

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

SF-00006-05 (4/86)

DEPARTMENT : ATTORNEY GENERAL

STATE OF MINNESOTA

Office Memorandum

DATE : April 11, 1990

TO : MISSY NORINE OLSON-ELM
Special Assistant
Attorney General

FROM :
MARTHA J. CASSERLY MJC
Special Assistant Attorney General
525 Park Street, Suite 500 (55103)

PHONE :
296-6839

SUBJECT :
In the Matter of the Adopted Permanent Rule
Relating to Franchises

The above-referenced Permanent rule has been approved as to its legality by the Attorney General on April 9, 1990.

Enclosed is your copy of the approved rule. This office has already filed two copies with the Secretary of State, who will forward one copy to the Revisor of Statutes. The fourth is being retained by this division of the Attorney General's Office for its records.

Also enclosed are any petitions, requests, submissions or comments along with any extra copies of documents which you submitted to the Attorney General.

Your next step is to arrange for publication of the Notice of Adoption in the State Register. In a day or two, you should receive from the Revisor's Office three copies of the notice of adoption of your rule. You should submit two copies of the Notice of Adoption to the State Register for publication. A permanent rule without a hearing does not become effective until five days after a notice of adoption is published in the State Register in accordance with Minn. Stat. § 14.27. An emergency rule becomes effective five working days after approval by the Attorney General; however, the agency must publish a notice in the State Register in accordance with Minn. Stat. § 14.34.

If you have any questions in this regard please contact me.

MJC:bbl
Enclosures
cc: William Brown, Chief Judge (memo only)
MaryAnn Hruby " "

Rev. #AR1551 MJC

RULE REVIEW CHECKLIST
(commerce)

File No. 1687 Docket No. 05-0009-0125

DATE RECEIVED 3-28-90 ADOPTED W/O HEARING X

REVIEW DATE 4-6-90 EMERGENCY RULE _____

DUE DATE 4-11-90 To Revisor: 3-29-90

REVISOR APPROVED 4-8-90

APPROVED 4-9-90 mjc REVISOR DISAPPROVED _____

DISAPPROVED _____ FILED W/SEC. OF STATE 4-11

WITHDRAWN _____ RETURNED TO AGENCY 4-11

✓ Rule as adopted (4 copies)

✓ Notice to Solicit Outside Information/Opinion (if applicable)
- Sept 11, 1989 Date published in State Register
- _____ Comments

_____ Petition for Adoption of a Rule (if applicable)

_____ Board's Authorizing Resolution
- _____ Date adopted

✓ Proposed Rule
- ✓ Revisor's Certificate

_____ Notice of Intent to Adopt Rule
- 45.023 Statutory Authority 80C.18
- ✓ Small Business Statement
- NA Expenditure of public money statement
- Dated Signature

✓ Statement of Need and Reasonableness (if applicable)
- NA Small Business Statement
- _____ Fees - § 16A.128

✓ Affidavit of Mailing Notice of Intent to Adopt Rule
- Dec 14, 1989 Date 30/25 days before adoption
- ✓ Notice attached indicates its attached
- _____ Copy of rule or summary attached

✓ Publication in State Register
- Dec 18, 1989 Date 30/25 days before adoption

✓ 180-day deadline from:
- NA Effective date of law requiring rule (14.12) (both rules) not new material
- ✓ end of comment period (§ 14.26) (rules without hearing)
- _____ effective date of statutory authority (§ 14.29) (emergency rules)

_____ Resolution Adopting
- _____ Date adopted

✓ Findings of Fact, Conclusions & Order Adopting
- March 22, 1990 Date

✓ Written requests, submissions or comments

✓ Declaration of attorney
- Norine Green Elm Name of SAAG representing agency

_____ Notice of Submission to Atty. Gen. (if applicable)

_____ Aff. of Mailing Notice to Atty. Gen. (if applicable)

Department of Commerce

Adopted Permanent Rules Relating to Franchises

Rules as Adopted

2860.0200 EXEMPTIONS.

Subpart 1. **Isolated sales.** The provisions of Minnesota Statutes 1973 Supplement, section 80C.03, clause (a), shall be available to franchisees only. The provisions of this part shall not be interpreted as to require registration of the franchise prior to its transfer under these circumstances. However, no person, in connection with such a transfer, may require a substituted franchisee to sign a franchise contract or agreement that violates the "unfair and inequitable" provisions of parts 2860.4500 to 2860.8300, whichever is applicable.

Subp. 2. **Securities.** The provisions of Minnesota Statutes 1973 Supplement, section 80C.03, clause (d), shall be available only when the franchise is in fact registered as a security in Minnesota. All reference to Minnesota Statutes, chapter 80 shall include Minnesota Statutes 1973 Supplement, chapter 80A, and provisions amendatory thereto.

2860.2500 ANNUAL REPORT.

[For text of subpart 1, see M.R. 1989]

Subp. 2. **Public offering statement.** The proposed public offering statement filed in connection with the annual report shall contain all data current as of the ~~anniversary date~~ end of the franchisor's fiscal year including audited financial statements in accordance with parts 2860.1200 to 2860.1600. All alterations in the text of the public offering statement previously filed as a part of registration shall be indicated by means of underscoring.

Subp. 3. **Time.** No later than the 120th day following the end of the franchisor's fiscal year, the franchisor shall file financial statements in accordance with parts 2860.1200 to 2860.1600. The newly filed financial statements are to be

Approved by Revisor PMM

included in all public offering statements used by the franchisor after such filing date.

[For text of subp 4, see M.R. 1989]

2860.3800 ALTERNATIVE APPLICATIONS.

The commissioner may accept as application for registration under Minnesota Statutes 1973 Supplement, chapter 80C, any currently effective public offering statement prepared for compliance with the registration provisions of the franchise laws of other jurisdictions as the commissioner may, from time to time, designate. The commissioner reserves the right to require alterations in such statements as necessary to fulfill the requirements of Minnesota Statutes 1973 Supplement, chapter 80C.

The commissioner may accept as application for registration the Uniform Franchise Registration Application adopted by the North American Securities Administrators Association; however, the commissioner reserves the right to require alterations in the Uniform Franchise Offering Circular as necessary.

2860.4200 FILING OF ADVERTISEMENTS.

One copy of each advertisement intended for use shall be filed with the commissioner at least five business days prior to its first publication.

If not disallowed by the commissioner by written notice or otherwise within three business days from the date filed, the advertisement may be published.

No formal approval of the advertisement shall be issued by the commissioner.

The person placing the advertisement shall be responsible for the accuracy and reliability of the advertisement and its conformity with the act and this part.

2860.4400 UNFAIR AND INEQUITABLE PRACTICES.

All franchise contracts or agreements and any other device or practice of a franchisor, shall conform to the following provisions. It shall be unfair and inequitable for any person

Approved
by Revisor _____

to:

[For text of items A to D, see M.R. 1989]

E. terminate or cancel a franchise unless:

(1) that person has given written notice setting forth all the reasons for termination or cancellation to the franchisee at least 90 days in advance of termination or cancellation; and

(2) the recipient of the notice fails to correct the reasons stated for termination or cancellation in the notice within 60 days of receipt of the notice, except that the notice shall be effective immediately upon receipt where the alleged grounds are:

(1) voluntary abandonment of the franchise relationship by the franchisee;

(2) the conviction of the franchisee in a court of competent jurisdiction of an offense directly related to the business conducted pursuant to the franchise; or

(3) failure to cure a default under the franchise agreement that materially impairs the good will associated with the franchisor's tradename, trademark, service mark, logotype, or other commercial symbol after the franchisee has received written notice to cure of at least 24 hours in advance thereof;

[For text of items F to I, see M.R. 1989]

J. require a franchisee to waive his rights to a jury trial or to waive his rights to any procedure, forum, or remedies provided for by the laws of the jurisdiction, or to consent to liquidated damages, termination penalties, or judgment notes; provided, that the franchise agreement may contain an exclusive arbitration clause if the agreement allows the franchisee to opt out of the requirements of the clause;

[For text of items K and L, see M.R. 1989]

M. fail to renew a franchise unless the franchisee has been given written notice of the intention not to renew at least 180 days in advance thereof and has been given a opportunity to operate the franchise over a sufficient period of time to enable the franchisee to recover the fair market value

Approved
by Revisor _____

of the franchise as a going concern as determined and measured from the date of the failure to renew. This item does not apply if the failure to renew a franchise is for good cause and the franchisee has failed to correct the reasons for termination.

2860.4500 FALSE, FRAUDULENT, AND DECEPTIVE PRACTICES.

In connection with an offer, grant, or sale of a franchise in this state, any person authorizing, aiding in, or causing such offer, grant, or sale of franchises shall be deemed to be engaging in a "false, fraudulent, or deceptive practice" within the meaning of Minnesota Statutes 1973 Supplement, sections 80C.12 and 80C.13, without limiting the authority of the commissioner under Minnesota Statutes 1973 Supplement, section 80C.12, if such person:

[For text of items A to D, see M.R. 1989]

2860.5500 CANCELLATION OF FRANCHISE.

Any provisions regarding cancellation of the franchise agreement shall be governed by items A to C.

[For text of items A and B, see M.R. 1989]

C. No person may cancel a franchise unless:

(1) that person has given written notice to the dealer in person or by certified mail setting forth all the reasons for cancellation at least 90 days in advance of the cancellation; and

(2) the recipient of the notice fails to correct the reasons for cancellation in the notice within 60 days of receipt, except that the notice shall be effective immediately upon receipt when the cause for termination or cancellation is:

(1) criminal misconduct;

(2) fraud;

(3) abandonment;

(4) bankruptcy or insolvency of the dealer;

(5) adulteration of product; or

(6) the giving of a nonsufficient fund check that remains dishonored for a period of ten days after notice, which notice shall be effective on the fifth day after the date of

Approved
by Revisor _____

mailing.

2860.5600 RENEWAL OF FRANCHISE.

Any provisions regarding the renewal of a franchise agreement shall be governed by items A and B.

A. Either party to a franchise agreement may refuse to renew the franchise agreement upon giving the other party written notice of his or her intent not to renew at least 180 days prior to the expiration of the franchise agreement.

