the New York franchise act

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 680 of the general business law, as added by chapter 730 of the laws of 1980, is amended to read as follows:

S 680. Legislative findings and declaration of policy. [1. The legislature hereby finds and declares that the widespread sale of franchises is a relatively new form of business which has created numerous problems in New York. New York residents have suffered substantial losses where the franchisor or his representative has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract between the franchisor and franchisee, the prior business experience of the franchisor, and other factors relevant to the franchise offered for sale.

2.] It is hereby determined and declared that the offer and sale of franchises, as defined in this article, is a matter affected with a public interest and subject to the supervision of the state, for the purpose of providing prospective franchisees [and potential franchise investors] with material details of the franchise offering so that they may participate in the franchise system in a manner that may avoid detriment to the public interest and benefit the commerce and industry of the state. Further, it is the intent of this law to prohibit the sale of franchises where such sale would lead to fraud or a likelihood that the franchisor's promises would not be fulfilled.

S 2. Section 681 of the general business law, as added by chapter 730 of the laws of 1980, and paragraph (b) of subdivision 3 as amended by chapter 87 of the laws of 1981, is amended to read as follows:

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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S 681. Definitions. 1. "Advertisement" includes any [written or printed communication, or any communication by means of recorded telephone messages or spoken on radio, television, or similar communications media, published in connection with an offer or sale of a franchise] PRINTED, BROADCAST OR ELECTRONICALLY DISSEMINATED MASS OR MULTIPLE COMMUNICATION OF ANY TYPE OR NATURE INTENDED TO ADVERTISE OR PROMOTE A FRANCHISE OFFERING TO PROSPECTIVE FRANCHISEES, WHETHER COMMUNICATED IN BROADCAST MEDIA, OVER THE INTERNET, IN PRINTED MEDIA, BY EMAIL OR OTHER ELECTRONIC COMMUNICATIONS OR OTHERWISE.

2. "Department" means the department of law.

3. "FRACTIONAL FRANCHISE" MEANS A FRANCHISE RELATIONSHIP THAT SATISFIES THE FOLLOWING CRITERIA WHEN THE RELATIONSHIP IS CREATED:

(A) THE FRANCHISEE, ANY OF THE FRANCHISEE'S CURRENT DIRECTORS OR OFFICERS, OR ANY CURRENT DIRECTORS OR OFFICERS OF A PARENT OR AFFILIATE, HAS MORE THAN TWO YEARS OF EXPERIENCE IN THE SAME TYPE OF BUSINESS; AND

(B) THE PARTIES HAVE A REASONABLE BASIS TO ANTICIPATE THAT THE SALES ARISING FROM THE RELATIONSHIP WILL NOT EXCEED TWENTY PERCENT OF THE FRANCHISEE'S TOTAL DOLLAR VOLUME IN SALES DURING THE FIRST YEAR OF OPERATION.

4. (A) "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two 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, and the franchisee is required to pay, directly or indirectly, a franchise fee, or

(b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services 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.

A franchise under this article shall not include any agreement, contract, or franchise subject to the provisions of article eleven-B of this chapter or section one hundred ninety-nine of this chapter, or any agreement or contract for the sale of motor fuel.

4. A] (I) 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;

(II) 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

(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.

(B) NONE OF THE FOLLOWING CONSTITUTES A "REQUIRED PAYMENT" FOR PURPOSES OF ITEM (III) OF PARAGRAPH (A) OF THIS SUBDIVISION:

(I) THE PURCHASE OR AGREEMENT TO PURCHASE GOODS AT A BONA FIDE WHOLESALE PRICE;

(II) THE PAYMENT OF A REASONABLE SERVICE CHARGE TO THE ISSUER OF A CREDIT CARD BY AN ESTABLISHMENT ACCEPTING OR HONORING SUCH CREDIT CARD;

(III) AMOUNTS PAID TO A TRADING STAMP COMPANY BY A PERSON ISSUING TRADING STAMPS IN CONNECTION WITH THE RETAIL SALE OF MERCHANDISE OR SERVICES;

(IV) THE PURCHASE OR LEASE, AT FAIR MARKET VALUE, OF REAL PROPERTY OR AGREEMENT TO SO PURCHASE OR LEASE REAL PROPERTY NECESSARY TO ENTER INTO THE BUSINESS OR TO CONTINUE THE BUSINESS UNDER THE FRANCHISE AGREEMENT; OR

(V) THE PURCHASE OF SALES DEMONSTRATION EQUIPMENT AND MATERIALS FURNISHED AT COST FOR USE IN MAKING SALES AND NOT FOR RESALE.

5. A "franchisee" [is] MEANS a person to whom a franchise is granted.

[5. A "franchisor" is]

6. "FRANCHISE SELLER" MEANS A PERSON WHO OFFERS FOR SALE, SELLS, OR ARRANGES FOR THE SALE OF A FRANCHISE. IT INCLUDES THE FRANCHISOR AND THE FRANCHISOR'S EMPLOYEES, REPRESENTATIVES, AGENTS, SUBFRANCHISORS, AND THIRD-PARTY BROKERS WHO ARE INVOLVED IN FRANCHISE SALES ACTIVITIES. IT DOES NOT INCLUDE EXISTING FRANCHISEES WHO SELL ONLY THEIR OWN OUTLET AND WHO ARE OTHERWISE NOT ENGAGED IN FRANCHISE SALES ON BEHALF OF THE FRANCHISOR.

7. "FRANCHISOR" MEANS a person who grants a franchise AS THE PARTY TO A CONTRACT WITH A FRANCHISEE. UNLESS OTHERWISE STATED, IT INCLUDES SUBFRANCHISORS.

[6. "Area franchise" means a contract or agreement between a franchisor and a subfranchisor whereby the subfranchisor is granted the right, for consideration given in whole or in part for such right, to sell or negotiate the sale of franchises in the name or on behalf of the franchisor; unless specifically stated otherwise, "franchise" includes "area franchise".

7. "Franchise fee" means any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay directly or indirectly for the right to enter into a business under a franchise agreement or otherwise sell, resell or distribute goods, services, or franchises under such an agreement, including, but not limited to, any such payment for goods or services. The following are not the payment of a franchise fee:

(a) The purchase or agreement to purchase goods at a bona fide wholesale price;

(b) The payment of a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring such credit card;

(c) Amounts paid to a trading stamp company by a person issuing trading stamps in connection with the retail sale of merchandise or services;

(d) The purchase or lease, at fair market value, of real property or agreement to so purchase or lease real property necessary to enter into the business or to continue the business under the franchise agreement;

(e) The payment of a fee which on an annual basis does not exceed five hundred dollars where the payor receives sales materials of an equivalent or greater value than his payment;

(f) The purchase of sales demonstration equipment and materials furnished at cost for use in making sales and not for resale;

(g) A lease, license or other agreement by a retailer permitting the lessee, licensee or beneficiary to offer, sell or distribute goods or services on or about the premises occupied by said retailer.

8. "Franchise sales agent" means a person who directly or indirectly engages in the offer or sale of any franchise on behalf of another. Franchisors, subfranchisors, and their employees are not to be considered franchise sales agents.

9. "Franchise salesman" means each and every person employed by a franchisor or franchise sales agent for the purpose of representing such

franchisor or franchise sales agent in the offer or sale of any franchise.

10.] 8. "Fraud," "fraudulent practice," and "deceit" are not limited to common law fraud or deceit, and include:

(a) Any deception, concealment, suppression, device, scheme or artifice employed by a [franchisor, franchise sales agent, subfranchisor or franchise salesman] FRANCHISE SELLER to obtain any money, promissory note, commitment or property by any false or visionary pretense, representation or promise;

(b) Any material misrepresentation in any registered [prospectus] DISCLOSURE DOCUMENT filed under this article; or

(c) The omission of any material fact in any registered [prospectus] DISCLOSURE DOCUMENT filed under this article.

[11.] 9. "Offer" or "offer to sell" includes any attempt to offer to dispose of, or solicitation of an offer to buy, a franchise or interest in a franchise for value. The terms "offer" and "offer to sell" do not include the renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business by the franchisee.

[12.] 10. (a) An offer or sale of a franchise is made in this state when an offer to sell is made in this state, or an offer to buy is accepted in this state, or, if the franchisee is domiciled in this state, the franchised business is or will be operated in this state.

(b) An offer to sell is made in this state when the offer either originated from this state or is directed by the offeror to this state and received at the place to which it is directed. An offer to sell is accepted in this state when acceptance is communicated to the offeror from this state.

