

**SENATE . . . . . No. 73**

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The Commonwealth of Massachusetts

PRESENTED BY:

*Brian A. Joyce*

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act protecting small business investments.

PETITION OF:

NAME:

*Brian A. Joyce*

DISTRICT/ADDRESS:

*Norfolk, Bristol and Plymouth*

**SENATE . . . . . No. 73**

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By Mr. Joyce, a petition (accompanied by bill, Senate, No. 73) of Brian A. Joyce for legislation to regulate franchise agreements . Community Development and Small Businesses.

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[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE

□ □ SENATE  
□ , NO. 1843 OF 2011-2012.]

**The Commonwealth of Massachusetts**

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**In the Year Two Thousand Thirteen**  
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An Act protecting small business investments.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. The Legislature makes the following findings:

2 (1) Franchise businesses represent a large and growing segment of the Commonwealth’s  
3 retail and service businesses and are rapidly replacing more traditional forms of small business  
4 ownership in the Massachusetts economy.

5 (2) Franchise businesses involve a joint enterprise between the franchisor and franchisees  
6 in which each party has a vested interest and equity in the franchised business.

7 (3) Most prospective franchisees lack bargaining power and generally invest substantial  
8 amounts to obtain a franchise business when they may be unfamiliar with operating a business,  
9 with the business being franchised and with industry practices in franchising.

10 (4) Many franchises reflect a profound imbalance of contractual power in favor of the  
11 franchisor, and fail to give due regard to the legitimate business interests of the franchisee, as a  
12 result of the franchisor reserving pervasive contractual rights over the franchise relationship.

13 (5) Franchisees may suffer substantial financial losses if the franchisor does not act in  
14 good faith in the performance of the franchise agreement.

15 (6) Traditional common law doctrines have not evolved sufficiently to protect franchisees  
16 adequately from fraudulent or unfair practices in the sale and operation of franchise businesses,  
17 and significant contractual and procedural restrictions have denied franchisees adequate legal  
18 recourse to protect their interests in such businesses.

19 (7) A franchisee's freedom to contract remains greatly limited by the disparity of  
20 bargaining power, lack of consistent legal standards, and other factors described above. This Act  
21 is necessary to restore freedom to contract, to remove restrictive barriers impeding entry into  
22 industries and markets dominated by franchise systems, and to protect franchisee investments.

23 SECTION 2. The General Laws are hereby amended by inserting after chapter 93I the  
24 following chapter:-

25 Chapter 93J. Regulation of Franchise Agreements.

26 Section 1. Title.

27 This chapter shall be known as the Massachusetts Fair Franchise Act.

28 Section 2. Purposes.

29 (a) This chapter shall be liberally construed and applied to promote its underlying  
30 remedial purposes and policies.

31 (b) The underlying purposes and policies of this chapter are:

32 (1) To promote the compelling interest of the public in fair business relations between  
33 franchisees and franchisors;

34 (2) To protect franchisees against unfair treatment by franchisors, who inherently have  
35 superior economic power and superior bargaining power in the negotiation of the business;

36 (3) To provide franchisees with rights and remedies in addition to those existing by  
37 contract or common law;

38 (4) To govern franchise agreements, including any renewals or amendments, to the full  
39 extent consistent with the constitutions of the Commonwealth of Massachusetts and the United  
40 States.

41 (c) The effect of this chapter may not be varied or waived by contract or agreement. Any  
42 contract or agreement purporting to do so is void and unenforceable to that extent only.

43 Section 3. Definitions.

44 For the purposes of chapter, the following words shall have the following meanings:

45 "Franchise" means a contract or agreement, either expressed or implied, whether oral or  
46 written, between two or more persons by which: (i) the franchisor will exert or has the authority  
47 to exert a significant degree of control over the franchisee's, method of operation, or provide  
48 significant assistance in the franchisee's method of operation; (ii) the operation of the  
49 franchisee's business pursuant to that plan or system is substantially associated with the  
50 franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial  
51 symbol designating the franchisor or its affiliate; and (iii) as a condition of obtaining or  
52 commencing operation of the franchise, the franchisee makes a required payment or commits to  
53 make a required payment to the franchisor or its affiliate.