[For text of item B, see M.R. 1989]

REPEALER. Minnesota Rules, parts 2860.3400, subpart 2; 2860.6100; 2860.6200; 2860.6300; 2860.6400; and 2860.6500, are repealed.

Approved
by Revisor _____

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED

APR 11 1990

Joan Anderson Growe

Secretary of State 10:10 AM

APPROVED AS TO FORM AND LEGALITY

April 9 19 90

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

BY MJ Cassedy
SPECIAL ASSISTANT ATTORNEY GENERAL

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

ST. PAUL 55155

March 27, 1990

ADDRESS REPLY TO:
1100 BREMER TOWER
SEVENTH PL. AND MINNESOTA ST.
ST. PAUL, MN 55101
TELEPHONE: (612) 296-9412

In the Matter of the Adoption
of the Rule of the State Commerce
Department Governing Franchises.

DECLARATION OF OF COUNSEL

I, Norine Olson-Elm, Special Assistant Attorney General, do hereby declare that I have examined the above-captioned rule, and the supporting rulemaking record, and that, based on my examination, the Administrative Procedure Act and Minnesota Rules, chapter 2010 have been followed. For Attorney General billing purposes, the four digit docket client code is .0125.

Norine Olson Elm

MISSY NORINE OLSON-ELM
Special Assistant
Attorney General

.aq0

SF-00006-05 (4/86)

DEPARTMENT : of COMMERCE

STATE OF MINNESOTA

Office Memorandum

DATE : March 22, 1990

TO : AL GILBERT

FROM : PATRICIA L. PETERSON
Director of Registration

PHONE : 296-2284

SUBJECT : Franchise Rules

Enclosed are copies of the following materials regarding the above-captioned rules:

1. Notice of Intent to Solicit Outside Opinion as published in State Register (2010.0300 A)

2. Copy of the Proposed Rules with Revisor's Certificate (2010.0300 D)

3. Notice of Intent to Adopt Rule Without Public Hearing (2010.0300 E)

4. Statement of Need and Reasonableness (2010.0300 F)

5. Affidavit of Mailing Notice of Intent to Adopt Rule Without Public Hearing (2010.0300 G)

6. Copy of Notice of Intent to Adopt Rule Without Public Hearing and Rules as published in the State Register (2010.0300 H)

7. Four Copies of Rule as adopted (2010.0300 I)

8. Findings of Fact, Conclusion & Order Adopting Rule (2010.0300 K)

9. Affidavit (2010.0300)

RECEIVED
MAR 23 90
ATTORNEY GENERAL'S OFFICE
1100 BREMER TOWER
7TH PLACE AND MINNESOTA ST.
ST. PAUL, MN 55101

Department of Commerce

Proposed Permanent Rules Relating to Franchises

Rules as Proposed

2860.0200 EXEMPTIONS.

Subpart 1. **Isolated sales.** The provisions of Minnesota Statutes 1973 Supplement, section 80C.03, clause ~~(1)~~ (a), shall be available to franchisees only. The provisions of this part shall not be interpreted as to require registration of the franchise prior to its transfer under these circumstances. However, no person, in connection with such a transfer, may require a substituted franchisee to sign a franchise contract or agreement that violates the "unfair and inequitable" provisions of parts 2860.4500 to 2860.8300, whichever is applicable.

Subp. 2. **Securities.** The provisions of Minnesota Statutes 1973 Supplement, section 80C.03, clause ~~(4)~~ (d), shall be available only when the franchise is in fact registered as a security in ~~the state of~~ Minnesota. All reference to Minnesota Statutes, chapter 80 shall include Minnesota Statutes 1973 Supplement, chapter 80A, and provisions amendatory thereto.

2860.2500 ANNUAL REPORT.

[For text of subps 1 and 2, see M.R. 1989]

Subp. 3. **Time.** No later than the ~~90th~~ 120th day following the end of the franchisor's fiscal year, the franchisor shall file financial statements in accordance with parts 2860.1200 to 2860.1600. The newly filed financial statements are to be included in all public offering statements used by the franchisor after such filing date.

[For text of subp 4, see M.R. 1989]

2860.3800 ALTERNATIVE APPLICATIONS.

The commissioner may accept as application for registration under Minnesota Statutes 1973 Supplement, chapter 80C, any currently effective public offering statement prepared for

Approved by Revisor

compliance with the registration provisions of the franchise laws of ~~such~~ other jurisdictions as the commissioner may, from time to time, designate. The commissioner reserves the right to require alterations in such statements as ~~he deems~~ necessary to fulfill the requirements of Minnesota Statutes 1973 Supplement, chapter 80C.

The commissioner may accept as application for registration the Uniform Franchise Registration Application adopted by the ~~Midwest Securities Commissioners Association~~ North American Securities Administrators Association; however, the commissioner reserves the right to require alterations in the Uniform Franchise Offering Circular as ~~he may deem~~ necessary.

2860.4200 FILING OF ADVERTISEMENTS.

One copy of each advertisement intended for use shall be filed with the commissioner at least ~~three~~ five business days prior to ~~the~~ its first publication ~~thereof~~.

If not disallowed by the commissioner by written notice or otherwise within three business days from the date filed, the advertisement may be published.

No formal approval of the advertisement shall be issued by the commissioner.

The person placing the advertisement shall be responsible for the accuracy and reliability of the advertisement and its conformity with the act and this part.

2860.4400 UNFAIR AND INEQUITABLE PRACTICES.

All franchise contracts or agreements and any other device or practice of a franchisor, shall conform to the following provisions. It shall be unfair and inequitable for any person to:

[For text of items A to D, see M.R. 1989]

E. terminate or cancel a franchise ~~without first having~~ unless:

(1) that person has given written notice setting forth all the reasons for ~~such~~ termination or cancellation to the franchisee at least ~~60~~ 90 days in advance of ~~such~~

Approved by Revisor _____

termination or cancellation; and

(2) the recipient of the notice fails to correct the reasons stated for termination or cancellation in the notice within 60 days of receipt of the notice, except that the notice shall be effective immediately upon receipt where the alleged grounds are:

(1) voluntary abandonment of the franchise relationship by the franchisee;

(2) the conviction of the franchisee in a court of competent jurisdiction of an offense directly related to the business conducted pursuant to the franchise; or

(3) failure to cure a default under the franchise agreement that materially impairs the good will associated with the franchisor's tradename, trademark, service mark, logotype, or other commercial symbol after the franchisee has received written notice to cure of at least 24 hours in advance thereof;

[For text of items F to I, see M.R. 1989]

J. require a franchisee to waive his rights to a jury trial or to waive his rights to any procedure, forum, or remedies provided for by the laws of the jurisdiction, or to consent to liquidated damages, termination penalties, or judgment notes; provided, that ~~this part shall not bar a voluntary arbitration of any matter if the proceeding is conducted by an independent tribunal under the rules of the American Arbitration Association~~ the franchise agreement may contain an exclusive arbitration clause if the agreement allows the franchisee to opt out of the requirements of the clause;

[For text of items K and L, see M.R. 1989]

M. fail to renew a franchise unless the franchisee has been given written notice of the intention not to renew at least 90 180 days in advance thereof and has been given a ~~sufficient~~ opportunity to ~~recover his investment or unless for good cause as defined in item F.~~ operate the franchise over a sufficient period of time to enable the franchisee to recover the fair market value of the franchise as a going concern as determined and measured from the date of the failure to renew.

Approved
by Revisor _____

This item does not apply if the failure to renew a franchise is for good cause and the franchisee has failed to correct the reasons for termination.

2860.4500 FALSE, FRAUDULENT, AND DECEPTIVE PRACTICES.

In connection with an offer, grant, or sale of a franchise in this state, any person authorizing, aiding in, or causing such offer, grant, or sale of franchises shall be deemed to be engaging in a "false, fraudulent, or deceptive practice" within the meaning of Minnesota Statutes 1973 Supplement, sections 80C.12 and 80C.13, without limiting the authority of the commissioner under Minnesota Statutes 1973 Supplement, section 80C.12 ~~or 80C.15~~, if such person:

[For text of items A to D, see M.R. 1989]

2860.5500 CANCELLATION OF FRANCHISE.

Any provisions regarding cancellation of the franchise agreement shall be governed by items A to C.

[For text of items A and B, see M.R. 1989]

C. ~~Cancellation of the franchise agreement by the supplier shall be preceded by~~ No person may cancel a franchise unless:

(1) that person has given written notice to the dealer in person or by certified mail. ~~The notice shall be given~~ setting forth all the reasons for cancellation at least ~~60~~ 90 days ~~prior to the date on which the supplier intends to terminate or cancel the franchise agreement~~ in advance of the cancellation; and

(2) the recipient of the notice fails to correct the reasons for cancellation in the notice within 60 days of receipt, except that the notice shall be effective immediately upon receipt when the cause for termination or cancellation is:

(1) criminal misconduct;

(2) fraud;

(3) abandonment;

(4) bankruptcy or insolvency of the dealer;

(5) adulteration of product; or

Approved by Revisor _____

(6) the giving of a nonsufficient fund check that remains dishonored for a period of ten days after notice, which notice shall be effective on the fifth day after the date of mailing.

2860.5600 RENEWAL OF FRANCHISE.

Any provisions regarding the renewal of a franchise agreement shall be governed by items A and B.

A. Either party to a franchise agreement may refuse to renew the franchise agreement upon giving the other party written notice of his or her intent not to renew at least ~~90~~ 180 days prior to the expiration of the franchise agreement.

[For text of item B, see M.R. 1989]

REPEALER. Minnesota Rules, parts 2860.3400, subpart 2; 2860.6100; 2860.6200; 2860.6300; 2860.6400; and 2860.6500, are repealed.

Approved
by Revisor _____

Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Permanent Rules Relating to Franchises

AGENCY: Department of Commerce

MINNESOTA RULES: Chapter 2860

The attached rules are approved for publication
in the State Register

John C. Fuller
Assistant Deputy Revisor

LAW OFFICES

RUDNICK & WOLFE

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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WRITER'S DIRECT LINE:

(312) 368-4055

February 23, 1990

VIA FEDERAL EXPRESS

Patricia L. Peterson, Esq.
Director of Registration
Department of Commerce
500 Metro Square Building
St. Paul, Minnesota 55101

Re: **Binding Predispute Arbitration Provisions**

Dear Ms. Peterson:

For your information, I am enclosing a copy of an article that I am submitting for publication in the International Franchise Association's Franchise Legal Digest, concerning Section 2860.4400J of the Minnesota Rules and the Department of Commerce's position prohibiting the inclusion of binding predispute arbitration provisions in franchise agreements. As you will see from the article, we believe that the Department's policy is not only unsound as a matter of public policy, but is in direct conflict with the Federal Arbitration Act and therefore, preempted under the Supremacy Clause of the Constitution. We are also forwarding a copy of the enclosed article to the Minnesota Attorney General's Office for their review. I hope that after reading the enclosed article, the staff of the Department will reconsider its position on this matter.