(c) An offer to sell is not made in this state merely because a publisher circulates or there is circulated on his behalf in this state a bona fide newspaper or other publication of general, regular and paid circulation which has had more than two-thirds of its circulation outside this state during the past twelve months, or a radio or television program originating outside this state is received in this state.

[13.] 11. "Person" means an individual, corporation, LIMITED LIABILITY COMPANY, LIMITED OR GENERAL partnership, joint venture, association, company, trust, unincorporated organization or other entity and shall include any other person that has a substantial interest in or effectively controls such person, as well as the individual officers, directors, general partners, MANAGING PARTNERS, LIMITED LIABILITY COMPANY MANAGERS OR MANAGING MEMBERS, trustees or other individuals in control of the activities of each such person.

12. "PROSPECTIVE FRANCHISEE" MEANS ANY PERSON (INCLUDING ANY AGENT, REPRESENTATIVE OR EMPLOYEE)_ WHO APPROACHES OR IS APPROACHED BY A FRANCHISE SELLER TO DISCUSS THE POSSIBLE ESTABLISHMENT OF A FRANCHISE RELATIONSHIP.

[14.] 13. "Publish" means publicly to issue [or], circulate OR DISSEMINATE by newspaper, mail, radio [or], television, ELECTRONIC COMMUNICATIONS (INCLUDING THOSE ACHIEVED THROUGH THE INTERNET, ELECTRONIC MAIL AND OTHER FORMS OF ELECTRONIC OR COMPUTER COMMUNICATIONS) or otherwise [to disseminate to the public].

[15.] 14. "Sale" or "sell" includes every contract or agreement of sale, contract to sell, or disposition of, a franchise or interest in a franchise for value. "SALE" OR "SELL" DOES NOT INCLUDE THE TRANSFER, SALE OR ASSIGNMENT OF A FRANCHISE BY AN EXISTING FRANCHISEE WHERE THE FRANCHISOR HAD NO SIGNIFICANT INVOLVEMENT IN ARRANGING FOR OR EFFECTUAT-

ING THE FRANCHISEE'S SALE, TRANSFER OR ASSIGNMENT OF ITS FRANCHISE. A FRANCHISOR'S APPROVAL OR DISAPPROVAL OF A FRANCHISEE SALE, TRANSFER OR ASSIGNMENT ALONE IS NOT DEEMED TO BE SIGNIFICANT INVOLVEMENT. A FRANCHISOR'S ENTERING INTO OF A SUBSTITUTE FRANCHISE AGREEMENT WITH A FRANCHISE PURCHASER, TRANSFEREE OR ASSIGNEE IS NOT DEEMED TO BE SIGNIFICANT INVOLVEMENT IF SUCH SUBSTITUTE AGREEMENT CONTAINS TERMS AND CONDITIONS THAT DO NOT DIFFER MATERIALLY FROM THE ORIGINAL FRANCHISE AGREEMENT.

[16.] 15. "State" means any state, territory, or possession of the United States, INCLUDING the District of Columbia and Puerto Rico.

[17.] 16. "Subfranchisor" means a franchisee [who has the right to sell or subdivide his franchise to another or others, known as "subfranchisees," while having and retaining all or part of the franchisor's interest or rights under franchise agreements with such subfranchisee. Under this article and in this situation, the subfranchisee shall be considered the franchisee, and both the principal franchisor and the subfranchisor shall be considered the franchisor] WHOSE FRANCHISE INCLUDES THE RIGHT TO GRANT FRANCHISES TO OTHER PERSONS, MEANING TO OFFER AND ENTER INTO AGREEMENTS WITH OTHER PERSONS GRANTING FRANCHISE RIGHTS TO SUCH OTHER PERSONS (KNOWN AS "SUBFRANCHISEES"). UNDER THIS ARTICLE, BOTH THE PRINCIPAL FRANCHISOR AND THE SUBFRANCHISOR SHALL BE CONSIDERED THE "FRANCHISOR" IN INSTANCES IN WHICH BOTH ARE INVOLVED IN OFFERING AND SELLING THE SUBJECT FRANCHISE AND BOTH FULFILL POST-SALE OBLIGATIONS TO THE SUBJECT SUBFRANCHISEE. UNDER THIS ARTICLE, ONLY THE SUBFRANCHISOR SHALL BE CONSIDERED THE "FRANCHISOR", TO THE EXCLUSION OF THE PRINCIPAL FRANCHISOR, IF IT IS THE SUBFRANCHISOR ALONE WHICH OFFERS AND SELLS FRANCHISES TO SUBFRANCHISEES AND IS ENTIRELY RESPONSIBLE FOR FULFILLING ALL CONTRACTUAL DUTIES AND OBLIGATIONS TO SUCH FRANCHISEES. UNDER THIS ARTICLE, A SUBFRANCHISEE SHALL BE CONSIDERED A "FRANCHISEE".

[18.] 17. In any proceeding under this article, the burden of proving an exemption or an exception from a definition is upon the person claiming it.

S 3. Section 682 of the general business law, as added by chapter 730 of the laws of 1980, is amended to read as follows:

S 682. Scope. The disclosure requirements mandated by this article apply to all [written or oral arrangements between a franchisor and franchisee in connection with the offer or sale of a franchise, including, but not limited to, the franchise offering, the franchise agreement, sales of goods or services, leases and mortgages of real or personal property, promises to pay, security interests, pledges, insurance, advertising, construction or installation contracts, servicing contracts, and all other arrangements in which the franchisor or subfranchisor has an interest] OFFERS AND SALES OF FRANCHISES MADE IN THIS STATE, EXCEPT FOR THOSE OFFERS AND SALES THAT ARE SPECIFICALLY EXEMPTED OR EXCLUDED BY THIS ARTICLE.

S 4. Section 683 of the general business law, as added by chapter 730 of the laws of 1980, subdivision 8 as amended by chapter 193 of the laws of 1982, is amended to read as follows:

S 683. [Disclosure] REGISTRATION AND DISCLOSURE requirements. 1. It shall be unlawful and prohibited for any person to offer to sell or sell in this state any franchise unless and until there shall have been registered with the department of law, prior to such offer or sale, a written [statement to be known as an "offering prospectus"] FRANCHISE DISCLOSURE DOCUMENT concerning the contemplated offer or sale, which shall contain the information and representations set forth in and required by this [section] ARTICLE AND THE REGULATIONS PROMULGATED UNDER

THIS ARTICLE, EXCEPT AS OTHERWISE PROVIDED UNDER SECTION SIX HUNDRED EIGHTY-FOUR OF THIS ARTICLE. Any uniform disclosure document approved for use by any agency of the federal government or sister state may be utilized and sought to be registered, provided that said uniform disclosure documents comply with the provisions of this article.

2. [The offering prospectus sought to be registered with the department of law shall be filed with the department, accompanied by an application for registration on forms prescribed by the department, and shall contain the following:

(a) The name of the franchisor, the name under which the franchisor is doing or intends to do business, and the name of any parent or affiliated company that will engage in business transactions with franchisees.

(b) The franchisor's principal business address and the name and address of its agent in this state authorized to receive process.

(c) The business form of the franchisor, whether corporate, partnership, or otherwise.

(d) Such information concerning the identity and business experience of persons affiliated with the franchisor as the department of law may by rule prescribe.

(e) A statement as to whether the franchisor and its principals, officers, partners, directors, or any other person identified in the application for registration:

(1) Has been convicted of a felony, or pleaded nolo contendere to a felony charge, or held liable or enjoined in a civil action by a final judgment if such civil action involved fraud, embezzlement, fraudulent conversion or misappropriation of property.

(2) Is subject to any currently effective order of the United States securities and exchange commission or the securities administrator of any state denying the registration of or barring, revoking or suspending the registration of such person as a securities broker or dealer, or investment advisor, or securities agent or registered representative, or is subject to any currently effective order of any national securities association or national securities exchange, as defined in the Securities and Exchange Act of 1934, suspending or expelling such person from membership in such association or exchange.

(3) Is subject to a currently effective order or ruling of the federal trade commission.

(4) Is subject to any currently effective injunctive or restrictive order relating to business activity as a result of an action brought by a public agency or department, including, without limitation, actions affecting a license as a real estate broker or salesman.

Such statement shall set forth the court, date of conviction or judgment, any penalty imposed or damages assessed, or the date, nature and issuer of such order.

(f) The length of time the franchisor: (1) has conducted a business of the type to be operated by the franchisees, (2) has granted franchises for such business, and (3) has granted franchises in other lines of business.

