

MAINE STATE LEGISLATURE

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1 SECOND REGULAR SESSION

2
3 ONE HUNDRED AND TENTH LEGISLATURE

4
5 **Legislative Document**

No. 1892

6
7 S. P. 806 In Senate, January 27, 1982
Submitted by the Department of Business Regulation pursuant to
Joint Rule 24.

Referred to the Committee on Business Legislation and 1,600 ordered printed. Sent down for concurrence.

8 MAY M. ROSS, Secretary of the Senate
Presented by Senator Trafton of Androscoggin.

Cosponsors: Senator Clark of Cumberland and Representative Perkins of Brooksville.

9
10 STATE OF MAINE

11
12 IN THE YEAR OF OUR LORD
13 NINETEEN HUNDRED AND EIGHTY-TWO

14
15 **AN ACT to Regulate the Sale of**
16 **Franchises and Business Opportunities.**

17
18 Be it enacted by the People of the State of Maine as follows:

19 **Sec. 1.** 32 MRSA c. 69-B, as enacted by PL 1979, c.
20 571, is repealed.

21 **Sec. 2.** 32 MRSA c. 9I is enacted to read:

22 CHAPTER 9I

23 FRANCHISE AND BUSINESS OPPORTUNITY ACT

24 §9101. Purpose

25 The purpose of this Act is to require registration of
26 franchisors, their representatives, agents, employees,
27 affiliated persons and brokers and of sellers of business
28 opportunities, their representatives, agents, employees,
29 affiliated persons and brokers and to thereby regulate the

1 sale of franchises and of business opportunities within this
2 State.

3 §9102. Definitions

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

6 1. Affiliated person. "Affiliated person" means a
7 person who:

8 A. Directly or indirectly controls, is controlled by
9 or is under common control with a seller;

10 B. Directly or indirectly owns, controls or holds with
11 power to vote, 10% or more of the outstanding voting
12 securities of a seller; or

13 C. Has, in common with a seller, one or more partners,
14 officers, directors, trustees, branch managers or other
15 persons occupying similar status or performing similar
16 functions.

17 2. Business day. "Business day" means any day other
18 than Saturday, Sunday or the following holidays: New Year's
19 Day; Washington's Birthday; Memorial Day; Independence Day;
20 Labor Day; Columbus Day; Veteran's Day; Thanksgiving; and
21 Christmas.

22 3. Business opportunity. A "business opportunity"
23 means:

24 A. The sale, lease or distribution of any of the fol-
25 lowing items which are sold, leased or distributed by
26 the seller to the purchaser for the purpose of enabling
27 the purchaser to start a business:

28 (1) Any products;

29 (2) Equipment;

30 (3) Supplies;

31 (4) Goods;

32 (5) Commodities, including plants used for culti-
33 vation and animals used for breeding; or

34 (6) Services; and

1 B. In which the seller represents or suggests one or
2 more of the following:

3 (1) That the seller will provide locations or
4 assist the purchaser in finding locations for the
5 use or operation of vending machines, racks, dis-
6 play cases or other similar devices, or electric
7 game machines, currency-operated amusement
8 machines or other similar devices on premises nei-
9 ther owned nor leased by the seller or purchaser;

10 (2) That the seller will purchase any or all
11 products made, produced, fabricated, grown, bred
12 or modified by the purchaser using in whole or in
13 part the supplies, services or chattels sold to
14 the purchaser;

15 (3) That if the purchaser is not satisfied with
16 the business opportunity, the seller will refund
17 all or part of the price paid for the business
18 opportunity, or will repurchase any of the prod-
19 ucts, equipment, supplies or chattels supplied by
20 the seller; or

21 (4) That upon receiving payment the seller will
22 provide the purchaser with a sales or marketing
23 program which will enable the purchaser to derive
24 income which exceeds the price paid for the busi-
25 ness opportunity; except that the sale of an
26 ongoing business by its owner, who sells and
27 intends to sell no other business entities, is not
28 the sale of a business opportunity within the
29 meaning of this section.