I want to direct your attention to the last paragraph of the conclusion of my article; I hope that you will understand the criticism contained in the article is directed

RECEIVED

FEB 26 1990

Office of the Attorney General
Government Services Section
Capitol Office Bldg., Suite 500
525 Park Street
St. Paul, MN 55103

at the proposed rule and not the Department. If you have any questions or comments concerning the enclosed article, please do not hesitate to contact me.

Very truly yours,

RUDNICK & WOLFE

Lewis G. Rudnick

LGR/le
Enclosure

cc: Mr. Thomas Borman (w/encl.)
Christie Eller, Esq. (w/encl.)
Ms. Patty Nolte (w/encl.)

M:KSM0156/2

RECEIVED

FEB 26 1990

Office of the Attorney General
Government Services Section
Capitol Office Bldg., Suite 500
525 Park Street
St. Paul, MN 55103

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE

IN THE MATTER OF THE PROPOSED AMENDMENTS TO FRANCHISE RULES

STATEMENT OF

NEED AND REASONABLENESS

STATEMENT OF AUTHORITY

Minnesota Statements, Section 80C.18, subdivision 1 provides that:

> Subdivision 1. The Commissioner may promulgate rules to carry out the provisions of sections 80C.01 to 80C.22, including rules and forms governing public offering statements, applications, financial statements and annual reports, and defining any terms, whether or not used in sections 80C.01 to 80C.22, insofar as the definitions are not inconsistent with sections 80C.21 to 80C.22.

Additional rulemaking authority provided in Minnesota Statutes Section 45.023 authorizes the Commissioner to "adopt, amend, suspend, or repeal rules ... whenever necessary or proper in discharging the Commissioner's official responsibilities."

The Commissioner finds the proposed rules to be necessary and consistent with the purposes fairly intended by the policies and provisions of Chapter 45 and 80C.

FACTS ESTABLISHING NEED AND REASONABLENESS

BACKGROUND:

The Minnesota Franchise Act has been amended frequently in the last years. However, the Minnesota Franchise Rules have not been amended to conform to these statutory changes. Most of the proposed amendments attempt to make the franchise rules consistent with current law. The amendment to Part 2860.4400, (J) will clarify the current rule and expand it to a certain extent.

Rule Parts 2860.0200

The amendments to this part are technical ones which make the references to clauses in Minnesota Statute 80C.03 consistent with that statute.

Rule Part 2860.0500

The law which governs the filing of annual reports is found at Minnesota Statute 80C.08. It requires the registrant to file an annual report within 120 days after the registrant's fiscal year end.

The amendment to this part substitutes 120 days for 90 days for filing of the annual report and again makes the rule consistent with statutory law.

Rule Part 2860.3800

The provision being amended allows the Commissioner to accept the Uniform Franchise Registration Application adopted by the Midwest Securities Commissioners Association as application for registration.

The amendment replaces the reference to the Midwest Securities Commissioners Association with the North American Securities Administrators Association. The North American Securities Administrators is a cooperative organization of securities commissioners from the states, the District of Columbia, Puerto Rico and several Canadian provinces which succeeded the Midwest Securities Commissioners Association.

Rule Part 2860.4200

This part requires that a copy of each advertisement used in connection with the offer and sale of a franchise be filed with the Commissioner at least three business days prior to its first publication.

The amendment substitutes five business days for three business days bringing the rule into conformity with Minnesota Statute 80C.09, subdivision 1.

Rule Part 2860.4400

This part enumerates certain franchise contracts or agreements and other devices or practices which are unfair and inequitable per se. The language is meant to track that found in Minnesota Statute 80C.14.

One of the unfair practices deals with termination or cancellation of franchises. That provision has been amended by the Minnnesota Legislature. The statutory amendment required that the franchisee be given 90 days advance written notice of termination or cancellation rather than the previous 60 day notice

and 60 days to correct the reasons set forth in the written notice for termination. The amendment to Letter E of this Part repeats the language in Minnesota Statute 80C.14, subdivision 3.

Letter J of Part 2860.4400 makes it an unfair and inequitable practice to require a franchisee to waive his rights to a trial, consent to liquidated damages, termination penalties, on judgment notes. However, the section does not bar "a voluntary arbitration of any matter if the proceeding is conducted by an independent tribunal under the rules of the American Arbitration Association."

Minnesota Statute 80C.14 provides that "No person, whether by means of a term or condition of a franchise or otherwise, shall engage in any unfair or inequitable practice ..." The statute gives the Commissioner specific authority to adopt rules "defining as to franchises the words 'unfair and inequitable'".

The franchise statutes exist not only to prevent fraud and abuse by franchisors but also to prevent the franchisor from taking advantage of its superior bargaining position. Historically, franchisors have been the more sophisticated parties to the franchise agreement. The situation is rife with opportunity for contracts

of adhesion. The statutes function to level the playing field so that the unwary franchisee has significant protections, both before and after entering into the agreement. Since the adoption of the legislation, the franchisor has the affirmative responsibility to act in an equitable manner, and fails to do so at his own peril.

In view of this unequal bargining power, the Commissioner finds the amendment to Letter J of this Part to be reasonable and necessary. The amendment makes it an unfair and equitable practice to require, as a condition to entering into the franchise contract, that a franchisee waive his rights to a jury trial or waive his rights to any procedure, forum, or remedies provided for by the laws of the jurisdiction, or consent to liquidated damages, termination penalties, or judgment notes; provided that the franchise agreement may contact an exclusive arbitration clause if the agreement allows the franchisee to opt out of the requirments of the clause."

The Commissioner believes that franchisees should not be required to give up rights given them under the law in order to enter into a franchise contract. If the franchisee can be forced to give up his basic

legal rights by the franchisor, then one of the primary purposes of the franchise act, that of creating a level playing field for the parties, is thwarted. The Commissioner believes, however, that certain franchisees may wish to waive their rights to trial in favor of arbitration. Therefore, the rule allows an exclusive arbitration clause if the franchisee has the right to opt out of that clause.

The amendments to Letter M of this part are consistent with the amendments which the legislature made to Subdivision 4 of Minnesota Statute 80C.14. These amendments extend the notice period for failure to renew a franchise from 90 to 180 days and require the franchisor to give the franchisee an opportunity to "operate the franchise over a sufficient period of time to enable the franchisee to recover the fair market value of the franchise as a going concern as determined and measured from the date of the failure to renew."

Rule Part 2860.4500

This amendment deletes the reference to Minnesota Statute 80C.15, which has been repealed.

Rule Part 2860.5500

The amendment to this part reflects changes made to Minnesota Statute 80C.14, subdivision 3.

The proposed change amends the notice period for cancellation from 60 days to 90 days and gives the franchisee a 60 day period to correct the reasons for cancellation.

Rule Part 2860.5600

This amendment again reflects the changes made to Minnesota Statute 80C.14, subdivision 4 dealing with written notice of intent not to renew.

Small Business Considerations

The amendments which are being proposed to bring the rules into conformity with the language of the Franchise Act will have no impact on small business.

The amendment to Rule Part 2860.4400 (J) will have a positive effect on small business. It will remove the advantage that large sophisticated franchisors have over small franchisees and will elevate the bargaining

power held by small businesses when they negotiate franchise contracts.

Because any impact of these rules on small business will be positive, there is no need to discuss the methods for reducing the impact which are enumerated in Minnesota 14.155, subdivision 2.

MINNESOTA ADOPTS AN UNSOUND AND UNCONSTITUTIONAL POLICY ON ARBITRATION AGREEMENTS

Lewis G. Rudnick

The State of Minnesota is one of fifteen (15) states which regulates the offer and sale of franchises. As part of its regulatory scheme, Minnesota requires franchisors who intend to offer and sell franchises in that state (the Minnesota franchise law defines what constitutes an offer or sale in the state) to register their franchise offerings with the Minnesota Department of Commerce (the "Department"). Failure to register may subject a franchisor and its officers, directors and employees to civil and criminal sanctions. Each franchisor, as part of its registration application, must submit the offering circular to be used in connection with offers and sales made in Minnesota to the Department for review. The Department reviews those offering circulars to determine whether they comply with the Minnesota franchise law and the rules promulgated thereunder.

Section 80.C.14 of the Minnesota Statutes prohibits persons from engaging in unfair and inequitable practices "by means of a term or condition of a franchise or otherwise." That same section empowers the Commissioner of the Department to adopt rules defining unfair and inequitable practices. After extensive discussions with representatives of the franchising community, the Department promulgated a rule in the early 1970's which was intended to prohibit franchisors from including in their franchise agreements, waivers of liability, confessions of judgement and other similar

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provisions which unfairly limited the rights and remedies of franchisees. Section 2860.4400J of the Minnesota Rules (the "Rule") provides:

> it shall be unfair and inequitable for any person to . . . require a franchisee to waive his rights to trial or to consent to liquidated damages, termination, penalties, or judgment notes; provided that this part shall not bar a voluntary arbitration of any matter if the proceeding is conducted by an independent tribunal under the rules of the American Arbitration Association.

In promulgating the Rule, the Department carved out an exception from the broad prohibitions contained therein for binding predispute arbitration provisions. At the time the Rule was promulgated, the Department viewed arbitration as being generally favorable to franchisees due to faster results and lower costs. The Department continued to interpret the Rule to permit binding arbitration covenants in franchise agreements for the next 15 years. In 1988, without prior notice to the franchising community, the Department changed its interpretation of the Rule, finding that mandatory arbitration covenants contained in franchise agreements violate the Rule. Consequently, the Department has refused to register franchise offerings containing such covenants. According to the Department, the Rule permits provisions making the arbitration of disputes between a franchisor and a franchisee voluntary on the part of the franchisee, but prohibits mandatory predispute arbitration agreements on the ground that they deny a franchisee the right to a judicial forum for the resolution of disputes. Apparently, the Department has somehow come to the conclusion that arbitration agreements are disadvantageous to franchisees. The Department's reinterpretation was presumably predicated on a construction of the word "voluntary" to mean an agreement to arbitrate concluded after a dispute has arisen. Since the parties to a franchise agreement are presumably free to enter into an agreement to arbitrate at any time

after a dispute has arisen, the Department's construction would render the Rule's exception concerning "voluntary arbitration" meaningless.