(g) The most recent financial statement of the franchisor, together with a statement of any material changes in the financial condition of the franchisor from the date thereof. The department of law may by rule or order prescribe (1) the form and content of financial statements required under this article, (2) the circumstances under which consolidated financial statements shall be required, and (3) the circumstances

under which financial statements shall be audited by independent certified public accountants.

(h) A statement of the franchise fee charged, the proposed application of the proceeds of such fee by the franchisor, and the formula by which the amount of the fee is determined if the fee is not uniform and the same in all cases.

(i) A statement describing any payments or fees other than franchise fees that the franchisee or subfranchisor is required to pay to the franchisor, including royalties and payments of fees which the franchisor collects in whole or in part on behalf of a third party or parties.

(j) A statement of the conditions under which the franchise agreement may be terminated or renewal refused or repurchased at the option of the franchisor.

(k) A statement as to whether, by the terms of the franchise agreement or by other device or practice, the franchisee or subfranchisor is required to purchase from the franchisor or his designee services, supplies, products, fixtures or other goods relating to the establishment or operation of the franchise business, together with a description and the terms and conditions thereof.

(l) A statement as to whether, by the terms of the franchise agreement or other device or practice, the franchisee is limited in the goods or services offered by him to his customers.

(m) A statement of the terms and conditions of any financing arrangements when offered directly or indirectly by the franchisor or his agent or affiliate.

(n) A statement of any past or present practice or of any intent of the franchisor to sell, assign, or discount to a third party any note, contract, or other obligation of the franchisee or subfranchisor in whole or in part.

(o) Any representation of estimated or projected franchisee earnings or income, together with a statement setting forth the data, methods and computations upon which such estimate or projection is based.

(p) A statement of any compensation or other benefit given or promised to a public figure arising, in whole or in part, from (1) the use of the public figure in the name or symbol of the franchise, or (2) the endorsement or recommendation of the franchise by the public figure in advertisements.

(q) A statement of the total number and location of franchises presently operating and proposed to be sold.

(r) A statement as to whether franchisees or subfranchisors receive an exclusive area or territory.

(s) A representation that the registered prospectus does not knowingly omit any material fact or contain any untrue statement of a material fact.

(t) Other information which the franchisor may desire to present.

(u) Other information or such additional disclosures related to the offer or sale of the franchise as the department of law may prescribe by rules or regulations promulgated under section six hundred ninety-four of this article as will afford prospective franchisees an adequate basis upon which to found their judgment.

(v) When the person filing the application for registration of an offering prospectus is a subfranchisor, the prospectus shall also include the same information concerning the subfranchisor as is required from the franchisor pursuant to this article.

3. Applications for registration of an offering prospectus shall be signed and verified by the franchisor or by the subfranchisor in the

same manner provided in the civil practice law and rules for the verification of pleadings.

4. Every application by a franchisor for registration of an offering prospectus shall be accompanied by a copy of the typical franchise contract or agreement proposed for use or in use in this state, including all amendments, deletions, variations, and supplements thereto.

5. Every application by a franchisor for registration of an offering prospectus shall be accompanied by] THE DEPARTMENT WILL NOT REGISTER A FRANCHISE DISCLOSURE DOCUMENT SUBMITTED TO THE DEPARTMENT WITH AN APPLICATION FOR REGISTRATION UNLESS THE FRANCHISE DISCLOSURE DOCUMENT CONTAINS SUCH DISCLOSURES AS THE DEPARTMENT MAY BY RULE OR REGULATION REQUIRE, TOGETHER WITH such materials, data, records, [or] AND other information as the department may by rule OR REGULATION require [in connection with its consideration of the application].

[6.] 3. The [offering prospectus] FRANCHISE DISCLOSURE DOCUMENT shall recite [in bold type of not less than twelve-point] that registration does not [constitute approval, recommendation, or endorsement by] MEAN THAT the department [of law] RECOMMENDS THE FRANCHISE OR HAS VERIFIED THE INFORMATION IN THE DISCLOSURE DOCUMENT. The department may require that the applicant set forth in its [prospectus] FRANCHISE DISCLOSURE DOCUMENT potentially adverse information [in]. THE DEPARTMENT MAY SPECIFY designated positions and [in a] type [size] SIZES acceptable to the department FOR THE DISCLOSURE REQUIRED BY THIS SUBDIVISION.

[7.] 4. Unless otherwise provided by regulation issued by the department, applications to register the [offering prospectus] FRANCHISE DISCLOSURE DOCUMENT required by subdivision one of this section shall be filed with the department [of law] at its office in the city of New York [prior to the offering of the franchise involved]. No offer, advertisement, or sale of [such] a franchise DESCRIBED IN THE FRANCHISE DISCLOSURE DOCUMENT shall be made in or from the state of New York until the department has issued to the franchisor [or other offeror] a letter stating that the [offering prospectus] FRANCHISE DISCLOSURE DOCUMENT sought to be registered has been [accepted for filing and filed] REGISTERED. The department, not later than thirty days after such filing, shall issue such a letter or, in the alternative, a notification in writing indicating the respect in which the application for registration or the proposed [offering prospectus] FRANCHISE DISCLOSURE DOCUMENT itself is deficient or otherwise fails to make adequate disclosure. [A refusal to register an offering prospectus, and notification thereof, shall be forthcoming] THE DEPARTMENT SHALL DENY REGISTRATION OF A FRANCHISE DISCLOSURE DOCUMENT AND SHALL NOTIFY THE APPLICANT OF SUCH DENIAL if the department finds:

(a) That there has been a failure to comply with any of the provisions of this article or the rules of the department pertaining thereto.

(b) That the offer or sale of the franchise would constitute misrepresentation to, or deceit or fraud of, prospective franchisees.

(c) That the application for registration of the [offering prospectus or the] proposed [offering prospectus] FRANCHISE DISCLOSURE DOCUMENT itself is incomplete in any material respect or contains any statement which is, in light of the circumstances under which it was made, false or misleading with respect to any material fact.

(d) That the franchisor's method of business includes or would include activities which are illegal where performed.

(e) That a person identified in the application WHO has been convicted of an offense [described in subparagraph one of paragraph (e) of subdivision two of this section,] is subject to an administrative order, or

has had a civil judgment entered against him involving the illegal offering of franchises or securities, and the department determines that the involvement of the person in the sale or management of the franchise creates an unreasonable risk to prospective franchisees.

(f) That the franchise offering sought to be registered is the subject of a permanent or temporary injunction entered under any federal or state act applicable to the offering.

(g) That the franchisor has failed to pay the [proper] fee REQUIRED BY THE DEPARTMENT.

[8. A franchise which is subject to registration under this article shall not be sold without first providing to the prospective franchisee, a copy of the offering prospectus, together with a copy of all proposed agreements relating to the sale of the franchise at the earlier of (a) the first personal meeting between the franchisor or its agent and the prospective franchisee, (b) at least ten business days prior to the execution of a binding franchise or other agreement, or (c) at least ten days prior to the receipt of any consideration in connection with the sale or proposed sale of a franchise. For the purposes of this chapter, the words: (i) "first personal meeting" shall mean the first face to face meeting between a franchisor or franchisor's agent or any representative or employee thereof and a prospective franchisee which is held for the purpose of discussing the sale or possible sale of a franchise; (ii) "other agreement" shall mean an agreement imposing a binding legal obligation on such prospective franchisee, about which the franchisor, franchise sales agent, or any agent, representative or employee thereof, knows or should know, in connection with the sale or proposed sale of a franchise; and, (iii) "receipt of any consideration" shall mean the payment by a prospective franchisee, about which the franchisor, franchise sales agent, or any agent, representative or employee thereof, knows or should know, of any consideration in connection with the sale or proposed sale of a franchise.]

5. TO ENHANCE THE UNIFORM AND EFFICIENT ADMINISTRATION AND THE EFFECTIVE ENFORCEMENT OF THIS ARTICLE, IT IS THE INTENT OF THE LEGISLATURE THAT THE DEPARTMENT MAINTAIN A RISK-BASED PROCESS OF REVIEWING APPLICATIONS FOR REGISTRATION OF FRANCHISE DISCLOSURE DOCUMENTS. UNDER THE RISK-BASED REVIEW PROCESS, THE DEPARTMENT SHALL FOCUS ON REVIEWING APPLICATION INFORMATION POSING SIGNIFICANT RISK TO PROSPECTIVE FRANCHISEES, WITH EMPHASIS ON RISKS ASSOCIATED WITH THE FRANCHISOR'S FINANCIAL CONDITION, THE FRANCHISOR'S COMPLIANCE RECORD, AND SIGNIFICANT DEFICIENCIES WITH THE FRANCHISOR'S APPLICATION. WHEN REVIEWING FRANCHISE REGISTRATION APPLICATIONS UNDER THIS ARTICLE, THE DEPARTMENT SHALL CONCENTRATE ON HELPING TO PREVENT MISAPPROPRIATION, MISMANAGEMENT, AND MISREPRESENTATION IN CONNECTION WITH THE OFFER OR SALE OF ANY FRANCHISE SUBJECT TO THIS ARTICLE.