30 4. Commissioner. "Commissioner" means the Commis-
31 sioner of Business Regulation or his designee.

32 5. Franchise. "Franchise" has the following meanings
33 subject to the exclusions and exemptions indicated.

34 A. "Franchise" means any franchise as defined in the
35 Federal Trade Commission trade regulation rule on dis-
36 closure requirements and prohibitions concerning
37 franchising and business opportunity ventures, 16 Code
38 of Federal Regulations, Part 436, Section 436.2(a).

39 B. This definition does not apply to any franchise ex-
40 empted by the Federal Trade Commission's trade regula-
41 tion rule on disclosure requirements and prohibitions

1 concerning franchising and business opportunity
2 ventures, 16 Code of Federal Regulations, Part 436,
3 Section 436.2(a) (3) (i)-(iv).

4 C. This subsection does not include any continuing
5 commercial relationship excluded by the Federal Trade
6 Commission's trade regulation rule on disclosure re-
7 quirements and prohibitions concerning franchising and
8 business opportunity ventures, 16 Code of Federal Regu-
9 lations, Part 436, Section 436.2(a) (4) (i)-(iv); nor
10 does it include the not-for-profit sale of sales demon-
11 stration equipment, materials or samples, for a total
12 price of \$100 or less.

13 6. Franchise broker. "Franchise broker" means any
14 person other than a franchisor or a franchisee who sells,
15 offers for sale or arranges the sale of a franchise.

16 7. Franchisee. "Franchisee" means a person who:

17 A. Participates in a business relationship as a
18 franchisee; or

19 B. Participates in a commercial relationship as a pur-
20 chaser.

21 8. Franchisor. "Franchisor" means a person who:

22 A. Participates in a franchise relationship as a
23 franchisor, as denoted in subsection 5, or undertakes
24 any other act relating to the promotion of franchises;

25 B. Participates in a commercial relationship as a
26 seller, as denoted in subsection 5;

27 C. Is a representative, agent or employee of the
28 franchisor; or

29 D. Is a subfranchisor.

30 9. Prospective franchisee. "Prospective franchisee"
31 means any person, including any representative, agent or
32 employee of that person, who approaches or is approached by
33 a franchisor or a franchise broker or any representative,
34 agent or employee of a franchisor or a franchise broker, for
35 the purpose of discussing the establishment, or possible
36 establishment, of a franchise relationship involving such a
37 person.

1 10. Purchaser. "Purchaser" means a person who pur-
2 chases, leases or communicates with a seller concerning the
3 purchase or lease of a business opportunity.

4 11. Seller. "Seller" means a person who sells,
5 leases, distributes, advertises or undertakes any other act
6 relating to the promotion of business opportunities.

7 §9103. Intended coverage

8 Representatives, agents, employees and affiliated per-
9 sons of franchisors, franchise brokers and representatives,
10 agents, employees and affiliated persons of business oppor-
11 tunity sellers all have the same obligations as franchisors
12 and sellers of business opportunities under this chapter.

13 §9104. Registration

14 1. Time of registration. Every franchisor, franchise
15 broker and seller shall register with the Department of
16 Business Regulation prior to selling, leasing, distributing,
17 advertising, offering to sell or performing any other act
18 relating to the sale of business opportunities or franchises
19 in this State.

20 2. Requirements. Registration is complete upon:

21 A. Filing a registration application form;

22 B. Filing a copy of the disclosure statement required
23 by section 9109;

24 C. Providing evidence of a bond or escrow account
25 satisfying the requirements of section 9111;

26 D. Filing a completed consent to service of process
27 form; and

28 E. Paying a \$75 fee.

29 3. Department response. Not later than 30 days after
30 the receipt for filing of the required registration mate-
31 rials, or not later than 15 days after the receipt for
32 filing of a supplemental report to a disclosure statement,
33 the department shall:

34 A. Issue a letter accepting the filing, stating the
35 date that the registration becomes effective and grant-
36 ing the franchisor a registration number; or

1 B. Issue a letter indicating the manner in which the
2 submission for registration is deficient.

3 4. Period of registration. An approved franchise or
4 business opportunity is effective for a period of one year
5 from the date of issuance of a registration number, unless
6 the commissioner specifies a different period.