As far as is known, the Department's reinterpretation came without any investigation or factual record that would demonstrate that its prior interpretation was erroneous or that the notice or use of arbitration provisions in franchise agreements had changed somehow and become harmful to franchisees.

In response to objections from franchisors, the Department moderated its position to allow binding agreements to arbitrate to be embodied in an addendum to a franchise agreement, provided that the franchisor communicates to the franchisee that the execution of the addendum is not a precondition to the grant of the franchise. This modification is of small consolation to franchisors who have determined that arbitration is a more efficient and effective method of dispute resolution. In addition to adding costs and delays to the granting of a franchise, a franchisor that adopts the Department's sanctioned method of securing arbitration agreements would be required to grant franchises to persons who refuse to sign the addendum. Franchisors are thus deprived of the right to adopt a uniform method of resolving disputes with Minnesota franchisees.

The Department's modified position appears to be predicated on the notion that if the franchisor does not condition the grant of the franchise on the franchisee's agreement to arbitrate, the franchisee's agreement to arbitrate is "voluntary". The Department has apparently concluded that an agreement to arbitrate disputes contained in a standard form franchise agreement is not "voluntary", notwithstanding the fact that the franchise voluntarily enters into the agreement. As discussed below, the courts have rejected that proposition and have struck down similar state statutes and

regulations which attempted to erect barriers to the use of binding predispute arbitration covenants.

The effect of the Department's current interpretation of the Rule is to single out an agreement to arbitrate and treat it differently from all other covenants and agreements contained in a franchise agreement. A franchisor may condition the grant of a franchise on the agreement by the franchisee to pay certain fees, comply with system standards and accept a variety of other obligations, but it may not condition the grant of a franchise on agreement by the franchisee to resolve disputes by arbitration. In addition to being an unsound policy, the Department's interpretation is an unnecessary construction of the language of the Rule and causes the Rule to be in conflict with the federal policy favoring arbitration of disputes and, therefore, preempted by the Federal Arbitration Act.

On December 18, 1989, the Commissioner of Commerce published proposed revisions to the Rule in the State Register. The relevant portion of the proposed revisions to the Rule (referred to herein as the "Proposed Rule") provide:

> . . . It shall be unfair and inequitable for any person to . . . require a franchise to waive his rights to a jury trial or to waive his rights to any procedure, forum, or remedies provided for by the laws of the jurisdiction, or to consent to liquidated damages, termination penalties, or judgment notes; provided, that the franchise agreement may contain an exclusive arbitration clause if the agreement allows the franchisee to opt out of the requirements of the clause;

Since the Proposed Rule does not expressly provide that a franchisee must "opt out" prior to signing a franchise agreement, it can be read to render all binding predispute arbitration agreements contained in franchise agreements meaningless. Assuming arguendo that the Proposed Rule can be read to require a franchisee to exercise its right to "opt out" prior to or contemporaneously with the execution of the

franchise agreement, the Proposed Rule has the effect of imposing a precondition on the use of predispute arbitration covenants which is not applicable to contracts generally. Therefore, in substance, the Proposed Rule would have the same legal effect as the Department's current interpretation of the Rule.

No person is obligated to sign a franchise agreement or to accept any clause of a franchise agreement without seeking to modify it through negotiation. Negotiation of the terms of franchise agreements is common and nothing prevents the prospective buyer of a franchise from seeking elimination of an arbitration clause if he believes the right to litigate is in his interest (or to seek such right, if he believes arbitration to be to his advantage). Some franchisors are willing to negotiate this issue and others are not. If access to the courts is sufficiently important to the franchise buyer, he can simply reject a franchise that requires arbitration and select one that does not. Most franchisees will, of course, assign a low priority to dispute resolution clauses relative to such elements of the franchise relationship as fees, territorial rights, franchisor services and term and renewal rights. Without regard to the priority a given franchise buyer attributes to an arbitration clause, if he elects to sign a franchise agreement that contains one, he has done so voluntarily and has, therefore, voluntarily agreed to arbitrate disputes.

Constitutionality of the Rule

As interpreted by the Department, the Rule is in direct conflict with the Federal Arbitration Act, 9 U.S.C. §1 et seq. (the "FAA") and is, therefore, preempted under the Supremacy Clause to the Constitution, which prevents state laws and regulations from taking root when they loom as an obstacle to the achievement of the full purposes and

ends which Congress has itself set out to accomplish. Securities Industry Association v. Connolly, 883 E.2d 1114, 1118 (1st Cir. 1989). Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration any controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.

The scope of the preemptive effect of Section 2 with respect to conflicting state franchise laws first arose in Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852 (1984). Southland's standard form franchise agreement contained a provision requiring that "any controversy or claim arising out of or relating to [the franchise agreement] or the breach thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association ... " After various franchisees filed separate actions against Southland in the California courts, alleging, among other things, fraud, oral misrepresentation, breach of contract, breach of fiduciary duty and violations of the disclosure requirements of the California Franchise Investment Law, Southland petitioned the courts in all cases to compel arbitration of all claims. After conflicting lower court decisions, the California Supreme Court ruled that claims asserted under the California Franchise Investment Law were not arbitrable on the basis of Section 31512 of the California Corporations Code, which provided that "any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." The California Supreme Court interpreted that section to provide franchisees with a right to seek judicial resolution of claims brought under the California franchise laws and accordingly, refused to enforce contracts to arbitrate such claims.

On appeal, the United States Supreme Court disagreed, voting 7 to 2 (with Justices O'Connor and Reinquist dissenting) that Section 31512, as interpreted by the California Supreme Court, directly conflicted with Section 2 of the FAA and violated the Supremacy Clause. In its analysis, the Supreme Court stated that "in enacting Section 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which contracting parties agreed to resolve by arbitration." Southland Corp., 104 S.Ct. at 858. The Court held that there are only two limitations on the enforceability of arbitration provisions governed by the FAA: (i) they have to be part of a written maritime contract or contract evidencing a transaction involving commerce; and (ii) they can be revoked upon grounds as exist at law or in equity for the revocation of any contract. Id. at 858. The Court went on to say that nothing in the FAA indicates that the broad principle of enforceability is subject to any additional limitations under state law. Id. at 858. In concluding that Section 31512 violated the FAA and the Supremacy Clause, the Court found that in creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose legislative attempts at the state level, to undercut the enforceability of arbitration agreements Id. at 861.

Subsequent Supreme Court and lower Federal Court decisions have reasserted the strong federal policy in favor of arbitration and reaffirmed the supremacy of the FAA over state statutes seeking to preclude arbitration of certain state statutory claims. See e.g., Perry v. Thomas 482 U.S. 483, 107 S.Ct. 2520, 2525 (1987), holding that the FAA preempted a provision of California Labor Law which was interpreted to require a judicial forum for resolving wage disputes without regard to the existence of a private agreement to arbitrate ("Section 2 is a Congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive

or procedural policies to the contrary. The effect of [Section 2] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA]"); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 2337 (1987) ("the [FAA], standing alone, ... mandates enforcement of agreements to arbitrate statutory claims"); Securities Industry Association v. Connolly, 703 F. Supp. 146 (D. Mass. 1988), aff'd, 883 F.2d 1114 (1st Cir. 1989) ("the Court has variously found in the FAA an embodiment of Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause ... [which] policy has been set loose with hydraulic pressure, sweeping away any state law purporting to override the parties' choice to arbitrate rather than litigate in court ... [T]he Supreme Court's decisions support a conclusion that all state laws seeking to limit the use of the arbitral process are superseded by federal law." (quoting New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1, 4 (1st Cir. 1988)).

In August, 1988, Neil A. Simon, Counsel and Director of Government Relations of the IFA wrote the Department to express the strong objection of the IFA to the Department's reinterpretation of the Rule in light of Southland Corp. and other precedent. In its response to this letter, the Department stated its belief that the facts of Southland Corp. were distinguishable from the facts surrounding the Department's policy relating to mandatory arbitration clauses. Specifically, the Department noted that while the statute under consideration in Southland Corp. purported to void any provision binding a franchisee to waive its rights to a judicial forum for the resolution of certain disputes, the Rule (as interpreted by the Department) does not render unenforceable any contract providing for arbitration. According to the Department, the primary requirement imposed by the Rule for the protection of franchisees is that an agreement to arbitrate (differentiated from the contract which contains the provision

requiring arbitration) must itself be entered into voluntarily. Presumably, the Department's analysis of Southland Corp. would be the same with regard to the Proposed Rule. The Department stated that any franchisor who wanted to challenge the Rule could refuse to remove the offending arbitration provision, which would result in the Department issuing an Order of Denial, entitling the franchisor to a hearing with an administrative law judge.

The Department's rationale for its reinterpretation of the Rule (and presumably, its rationale for the Proposed Rule) ignores the purpose of Section 2 of the FAA: to encourage agreements to arbitrate made in advance of a dispute and to protect such agreements from state laws or regulations purporting to invalidate them. The Department's assertion that a state law that prevents such an agreement from becoming effective falls outside of the preemptive effect of Section 2, whereas a state law that purports to invalidate such an agreement is preempted, is not persuasive.

In Securities Industry Association v. Connolly, 703 F. Supp. 146 (D. Mass. 1988), aff'd. 883 F.2d 1114 (1st Cir. 1989), both the Federal District Court of Massachusetts and the United States Court of Appeals for the First Circuit resoundingly rejected the rationale proferred by the Department in a case involving an attempt by the State of Massachusetts to impose a similar "voluntariness" requirement in connection with the use of predispute arbitration agreements by securities brokers, who typically require their customers to sign such agreements as a precondition to establishing an account relationship.