54 "Franchisee" means a person to whom a franchise is granted.

55 "Franchisor" means a person that grants a franchise.

56 "Affiliate" an entity controlled by, controlling, or under common control with, another  
57 entity.

58 "Person" means an individual, a corporation, a partnership, a limited liability company, a  
59 joint venture, an association, a joint stock company, a trust or an unincorporated organization.

60 "Required payment" means all consideration that the franchisee must pay to the  
61 franchisor or an affiliate, either by contract or by practical necessity, as a condition of obtaining  
62 or commencing operation of the franchise, continuing in, reinstating or renewing the operation of  
63 a franchise. A required payment does not include payments for the purchase of reasonable  
64 amounts of inventory at bona fide wholesale prices for resale or lease.

65 "Good faith" means honesty in fact and the observance of reasonable commercial  
66 standards of fair dealing in the trade. As used in this Act, a duty of good faith shall obligate a  
67 party to a franchise to do nothing that will have the effect of destroying or injuring the right of  
68 the other party to obtain and receive the expected fruits of the contract and to do everything  
69 required under the contract to accomplish such purpose; and require honesty of fact and  
70 observance of reasonable standards of fair dealing in the trade.

71 Section 4. Applicability of Chapter.

72 Any person who engages directly or indirectly in purposeful contacts in the  
73 Commonwealth in connection with the offering or advertising for sale or has business dealings  
74 with respect to franchises in the Commonwealth shall be subject to this chapter and shall be  
75 subject to the jurisdiction of the courts of the Commonwealth, upon service of process in  
76 accordance with chapter 223A.

77 Section 5. Termination; Good Cause; Notice; Opportunity to Cure.

78 (a) A franchisor shall not, directly or through an officer, agent or employee, terminate or  
79 cancel a franchise, or substantially change the competitive circumstances of a franchise  
80 agreement except for good cause shown.

81 (b) Good cause shall be based upon legitimate business reason which shall include, but  
82 not be limited to, the franchisee's refusal or failure to comply substantially with any material,  
83 reasonable and reasonably necessary express obligation of the franchise agreement, including  
84 repeated and intentional nonpayment of royalties or other payments clearly required by the  
85 franchise agreement.

86 (c) A default under one franchise agreement shall not in and of itself constitute a default  
87 under another franchise agreement to which the franchisee or an affiliate of the franchisee is a  
88 party.

89 (d) The franchisor shall bear the burden of proving good cause.

90 (e) Prior to termination or cancellation of the franchise, the franchisor shall give the  
91 franchisee written notice at least 90 days in advance of the termination. The notice shall state all  
92 of the reasons constituting good cause for termination or cancellation and shall provide that the  
93 franchisee has 60 days in which to rectify any claimed discrepancy.

94 (f) The requirement for 90 days advance written notice for termination shall not apply if  
95 the reason for termination is because: (1) the alleged grounds are voluntary abandonment by the  
96 franchisee of the franchise relationship, in which event, such notice may be given 15 days in  
97 advance of the termination or cancellation; or (2) conviction of the franchisee in a court of  
98 competent jurisdiction of an offense (a) punishable by a term of imprisonment in excess of 1  
99 year, (b) directly related to the business conduct pursuant to the franchise, (c) which materially  
100 impairs the goodwill value of the franchise or the franchised trademark mark, and (d) which is no  
101 longer appealable. In that event, such notice may be given at any time following the date on  
102 which the conviction is no longer appealable and shall be effective upon delivery and written  
103 receipt of the notice. In no event shall any franchisor collect any financial penalty or fee,  
104 however delineated, as a consequence of such conviction.

105 (g) If the reason for termination or cancellation is nonpayment of sums due under the  
106 franchise agreement, the franchisee shall be entitled to written notice of such default, and shall  
107 have ten (10) days in which to cure such default from the date of such notice. A franchisee has  
108 the right to cure three (3) times in any twelve (12) month period during the period of the  
109 dealership agreement.