7 §9105. Supplemental reports

8 1. When required. If a material adverse change in the
9 condition of the franchisor or the seller should occur
10 during any year, a supplemental report shall be filed as
11 soon as reasonably possible and in any case, before the
12 future sale of any franchise.

13 2. Definition. A material adverse change includes,
14 but is not limited to:

15 A. Insolvency; bankruptcy, voluntary or not; or
16 inability to meet its routine obligations; and

17 B. A change of ownership or control.

18 3. Fee. Each supplemental report shall be accompanied
19 by a supplemental report filing fee of \$15.

20 §9106. Renewal of registration

21 1. Requirements. Franchisors and sellers shall annu-
22 ally renew their registration by:

23 A. Filing a registration renewal application;

24 B. Filing a copy of a current disclosure document or a
25 sworn statement that no material adverse change has
26 occurred since the last disclosure filing;

27 C. Providing evidence of the continuation of their
28 bond or escrow account satisfying the requirements of
29 section 9110; and

30 D. Paying a \$35 fee.

31 2. Additional filings. At his discretion, the commis-
32 sioner may require the submission of a complete new applica-
33 tion.

34 §9107. Refusal to renew registration

1 The commissioner may refuse to renew a registration if,
2 after providing the franchisor or seller with an opportunity
3 for hearing, he finds that the franchisor, seller, any part-
4 ner, officer or director of the franchisor and seller or any
5 person occupying similar functions or any affiliated person:

6 1. Fraudulent transaction. Has engaged in any fraud-
7 ulent transaction;

8 2. Insolvency. Is insolvent, or in danger of becoming
9 insolvent, either in the sense that his liabilities exceed
10 his assets or in the sense that he cannot meet his obli-
11 gations as they mature;

12 3. Incompetency. Has been adjudicated mentally incom-
13 petent or is a person for whom a conservator or guardian has
14 been appointed and is acting;

15 4. Conviction. Has been convicted, within or without
16 this State of:

17 A. Any crime involving a franchise; or

18 B. Any crime punishable by a maximum term of imprison-
19 ment equal to or exceeding one year;

20 5. Information. Has failed to furnish information
21 requested by the Department of Business Regulation pursuant
22 to its authority under this chapter concerning the conduct
23 of his business; or

24 6. Violation of chapter. Has violated any of this
25 chapter.

26 §9108. Suspension or revocation of registration

27 The commissioner may file a complaint with the Adminis-
28 trative Court seeking the suspension or revocation of regis-
29 tration granted under this chapter for any reason which
30 would justify refusal to renew the registration. In lieu of
31 initiating a proceeding in the Administrative Court the com-
32 missioner may summarily suspend or revoke a registration,
33 pursuant to Title 5, section 10004, where appropriate.

34 §9109. Required disclosure statement

35 A disclosure statement which contains the form and sub-
36 stance required by the Federal Trade Commission's trade
37 regulation rule on disclosure requirements and prohibitions

1 concerning franchising and business opportunity ventures, 16
2 Code of Federal Regulations, Part 436, Section 436.1(a)
3 (1)-(20), as amended, complies with this section if it also
4 satisfies the following added requirements.

5 1. Written disclosure statement. At least 72 hours
6 before the signing of a franchise agreement or a business
7 opportunity agreement or at least 72 hours before the pay-
8 ment of any consideration, whichever occurs first, prospec-
9 tive franchisors and purchasers shall be provided with a
10 written document, the cover page of which is in at least
11 10-point type capital letters and is entitled "DISCLOSURE
12 REQUIRED BY MAINE LAW."