In response to the Supreme Court's decision in Shearson/American Express, which upheld the use of arbitration clauses in brokerage contracts, the Secretary of State of the Commonwealth of Massachusetts and the Director of the Massachusetts

Securities Division created a new regulatory definition of "dishonest or unethical practices" in an attempt to thwart the use of arbitration agreements by securities brokers. The Massachusetts regulation included within its list of dishonest or unethical practices: (1) requiring a non-institutional customer to execute a mandatory predispute arbitration agreement, or a brokerage contract containing such an agreement, as a non-negotiable precondition to opening a brokerage account; and (2) failing to fully disclose the legal effects of such an arbitration agreement prior to entering into the "negotiated contract." The regulation did not specify what disclosure was required in order to constitute negotiability or full disclosure. The regulation's proscription against dishonest or unethical practices by broker dealers was enforceable by the power of the Secretary of State to deny, suspend or revoke the registration of a broker. Since unregistered brokers were prohibited from transacting business in Massachusetts, any broker wishing to do business in the Commonwealth would be forced to observe these regulations. Any attempt to enforce a contract formed without complying with the regulations would prove unavailing, due to a statute prohibiting anyone from bringing such a suit (and, presumably, a suit to compel arbitration or confirm and enforce an arbitration award).

In September, 1988, the Securities Industry Association and ten member brokerage firms filed suit in the Federal District Court in Massachusetts, seeking a declaratory judgment that the Massachusetts regulations were unconstitutional under the FAA and the Supremecy Clause. In analyzing the propriety of the Massachusetts regulations, the district court stated that the question of whether the FAA preempts a state law or rule must focus on whether the state law or rule "singles out arbitration agreements for special treatment." Securities Industry Association, 703 F. Supp. at 151 (quoting Mitsubishi Motors Corp., 723 F2d. 155, 158 (1st Cir. 1983), aff'd. in part, rev'd in part, 473 U.S. 614 (1985)). In undertaking its analysis, the district court pointed out that

other courts had been vigilant to ensure that state law concepts specifically directed at arbitration contracts were not permitted to eviscerate the fundamental purpose of the FAA, which was to place arbitration agreements on the same footing as other contracts. Id. at 151. The district court concluded that the formation of an arbitration agreement can only be wholly a matter of state law if that law arose to govern issues concerning the validity, revocability and enforceability of contracts generally. Id. at 151 (quoting Perry, 107 S.Ct. at 2527 n. 9) and that Section 2 of the FAA preempts state statutory and case law that treats arbitration agreements differently from other contracts. Id. at 151.

In an attempt to justify their new regulations, the defendants in Securities Industry Association asserted that they were intended to give effect to another purpose evidenced by the legislative history of the FAA, which was a concern to implement "voluntary agreements" to arbitrate. This, the district court concluded, was "semantic sleight of hand". Id. at 152. Since the voluntariness concerns expressed in the Massachusetts Securities Arbitration regulations imposed conditions on the formation and execution of arbitration agreements which are not part of the generally applicable law of Massachusetts, they could not be given effect under the Federal Arbitration Act. Id. at 153.

On appeal, the United States Circuit Court for the First Circuit found that the regulations in question, which barred securities firms from requiring individuals to execute predispute arbitration agreements as a condition to establishing an account relationship, were "patentently inhospitable to arbitration" and therefore, unconstitutional under Section 2 of the FAA and the Supremacy Clause. Securities Industry Association,

883 F.2d 1114, 1117 (1st Cir. 1989). In analyzing the permissibility of state laws and regulations which effect arbitration, the court concluded:

> What seems beyond dispute at this juncture is that no state may simply subject arbitration to individual regulation in the same manner as it might subject some other unprotected contractual device (say, a prescriptive period or exculpatory clause contained within a private contract). Thus, for example, the Eighth Circuit struck down Missouri's effort to require that contracts highlight the existence of arbitration clauses by use of 10-point capital letters, Webb. v. Rowland & Co., 800 F.2d 803, 806 (8th Cir. 1986), and earlier refused to honor a state requirement that arbitration agreements bear an attorney's acknowledgment, attesting that all parties had been informed of the agreements effect, Collins Radio Co. v. Ex-Cell-O-Corp., 467 F.2d 995, 997 (8th Cir. 1972). Any similar limitary approach would seemingly defeat the very aim of the [FAA], allowing states to revivify the ancient jurisdictional antagonism toward arbitration by clocking it in regulatory garb (emphasis added). At the very least, such enmity, howsoever manifested in state law, is preempted. Id. at 1120 (quoting Volt Informational Sciences, Inc. v. Board of Trustees of Leland Standford Junior University, 109 S.Ct. 1248, 1253 (1989); Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626-27 (1985); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-21 (1985); Southland Corp., 465 U.S. 1, 18-19 (1984); Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967); New England Energy, 855 F.2d at 4-5).

The Appellate Court also addressed Massachusetts' rather lame attempt at justifying its regulations by arguing that the regulations did not effect the validity and enforceability of predispute arbitration provisions at all; but instead, only governed the conduct of securities brokers. In concluding that Massachusetts' assertions were fatally flawed, the court pointed out that a state law does not have to "clash head on" with a federal enactment in order to be preempted. Id. at 1123. Consequently, the court ruled that as a matter of law, the regulations in question actually conflicted with the FAA and the federal policy embedded therein. Id. at 1124.

Under Securities Industry Association and other precedent, neither the Department nor the Minnesota Legislature may impose any type of a "voluntariness" requirement that applies only to the use of arbitration agreements and not to contracts in general. The Department's interpretation of the Rule imposes just such distinction, by requiring a franchisor to secure an agreement to arbitrate on a distinctly different basis than it secures other provisions of a franchise agreement.

This author is aware of only one case in which a federal court has upheld a regulation similar to the Proposed Rule. In Saturn Distribution Corporation v. Williams, 717 F.Supp. 1147 (E.D. Va., 1989), the District Court for the Eastern District of Virginia, in a poorly reasoned opinion, upheld the right of the Commissioner of Motor Vehicles to require automobile distributors to allow prospective automobile dealers to opt-out from the requirements of an arbitration covenant contained in the distributor's standard form dealership agreement. Saturn Distribution Corporation filed its standard dealership agreement with the Commissioner of Motor Vehicles for approval, as required by the Virginia Motor Vehicle Dealer Licensing Act (the "Act"). The Commissioner subsequently informed Saturn that he would not approve its agreement as written, but would grant his approval if the agreement allowed a prospective dealer the option to delete the exclusive arbitration clause. The Commissioner based his decision on §46.1-550.5:27(10) of the Act, which states that an automobile distribution agreement must contain language identical in effect to the following:

> If any provision herein contravenes the valid laws or regulations or any state or other jurisdiction wherein this agreement is to be performed, or denies access to the procedures, forums, or remedies provided for by such laws or regulations, such provision shall be deemed to be modified to conform to such laws or regulations, and all other terms and provisions shall remain in full force and effect.

In response to the Commissioner's actions, Saturn filed suit seeking a declaratory judgment that the provision in question, as applied by the Commissioner of Motor Vehicles to Saturn's agreement, was preempted by Section 2 of the FAA and the Supremacy Clause. The basis of Saturn's argument was that the subject regulation, as interpreted by the Commissioner, was preempted by the FAA and unenforceable under the Supremacy Clause because it singled out arbitration clauses and subjected only such clauses to the opt-out treatment. The court rejected Saturn's assertion, finding that the subject regulation did not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives [of the FAA]." Id. at 1151.

Judge Williams appears to have based his decision on two factors. First, he asserted that since the burdens imposed on the formation of arbitration covenants by the subject regulation were not nearly as great as the burdens imposed by other sections of the Act and other similar laws on the use or enforcement of other types of contractual provisions (e.g., restrictions on terminations of dealerships without notice and/or good cause), they were permissible. He even went so far as to state that since other similar laws actually prohibited certain types of contractual provisions, arbitration covenants had been given a "privileged status" under the circumstances. Id. at 1150. What Judge Williams failed to discuss (or realize) is that such "tougher" restrictions were a permissible exercise of state power to regulate commerce because Congress had not seen fit to preempt exercise of state regulatory power with respect to other elements of motor vehicle distribution, as it had with respect to arbitration agreements (See e.g., The Petroleum Marketing Practices Act, 15 U.S.C. §§2801 et seq.). The FAA prohibits states from interfering with predispute arbitration agreements, not merely from regulating them more severely than other contractual provisions.

Second, Judge Williams appears to have based his decision on his belief that "in order for arbitration to be legitimate, it must result from the acquiescence of both parties; it may not be imposed by one party upon the other." Id. at 1151. Judge Williams' reasoning is implicity predicated on the assumption that the agreement to arbitrate set forth in Saturn's form distributorship agreement would not necessarily be entered into "voluntarily" without separately providing for the option to opt-out, notwithstanding the fact that the prospective Saturn dealers would enter into their dealership agreements voluntarily. In citing precedent in support his position, Judge Williams curiously ignored all of the relevant cases decided by the United States Supreme Court, the Federal Appellate Courts and other Federal District Courts on this issue and similar issues involving impediments to the formation and enforceability of arbitration covenants and instead, chose to site the pronouncements of a trial court from New York to support his otherwise unsupportable proposition.

Saturn cited Collins Radio Co., Webb and the district court's decision in Securities Industry Association (the Saturn Distribution Corporation decision was issued prior to the decision of the First Circuit in Securities Industry Association) in support of its position. Judge Williams stated that Collins Radio Co. and Webb were easily distinguishable because both cases involved existing agreements to arbitrate and not impediments to the formation of an arbitration provision. Similarly, he chose to ignore the district court's decision in Securities Industry Association on the basis that defendants in that case had admitted that the regulations in question singled out arbitration agreements. According to Judge Williams, the Commissioner of Motor Vehicles had not made such a concession and the court found (as a matter of law) that the regulation did not single out arbitration agreements for especially burdensome treatment. Id. at 1152.

Fourteen days after the Saturn Distribution Corporation opinion was issued, the First Circuit decided Securities Industry Association. Based on the First Circuit's opinion (discussed above), it is doubtful that Judge Williams' idiosyncratic, result-oriented decision can possibly survive the scrutiny of an appeal.