6. (A) A FRANCHISOR MAY NOT SELL A FRANCHISE SUBJECT TO REGISTRATION IN THIS STATE WITHOUT DELIVERING TO THE PROSPECTIVE FRANCHISEE A COPY OF THE FRANCHISOR'S CURRENTLY REGISTERED FRANCHISE DISCLOSURE DOCUMENT AT THE EARLIER OF: (I) FOURTEEN CALENDAR DAYS BEFORE THE PROSPECTIVE FRANCHISEE SIGNS A BINDING AGREEMENT WITH THE FRANCHISOR, OR (II) FOURTEEN CALENDAR DAYS BEFORE THE PROSPECTIVE FRANCHISEE PAYS ANY CONSIDERATION TO THE FRANCHISOR OR ITS AFFILIATE THAT RELATES TO THE PROPOSED FRANCHISE SALE. SUCH FOURTEEN CALENDAR DAY PERIOD SHALL COMMENCE THE DAY AFTER THE DISCLOSURE DOCUMENT IS RECEIVED, OR DEEMED RECEIVED, BY THE PROSPECTIVE FRANCHISEE. THE FRANCHISOR SHALL DELIVER TO THE PROSPECTIVE FRANCHISEE A COPY OF THE FRANCHISOR'S CURRENTLY REGISTERED FRANCHISE

DISCLOSURE DOCUMENT EARLIER IN THE SALES PROCESS UPON THE PROSPECTIVE FRANCHISEE'S REASONABLE REQUEST.

(B) IF THE FRANCHISE DISCLOSURE DOCUMENT HAS BEEN AMENDED OR OTHERWISE REVISED AFTER THE FRANCHISOR HAS FURNISHED IT TO THE PROSPECTIVE FRANCHISEE, BUT BEFORE THE FRANCHISE SALE, THEN, EXCEPT AS SET FORTH IN PARAGRAPH (C) OF THIS SUBDIVISION, THE FRANCHISOR SHALL FURNISH TO SUCH PROSPECTIVE FRANCHISEE A COPY OF THE FRANCHISOR'S AMENDED OR REVISED DISCLOSURE DOCUMENT BEFORE THE PROSPECTIVE FRANCHISEE SIGNS AN AGREEMENT OR MAKES ANY PAYMENT TO THE FRANCHISOR OR ITS AFFILIATE IN CONNECTION WITH THE SALE OF THE FRANCHISE.

(C) IF THE FRANCHISE DISCLOSURE DOCUMENT HAS BEEN AMENDED OR OTHERWISE REVISED AFTER THE FRANCHISOR HAS FURNISHED IT TO THE PROSPECTIVE FRANCHISEE, BUT BEFORE THE FRANCHISE SALE, AND SUCH AMENDMENT INCLUDES A MATERIAL ALTERATION OF THE FRANCHISE AGREEMENT OR ANY RELATED AGREEMENT, THEN THE FRANCHISOR SHALL FURNISH TO THE PROSPECTIVE FRANCHISEE A COPY OF EACH SUCH REVISED AGREEMENT AT LEAST SEVEN CALENDAR DAYS BEFORE THE PROSPECTIVE FRANCHISEE SIGNS AN AGREEMENT OR MAKES ANY PAYMENT TO THE FRANCHISOR OR ITS AFFILIATE IN CONNECTION WITH THE SALE OF THE FRANCHISE, SUCH SEVEN CALENDAR DAY PERIOD TO COMMENCE THE DAY AFTER THE FRANCHISOR FURNISHES THE REVISED AGREEMENT TO THE PROSPECTIVE FRANCHISEE. CHANGES TO AN AGREEMENT THAT ARISE OUT OF NEGOTIATIONS INITIATED BY THE PROSPECTIVE FRANCHISEE DO NOT TRIGGER THIS SEVEN CALENDAR DAY WAITING PERIOD.

(D) A FRANCHISOR WILL HAVE SATISFIED ITS DISCLOSURE OBLIGATIONS UNDER THIS SUBDIVISION IF THE FRANCHISOR HAS: (I) HAND DELIVERED, SENT BY OVERNIGHT DELIVERY SERVICE, FAXED, EMAILED OR OTHERWISE DELIVERED TO THE PROSPECTIVE FRANCHISEE THE FRANCHISOR'S LATEST REGISTERED FRANCHISE DISCLOSURE DOCUMENT BY THE REQUIRED DATE OR DATES; (II) FURNISHED TO THE PROSPECTIVE FRANCHISEE DIRECTIONS FOR ACCESSING THE FRANCHISOR'S LATEST REGISTERED FRANCHISE DISCLOSURE DOCUMENT ON THE INTERNET OR BY OTHER READILY ACCESSIBLE ELECTRONIC MEANS BY THE REQUIRED DATE OR DATES; OR, (III) SENT A PAPER OR TANGIBLE ELECTRONIC COPY, INCLUDING, BUT NOT LIMITED TO, COMPUTER DISK OR CD-ROM TO THE ADDRESS SPECIFIED BY THE PROSPECTIVE FRANCHISEE BY FIRST CLASS UNITED STATES MAIL AT LEAST THREE CALENDAR DAYS BEFORE THE REQUIRED DATE OR DATES.

[9.] 7. (a) A franchisor shall promptly notify the department in writing, by an application to amend the registered [offering prospectus] FRANCHISE DISCLOSURE DOCUMENT, of any material change in the information contained in the [prospectus as originally submitted or amended] DISCLOSURE DOCUMENT. The department may further define by rule what is a material change for the purpose and circumstances under which an amendment of a registered [prospectus] DISCLOSURE DOCUMENT shall be mandatory.

(b) An amendment to a registered [offering prospectus] FRANCHISE DISCLOSURE DOCUMENT filed after the effective date of the registration of the original [offering prospectus] FRANCHISE DISCLOSURE DOCUMENT, if the amendment is approved by the department, shall become effective on such date the department may determine, having due regard for the public interest and the protection of franchisees.

[10.] 8. (a) Neither the fact that an application for registration of [an offering prospectus] A FRANCHISE DISCLOSURE DOCUMENT under this article has been filed, nor the fact that such registration has become effective, constitutes a finding by the department that any document filed under this article, including the registered [offering prospectus] FRANCHISE DISCLOSURE DOCUMENT, is true, complete or not misleading. Neither any such fact nor the fact that an exemption is available for a

transaction means that the department has passed in any way upon the merits or qualifications of, or recommended or given approval to, any person, franchise, or transaction.

(b) It is unlawful to make or cause to be made to any prospective purchaser or offeree a representation inconsistent with paragraph (a) of this subdivision.

[11. No offer of a franchise shall be made except by the offering prospectus registered with the department of law pursuant to this section. Any advertisement in whatever form, including periodicals or on radio or television, shall contain a statement that no offer of such franchise is made except by such offering prospectus, and all such advertising shall be consistent with the representations and information required to be set forth in such prospectus as hereinbefore in this section provided.

12. In all literature employed in the offer and sale of a franchise and in all advertising in connection therewith, there shall be contained, in easily readable print on the face thereof, a statement that the filing of an application for registration of an offering prospectus or the acceptance and filing thereof by the department of law as required by this section does not constitute approval of the offering or the sale of such franchise by the department of law or the attorney general of this state.

13. A person shall not offer to sell or sell a franchise in this state on behalf of a franchisor or subfranchisor, except in transactions exempted under this article, unless the franchisor or subfranchisor and the person file a franchise agent's application with the department of law on the form prescribed by the department, and the department issues an order of registration for such person. The department may prescribe rules relating to the qualifications, conduct, and denial, suspension, or revocation or registrations of franchise sales agents.

14.] 9. ALL ADVERTISING, MARKETING AND PROMOTION OF A FRANCHISE OFFERING IN WHATEVER FORM - WHETHER PRINT, BROADCAST, ELECTRONIC OR OTHERWISE - SHALL BE CONSISTENT WITH THE REPRESENTATIONS AND INFORMATION SET FORTH IN THE FRANCHISE DISCLOSURE DOCUMENT.

