

1 H.694

2 Introduced by Representative Greshin of Warren

3 Referred to Committee on

4 Date:

5 Subject: Commerce and trade; franchise agreements

6 Statement of purpose: This bill proposes to establish duties and standards for  
7 the sale or transfer of a business franchise; to establish a procedure for  
8 resolution of encroachment issues arising from the granting of additional  
9 franchise locations; to establish duties, rights, and responsibilities of  
10 franchisors and franchisees in the event a franchise is terminated or  
11 nonrenewed; and to establish certain minimum protections for franchisees.

12 An act relating to franchise agreements

13 It is hereby enacted by the General Assembly of the State of Vermont:

14 Sec. 1. 9 V.S.A. chapter 106 is added to read:

15 CHAPTER 106. FRANCHISE AGREEMENTS

16 § 4061. DEFINITIONS

17 In this chapter:

18 (1) "Affiliate" means a person controlling, controlled by, or under  
19 common control with another person, every officer or director of such a  
20 person, and every person occupying a similar status or performing similar

1 functions.

2 (2) "Business day" means a day other than a Saturday, Sunday, or  
3 federal holiday.

4 (3)(A) "Franchise" means either of the following:

5 (i) An oral or written agreement, either express or implied, which  
6 provides all of the following:

7 (I) Grants the right to distribute goods or provide services  
8 under a marketing plan prescribed or suggested in substantial part by the  
9 franchisor.

10 (II) Requires payment of a franchise fee to a franchisor or its  
11 affiliate.

12 (III) Allows the franchise business to be substantially  
13 associated with a trademark, service mark, trade name, logotype,  
14 advertisement, or other commercial symbol of or designating the franchisor or  
15 its affiliate.

16 (ii) A master franchise.

17 (B) "Franchise" does not include any business that is operated under  
18 a lease or license on the premises of the lessor or licensor as long as such  
19 business is incidental to the business conducted by the lessor or licensor on  
20 such premises, including, without limitation, leased departments, licensed  
21 departments, and concessions, and the leased or licensed department operates

1 only under the trademark, trade name, service mark, or other commercial  
2 symbol designating the lessor or licensor.

3 (C) "Franchise" does not include an agreement regulated under  
4 chapters 107 (machinery dealerships), 108 (motor vehicle manufacturers,  
5 distributors, and dealers franchising), or 109 (service station operators, oil  
6 companies and franchises) of this title or any agreement or license relating to  
7 alcoholic beverages governed by Title 7.

8 (4) "Franchise fee" means a direct or indirect payment to purchase or  
9 operate a franchise. Franchise fee does not include any of the following:

10 (A) Payment of a reasonable service charge to the issuer of a credit  
11 card by an establishment accepting the credit card.

12 (B) Payment to a trading stamp company by a person issuing trading  
13 stamps in connection with a retail sale.

14 (C) An agreement to purchase at a bona fide wholesale price a  
15 reasonable quantity of tangible goods for resale.

16 (D) The purchase or agreement to purchase, at a fair market value,  
17 any fixtures, equipment, leasehold improvements, real property, supplies, or  
18 other materials reasonably necessary to enter into or continue a business.

19 (E) Payments by a purchaser pursuant to a bona fide loan from a  
20 seller to the purchaser.

21 (F) Payment of rent which reflects payment for the economic value

1 of leased real or personal property.

2 (G) The purchase or agreement to purchase promotional or  
3 demonstration supplies, materials, or equipment furnished at fair market value  
4 and not intended for resale.

5 (5) "Franchisee" means a person to whom a franchise is granted.

6 Franchisee includes the following:

7 (A) A subfranchisor with regard to its relationship with a franchisor.

8 (B) A subfranchisee with regard to its relationship with a  
9 subfranchisor.

10 (6) "Franchisor" means a person who grants a franchise or master  
11 franchise, or an affiliate of such a person. Franchisor includes a subfranchisor  
12 with regard to its relationship with a franchisee, unless stated otherwise in this  
13 section.

14 (7) "Marketing plan" means a plan or system concerning a material  
15 aspect of conducting business. Indicia of a marketing plan include any of the  
16 following:

17 (A) Price specification, special pricing systems, or discount plans.

18 (B) Sales or display equipment or merchandising devices.

19 (C) Sales techniques.

20 (D) Promotional or advertising materials or cooperative advertising.

21 (E) Training regarding the promotion, operation, or management of

1 the business.