Policy Considerations

Both the Department's current interpretation of the Rule and the Proposed Rule are unsound public policy. The Department has presumably concluded that arbitration is a disadvantageous forum for a franchisee and that franchisors bind franchisees to arbitrate for this reason. There has been a long and on-going debate among businessmen and attorneys over the relative advantages and disadvantages of litigation and arbitration. The issues and assertions of this debate are beyond the scope of this article. However, it is important to note that a principal advantage of arbitration is substantially lower cost, a result that is presumably at least as important to a franchisee as to a franchisor. Contrary to the widely held belief that franchisees are usually plaintiffs represented by contingent fee lawyers (and, therefore, indifferent to the cost of litigation), franchisees are very often defendants required to pay $100.00 to $250.00 per hour for legal representation. Arbitration may be disadvantageous to a franchisee in some instances and confer significant advantages in others. It is the experience of the author that franchisors adopt arbitration for the reason that on balance, over the long term, it will be the most effective and efficient dispute resolution method, not that it will be such in every dispute. It is not possible to predict whether arbitration will generally afford the franchisor a tactical advantage. The factors that will determine whether a franchisor is in a better position in court or before an arbitrator in a given dispute are numerous and not predictable and an informed decision to utilize arbitration to resolve disputes is based on the economies and efficiencies that arbitration is

thought to assure in the long run. If, as it appears, the Department's policy is predicated on the assumption that arbitration is disadvantageous to franchisees, there is no factual support for the policy.

In Southland Corp., the California Supreme Court interpreted a statutory provision voiding a waiver of compliance with the Franchise Investment Law to prohibit binding agreements to arbitrate claims of violation of that law. Although the court's construction was clearly not a necessary, or even reasonable, reading of the prohibition of waivers, it was at least plausible to construe the statute to require a judicial remedy. In contrast, the Rule and the Proposed Rule are not based on any provision of the Minnesota Franchise Law relating to waivers of claims of violation of that law. Both the Rule and the Proposed Rule were promulgated by the Department under Section 14 of the law, which prohibits "unfair practices" and authorizes the Department to define them. Few would quarrel with characterizing a requirement that franchisees waive compliance with the law an unfair practice. However, in its reinterpretation of the Rule and in its promulgation of the Proposed Rule, the Department has bootstrapped that characterization into a prohibition of binding agreements to arbitrate disputes -- all disputes -- not just disputes relating to compliance with the law.

The Department's policy decision flies in the face of federal and state policy regarding arbitration. Arbitration is encouraged by strong federal and state policy and law. Binding agreements to arbitrate entered into before a dispute has occurred are sanctioned under the FAA and the Uniform Arbitration Act, adopted by a large majority of the states, including the state of Minnesota. In that regard, the Department's policy runs contrary to the Minnesota legislature's express endorsement of binding, predispute arbitration agreements.

The scope of statutory claims held nonarbitrable has steadily shrunk in recent years and antitrust law, securities law and RICO claims are now generally considered arbitrable. In May of 1989, the U.S. Supreme Court continued its trend of finding federal statutory claims arbitrable (absent an express Congressional command for judicial resolution of claims) in its decision in Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989), holding that claims under the Securities Act of 1933 are arbitrable and expressly overruling Wilco v. Swan, 346 U.S. 427 (1953), a long standing precedent that predispute arbitration agreements were not enforceable if a claim is asserted under the Securities Act of 1933 (in Shearson/American Express, Inc. v. McMahan, 482 U.S. 220, 107 S.Ct. 2332 (1987), the Court had previously held that claims under the Securities and Exchange Act of 1934 are arbitrable). The Supreme Court's discussion of the evolution of policy relative to arbitration of federal statutory claims is instructive:

II.

> The Wilco case, decided in 1953, required the Court to determine whether an agreement to arbitrate future controversies constitutes a binding stipulation "to waive compliance with any provision" of the Securities Act, which is nullified by §14 of the Act. 15 U.S.C. §77n. The Court considered the language, purposes and legislative history of the Securities Act, and concluded that the agreement to arbitrate was void under §14. But the decision was a difficult one in view of the competing legislative policy embodied in the Arbitration Act, which the Court described as "not easily reconcilable" and which strongly favors the enforcement of agreements to arbitrate as a means of securing "prompt, economical and adequate solution of controversies." 346 U.S., at 438.
>
> It has been recognized that Wilko was not obviously correct, for "the language prohibiting waiver of 'compliance with any provision of this title' could easily have been read to relate to substantive provisions of the Act without including the remedy provisions." Alberto-Culver Co. v. Scherk, 484 F.2d 611, 618, n. 7 (CA 7 1973) (Stevens, J., dissenting), rev'd, 417 U.S. 506 (1974). The Court did not read the language this way in Wilko, however, and gave two reasons. First, the Court rejected the argument that "arbitration is merely a form of trial to be used in lieu of a trial at law." 346 U.S., at 438. The Court found instead that §14 does not permit waiver of "the right to select the judicial forum" in favor of

arbitration, Id., at 435, because "arbitration lacks the certainty of a suit at law under the Act to enforce [the buyer's] rights," Id., at 432. Second, the Court concluded that the Securities Act was intended to protect buyers of securities, who often do not deal at arm's length and on equal terms with sellers, by offering them "a wider choice of courts and venue" than is enjoyed by participants in other business transactions, making "the right to select the judicial forum" a particularly valuable feature of the Securities Act. Id., at 435

> We do not think these reasons justify an interpretation of §14 that prohibits agreements to arbitrate future disputes relating to the purchase of securities. The Court's characterization of the arbitration process in Wilko is pervaded by what Judge Jerome Frank called "the old judicial hostility to arbitration." Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (CA 2 1942). That view has been steadily eroded over the years, beginning in the lower courts. See Scherk, 484 F.2d at 616 (Stevens, Jr., dissenting) (citing cases). The erosion intensified in our most recent decisions upholding agreements to arbitrate federal claims raised under the Securities Exchange Act of 1934, see Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), under the RICO statutes, see ibid., and under the antitrust laws, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). See also Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (federal arbitration statute "requires that we rigorously enforce agreements to arbitrate"); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983) ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). The shift in the Court's views on arbitration away from those adopted in Wilko is shown by the flat statement in Mitsubishi: "By agreement to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S., at 628. To the extent that Wilko rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.
>
> Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that §14 is properly construed to bar any waiver of these provisions. Nor are they so critical that they cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers ... .

In addition to the rapidly growing judicial support for enforcement of predispute arbitration agreements, an increasing number of courts are implementing mandatory arbitration systems for certain classes of disputes in order to relieve severely congested

dockets. In light of the overwhelming support of binding arbitration, by what logic or experience can it be considered an unfair practice.

Conclusion

The Minnesota Department of Commerce has adopted an unsound and unconstitutional policy with respect to arbitration of disputes arising in franchise relationships. The Department's policy is not a disclosure requirement, but a demand by the Department that franchisors change a legitimate and generally favored policy of resolving disputes by arbitration rather than in the over-burdened judicial system.

Because of the harshness of the criticism in this article directed at the Department's reinterpretation of the Rule, the author would like to make clear that his criticism is not intended to be a personal attack on the staff of the Department or any member thereof. Although the author has not discussed the Department's policy on predispute arbitration agreements with any member of the Department's staff, he has no doubt that they hold a sincere belief that binding arbitration is disadvantageous to Minnesota franchisees and that it is within their statutory mandate to reinterpret the Rule to prohibit such agreements unless the franchisee is given a right to decline to resolve disputes by arbitration. The purpose of this article is to demonstrate how wrong that action is from the perspective of constitutional law and public policy. The author hopes that the Department will read this article in that light.

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE

In The Matter of the Proposed Rules Relating to Franchises

FINDINGS OF FACT CONCLUSION & ORDER OF ADOPTION

(1) Notice of the Commissioner's proposed adoption of the above-entitled rules without a public hearing was published in the State Register on December 18, 1989. On December 14, 1989, the Department of Commerce sent copies of the Notice by United States mail to all persons on the list maintained by the agency pursuant to Minnesota Statutes, Section 14.14, Subdivision 1, paragraph (a) and 14.22.

(4) All persons were given the opportunity to submit comments on the rule for thirty days after notice of proposed rulemaking. (5) No persons submitted requests for hearing within the thirty day comment period.

All persons were given the opportunity to submit comments on the amendments to the rules for a 30 day period after the above-referenced notice of proposed rulemaking. No persons submitted requests for hearing within the thirty day comment period.

(6) Based upon the comments and evidence on the record, I find that Part 2860.2500, Subpart 2. should be amended to: "**Public Offering Statement.** The proposed public offering statement filed in connection with the annual report shall contain all data current as of the end of the franchisor's fiscal year including audited financial statements in accordance with parts 2860.1200 to 2860.1600. All alterations in the text of the public offering statement previously filed as part of registration shall be indicated by means of underscoring." This change is not substantial, is needed and reasonable and will make Subpart 2 consistent with Subpart 3 of Part 2860.2500 and with Minnesota Statute 80C.08. As to the balance of the (8) above captioned rules, they are needed and reasonable.

(9) NOW, THEREFORE, IT IS ORDERED that the rules identified as the Rules Relating to Franchises, as amended, are adopted this 22 day of March 1990 pursuant to the authority vested in me by Minnesota Statutes, Section 155A.05.

Thomas H. Borman

THOMAS H. BORMAN
Commissioner of Commerce

Dated this 22 day of March, 1990.

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE

In the Matter of the Proposed
Amendment to Franchise Rules

AFFIDAVIT

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

Patricia L. Peterson, being sworn says:

No one has requested notification of the date of submission of the Rule to the Attorney General and therefore, the Affidavit of Mailing Notice of Submission of the Rule to Attorney General pursuant to Minn. Rule Part 2010.0300 is inapplicable.

Patricia L. Peterson
PATRICIA L. PETERSON
Director of Registration

Subscribed and sworn to before me
this 23rd day of March, 1990.

Cynthia Claason
NOTARY PUBLIC

CYNTHIA L. CLAASON
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
MY COMMISSION EXPIRES FEBRUARY 11, 1992

Stat Auth 45.023

The commissioner of commerce may adopt amend, suspend or repeal rules including emergency rules.

80C.18
The commissioner may promulgate rules to carry out the provisions of sections 80C.01 to 80C.22 including rules

Notice of Intent
missing K(2) statement of need and reasonable was prepared before Notice
...

missing K(7) if agency received no requests requests for notice of submission of the adopted rule to the attorney general...