10. (a) Every franchisor [or] AND subfranchisor offering franchises for sale in this state shall keep and maintain a complete set of books and records and shall keep and maintain accounts of franchise sales in accordance with generally accepted accounting principles, and shall make and file with the department such reports as the department may by rule prescribe, including an annual report setting forth the franchises sold by it [and the proceeds derived therefrom], and shall furnish to the department such materials relating to the offer or sale of the franchise as it may by rule require. All such records are subject at any time to reasonable periodic, special, or other examinations by a representative of the department, within or without this state, as the department deems necessary or appropriate in the public interest or for the protection of [investors] FRANCHISEES.

(b) The department may consider the opinions, appraisals, and reports of engineers, appraisers, or other experts which may be presented by an applicant or any interested party, on any question of fact concerning or affecting the franchises proposed to be offered and sold. In lieu of, or in addition to, such opinions, appraisals, and reports, the department may have any or all matters concerning or affecting such franchises investigated, appraised, passed upon, and certified to it by engineers, appraisers, or other experts selected by it. The experts' cost of travel and lodging relating to such investigation, and the costs of experts'

fees, shall be borne by the applicant and shall be paid before effectiveness of its registration, provided that the applicant shall have agreed in writing with the department to bear such costs and fees, or shall have had the opportunity to establish that no good cause exists for such investigation or expenditure, or shall have himself furnished the desired information to the department.

(c) If information that the department deems necessary relating to the franchise is requested by the department and is not furnished by the applicant, or the department deems information submitted to be unreliable or substantially incomplete, the department may investigate any or all matters concerning or affecting such franchise. The costs of all travel and lodging expenses relating to investigations outside of this state shall be borne by the applicant and shall be paid before effectiveness of its registration.

[15.] 11. The department may by rule require the filing and approval prior to use of any pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed to or intended for distribution to prospective franchisees.

S 5. Section 684 of the general business law, as added by chapter 730 of the laws of 1980, and subdivision 6 as further amended by section 104 of part A of chapter 62 of the laws of 2011, is amended to read as follows:

S 684. Exemptions. 1. The department [of law] is hereby authorized and empowered to exempt by rule or regulation any person, franchise, or transaction from any provision of section six hundred eighty-three of this article or from any rule or regulation thereunder if the department finds that such action is not inconsistent with the public interest or the protection of prospective franchisees.

2. The department [of law] may, upon application and within its discretion, exempt from the registration AND DISCLOSURE requirements of section six hundred eighty-three of this article the offer and sale of a franchise if:

(a) The franchisor has a net worth on a consolidated basis, according to its most recently audited financial statement, of not less than five million dollars; or the franchisor has a net worth, according to its most [recently audited] RECENT financial statement, of not less than one million dollars and is at least eighty percent owned by a corporation which has a net worth on a consolidated basis, according to its most recently audited financial statement, of not less than five million dollars; and

(b) The franchisor files with the department [of law] an application for an exemption, on forms and in the manner prescribed by the department, and a consent to service of process on the form required by the department[; and].

[(c) The franchisor discloses in writing to each prospective franchisee, at least seven days prior to the execution by the prospective franchisee of any binding franchise or other agreement, or at least seven days prior to the receipt of any consideration, whichever occurs first, the following information:

(1) The name of the franchisor, the name under which the franchisor is doing or intends to do business, and the name of any parent or affiliated company that will engage in business transaction with the franchisee.

(2) The franchisor's principal business address and the name and address of its agent in this state authorized to receive process.

(3) The business form of the franchisor, whether corporate, partnership, or otherwise.

(4) Such information concerning the identity and business experience of persons affiliated with the franchisor as the department may by rule prescribe.

(5) The business experience of the franchisor, including the length of time the franchisor (i) has conducted a business of the type to be operated by franchisees, (ii) has granted franchises for such business, and (iii) has granted franchises in other lines of business.

(6) A copy of the typical franchise contract or agreement proposed for use and in use in this state, including all amendments, deletions, variations, and supplements thereto.

(7) A statement of the franchise fee charged, the proposed application of the proceeds of such fee by the franchisor, and the formula by which the amount of the fee is determined if the fee is not uniform and the same in all cases.

(8) A statement describing any payments or fees other than franchise fees that the franchisee is required to pay to the franchisor, including royalties and payments or fees which the franchisor collects in whole or in part on behalf of a third party or parties.

(9) A statement of the conditions under which the franchise agreement may be terminated or renewal refused, or repurchased at the option of the franchisor.

(10) A statement as to whether, by the terms of the agreement or by other device or practice, the franchisee is required to purchase from the franchisor or his designee services, supplies, products, fixtures or other goods relating to the establishment or operation of the franchise business, together with a description and the terms and conditions thereof.

(11) A statement as to whether, by the terms of the franchise agreement or by other device or practice, the franchisee is limited in the goods or services offered by him to his customers.

(12) A statement of the terms and conditions of any financing arrangements when offered directly or indirectly by the franchisor or his agent or affiliate.

(13) A statement of any past or present practice or of any intent of the franchisor to sell, assign, or discount to a third party any note, contract, or other obligation of the franchisee in whole or in part.

(14) If any statement of estimated or projected franchisee earnings or income is used, a statement of such estimate or projection and the data, methods and computations upon which such estimate or projection is based.

(15) A statement as to whether franchisees receive an exclusive area or territory.

(16) Other information related to the offer and sale of the franchise as the department of law may reasonably require.

(d) Applications for exemptions shall be signed and verified by the franchisor in the same manner provided in the civil practice law and rules for the verification of pleadings, and shall be filed with the department of law at its office in the city of New York.]

APPLICATIONS FOR EXEMPTIONS SHALL BE FILED WITH THE DEPARTMENT IN THE MANNER DESCRIBED IN REGULATIONS PROMULGATED BY THE DEPARTMENT HEREUNDER UNDER AUTHORITY VESTED BY SECTION SIX HUNDRED NINETY-FOUR OF THIS ARTICLE AND SHALL BE FILED AT THE DEPARTMENT'S OFFICE IN THE CITY OF NEW YORK OR SUCH OTHER LOCATION AS THE REGULATIONS MAY SPECIFY.

3. There shall be exempted from the registration AND DISCLOSURE provisions of section six hundred eighty-three of this article the offer and sale of a franchise if:

(a) [(i)] The franchisor has a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than fifteen million dollars; or the franchisor has a net worth, according to its most recent [audited] financial statement, of not less than [three] ONE million dollars and is at least eighty percent owned by a corporation which has a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than fifteen million dollars[; and].

[(ii) The franchisor discloses in writing to each prospective franchisee, at least seven days prior to the execution by the prospective franchisee of any binding franchise or other agreement, or at least seven days prior to the receipt of any consideration, whichever occurs first, such information as is required to be disclosed under subparagraph two of paragraph (c) of subdivision two of this section.]

(b) The offer or sale is to a bank, savings institution, trust company, insurance company, investment company, or other financial institution, association, or institutional buyer, or to a broker-dealer, where the purchaser is acting for itself or in some fiduciary capacity.

(c) The transaction is pursuant to an offer directed by the franchisor to not more than two persons, other than persons specified in this subdivision, if [the franchisor does not grant the franchisee the right to offer franchises to others,] a commission or other remuneration is not paid directly or indirectly for soliciting a prospective franchisee in this state, and the franchisor is domiciled in this state or has filed with the department [of law] its consent to service of process on the form prescribed by the department.

(d) The offer or sale by a franchisor of a franchise to one of [his] THE FRANCHISOR'S existing franchisees. This exemption shall apply where:

(i) the existing franchisee has actively operated a franchise of the selling franchisor for the eighteen months preceding the offer; and

(ii) the existing franchisee purchases the franchise in order to operate the business and not for the purpose of resale; and

(iii) the franchisor reports the sale to the department [of law on the form required by the department within fifteen days of the sale] IN THE ANNUAL REPORT REQUIRED BY THIS ARTICLE.

[4. The department of law may, in its discretion, deny or revoke an exemption with respect to a specific franchisor or transaction, or withdraw or further condition any exemption enumerated in this section.

5.] (E) THE FRANCHISE RELATIONSHIP IS A FRACTIONAL FRANCHISE.

(F) THE FRANCHISE RELATIONSHIP IS A LEASED DEPARTMENT.

(G) THE FRANCHISE IS GOVERNED BY THE FEDERAL PETROLEUM MARKETING PRACTICES ACT OR ANY SUCCESSOR THERETO, ARTICLE ELEVEN-B OF THIS CHAPTER, OR SECTION ONE HUNDRED NINETY-NINE OF THIS CHAPTER.