2 (F) Operational, managerial, technical, or financial guidelines or  
3 assistance.

4 (8) "Master franchise" means an agreement by which a person pays a  
5 franchisor for the right to sell or negotiate the sale of franchises.

6 (9) "Offer" or "offer to sell" means every attempt to offer or to dispose  
7 of, or solicitation of an offer to buy, a franchise or interest in a franchise for  
8 value.

9 (10) "Sale" or "sell" means every contract or agreement of sale of,  
10 contract to sell, or disposition of a franchise or interest in a franchise for value.

11 (11) "Subfranchise" means an agreement by which a person pays a  
12 franchisor for the right to sell or negotiate the sale of franchises.

13 (12) "Subfranchisee" means a person who is granted a franchise from a  
14 subfranchisor.

15 (13) "Subfranchisor" means a person who is granted a master franchise.

16 § 4062. TRANSFER OF FRANCHISE

17 (a) A franchisee may transfer the franchised business and franchise to a  
18 transferee, provided that the transferee satisfies the reasonable current  
19 qualifications of the franchisor for new franchisees. For the purposes of this  
20 section, a reasonable current qualification for a new franchisee is a  
21 qualification based upon a legitimate business reason.

1       (b)(1) A franchisee may transfer less than a controlling interest in the  
2       franchise to an employee stock ownership plan or an employee incentive plan  
3       provided that more than 50 percent of the entire franchise is held by those who  
4       meet the franchisor's reasonable current qualifications for franchisees and such  
5       transfer is approved by the franchisor. Approval of such transfer shall not be  
6       unreasonably withheld.

7       (2) Participation by an employee in an employee stock ownership plan  
8       or employee incentive plan established pursuant to this subsection does not  
9       confer upon such employee any right to access trade secrets protected under  
10       the franchise agreement which access the employee would not otherwise have  
11       if the employee did not participate in such plan.

12       (c) A franchisor may require as a condition of a transfer any of the  
13       following:

14               (1) That the transferee successfully complete a training program.

15               (2) That a transfer fee be paid to reimburse the franchisor for the  
16       franchisor's actual expenses directly attributable to the transfer.

17               (3) That the franchisee pay or make provision acceptable to the  
18       franchisor to pay any amount due the franchisor or the franchisor's affiliate.

19               (4) That the financial terms of the transfer comply at the time of the  
20       transfer with the franchisor's current financial requirements for franchisees.

21       (d) A franchisee shall give the franchisor no less than 60 days' written

1 notice of a transfer which is subject to this subsection and on request from the  
2 franchisor shall provide in writing the ownership interests of all persons  
3 holding or claiming an equitable or beneficial interest in the franchise  
4 subsequent to the transfer or the franchisee, as appropriate. A franchisee shall  
5 not circumvent the intended effect of a contractual provision governing the  
6 transfer of the franchise or an interest in the franchise by means of a  
7 management agreement, lease, profit-sharing agreement, conditional  
8 assignment, or other similar device.

9 (e) A transfer by a franchisee is deemed to be approved 60 days after the  
10 franchisee submits the request for consent to the transfer unless the franchisor  
11 withholds consent to the transfer as evidenced in writing, specifying the reason  
12 or reasons for withholding the consent. The written notice must be delivered  
13 to the franchisee prior to the expiration of the 60-day period. Any such notice  
14 is privileged and is not actionable based upon a claim of defamation.

15 (f) A franchisor shall not discriminate against a proposed transferee of a  
16 franchise on the basis of race, color, national origin, religion, sexual  
17 orientation, gender identification, or disability.

18 (g) A transfer of less than a controlling interest in the franchise to the  
19 franchisee's spouse or child or children shall be permitted if following the  
20 transfer more than 50 percent of the interest in the entire franchise is held by  
21 those who meet the franchisor's reasonable current qualifications. If following

1 such a transfer 50 percent or less of the interest in the franchise would be  
2 owned by persons who meet the franchisor's reasonable current qualifications,  
3 the franchisor may refuse to authorize the transfer, provided that enforcement  
4 of the reasonable current qualifications is not arbitrary or capricious.