13 2. Contents. The body of the disclosure statement
14 shall contain the following information in addition to the
15 Federal Trade Commission's disclosure requirements:

16 A. The following notice:

17 As required by Maine law, we have secured a bond
18 in the amount of \$ _____ issued by

19 _____
20 (name and address of surety company)

21 Before signing a contract to purchase a franchise
22 or a business opportunity, you should check with the
23 surety company to determine the current status of the
24 bond.

25 or

26 As required by Maine law, we maintain an escrow
27 account in the amount of \$ _____ at

28 _____
29 (name and address of financial institution)

30 Before signing a contract to purchase a franchise
31 or a business opportunity you should check with the
32 financial institution to determine the current status
33 of the escrow account.

34 B. The following notice, to appear under the conspicu-
35 ous caption:

36 BUYER'S RIGHT TO CANCEL

37 Pursuant to Maine law, you have the right to can-
38 cel this purchase for any reason, within 3 business

1 days following the signing of the contract or agree-
2 ment. You may cancel the purchase by mailing a notice
3 to the franchisor or seller. The notice must say that
4 you do not want the franchise or business opportunity
5 and must be mailed to

6 _____
7 (name and address of franchisor or seller)
8 before midnight of _____
9 (stated date)

10 C. A list of the following:

11 (1) The states in which the proposed registrant
12 has been authorized to sell franchises or business
13 opportunities;

14 (2) The states, if any, which have refused, by
15 order or otherwise, to register these franchises
16 or business opportunities;

17 (3) The states, if any, which have revoked or
18 suspended the right to offer these franchises or
19 business opportunities; and

20 (4) The states, if any, in which the proposed
21 registration of these franchises has been with-
22 drawn;

23 D. An unexecuted copy of all contracts or agreements
24 relating to the sale of the franchise or business
25 opportunity; and

26 E. A table of contents.

27 3. Earnings claim document. If the franchisor or
28 seller makes or intends to make any oral, written or visual
29 representation to a prospective franchisee or purchaser con-
30 cerning estimated, projected or potential sales, income or
31 gross net profit for that prospective franchisee or pur-
32 chaser, the prospective franchisee or purchaser must be pro-
33 vided with an earnings claim document prepared in accordance
34 with the Federal Trade Commission's rule, 16 Code of Federal
35 Regulations, Section 436.1(b)-(e).

36 §9110. Report of sale

37 Each sale of a franchise or a business opportunity in
38 this State shall be reported to the commissioner no later
39 than 10 days after the sale is made on a form provided by
40 the Department of Business Regulation.

1 §9111. Bonds and escrow accounts

2 1. Amount. All franchisors or sellers shall either
3 obtain a surety bond issued by a surety company authorized
4 to do business in this State or have established an escrow
5 account with a licensed financial institution authorized to
6 do business in this State. The surety bond or escrow ac-
7 count shall be in an amount not less than \$30,000 nor more
8 than \$100,000, as determined by the commissioner.

9 2. Action against bond. Any person who is damaged by
10 a violation of this chapter, by the franchisor's or seller's
11 breach of contract for the franchise or business oppor-
12 tunity, or by a violation of Title 5, section 207, relating
13 to the sale, offer for sale or promotion of a franchise or
14 business opportunity may bring an action against the bond or
15 escrow account to recover damages. In addition to the reme-
16 dies provided under section 9116, the Attorney General may
17 bring an action against the bond or escrow account to
18 recover damages on behalf of persons in the State aggrieved
19 by unlawful conduct related to the sale or offer for sale of
20 a franchise or business opportunity. The aggregate liabil-
21 ity of the surety or financial institution shall be only for
22 actual damages and shall not exceed the amount of the bond
23 or escrow account.