(H)(I) THE FRANCHISEE'S INITIAL INVESTMENT, EXCLUDING ANY FINANCING RECEIVED FROM THE FRANCHISOR OR AN AFFILIATE AND EXCLUDING THE COST OF UNIMPROVED LAND, TOTALS AT LEAST ONE MILLION DOLLARS, PROVIDED THAT, IF THE PROSPECTIVE FRANCHISEE IS AN INVESTOR GROUP, AT LEAST ONE INDIVIDUAL WITHIN SUCH GROUP QUALIFIES FOR THE EXEMPTION BY INVESTING AT THIS THRESHOLD LEVEL, AND (II) THE PROSPECTIVE FRANCHISEE SIGNS AN ACKNOWLEDGMENT VERIFYING THE GROUNDS FOR THE EXEMPTION.

(I) THE FRANCHISEE OR ITS PARENT OR ANY AFFILIATE IS AN ENTITY THAT HAS BEEN IN BUSINESS FOR AT LEAST FIVE YEARS AND HAS A NET WORTH OF AT LEAST FIVE MILLION DOLLARS.

(J) ONE OR MORE PURCHASERS OF AT LEAST A FIFTY PERCENT OWNERSHIP INTEREST IN THE FRANCHISE, WITHIN SIXTY DAYS OF THE SALE, HAS BEEN, FOR AT LEAST TWO YEARS, AN OFFICER, DIRECTOR, GENERAL PARTNER, INDIVIDUAL WITH MANAGEMENT RESPONSIBILITY FOR THE OFFER AND SALE OF THE FRANCHISOR'S FRANCHISES OR AN ADMINISTRATOR OF THE FRANCHISED NETWORK, OR WITHIN SIXTY DAYS OF THE SALE HAS BEEN, FOR AT LEAST TWO YEARS, AN OWNER OF AT LEAST A TWENTY-FIVE PERCENT INTEREST IN THE FRANCHISOR.

(K) THE TOTAL REQUIRED PAYMENT BY THE FRANCHISEE TO THE FRANCHISOR DURING THE FIRST SIX MONTHS AFTER COMMENCING OPERATION OF THE FRANCHISE IS LESS THAN FIVE HUNDRED DOLLARS.

(L) THE PARTIES CONTEMPLATE, AT THE TIME THE FRANCHISE AGREEMENT IS SIGNED, THAT ALL FRANCHISED LOCATIONS WILL BE LOCATED OUTSIDE OF THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS.

4. The offer or sale of a franchise by a franchisee for [his] THE FRANCHISEE'S own account [or the offer and sale of an entire area franchise owned by a subfranchisor for his own account] is exempted from the registration AND DISCLOSURE provisions of section six hundred eighty-three of this article if:

(a) The sale is an isolated sale and not part of a plan of distribution of franchises; and

(b) The sale is not "effected by or through a franchisor[; and]"

[(c) The franchisee furnishes to the prospective purchaser, at least one week prior to the execution of any binding contract or purchase agreement, or at least one week prior to the receipt of any consideration, whichever occurs first, a copy of the offering prospectus of the franchisor (including amendments, if any) currently registered with the department of law.]

A sale is not "effected by or through a franchisor [merely because a]" IF THE franchisor has [a right to approve or disapprove a different franchisee] NO SIGNIFICANT INVOLVEMENT WITH THE PROSPECTIVE ASSIGNEE; WILL NOT ENTER INTO A NEW OR SUBSTITUTE FRANCHISE AGREEMENT WITH THE ASSIGNEE THAT CONTAINS MATERIALLY DIFFERENT TERMS AND CONDITIONS; AND, DOES NOT OTHERWISE SOLICIT THE ASSIGNEE OR PARTICIPATE IN THE SALE OF THE SUBJECT FRANCHISE TO THE ASSIGNEE. A FRANCHISOR'S APPROVAL OR DISAPPROVAL OF A SALE OR TRANSFER OF AN EXISTING FRANCHISE, STANDING ALONE, IS NOT DEEMED TO BE SIGNIFICANT INVOLVEMENT.

[6.] 5. This article shall not be applicable to any transaction relating to a bank credit card plan. "Bank credit card plan" means a credit card plan in which the issuers of credit cards are only: banks regulated by or under the supervision of the Federal Reserve Board; the Federal Deposit Insurance Corporation; the Controller of the Currency of the United States; or the Superintendent of Financial Services [of this state]; or persons controlling such banks, provided that the assets of such a bank or banks represent a majority of the assets on a consolidated basis of any holding company system of which such card issuers may be a party; or, persons controlled by such banks.

S 6. Section 685 of the general business law, as added by chapter 730 of the laws of 1980, is amended to read as follows:

S 685. Escrows and impoundments. If the department [of law] finds that the applicant for registration has failed to demonstrate that adequate financial arrangements have been made to fulfill obligations to provide real estate, improvements, equipment, inventory, training, or other items included in the offering, the department may require the escrow or impoundment of franchise fees and other funds paid by the franchisee or subfranchisor until the obligations are fulfilled, or, at the option of the franchisor, the furnishing of a surety bond OR THE SATISFACTION OF

ANY OTHER CONDITIONS as provided by rule of the department [of law] if it finds that the requirement is necessary and appropriate to protect prospective franchisees or subfranchisors.

S 7. Section 686 of the general business law, as added by chapter 730 of the laws of 1980, is amended to read as follows:

S 686. Designation of secretary of state as agent for service of process; service of process. [Any person who shall offer to sell or sell a franchise in this state as a franchisor, subfranchisor or franchise sales agent] A FRANCHISE SELLER shall be deemed to have irrevocably appointed the secretary of state as his or its agent upon whom may be served any summons, complaint, subpoena, subpoena duces tecum, notice, order or other process directed to such person, or any partner, principal[,] officer, [salesman] or director thereof, or his or its successor, administrator or executor, in any action, investigation, or proceeding which arises under this article or a rule hereunder, with the same force and validity as if served personally on such person. Service of such process upon the secretary of state shall be made by personally delivering to and leaving with him or a deputy secretary of state a copy thereof at the office of the department [of state], and such service shall be sufficient provided that notice of such service and a copy of such process are sent forthwith by the department to such person, by registered or certified mail with return receipt requested, at his OR HER address as set forth in the application for registration of his [offering prospectus] OR HER FRANCHISE DISCLOSURE DOCUMENT or in the registered [offering prospectus] FRANCHISE DISCLOSURE DOCUMENT itself filed with the department [of law] pursuant to this article, or in default of the filing of such application or [prospectus] FRANCHISE DISCLOSURE DOCUMENT, at the last address known to the department. Service of such process shall be complete upon receipt by the department of a return receipt purporting to be signed by the addressee or a person qualified to receive his or its registered or certified mail, in accordance with the rules and customs of the post office department, or, if acceptance was refused or unclaimed by the addressee or his or its agent, or if the addressee moved without leaving a forwarding address, upon return to the department of the original envelope bearing a notation by the postal authorities that receipt thereof was refused or that such mail was otherwise undeliverable.

S 8. Section 687 of the general business law, as added by chapter 730 of the laws of 1980, is amended to read as follows:

S 687. Fraudulent and unlawful practices. 1. It is unlawful for any person to make any untrue statement of a material fact in any application, notice, statement, [prospectus] FRANCHISE DISCLOSURE DOCUMENT or report filed with the department under this article, or wilfully to omit to state in any such application, notice, statement, [prospectus] FRANCHISE DISCLOSURE DOCUMENT or report any material fact which is required to be stated therein, or to fail to notify the department of any material change as required by this article.

2. It is unlawful for a person, in connection with the offer, sale or purchase of any franchise, to directly or indirectly:

(a) Employ any device, scheme, or artifice to defraud.

(b) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. It is an affirmative defense to one accused of omitting to state such a material fact that said omission was not an intentional act.

(c) Engage in any act, practice, or course of business [which] THAT operates or would operate as a fraud or deceit upon any person.

(D) MAKE ANY CLAIM OR REPRESENTATION, ORALLY, VISUALLY, OR IN WRITING, THAT CONTRADICTS THE INFORMATION REQUIRED TO BE DISCLOSED BY THIS SECTION.

(E) MISREPRESENT THAT ANY PERSON:

(I) PURCHASED A FRANCHISE FROM THE FRANCHISOR OR OPERATED A FRANCHISE OF THE TYPE OFFERED BY THE FRANCHISOR.

(II) CAN PROVIDE AN INDEPENDENT AND RELIABLE REPORT ABOUT THE FRANCHISE OR THE EXPERIENCES OF ANY CURRENT OR FORMER FRANCHISEES.