5 (h) A franchisor shall not deny the surviving spouse or a child or children  
6 of a deceased or permanently disabled franchisee the opportunity to participate  
7 in the ownership of a franchise under a valid franchise agreement for a  
8 reasonable period, which need not exceed one year, after the death or disability  
9 of the franchisee. During such reasonable period, the surviving spouse or the  
10 child or children of the franchisee shall either meet all of the qualifications  
11 which the franchisee was subject to at the time of the death or disability of the  
12 franchisee or sell, transfer, or assign the franchise to a person who meets the  
13 franchisor's current qualifications for a new franchisee. The rights granted  
14 pursuant to this subsection are subject to the surviving spouse or the child or  
15 children of the franchisee maintaining all standards and obligations of the  
16 franchise.

17 (i) Incorporation of a proprietorship franchise shall be permitted upon 60  
18 days' prior written notice to the franchisor. Such incorporation does not  
19 prohibit a franchisor from requiring a personal guaranty by the franchisee of  
20 obligations related to the franchise, and the owners of the corporation must  
21 meet the franchisor's reasonable current qualifications for franchisees.



1        (j) A transfer within an existing ownership group of a franchise shall be  
2        permitted provided that the transferee meets the franchisor's reasonable current  
3        qualifications for franchisees and written notice is submitted to the franchisor  
4        60 days prior to such a transfer. If less than 50 percent of the franchise would  
5        be owned by persons who meet the franchisor's reasonable current  
6        qualifications, the franchisor may refuse to authorize the transfer, provided that  
7        enforcement of the reasonable current qualifications is not arbitrary or  
8        capricious.

9        § 4063. ENCROACHMENT

10       (a) If a franchisor develops or grants to a franchisee the right to develop a  
11       new outlet or location which sells essentially the same goods or services under  
12       the same trademark, service mark, trade name, logotype, or other commercial  
13       symbol as an existing franchisee and the new outlet or location is in  
14       unreasonable proximity to the existing franchisee's outlet or location and has  
15       an adverse effect on the gross sales of the existing franchisee's outlet or  
16       location, the existing adversely affected franchisee has a cause of action for  
17       monetary damages in an amount calculated pursuant to subsection (d) of this  
18       section unless any of the following apply:

19       (1) The franchisor has first offered the new outlet or location to the  
20       existing franchisee on the same basic terms and conditions available to the  
21       potential franchisee, and such existing franchisee meets the reasonable current

1 qualifications of the franchisor including any financial requirements, or, if the  
2 new outlet or location is to be owned by the franchisor, on the terms and  
3 conditions that would ordinarily be offered to a franchisee for a similarly  
4 situated outlet or location.

5 (2) The adverse impact on the existing franchisee's annual gross sales,  
6 based on a comparison to the annual gross sales from the existing outlet or  
7 location during the 12-month period immediately preceding the opening of the  
8 new outlet or location, is determined to have been less than six percent during  
9 the first 12 months of operation of the new outlet or location.

10 (3) The existing franchisee, at the time the franchisor develops or grants  
11 to a franchisee the right to develop a new outlet or location, is not in  
12 compliance with the franchisor's then-current reasonable criteria for eligibility  
13 for a new franchise, not including any financial requirements.

14 (4) The existing franchisee has been granted reasonable territorial rights,  
15 and the new outlet or location does not violate those territorial rights.

16 (b)(1) The franchisor, with respect to claims made under subsection (a) of  
17 this section, shall establish both of the following:

18 (A) A formal procedure for hearing and acting upon claims by an  
19 existing franchisee with regard to a decision by the franchisor to develop or to  
20 grant to a franchisee the right to develop a new outlet or location prior to the  
21 opening of the new outlet or location.

1           (B) A reasonable formal procedure for mediating a dispute resulting  
2 in an award of compensation or other form of consideration to a franchisee to  
3 offset all or a portion of the franchisee’s lost profits caused by the  
4 establishment of the new outlet or location. The procedure shall involve a  
5 neutral third-party mediator. The procedure shall be deemed reasonable if  
6 approved by a majority of the franchisor’s franchisees in the United States.

7           (2) A dispute submitted to a formal procedure under subdivision (1) of  
8 this subsection does not diminish the rights of a franchisor or franchisee to  
9 bring a cause of action for a violation of this subsection if no settlement results  
10 from such procedure.

11           (c) A franchisor shall establish and make available to its franchisees a  
12 written policy setting forth its reasonable criteria to be used by the franchisor  
13 to determine whether an existing franchisee is eligible for a franchise for an  
14 additional outlet or location.