*note comment sent from Lewis Ladnick re: unconstitutional policy on arbitration agreements

Rules note 2860.4400 J.

DEPARTMENT OF COMMERCE

Notice to Solicit Outside Opinion Regarding Proposed Amendments to Franchise Rules Including the Impact of the Rules on Small Business.

Notice is hereby given that the Department of Commerce is seeking information or opinions from persons outside the agency in preparing to amend current rules relating to arbitration and to amend various franchise rules to reflect statutory changes. Promulgation of these rules is authorized by Minnesota Statutes, 45.023 and 80C.18.

Outside opinion is also being solicited as to how these rules will affect small businesses as defined by Minnesota Statutes 14.115, subdivision 1.

The Department of Commerce requests information and comments concerning the subject matter of these rules. Interested or affected persons or groups may submit statements of information or comment orally or in writing to:

Patricia L. Peterson
Department of Commerce
500 Metro Square Building
St. Paul, MN 55101
(612) 296-2284

Oral statements will be received during regular business hours over the telephone at 296-2284.

All statements of information and comment shall be accepted until September 25, 1989. Any written material received by the Department of Commerce shall become part of the record in the event that the rules are promulgated.

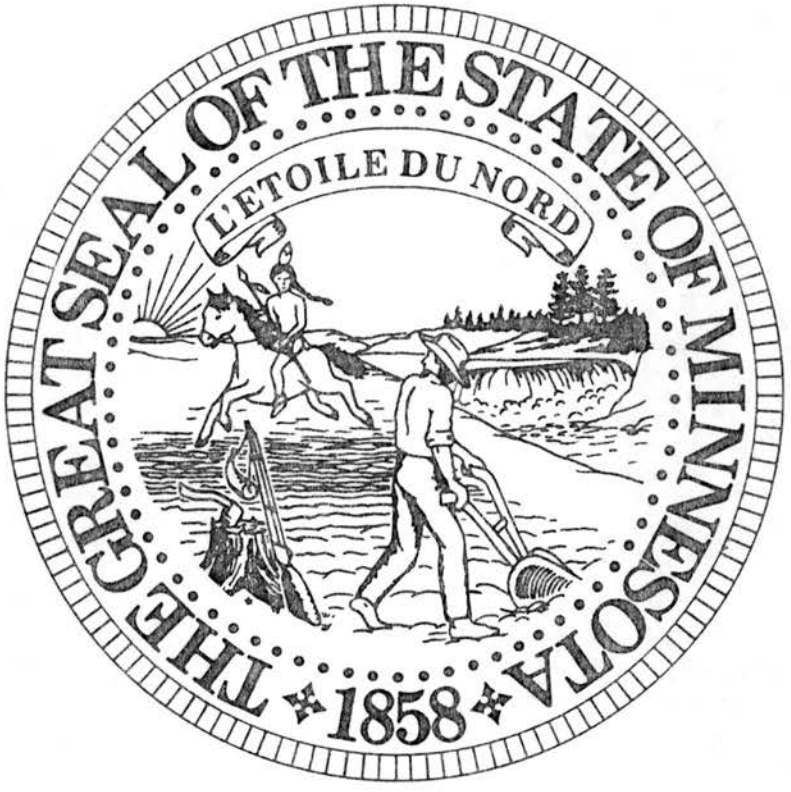
MICHAEL A. HATCH
Commissioner of Commerce

SEP 12 1989

State of Minnesota

STATE REGISTER

Department of Administration—Print Communications Division



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Department of Commerce

Notice to Solicit Outside Opinion Regarding Proposed Amendments to Franchise Rules Including the Impact of the Rules on Small Business

NOTICE IS HEREBY GIVEN that the Department of Commerce is seeking information or opinions from persons outside the agency in preparing to amend current rules relating to arbitration and to amend various franchise rules to reflect statutory changes. Promulgation of these rules is authorized by *Minnesota Statutes*, 45.023 and 80C.18.

Outside opinion is also being solicited as to how these rules will affect small businesses as defined by *Minnesota Statutes* 14.115, subdivision 1.

The Department of Commerce requests information and comments concerning the subject matter of these rules. Interested or affected persons or groups may submit statements of information or comment orally or in writing to:

Patricia L. Peterson
Department of Commerce
500 Metro Square Building
St. Paul, MN 55101
(612) 296-2284

Oral statements will be received during regular business hours over the telephone at 296-2284.

All statements of information and comment shall be accepted until September 25, 1989. Any written material received by the Department of Commerce shall become part of the record in the event that the rules are promulgated.

Michael A. Hatch
Commissioner of Commerce

Department of Commerce

Notice to Solicit Outside Opinion Regarding Proposed Rules Regarding The Minnesota Insurance Fair Information Reporting Act Including the Impact of the Rules on Small Business

NOTICE IS HEREBY GIVEN that the Department of Commerce is seeking information or opinions from persons outside the agency to determine whether rules should be adopted in regard to the Minnesota Insurance Fair Information Reporting Act (Chapter 316, *Laws of Minnesota 1989*) and if so what those rules should be. Promulgation of these Minnesota Insurance Fair Information Reporting Act rules is authorized by *Minnesota Statutes*, section 72A.19, subd. 2, and 45.023.

Outside opinion is also being solicited as to how these rules will affect small businesses as defined by *Minnesota Statutes* Section 14.115, subdivision 1.

The Department of Commerce requests information and comments concerning the subject matter of these rules. Interested or affected persons or groups may submit statements of information or comment orally or in writing to:

Richard G. Gomsrud
Department Counsel
Department of Commerce
500 Metro Square Building
St. Paul, Minnesota 55101
(612) 296-5689

Oral statements will be received during regular business hours over the telephone at (612) 296-5689.

All statements of information and comment shall be accepted until October 15, 1989. Any written material received by the Department of Commerce shall become part of the record in the event that the rules are promulgated.

Michael A. Hatch
Commissioner of Commerce

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE

In the Matter of the Proposed Adoption of Rules Relating to Franchises.

Notice of Intent to adopt Rules without a Public Hearing.

(1) Notice is hereby given that the Department of Commerce intends to adopt the above-entitled rules without a public hearing following the procedures set forth in the Administrative Procedures Act for adopted Rules without a public hearing in Minnesota Statutes, section 14.22-14.28. Authority for the adoption of these rules is contained in Minnesota Statutes, Section 45.023 and 80C.18.

(2) All persons have 30 days to submit comments in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. (3) Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed. (8) The proposed rules may be modified if the modifications are supported by the data and views submitted to the Department and do not result in a substantial change.

Any person may make a written request for a public hearing within the 30 days comment period. (4) If 25 or more persons submit a written request for a public hearing within the 30 day comment period, a public hearing will be held unless a sufficient number withdraw their request in writing. (6) Any person requesting a hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed. (7) If a public hearing is required, the Department will proceed pursuant to Minnesota Statutes, sections 14.13 to 14.20.

(5) Persons who wish to submit comments or a written request for a public hearing should submit them to:

Patricia L. Peterson
Director of Registration
Department of Commerce
500 Metro Square Building
St. Paul, Minnesota 55101
(612) 296-2284

(12) A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rule and identifies the data and information relied upon to support the proposed rules has been prepared and is available upon request from Patricia Peterson.

(14) Pursuant to Minnesota Statutes Section 14. 115, subdivision 2, the impact on small business has been considered in the promulgation of the rules. Anyone wishing to present evidence or argument as to the rules' effect on small business may do so. The Department's position regarding the impact of the rules on small business is set forth in the Statement of Need and Reasonableness.

(9) If no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent the form relates to legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the adopted rule, must submit the written request to Patricia Peterson.

MICHAEL A. HATCH
Commissioner of Commerce

In the Matter of the Proposed Rules
Relating to Franchises

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

AFFIDAVIT OF
MAILING

Dolores Anitzberger being first duly sworn, and says:

I hereby certify that the list of persons, associations, and other interested groups who have requested, pursuant to Minnesota Statutes, section 14.14, subdivision 1a, that their names be placed on file with and maintained by the Department of Commerce for the purpose of receiving notice of the proposed adoption of rules is accurate and complete as of 12:00 P.M., this 14th day of December 1989.

That on the 14th day of December 1989, at the City of St. Paul, County of Ramsey, State of Minnesota, the attached Notice of Intent to Adopt Rules Without a Public Hearing was served by depositing in the State of Minnesota Central Mail System for United States mailing at said City of St. Paul, a copy properly prepared with first-class postage prepaid, on all persons and associations who have requested that their names be placed on file with the Minnesota Department of Commerce for the purpose of receiving notice of the proposed adoption of rules by the Department.

Dolores Anitzberger

Subscribed and sworn to before me
this 14th day of December 1989.

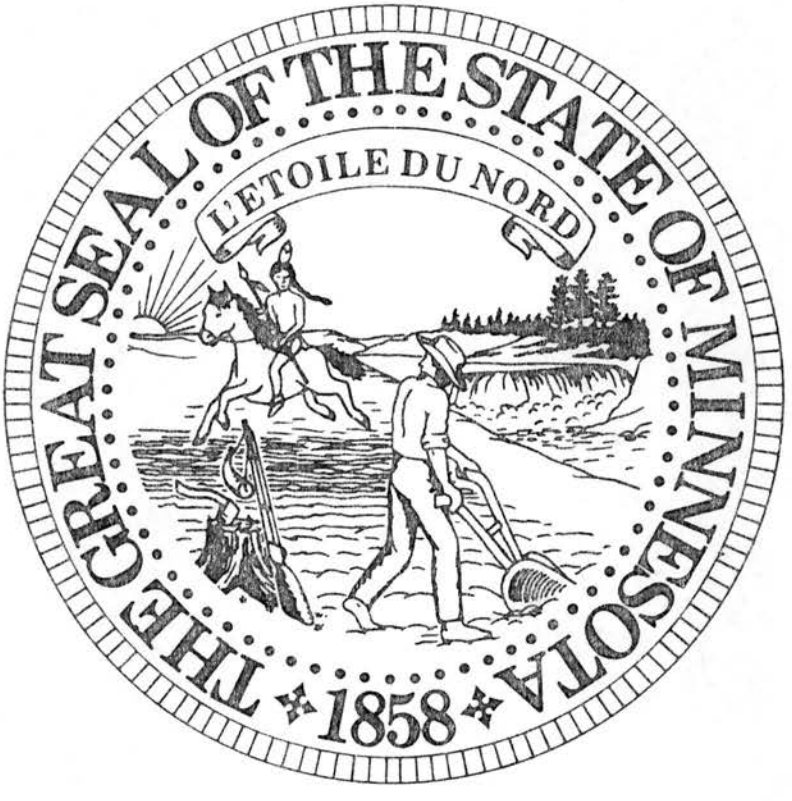
Cynthia L. Claason

CYNTHIA L. CLAASON
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
MY COMMISSION EXPIRES FEBRUARY 10, 1992

State of Minnesota

STATE REGISTER

Department of Administration—Print Communications Division



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Department of Commerce

Proposed Permanent Rules Relating to Franchises

Notice of Intent to Adopt Rules Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Department of Commerce intends to adopt the above-entitled rules without a public hearing following the procedures set forth in the Administrative Procedures Act for Adopted Rules without a public hearing in *Minnesota Statutes*, section 14.22-14.28. Authority for the adoption of these rules is contained in *Minnesota Statutes*, Section 45.023 and 80C.18.