(F) DISSEMINATE ANY FINANCIAL PERFORMANCE REPRESENTATIONS TO PROSPECTIVE FRANCHISEES UNLESS THE FRANCHISOR HAS A REASONABLE BASIS AND WRITTEN SUBSTANTIATION FOR THE REPRESENTATION AT THE TIME THE REPRESENTATION IS MADE, AND THE REPRESENTATION IS INCLUDED IN THE FRANCHISOR'S DISCLOSURE DOCUMENT. IN CONJUNCTION WITH ANY SUCH FINANCIAL PERFORMANCE REPRESENTATION, THE FRANCHISOR SHALL ALSO:

(I) DISCLOSE THE INFORMATION REQUIRED BY THIS ARTICLE AND THE REGULATIONS PROMULGATED HEREUNDER IF THE REPRESENTATION RELATES TO THE PAST PERFORMANCE OF THE FRANCHISOR'S OUTLETS.

(II) INCLUDE A CLEAR AND CONSPICUOUS ADMONITION THAT A NEW FRANCHISEE'S INDIVIDUAL FINANCIAL RESULTS MAY DIFFER FROM THE RESULT STATED IN THE FINANCIAL PERFORMANCE REPRESENTATION.

(G) FAIL TO MAKE AVAILABLE TO PROSPECTIVE FRANCHISEES, AND TO THE DEPARTMENT UPON REASONABLE REQUEST, WRITTEN SUBSTANTIATION FOR ANY FINANCIAL PERFORMANCE REPRESENTATIONS MADE IN A FRANCHISOR'S FRANCHISE DISCLOSURE DOCUMENT OR OTHERWISE.

(H) DISCLAIM OR REQUIRE A PROSPECTIVE FRANCHISEE TO WAIVE RELIANCE ON ANY REPRESENTATION MADE IN THE DISCLOSURE DOCUMENT OR IN ITS EXHIBITS OR AMENDMENTS, PROVIDED, HOWEVER, THAT THIS PROVISION IS NOT INTENDED TO PREVENT A PROSPECTIVE FRANCHISEE FROM VOLUNTARILY WAIVING SPECIFIC CONTRACT TERMS AND CONDITIONS SET FORTH IN HIS OR HER DISCLOSURE DOCUMENT DURING THE COURSE OF FRANCHISE SALE NEGOTIATIONS.

(I) FAIL TO RETURN ANY FUNDS OR DEPOSITS IN ACCORDANCE WITH ANY CONDITIONS DISCLOSED IN THE FRANCHISOR'S DISCLOSURE DOCUMENT, FRANCHISE AGREEMENT, OR ANY RELATED DOCUMENT.

3. It is unlawful for any person to violate any provision of this article, or any rule of the department promulgated hereunder, or any condition to the effectiveness of the registration of [an offering prospectus] A FRANCHISE DISCLOSURE DOCUMENT or of an exemption from the registration provisions of this article.

4. Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law, or rule promulgated hereunder, shall be void.

5. It is unlawful to require a franchisee to assent to a release, assignment, novation, waiver or estoppel [which] THAT would relieve a person from any duty or liability imposed by this article.

S 9. Subdivision 1 of section 688 of the general business law, as added by chapter 730 of the laws of 1980, is amended to read as follows:

1. Whenever it shall appear to the department [of law], either upon complaint or otherwise, that any person has violated any provision of this article, the department:

(a) may make such investigations within or outside of this state as it deems necessary to determine whether any person has violated any provision of this article or any rule or regulation hereunder, or to aid in the enforcement of this article or in the prescribing of rules and forms hereunder, and

(b) may require or permit any person to file a statement in writing, under oath or otherwise as the attorney general determines, as to all the facts and circumstances concerning the matter to be investigated.

S 10. Section 689 of the general business law, as added by chapter 730 of the laws of 1980, is amended to read as follows:

S 689. Action by the department of law. 1. Whenever the department shall believe from evidence satisfactory to it that any person has engaged in or is engaged in or is about to engage in any practice or transaction heretofore referred to as and declared to be an unlawful or a fraudulent practice, it may bring an action in the name and on behalf of the people of the state of New York against such person and any other person theretofore concerned in or in any way participating in such unlawful or fraudulent practice, to enjoin such person or persons from continuing such unlawful and fraudulent practice or engaging therein or doing any act or acts in furtherance thereof or, if the department should believe from such evidence that such person actually has or is engaged in any such unlawful or fraudulent practice, it may include in such action an application to enjoin permanently such person and such other person as may have been or may be concerned with or in any way participating in such unlawful or fraudulent practice, from selling or offering for sale within or from this state as franchisor, franchise [sales agent, franchise salesman] SELLER, or a principal EXECUTIVE OFFICER OR DIRECTOR thereof, any franchise offered or to be offered or sold, or from continuing any such practice. In said action an order or a judgment may be entered awarding the relief applied for or so much thereof as the court may deem proper. Upon a showing by the department in its application for a permanent injunction hereunder that the defendant named in the action or an officer thereof has refused to be sworn or to be examined or to answer a material question or to produce a book or paper relevant to the inquiry when duly ordered to do so by the officer or judge duly conducting an inquiry into the subject matter forming the basis of the application for such injunction, such refusal shall be prima facie proof that such defendant is or has engaged in an unlawful or fraudulent practice as set forth in such application and a permanent injunction may issue from the supreme court without further showing by the department. In an action brought under this section the court may award to the plaintiff a sum not in excess of ten thousand dollars for each defendant as an additional allowance.

2. Upon a showing by the department, in an application for an injunction, that any person engaged in the offer or sale of a franchise in this state has ever been convicted by a court of competent jurisdiction in any state or county of any felony or of any other criminal offense by any such court, whether or not constituting a felony, involving franchises, securities or subdivided land, the supreme court after a hearing may issue a permanent injunction awarding the relief applied for, or so much thereof as the court may deem proper, against such person shown to have been so convicted, in the form and manner provided for in subdivision one of this section in the case of one who actually has or is engaged in any unlawful or fraudulent practice.

3. If a franchise is offered or sold within the state of New York by a non-resident person and such non-resident person has not filed pursuant to laws heretofore or hereafter existing the designation of a person upon whom process against him or it may be served or the designation of the secretary of state as such person, pursuant to section thirteen hundred four of the business corporation law or other laws heretofore or hereafter existing, or in lieu thereof, an instrument in writing duly

acknowledged and filed in the office of the secretary of state designating the secretary of state as the person upon whom may be served any subpoena, subpoena duces tecum or other process directed to such non-resident person and issued in any investigation, examination or proceeding pending or about to be instituted under and pursuant to the provisions of this article, the department may serve a notice upon such non-resident person by mailing the same in a securely sealed postpaid wrapper addressed to such non-resident person at its or his last known place of business or residence, and may in such notice require that such non-resident person furnish a written statement under oath, as required in said notice, giving the information therein specified relating to the franchise offered, to be offered or sold in the state of New York by such non-resident person or, in the alternative, that such non-resident person shall appear within a reasonable time from the date of mailing such notice at a designated place within this state for examination and shall produce at the time and place of such examination such books and papers of such non-resident person as may be designated in such notice.

If such non-resident person shall fail to appear pursuant thereto or to produce the books and papers required thereby to be produced, or shall refuse to submit to examination or to answer any proper question, the proof of such failure or refusal shall constitute prima facie evidence that the offer or sale of a franchise by such non-resident person constitutes a fraudulent practice and may in the discretion of the court be treated as a sufficient basis for a permanent injunction against the continuance of such fraudulent practice.

4. In any action brought by the department as provided in this article, the court at any stage of the proceedings may appoint a receiver of any and all property derived by the defendant or defendants or any of them by means of any such unlawful or fraudulent practice, including also all property with which such property has been commingled if such property cannot be identified in kind because of such commingling, together with any or all books of account and papers relating to the same. The judgment entered in such action may provide that such receiver shall take title to any or all such property and books of account and papers relating to the same and liquidate such property or any part thereof for the benefit of all persons intervening in the said action and establishing an interest in such property. The judgment may also provide that all such property, the title to or interest in which has not been established in such action by intervenors or otherwise by due process to be in a person or persons other than defendant or defendants, shall be returned to the defendant or defendants as their interest may appear. Such receiver shall be subject to all the duties of receivers in civil actions as far as practicable except that such provisions relating to commissions or compensation of receivers shall not be applicable to receivers appointed pursuant to this section, but such commissions or compensations shall be fixed by the court in any amount which it may determine to be just and equitable. In any action brought by the department as provided in this article the court may grant such other and further relief as may be proper.