110 (h) If the reason for termination or cancellation is violation of any law, regulation or  
111 standard relating to an imminent danger to public health or safety, the franchisee shall be entitled  
112 to immediate written notice and shall have twenty-four (24) hours following receipt of such  
113 notice to cure such violation.

114 (i) A franchisee may terminate a franchise agreement for good cause shown, without  
115 penalty or fees. Good cause shall include but not be limited to changes to the franchise system  
116 or the competitive circumstances of the franchise agreement created or expressly required by  
117 franchisor which would cause substantial negative impact or substantial financial hardship to the  
118 franchisee in the operation of its franchise.

119 Section 6. Renewal of the Franchise; Notice.

120 (a) A franchisor shall not, directly or through an officer, agent or employee, fail to renew  
121 a franchise, except for good cause shown.

122 (b) Renewals shall not be subject to unreasonable fees. Fees shall not be deemed  
123 unreasonable if they do not exceed the amount of the average initial franchise fee or other  
124 Required Payment then being charged to all franchisees in the market.

125 (c) Good cause shall be based upon legitimate business reason which shall include, but  
126 not be limited to, the franchisee's refusal or failure to comply substantially with any material,  
127 reasonable and reasonably necessary express obligation of the franchise agreement, including  
128 repeated and intentional nonpayment of royalties, advertising or marketing fees clearly required  
129 by the franchise agreement.

130 (d) The franchisor shall act in good faith and shall not refuse to renew a franchise for  
131 arbitrary or capricious reasons or for solely the financial gain of the franchisor or any affiliate of  
132 the franchisor.

133 (e) Before non-renewal of the franchise, the franchisor shall give the franchisee written  
134 notice at least 90 days in advance of the non-renewal. The notice shall state all of the reasons  
135 constituting good cause for the non-renewal and shall provide that the franchisee has 60 days in  
136 which to rectify any claimed discrepancy and reinstate its right to renew the franchise.

137 Section 7. Unfair Acts and Practices.

138 (a) Unfair methods of competition and unfair or deceptive acts or practices are hereby  
139 declared to be unlawful.

140 (b) In construing subsection (a) the courts may be guided by but not bound to the  
141 interpretations of the Federal Trade Commission Act, 15 U.S.C. 45.

142 (c) The attorney general may make rules and regulations interpreting subsection (a). The  
143 rules and regulations shall not be inconsistent with the rules, regulations and decisions of the  
144 Federal Trade Commission and the federal courts interpreting the Federal Trade Commission  
145 Act, 15 U.S.C. 45.

146 (d) It shall be an unfair or deceptive act or practice, within the meaning of sections 2 and  
147 11 of chapter 93A of the General Laws to violate any of the provisions of this chapter.

148 (e) A franchisor shall not terminate, cancel or fail to renew a franchise for the failure or  
149 refusal of the franchisee to do any of the following:

150 (1) Failure to meet sales quotas suggested or required by the franchisor not expressly set  
151 forth in the franchise agreement.

152 (2) Refusal to keep the franchised premises open and operating during hours which are  
153 unprofitable to the franchisee or to preclude the franchisee from establishing its own hours of  
154 operation or non-operation between the hours of 10 p.m. and 6 a.m.

155 (3) Refusal to give the franchisor or any supplier financial records of the operation of the  
156 franchise which are not directly related or necessary to the performance of franchisee's express  
157 obligations under the franchise agreement

158 (f) A franchisor, directly or indirectly, through any affiliate, officer, agent, or employee  
159 shall not do any of the following:

160 (1) Restrict a franchisee from associating with other franchisees or from joining, leading  
161 or otherwise participating in a trade or other association, or retaliate against a franchisee for  
162 engaging in these activities.

163 (2) Require or prohibit any change in management of any franchise unless the  
164 requirement or prohibition of the change shall be for good cause, which cause shall be stated in  
165 writing by the franchisor and be based on violations of material, reasonable and reasonably  
166 required express provisions of the franchise agreement. Good cause shall include, but be limited  
167 to, requiring that management of the franchise be conducted by personnel who have been trained  
168 in the manner required of all franchise managers in the system or are legally eligible for  
169 employment in the United States of America.