15           (d)(1) In establishing damages under a cause of action brought pursuant to  
16 this subsection, the franchisee has the burden of proving the amount of lost  
17 profits attributable to the compensable sales. In any action brought under this  
18 subsection, the damages payable shall be limited to no more than three years of  
19 the proven lost profits. For purposes of this subsection, “compensable sales”  
20 means the annual gross sales from the existing outlet or location during the  
21 12-month period immediately preceding the opening of the new outlet or

1 location less both of the following:

2 (A) Six percent of the annual gross sales for that 12-month period  
3 immediately preceding the opening of the new outlet or location.

4 (B) The actual gross sales from the operation of the existing outlet or  
5 location for the 12-month period immediately following the opening of the  
6 new outlet or location.

7 (2) Compensable sales shall exclude any amount attributable to factors  
8 other than the opening and operation of the new outlet or location.

9 (e) Any cause of action brought under this subsection must be filed within  
10 18 months of the opening of the new outlet or location or within 30 days after  
11 the completion of the procedure under subdivision (b)(1) of this section,  
12 whichever is later.

13 § 4064. TERMINATION

14 (a) Except as otherwise provided by this section, a franchisor shall not  
15 terminate a franchise prior to the expiration of its term except for good cause.  
16 For purposes of this section, “good cause” is cause based upon a legitimate  
17 business reason. “Good cause” includes the failure of the franchisee to comply  
18 with any material lawful requirement of the franchise agreement, provided that  
19 the termination by the franchisor is not arbitrary or capricious. The burden of  
20 proof of showing that the action of the franchisor is arbitrary or capricious  
21 shall rest with the franchisee.

1       (b) Prior to termination of a franchise for good cause, a franchisor shall  
2 provide a franchisee with written notice stating the basis for the proposed  
3 termination. After service of written notice, the franchisee shall have a  
4 reasonable period of time to cure the default, which in no event shall be less  
5 than 30 days or more than 90 days. In the event of nonpayment of moneys due  
6 under the franchise agreement, the period to cure need not exceed 30 days.

7       (c) Notwithstanding subsection (b) of this section, a franchisor may  
8 terminate a franchise upon written notice and without an opportunity to cure if  
9 any of the following apply:

10       (1) The franchisee or the business to which the franchise relates is  
11 declared bankrupt or judicially determined to be insolvent.

12       (2) All or a substantial part of the assets of the franchise or the business  
13 to which the franchisee relates are assigned to or for the benefit of any creditor  
14 which is subject to chapter 53 of this title. An assignment for the benefit of  
15 any creditor pursuant to this subdivision does not include the granting of a  
16 security interest in the normal course of business.

17       (3) The franchisee voluntarily abandons the franchise by failing to  
18 operate the business for five consecutive business days during which the  
19 franchisee is required to operate the business under the terms of the franchise  
20 or for any shorter period after which it is not unreasonable under the facts and  
21 circumstances for the franchisor to conclude that the franchisee does not intend

1 to continue to operate the franchise, unless the failure to operate is due to  
2 circumstances beyond the control of the franchisee.

3 (4) The franchisor and franchisee agree in writing to terminate the  
4 franchise.

5 (5) The franchisee knowingly makes any material misrepresentations or  
6 knowingly omits to state any material facts relating to the acquisition or  
7 ownership or operation of the franchise business.

8 (6) The franchisee repeatedly fails to comply with one or more material  
9 provisions of the franchise agreement, when the enforcement of such material  
10 provisions is not arbitrary or capricious, whether or not the franchisee complies  
11 after receiving notice of the failure to comply.

12 (7) The franchised business or business premises of the franchisee are  
13 lawfully seized, taken over, or foreclosed by a government authority or  
14 official.

15 (8) The franchisee is convicted of a felony or any other criminal  
16 misconduct which materially and adversely affects the operation, maintenance,  
17 or goodwill of the franchise in the relevant market.

18 (9) The franchisee operates the franchised business in a manner that  
19 imminently endangers the public health and safety.

20 (d) Upon termination of any franchise, the franchisee shall be allowed fair  
21 and reasonable compensation by the franchisor for the franchisee's inventory,

1 supplies, equipment and furnishings purchased by the franchisee from the  
2 franchisor or its approved sources under the terms of the franchise or any  
3 ancillary or collateral agreement; provided that no compensation shall be  
4 allowed for personalized items which have no value to the franchisor.