5. Whenever the department has determined to commence an action under this article, it may present to any justice of the supreme court, before beginning such action, an application in writing for an order directing the person or persons mentioned in the application to appear before the justice of the supreme court or referee designated in such order and answer such questions as may be put to them or to any of them, or to produce such papers, documents and books concerning the alleged unlawful

or fraudulent practices to which the action which the department has determined to bring relates, and it shall be the duty of the justice of the supreme court to whom such application for the order is made to grant such application. The application for such order may simply show upon information and belief that the testimony of such person or persons is material and necessary. The provisions of the civil practice law and rules, relating to an application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examination, shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made with such preliminary injunction or stay as may appear to such justice to be proper and expedient and shall specify the time when and place where the witnesses are required to appear. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him and must be filed in the office of the clerk of the county in which such order for examination is filed.

6. The order for such examination must be signed by the justice making it, and service of a copy thereof with an endorsement by the department to the effect that the person named therein is required to appear and be examined at the time and place before the justice and referee specified in such endorsement, shall be sufficient notice for the attendance of witnesses. Such endorsement may contain a clause requiring such person to produce at such examination all books, papers and documents in his possession or under his control relating to the subject of such examination. The order shall be served upon the person named in [the] SUCH endorsement [aforesaid] by delivering to and leaving with it or him a certified copy thereof, endorsed as above provided, subject to the payment of witness fees and mileage as and when provided to be paid by paragraph (b) of subdivision four of section six hundred eighty-eight of this article in connection with attendance pursuant to subpoenas authorized to be issued under [said] SUCH section. Service of such an order may also be served under section six hundred eighty-six of this article in cases falling thereunder.

7. The referee appointed as provided in this article possesses all the powers and is subject to all the duties of a referee appointed in a civil action, so far as practicable, and may punish for contempt a witness duly served with the papers as prescribed in this article for non-attendance or refusal to be sworn or to testify or to produce books, papers and documents according to the direction of [the] SUCH endorsement [aforesaid] in the same manner and to the same extent as a referee to hear, try and determine an issue of fact or law.

8. Any person against whom a permanent injunction has been granted under the provisions of this article may apply to the supreme court at any time upon at least sixty days notice to the department for an order dissolving such injunction or modifying the same upon such terms and conditions as the court deems necessary or desirable. Such application for dissolution or modification of such injunction shall contain a recitation of the facts and circumstances which caused the granting of the injunction; the occupation and employment of the person making the application and his financial remuneration therefrom since the time the injunction was granted; his net worth at the time of the application and the source thereof; together with any other facts bearing upon the reasonableness of the application and the character of the applicant as may enable the court to issue an order that will properly dispose of

such application in the interest of justice. A copy of such application together with copies of any other papers in support thereof shall be served upon the department at least sixty days prior to the return date thereof. In addition thereto the applicant shall file with the court a good and sufficient surety bond in the sum of one thousand dollars guaranteeing that he will pay all costs and expenses of an investigation by the department of such applicant and the statements and claims alleged in the application together with any further investigation which the department may deem necessary or desirable to determine whether it should consent to the application, oppose the same, or make such other recommendations to the court as in its opinion are desirable to be included in any modification of such injunction. Should it appear in the course of such investigation by the department that said sum is not sufficient, the department may apply to the court by usual notice of motion or order to show cause for an increase in the amount of security or further surety bond necessary to fully pay all of the costs of the investigation and the court may require such further bond as the situation requires to fully pay the costs and expenses of the investigation. Upon the completion of such investigation, the department may file an answer to such application setting forth such facts as are pertinent to the determination by the court of the matter before it and whether said injunction should be dissolved, modified or continued in whole or in part and what conditions, if any, shall be attached to any dissolution or modification of said injunction. After a hearing upon such application and after any further investigation, proof or testimony which the court may desire has been offered, or at any adjourned dates thereof, the court may make a final order dissolving the permanent injunction or modifying the same upon such terms and conditions as in its opinion are just and desirable, or in its discretion may deny the application. Such order shall contain a direction that the applicant pay to the department the costs and expenses of the investigation in connection with the proceeding, and any judgment entered thereon may be enforced directly against the surety on the bond. The court shall grant no temporary or other relief from the injunction in force pending a final determination of such application. No application under this subdivision shall be entertained:

(a) in any case where the applicant has been convicted of a felony or a crime that would be a felony if committed in the state of New York since the issuance of the injunction, nor

(b) in any case where the injunction was granted incident to a felony, or the applicant has been convicted at any time of any felony involving franchises which are the subject matter of this article. Nor shall anything contained in this subdivision be construed to deny to or interfere with the power of the department to bring any other action or proceeding, civil or criminal, against the applicant at any time.

9. The provisions of the civil practice law and rules shall apply to all actions brought under this article except as herein otherwise provided.

S 11. Section 691 of the general business law, as added by chapter 730 of the laws of 1980, subdivision 4 as amended by chapter 86 of the laws of 1981, is amended to read as follows:

S 691. Civil remedies. 1. A person who offers or sells a franchise in violation of section six hundred eighty-three, six hundred eighty-four or six hundred eighty-seven of this article is liable to the person purchasing the franchise [for damages and, if such violation is willful and material,] for rescission, with interest [at six percent per year]

from the date of purchase, [and] AT AN ANNUAL INTEREST RATE SET FORTH IN OR DETERMINED IN ACCORDANCE WITH RULES OR REGULATIONS PROMULGATED BY THE DEPARTMENT, AND IF SUCH VIOLATION IS WILLFUL AND MATERIAL, FOR DAMAGES, IN EACH INSTANCE ALONG WITH reasonable attorney fees and court costs.

2. A person may not file or maintain suit under this section if the franchisee or such person received a written offer before suit, and at a time when he owned the franchise, to refund the consideration paid together with interest at [six percent per year] AN ANNUAL RATE SET FORTH IN OR DETERMINED IN ACCORDANCE WITH RULES OR REGULATIONS PROMULGATED BY THE DEPARTMENT from the date of payment, less the amount of income earned by the franchisee from the franchise, conditioned only upon tender by the person of all items received by him for the consideration and not sold, and failed to accept the offer within thirty days of its receipt, provided that the offering documents are submitted to the department for approval at least ten business days prior to submission to the franchisee. The rescission offer shall recite the provisions of this section. If the franchise involves a substantial building or substantial equipment or fixtures and a significant period of time has elapsed since the sale of the franchise to the franchisee, the department in approving a rescission offer may approve an equitable offer recognizing depreciation, amortization, and other factors which bear upon the value of the franchise being returned to the franchisor. Nothing in this subdivision shall prohibit settlement of any dispute arising under or involving claims based on this chapter, with or without approval of the department.

3. A person who directly or indirectly controls a person liable under this article, a partner in a firm so liable, a principal executive officer or director of a corporation so liable, a person occupying a similar status or performing similar functions, and an employee of a person so liable, who materially aids in the act of transaction constituting the violation, is also liable jointly and severally with and to the same extent as the controlled person, partnership, corporation or employer. It shall be a defense to any action based upon such liability that the defendant did not know or could not have known by the exercise of due diligence the facts upon which the action is predicated.

4. An action shall not be maintained to enforce a liability created under this section unless brought before the expiration of three years after the act or transaction constituting the violation.

5. Except as explicitly provided in this article, civil liability in favor of any private party shall not arise against a person by implication from or as a result of the violation of a provision of this article or a rule, regulation or order hereunder. Nothing in this article shall limit a liability which may exist by virtue of any other statute or under common law if this article were not in effect.

S 12. Section 694 of the general business law, as added by chapter 730 of the laws of 1980, subdivision 1 as amended by chapter 61 of the laws of 1989, is amended to read as follows:

S 694. Administration. [1. The department shall charge and collect the fees fixed by this section.

(a) The fee for filing an application for registration of an offering prospectus under subdivision two of section six hundred eighty-three of this article is seven hundred fifty dollars.

(b) The fee for filing an amendment to any registered offering prospectus filed under subdivision two, nine or thirteen of section six hundred eighty-three of this article is one hundred fifty dollars.

(c) The fee for filing a franchise agent's application under subdivision thirteen of section six hundred eighty-three of this article is one hundred fifty dollars.

2.] The department may from time to time make, amend, and rescind such rules, forms and regulations as are necessary to carry out the provisions of this article, including rules and forms governing applications and reports, and defining any terms, whether or not used in this article, insofar as the definitions are not inconsistent with the provisions of this article.

S 13. This act shall take effect immediately.