24 3. Termination. Such a bond or escrow account shall
25 not be terminated, canceled or returned to the franchisor
26 until:

27 A. Twelve months following expiration of the registra-
28 tion under section 9104; and

29 B. The Department of Business Regulation certifies to
30 the surety company issuing the bond or to the licensed
31 financial institution holding the escrow account that
32 it has no knowledge of any outstanding judgment, claims
33 or notices of claims against the franchisor or seller
34 in this State.

35 §9112. Rules and forms

36 The commissioner may, pursuant to the Maine Administra-
37 tive Procedure Act, Title 5, chapter 375, promulgate rules
38 to aid the administration or effectuation of this chapter.
39 The commissioner may issue forms, including, but not limited
40 to, forms governing disclosure statements, applications and
41 reports. The commissioner may, for the purposes of this
42 chapter, prescribe the content and form of financial state-

1 ments and direct whether they should be certified by inde-
2 pendent public or certified accountants.

3 §9113. Copy of contracts

4 Every contract for the sale of a franchise or business
5 opportunity in this State shall be in writing and is subject
6 to this chapter. A copy of the complete contract and copies
7 of all other documents signed by the franchisee or purchaser
8 shall be provided to the franchisee or purchaser at the time
9 they are signed.

10 §9114. Right of avoidance

11 1. Method. A franchisee or purchaser may avoid a con-
12 tract for the purchase of a franchise or business oppor-
13 tunity by giving written notice of avoidance to the
14 franchisor or seller, by ordinary mail postage prepaid
15 within 3 full business days following the day on which the
16 contract was made. The notice shall be sufficient if ad-
17 ressed to the franchisor or seller at the address given
18 either in the disclosure statement or on the contract.
19 Notice of avoidance is effective upon deposit in the United
20 States mail. The notice of avoidance need not take a par-
21 ticular form and is sufficient if it expresses the intention
22 of the franchisee or purchaser not to be bound by the con-
23 tract.

24 2. Return of goods. Within 20 days after avoidance is
25 effective, the franchisee or purchaser shall tender to the
26 franchisor or seller any goods or commodities delivered pur-
27 suant to the contract. Tender is sufficient if the
28 franchisee or purchaser makes the goods or commodities
29 available to the franchisor or seller at the franchisee's or
30 purchaser's residence or business. If the franchisor or
31 seller fails to take possession of the goods or commodities
32 within 20 days after notice of tender, the goods or commo-
33 dities shall become the property of the franchisee or seller
34 without obligation to pay for them.

35 3. Return of funds. Within 20 days after notice of
36 tender, the franchisor or seller shall return to the
37 franchisee or purchaser the full amount of any fees or
38 deposits which were paid under the contract.

39 §9115. Prohibited acts

40 It is unlawful for any franchisor:

1 1. Failure to register. To fail to register pursuant
2 to sections 9104 and 9106;

3 2. Failure to provide statement. To fail to provide
4 all franchisees with the disclosure statement required by
5 section 9109;

6 3. Failure to post bond. To fail to post a bond or
7 secure an escrow account as required by section 9111;

8 4. Failure to return funds. To fail to return funds
9 after a contract is avoided pursuant to section 9114, sub-
10 section 3;

11 5. Nonconforming representations. To make any repre-
12 sentation concerning estimated, projected or actual sales,
13 income and gross or net profits unless made only in accor-
14 dance with section 9109;

15 6. Use of trademarks. To use the trademark, service
16 mark, trade name, logotype, advertising or other commercial
17 symbol of any business which does not either control the
18 ownership interest in the franchisor or seller or accept
19 responsibility for all representations made by the
20 franchisor or seller concerning the franchise or business
21 opportunity, unless the owner of the commercial symbol noti-
22 fies all prospective franchisees or purchasers that the
23 owner of the commercial symbol is not involved in the sales;

24 7. False representations. To make any false, mislead-
25 ing or deceptive representations concerning the franchise or
26 business opportunity; and

27 8. Noncompliance. To fail to comply with any other
28 provision of this chapter.