5 § 4065. NONRENEWAL OF A FRANCHISE

6 (a) A franchisor shall not refuse to renew a franchise unless both of the  
7 following apply:

8 (1) At least six months prior to the expiration date or any extension of  
9 the franchise agreement, the franchisee has been notified of the franchisor's  
10 intent not to renew.

11 (2) Any of the following circumstances exists:

12 (A) Good cause exists, provided that the refusal of the franchisor to  
13 renew is not arbitrary or capricious. For purposes of this section, "good cause"  
14 means cause based on a legitimate business reason.

15 (B) The franchisor and the franchisee agree not to renew the  
16 franchise.

17 (C) The franchisor completely withdraws from directly or indirectly  
18 distributing its products or services in the geographic market served by the  
19 franchisee, provided that upon expiration of the franchise, the franchisor agrees  
20 not to seek to enforce any covenant of the nonrenewed franchisee not to  
21 compete with the franchisor or franchisees of the franchisor.

1       (b) As a condition of renewal of the franchise, a franchise agreement may  
2       require that the franchisee meet the then-current requirements for franchises  
3       and that the franchisee execute a new agreement incorporating the then-current  
4       terms and fees for new franchises.

5       § 4066. SOURCES OF GOODS OR SERVICES

6       A franchisor shall not require that a franchisee purchase goods, supplies,  
7       inventories, or services exclusively from the franchisor or from a source or  
8       sources of supply specifically designated by the franchisor where such goods,  
9       supplies, inventories, or services of comparable quality are available from  
10       sources other than those designated by the franchisor. However, the  
11       publication by the franchisor of a list of approved suppliers of goods, supplies,  
12       inventories, or services or the requirement that such goods, supplies,  
13       inventories, or services comply with specifications and standards prescribed by  
14       the franchisor does not constitute designation of a source. Additionally, the  
15       reasonable right of a franchisor to disapprove a supplier does not constitute a  
16       designation of source. This section does not apply to the principal goods,  
17       supplies, inventories, or services manufactured by the franchisor or to such  
18       goods, supplies, inventories, or services entitled to protection as a trade secret.

19       § 4067. FRANCHISEE'S RIGHT TO ASSOCIATE

20       A franchisor shall not restrict a franchisee from associating with other  
21       franchisees or from participating in a trade association and shall not retaliate



1 against a franchisee for engaging in these activities.

2 § 4068. DUTY OF GOOD FAITH

3 (a) A franchise imposes on the parties a duty of good faith in performance  
4 and enforcement of the franchise agreement. “Good faith” means honesty in  
5 fact and the observance of reasonable commercial standards of fair dealing in  
6 the trade.

7 (b) The duty of good faith is imposed in situations including but not limited  
8 to where the franchisor opens a new outlet or location that has an adverse  
9 impact on an existing franchisee.

10 § 4069. APPLICABILITY; JURISDICTION; VENUE; VIOLATIONS

11 (a) A franchise is operated in this state only if the premises from which the  
12 franchise is operated are physically located in this state. A franchise including  
13 marketing rights in or to this state is deemed to be operated in this state only if  
14 the franchisee’s principal business office is physically located in this state.  
15 This chapter does not apply to a franchise solely because an agreement relating  
16 to the franchise provides that the agreement is subject to or governed by the  
17 laws of this state.

18 (b) A provision in a franchise agreement restricting jurisdiction to a forum  
19 outside this state or requiring the application of the law of another state is void  
20 with respect to a claim otherwise enforceable under this chapter.

21 (c) A civil action or proceeding arising out of a franchise may be

1 commenced wherever jurisdiction over the parties or subject matter exists,  
2 even if the agreement limits actions or proceedings to a designated jurisdiction.

3 (d) Waivers void. A condition, stipulation, or provision requiring a  
4 franchisee to waive compliance with or relieving a person of a duty or liability  
5 imposed by or a right provided by this section or a rule or order under this  
6 section is void. This subsection shall not affect the settlement of disputes,  
7 claims, or civil lawsuits arising or brought pursuant to this section.

8 (e) A person who violates a provision of this chapter or an order issued  
9 under this chapter is liable for damages caused by the violation, including costs  
10 and fees, and subject to appropriate injunctive, equitable, or other relief.

11 Sec. 2. EFFECTIVE DATE

12 (a) This act shall take effect on July 1, 2012.

13 (b) This act shall not apply to an existing franchise agreement unless and  
14 until such agreement is substantially amended or renewed on or after July 1,  
15 2012.