170 (3) Impose on a franchise by contract, manual, policy, rule or regulation, whether written  
171 or oral, a standard of conduct or performance where the franchisor, its agents or representatives,  
172 cannot sustain the burden of proving the standard to be reasonable and necessary and uniformly  
173 enforced and applied throughout its system of similarly situated franchisees, franchisor-owned  
174 units and licensees in substantially the same manner. Notwithstanding the foregoing, it shall not  
175 be a violation of this chapter for a franchisor to provide forbearance to any franchisee as a means  
176 of assistance to the franchisee in performing its obligations under the franchise agreement or in  
177 operating its franchise in exigent circumstances.

178 (4) Fail to deal fairly and in good faith or fail to exercise due care with a franchisee or  
179 any association or other aggregation or incorporation of franchisees in all matters, including,  
180 without limitation, transfer of the franchise, administration of advertising funds, rewards  
181 programs, marketing funds and the interpretation, administration and performance of franchise  
182 and area development or territory agreements.

183 (5) Sell, rent or offer to sell to a franchisee any product or service for more than a fair and  
184 reasonable price or without the reasonable expectation that the sale or rental of the same will  
185 promote the profitability of the franchisee's business.

186 (6) Discriminate between franchises in the charges offered or made for royalties, goods,  
187 services, equipment, rentals, advertising services, or in any other business dealing, unless (A)  
188 that discrimination between franchisees would be necessary to allow a particular franchisee to  
189 fairly meet competition in the open market, (B) does not adversely affect the business of any  
190 existing franchisee, and (C) to the extent that the franchisor satisfies the burden of proving that  
191 any classification of or discrimination between franchisees is reasonable, is based on franchises  
192 granted at materially different times and the discrimination is reasonably related to the difference  
193 in time or on other proper and justifiable distinctions, and is not arbitrary or intended to be for  
194 the benefit of the franchisor at the expense of any franchisee. Nothing in this subsection shall be  
195 construed as granting to a franchisor any right which may be limited by any other state or federal  
196 statute.

197 (7) Notify the franchisee of a claimed breach of franchise agreement for good cause later  
198 than 180 days from the date good cause arises or 180 days after the franchisor knew or in the  
199 exercise of reasonable care should have known of the claimed good cause.

200 (8) Require a franchisee to sell any product or service for a price at a loss or otherwise  
201 not reasonably acceptable to the franchisee in the franchisee's good faith discretion.

202 (9) Fail to make readily available to franchisees, without charge, true, accurate and  
203 complete copies of all records of marketing, rewards programs, advertising funds and fees that  
204 have been paid by franchisees, vendors, suppliers and licensees.

205 (10) Coerce a franchisee to assent to a release, assignment, novation, waiver or estoppel  
206 which would prospectively relieve any person from liability imposed by this chapter.

207 (11) Require or demand that a franchisee pay liquidated or other post termination  
208 damages in excess of the average monthly royalty fees paid by the franchisee during the prior 12  
209 full calendar months (or the shorter time that the franchised location has been in the system),  
210 multiplied by the lesser of six (6) months or the number of months remaining in the term of the  
211 franchise agreement.

212 (12) Act to accomplish, either directly or indirectly through any affiliate or agent, what  
213 would otherwise be prohibited under this chapter on the part of the franchisor or an affiliate of  
214 franchisor.

215 (13) Require or demand that a franchisee pay the legal fees and related expenses of the  
216 franchisor or any affiliate of the franchisor in any dispute or proceeding, whether by contract or



217 otherwise, unless the Franchisor is the prevailing party. All such provisions in violation of this  
218 clause are deemed void.

219 Section 8. Transfer of the Franchise.

220 (a) It shall be a violation of this chapter for any franchisee to transfer, assign or sell a  
221 franchise or interest therein to another person unless the franchisee shall first notify the  
222 franchisor of such intention by written notice setting forth in the notice of intent the prospective  
223 transferee's name, address, statement of financial qualification and business experience during  
224 the previous 5 years.