All persons have 30 days to submit comments in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed. The proposed rules may be modified if the modifications are supported by the data and views submitted to the Department and do not result in a substantial change.

Any person may make a written request for a public hearing within the 30 days comment period. If 25 or more persons submit a written request for a public hearing within the 30 day comment period, a public hearing will be held unless a sufficient number withdraw their request in writing. Any person requesting a hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed. If a public hearing is required, the Department will proceed pursuant to *Minnesota Statutes*, sections 14.13 to 14.20.

Persons who wish to submit comments or a written request for a public hearing should submit them to:

Patricia L. Peterson
Director of Registration
Department of Commerce
500 Metro Square Building
St. Paul, Minnesota 55101
(612) 296-2284

A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rule and identifies the data and information relied upon to support the proposed rules has been prepared and is available upon request from Patricia Peterson.

Pursuant to *Minnesota Statutes* Section 14.115, subdivision 2, the impact on small business has been considered in the promulgation of the rules. Anyone wishing to present evidence or argument as to the rules' effect on small business may do so. The Department's position regarding the impact of the rules on small business is set forth in the Statement of Need and Reasonableness.

If no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent the form relates to legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the adopted rule, must submit the written request to Patricia Peterson.

Michael A. Hatch
Commissioner of Commerce

Rules as Proposed

2860.0200 EXEMPTIONS.

Subpart 1. **Isolated sales.** The provisions of *Minnesota Statutes* 1973 Supplement, section 80C.03, clause ~~(1)~~ (a), shall be available to franchisees only. The provisions of this part shall not be interpreted as to require registration of the franchise prior to its transfer under these circumstances. However, no person, in connection with such a transfer, may require a substituted franchisee to sign a franchise contract or agreement that violates the "unfair and inequitable" provisions of parts 2860.4500 to 2860.8300, whichever is applicable.

Subp. 2. **Securities.** The provisions of *Minnesota Statutes* 1973 Supplement, section 80C.03, clause ~~(4)~~ (d), shall be available only when the franchise is in fact registered as a security in ~~the state of~~ Minnesota. All reference to *Minnesota Statutes*, chapter 80 shall include *Minnesota Statutes* 1973 Supplement, chapter 80A, and provisions amendatory thereto.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." **ADOPTED RULES SECTION** — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

2860.2500 ANNUAL REPORT.

[For text of subps 1 and 2, see M.R. 1989]

Subp. 3. **Time.** No later than the ~~90th~~ 120th day following the end of the franchisor's fiscal year, the franchisor shall file financial statements in accordance with parts 2860.1200 to 2860.1600. The newly filed financial statements are to be included in all public offering statements used by the franchisor after such filing date.

[For text of subp 4, see M.R. 1989]

2860.3800 ALTERNATIVE APPLICATIONS.

The commissioner may accept as application for registration under *Minnesota Statutes* 1973 Supplement, chapter 80C, any currently effective public offering statement prepared for compliance with the registration provisions of the franchise laws of ~~such~~ other jurisdictions as the commissioner may, from time to time, designate. The commissioner reserves the right to require alterations in such statements as ~~he deems~~ necessary to fulfill the requirements of *Minnesota Statutes* 1973 Supplement, chapter 80C.

The commissioner may accept as application for registration the Uniform Franchise Registration Application adopted by the ~~Midwest Securities Commissioners Association~~ North American Securities Administrators Association; however, the commissioner reserves the right to require alterations in the Uniform Franchise Offering Circular as ~~he may deem~~ necessary.

2860.4200 FILING OF ADVERTISEMENTS.

One copy of each advertisement intended for use shall be filed with the commissioner at least ~~three~~ five business days prior to ~~the~~ its first publication ~~thereof~~.

If not disallowed by the commissioner by written notice or otherwise within three business days from the date filed, the advertisement may be published.

No formal approval of the advertisement shall be issued by the commissioner.

The person placing the advertisement shall be responsible for the accuracy and reliability of the advertisement and its conformity with the act and this part.

2860.4400 UNFAIR AND INEQUITABLE PRACTICES.

All franchise contracts or agreements and any other device or practice of a franchisor, shall conform to the following provisions. It shall be unfair and inequitable for any person to:

[For text of items A to D, see M.R. 1989]

E. terminate or cancel a franchise ~~without first having~~ unless:

(1) that person has given written notice setting forth all the reasons for ~~such~~ termination or cancellation to the franchisee at least ~~60~~ 90 days in advance of ~~such~~ termination or cancellation; and

(2) the recipient of the notice fails to correct the reasons stated for termination or cancellation in the notice within 60 days of receipt of the notice, except that the notice shall be effective immediately upon receipt where the alleged grounds are:

(1) voluntary abandonment of the franchise relationship by the franchisee;

(2) the conviction of the franchisee in a court of competent jurisdiction of an offense directly related to the business conducted pursuant to the franchise; or

(3) failure to cure a default under the franchise agreement that materially impairs the good will associated with the franchisor's tradename, trademark, service mark, logotype, or other commercial symbol after the franchisee has received written notice to cure of at least 24 hours in advance thereof;

[For text of items F to I, see M.R. 1989]

J. require a franchisee to waive his rights to a jury trial or to waive his rights to any procedure, forum, or remedies provided for by the laws of the jurisdiction, or to consent to liquidated damages, termination penalties, or judgment notes; provided, that ~~this part shall not bar a voluntary arbitration of any matter if the proceeding is conducted by an independent tribunal under the rules of the American Arbitration Association~~ the franchise agreement may contain an exclusive arbitration clause if the agreement allows the franchisee to opt out of the requirements of the clause;

[For text of items K and L, see M.R. 1989]

M. fail to renew a franchise unless the franchisee has been given written notice of the intention not to renew at least ~~90~~ 180 days in advance thereof and has been given a ~~sufficient~~ opportunity to ~~recover his investment or unless for good cause as defined in item F.~~ operate the franchise over a sufficient period of time to enable the franchisee to recover the fair market value of the franchise as a going concern as determined and measured from the date of the failure to renew. This item does not apply if the failure to renew a franchise is for good cause and the franchisee has failed to correct the reasons for termination.

2860.4500 FALSE, FRAUDULENT, AND DECEPTIVE PRACTICES.

In connection with an offer, grant, or sale of a franchise in this state, any person authorizing, aiding in, or causing such offer, grant, or sale of franchises shall be deemed to be engaging in a "false, fraudulent, or deceptive practice" within the meaning of *Minnesota Statutes* 1973 Supplement, sections 80C.12 and 80C.13, without limiting the authority of the commissioner under *Minnesota Statutes* 1973 Supplement, section 80C.12 ~~or 80C.15~~, if such person:

[For text of items A to D, see M.R. 1989]

2860.5500 CANCELLATION OF FRANCHISE.

Any provisions regarding cancellation of the franchise agreement shall be governed by items A to C.

[For text of items A and B, see M.R. 1989]

C. ~~Cancellation of the franchise agreement by the supplier shall be preceded by~~ No person may cancel a franchise unless:

(1) that person has given written notice to the dealer in person or by certified mail. ~~The notice shall be given~~ setting forth all the reasons for cancellation at least ~~60~~ 90 days ~~prior to the date on which the supplier intends to terminate or cancel the franchise agreement~~ in advance of the cancellation; and

(2) the recipient of the notice fails to correct the reasons for cancellation in the notice within 60 days of receipt, except that the notice shall be effective immediately upon receipt when the cause for termination or cancellation is:

(1) criminal misconduct;

(2) fraud;

(3) abandonment;

(4) bankruptcy or insolvency of the dealer;

(5) adulteration of product; or

(6) the giving of a nonsufficient fund check that remains dishonored for a period of ten days after notice, which notice shall be effective on the fifth day after the date of mailing.

2860.5600 RENEWAL OF FRANCHISE.

Any provisions regarding the renewal of a franchise agreement shall be governed by items A and B.

A. Either party to a franchise agreement may refuse to renew the franchise agreement upon giving the other party written notice of his or her intent not to renew at least ~~90~~ 180 days prior to the expiration of the franchise agreement.

[For text of item B, see M.R. 1989]

REPEALER. *Minnesota Rules*, parts 2860.3400, subpart 2; 2860.6100; 2860.6200; 2860.6300; 2860.6400; and 2860.6500, are repealed.

Board of Electricity

Proposed Permanent Rules Relating to Uniform Electrical Violation Citation

Notice of Intent to Adopt Rules Without a Public Hearing

NOTICE IS HEREBY GIVEN that the State Board of Electricity ("board") proposes to adopt the above-entitled rule without a public hearing. The Board has determined that the proposed adoption of this rule will be noncontroversial in nature and has elected to follow the procedures set forth in *Minnesota Statutes* § 14.22 to 14.28. Authority for the adopting of this rule is contained in *Minnesota Statutes* § 326.241, subd. 6. Additionally, a statement of need and reasonableness that describes the need for and identifies the data and information relied upon to support the proposed rule, has been prepared and is available from Mr. Quinn upon request.

All persons have 30 days in which to submit comment in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." **ADOPTED RULES SECTION** — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.