29 §9116. Waiver

30 Any waiver by a franchisee or purchaser of the provi-
31 sions of this chapter is null and void, and will not operate
32 to relieve the franchisor or seller of any obligation placed
33 upon him by this chapter.

34 §9117. Remedies

35 1. Violation. Any violation of this chapter consti-
36 tutes a violation of Title 5, chapter 10.

37 2. Class D crime. An intentional violation of this
38 chapter is a Class D crime.

1 3. Temporary restraining order. Upon application by
2 the Attorney General, the Superior Court shall issue a
3 temporary restraining order under Title 5, chapter 209,
4 enjoining any person who has committed any act prohibited by
5 section 9115 from engaging in any conduct relating to the
6 sale, offering for sale, leasing, distributing or promotion
7 of franchises or business opportunities in this State until
8 the person satisfies the court that he has complied with
9 this chapter. The Superior Court shall grant such a tempo-
10 rary restraining order without requiring a showing of
11 immediate and irreparable harm or injury.

12 §9118. Service of process

13 The Department of Business Regulation shall be an agent
14 of each franchisor or seller who sells, offers for sale,
15 advertises or promotes franchises or business opportunities
16 in this State for service of any process, notice or demand
17 required or permitted to be served. This service shall be
18 binding upon the franchisor. Service of any process, notice
19 or demand shall be made as provided for service upon the
20 Secretary of State under the Maine Rules of Civil Procedure,
21 Rule 4(d)(8).

22 §9119. Disposal of fees

23 All fees received under this chapter shall be paid to
24 the Treasurer of State and are to be used for carrying out
25 this chapter. Any balance of these fees shall not lapse,
26 but shall be carried forward as a continuing account to be
27 expended for the same purpose in the following years.

28 §9120. Employees

29 The Commissioner of Business Regulation may appoint,
30 subject to the Personnel Law, such employees as may be
31 necessary to carry out this chapter. Any person so employed
32 shall be located in the Department of Business Regulation
33 and under the administrative and supervisory direction of
34 the Commissioner of Business Regulation.

1 STATEMENT OF FACT

2 In 1979, the Legislature passed a sale of business
3 opportunities law in order to provide purchasers and poten-
4 tial purchasers with protection against unfair or deceptive
5 practices in the sale of business opportunities within this
6 State. Specifically, the law requires that sellers of busi-
7 ness opportunities register with the Department of Business
8 Regulation, post a bond or establish an escrow account and
9 disclose in writing to prospective purchasers certain infor-
10 mation.

11 The imprecise language of the law has made its inter-
12 pretation and administration extremely difficult. After 2
13 1/2 years, only one seller of business opportunities has
14 registered.

15 This bill seeks to repeal the current law and to
16 replace it with a statute covering the sale of both fran-
17 chises and business opportunities. Its passage would sim-
18 plify the registration process by conforming Maine's disclo-
19 sure requirements to the form and substance of the Federal
20 Trade Commission's disclosure requirements.

21 Additionally, this bill addresses the problem of
22 nondisclosure and misrepresentation which are apt to come to
23 light sometime after a purchaser buys a franchise or busi-
24 ness opportunity without having received essential and reli-
25 able information. To address these problems, the bill re-
26 quires franchisors and sellers of business opportunities to
27 furnish prospective buyers information in a single document
28 about the franchisor or seller, the business itself, and the
29 terms of the contract to be made. Additional information
30 must be furnished by sellers if claims are made about actual
31 or potential earnings or sales volume.

32 As does the current business opportunity law, this bill
33 requires registration with the Department of Business Regu-
34 lation and the posting of a surety bond or the establishment
35 of an escrow account.

36 This bill does not regulate the substantive terms of
37 the franchisor-franchisee or seller-purchaser agreement or
38 subsequent relationship. It does require a full and timely
39 disclosure of all facts, circumstances and claims.

40 4545123081