225 (b) The franchisor shall within 30 days after receipt of such notice either approve in  
226 writing to the franchisee such sale to proposed transferee or by written notice advise the  
227 franchisee of the unacceptability of the proposed transferee setting forth material reasons relating  
228 to the character, financial ability or business experience of the proposed transferee. If the  
229 franchisor does not reply within the specified 30 days, its approval is deemed granted.

230 (c) No such transfer, assignment or sale hereunder shall be valid unless the transferee  
231 agrees in writing to comply with all the requirements of the franchise then in effect. Any fee  
232 imposed by the franchisor as a condition of such transfer shall be limited to the franchisor's  
233 reasonable out-of-pocket expenses incurred in reviewing and approving such transfer.

234 (d) It shall be a violation of this chapter for any franchisor to prohibit or interfere with:

235 (1) The transfer of a franchise and the rights of franchisee to a qualified purchaser,  
236 including, but not limited to family members or business partners, nor shall a franchisor impose  
237 unreasonable stipulations or penalties regarding such transfer

238 (2) The transfer by will, or other lawful probate or similar procedure of any franchise and  
239 the rights of any franchisee.

240 Section 9. Effect of Termination.

241 (a) Upon termination of a franchise for whatever cause or reason, except voluntary  
242 relinquishment or abandonment of the franchise by the franchisee or the expiration of the  
243 franchise agreement where the franchisee does not elect to renew, the franchisor shall fairly  
244 compensate the franchisee or franchisee's estate for the fair market value at the time of  
245 termination of the franchise, of the franchisees inventory, supplies, equipment and furnishings  
246 purchased by the franchisee from the franchisor or its approved sources and the fair market value  
247 of good will, if any, exclusive of personalized items which have no value to the franchisor and  
248 inventory, supplies, equipment and furnishings not reasonably required in the conduct of the  
249 franchise business; provided, however, that

250 (1) Compensation need not be made to franchisee of good will if the franchisor agrees in  
251 writing not to enforce a covenant which restrains the franchisee from competing with the  
252 franchisor in the same or substantially similar business in the same or substantially similar  
253 manner at the same location using the same property except the franchisor's registered trademark  
254 or trade name; and

255 (2) A franchisor may offset against amounts owed to a franchisee under this subsection  
256 any amount mutual agreed upon and owed by the franchisee to franchisor which is not the  
257 subject of a good faith dispute by the franchisee.

258 (b) The provisions of this section shall not be construed to permit the termination or  
259 nonrenewal of any franchise agreement except in accordance with the express terms of the  
260 franchise agreement and this chapter.

261 Section 10. Good Faith and Fair Dealing; Duty of Due Care.

262 (a) All franchisors owe a duty of good faith and fair dealing to each of its franchisees. A  
263 franchise agreement imposes on the franchisor a duty of due care. Unless a franchisor represents  
264 that it has great skill or knowledge in its undertaking with the franchisees, or conspicuously  
265 disclaims that it has skill or knowledge, the franchisor is required to exercise the skill and  
266 knowledge normally possessed by franchisors in good standing in the same or similar types of  
267 business.

268 (b) For purposes of this subsection , term "skill or knowledge" means something more  
269 than the mere minimum level of skill or knowledge required of any person engaging in a service  
270 or business and involves a special level of expertise –

271 (1) which is the result of acquired learning and aptitude developed by special training and  
272 experience in the business to be licensed under the franchise agreement, or the result of extensive  
273 use and experience with the goods or services or the operating system of such business;

274 (2) which is the experience in organizing a franchise system and in providing training,  
275 assistance and services to franchisees; and which a prospective franchisee would expect in  
276 reasonable reliance on the written and oral commitments and representations of the franchisor.

277 Section 11. Warranties; Indemnification.

278 (a) A franchisor shall indemnify and save harmless its franchisee from financial loss and  
279 expense, including legal fees and costs, arising out of any claim, demand, suit or judgment by  
280 reason of a defect in merchandise, methods or procedures prescribed by franchisor and required  
281 to be performed by the franchisee, except for the negligent act or willful misconduct of the  
282 franchisee which causes said loss or expense.

283 (b) No franchisee, franchisee association or cooperative of franchisees shall be liable for  
284 the negligence or misconduct of any supplier or distributor of products or services prescribed by  
285 the franchisor, or for the failure of any product or service prescribed by the franchisor which are  
286 not fit for the particular purpose for which they were prescribed or any purpose related thereto,  
287 and any contractual provisions to the contrary shall be void as against public policy.

288 (c) A franchisor shall reimburse its franchisee at the prevailing retail price for any  
289 services rendered or products or parts supplied by the franchisee in satisfaction of any warranty  
290 issued by the franchisor or any warranty issued by the franchisee which is mandated by the  
291 franchisor, and, and a franchisor shall not restrict a franchisee from rendering services or  
292 providing parts in accordance with standards of good workmanship in satisfaction of the  
293 warranty.

#### 294 Section 12. Enforcement.

295 (a) If any franchisor violates any provision of this chapter, a franchisee may bring an  
296 action against such franchisor in any court of competent jurisdiction of the Commonwealth for  
297 damages sustained by the franchisee as a consequence of the franchisor's violation, together with  
298 the actual costs of the action, including reasonable actual attorneys' fees, and the franchisee also  
299 may be granted injunctive relief against unlawful termination, cancellation, or nonrenewal.

300 (b) Notwithstanding any term or provision of a franchise agreement to the contrary: (1)  
301 the laws of the commonwealth shall govern the interpretation of the franchise agreement of a  
302 franchise located in the commonwealth and the performance of the parties thereunder, and (2)  
303 the courts of the commonwealth and the federal courts with jurisdiction over cases filed in the  
304 district of Massachusetts shall have exclusive jurisdiction with respect to any action brought  
305 under this chapter or any action brought by a franchisor concerning a franchise located in the  
306 commonwealth.

307 (c) Upon the written request of a franchisor or a franchisee, the attorney general may  
308 enforce compliance with this chapter in accordance with section 4 of chapter 93A.

#### 309 Section 13. Void Provisions; Arbitration; Mediation; Class Action.

310 (a) A clause or provision in a franchise agreement requiring the parties to submit to  
311 arbitration shall be forceable only if the parties have voluntarily entered into an agreement  
312 after the dispute arises to submit to arbitration and the proceeding is conducted at a location  
313 within the Commonwealth reasonably convenient to the franchisee; provided, however, that the  
314 provisions of this subsection shall not prohibit the enforceability of a clause or provision in a  
315 franchise agreement which requires the parties to submit to non-binding mediation conducted at  
316 a location within the Commonwealth reasonably convenient to the franchisee.

317 (b) No provision in a franchise agreement shall deprive the franchisee from participating  
318 as member of a class or in a consolidated action permitted under Rules 23 and 19, respectively,  
319 of the Massachusetts and Federal Rules of Civil Procedure.

320 Section 14. Time Limitations; Cause of action.

321 (a) Actions arising out of this chapter shall be commenced within 4 years next after the  
322 cause of action accrues; but if a person liable hereunder fraudulently conceals the cause of action  
323 from the knowledge of the person entitled to bring it, the period prior to the discovery of its  
324 cause of action by the person so entitled shall be excluded in determining the time limit for the  
325 commencement of the action. Any provision in a franchise agreement, which requires any party  
326 to a franchise agreement to commence an action within any shorter period than as provided in  
327 this section, shall be void as against public policy.

328 (b) If a cause of action accrues during the pendency of any civil, criminal or  
329 administrative proceeding against a person brought by the United States or any of its agencies  
330 under the anti-trust laws, the Federal Trade Commission Act, or any other federal act, or brought  
331 by the Commonwealth or any of its political subdivisions under the laws of the Commonwealth  
332 related to anti-trust laws or to franchising, the actions may be commenced within 1 year after the  
333 final disposition of the civil, criminal or administrative proceeding.

334 Section 15. Severability.

335 If any provision or clause of this section or any application of this section to any person  
336 or circumstances is held invalid, such invalidity shall not affect other provisions or applications  
337 of the section which can be given effect without the invalid provision or application, and to this  
338 end the provisions of this section are declared to be severable.