

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Regulated Industries

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BILL: SB 1076

INTRODUCER: Senator Steube

SUBJECT: Franchises

DATE: January 29, 2018

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kraemer</u>	<u>McSwain</u>	<u>RI</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 1076 creates the “Protect Florida Small Business Act” (act). The act regulates the conduct of franchisors and their representatives to prevent fraud, unfair business practices, unfair methods of competition, impositions, and other abuses upon franchisees in Florida. The bill addresses requirements for sale, transfer, or assignment of franchises.

The bill provides that a franchise agreement in violation of any provision in the act is void and unenforceable, as is any provision that restricts, to a jurisdiction outside of Florida, the location (venue) of an action related to a claim arising under a franchise agreement, if the claim involves a franchisee who was a resident of Florida when the franchise agreement was signed, or a business entity established in Florida, or a franchise either operating or to be operated in Florida. Furthermore, the bill provides the act does not apply to a franchise agreement between a Florida franchisor and a franchisee who has no connections to Florida (i.e., was not a resident of Florida when the franchise agreement was signed, or a business entity established in Florida, or involving a franchise either operating or to be operated in Florida), even if the franchise agreement says Florida law applies.

SB 1076 has an indeterminate fiscal impact on state government. See Section V. Fiscal Impact Statement.

The bill is effective upon becoming law.

## II. Present Situation:

The regulation of franchising in Florida is addressed in multiple provisions of Florida law. Chapter 817, F.S. relating to Fraudulent Practices, includes provisions concerning False Pretenses and Frauds.<sup>1</sup>

### Florida Franchise Act

Section 817.416, F.S., deals with requirements for the relationship between a franchisee and a franchisor.<sup>2</sup> That statute defines the term “franchise or distributorship” to mean:

[A] contract or agreement, either expressed or implied, whether oral or written, between two or more persons:

1. Wherein a commercial relationship of definite duration or continuing indefinite duration is involved;
2. Wherein one party, hereinafter called the “franchisee,” is granted the right to offer, sell, and distribute goods or services manufactured, processed, distributed or, in the case of services, organized and directed by another party;
3. Wherein the franchisee as an independent business constitutes a component of franchisor’s distribution system; and
4. Wherein the operation of the franchisee’s business franchise is substantially reliant on franchisors for the basic supply of goods.<sup>3</sup>

The term “goods,” means “any article or thing without limitation, or any part of such article or thing, including any article or thing used or consumed by a franchisee in rendering a service established, organized, directed, or approved by a franchisor.”<sup>4</sup>

It is unlawful for any person selling or establishing a franchise or distributorship to intentionally:

- Misrepresent the prospects or chances for success of a proposed or existing franchise or distributorship;
- Misrepresent, by failure to disclose or otherwise, the known required total investment for such franchise or distributorship; or
- Misrepresent, or fail to disclose efforts to sell or establish more franchises or distributorships than is reasonable to expect the market or market area for the franchise or distributorship to sustain.<sup>5</sup>

The execution or carrying out of a scheme, plan, or corporate organization in violation of s. 817.416, F.S., if knowledge or intent is proved, is a second degree misdemeanor.<sup>6</sup>

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<sup>1</sup> See part I of ch. 817, F.S.

<sup>2</sup> Section 817.416, F.S. has not been amended since 1971. See ch. 71-61, Laws of Fla. While popularly referred as the “Florida Franchise Act,” the law does not cite s. 817.416, F.S., as such.

<sup>3</sup> See s. 817.416(1)(b), F.S.

<sup>4</sup> Section 817.416(1)(c), F.S.

<sup>5</sup> See s. 817.416(2), F.S.

<sup>6</sup> Section 775.082, F.S., provides that a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S. provides that a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

In addition, a person who proves a violation of s. 817.416, F.S., may be granted a judgment for all moneys invested in a franchise or distributorship. Upon such a showing of proof, a court may award the successful plaintiff reasonable attorney's fees and must award reasonable costs incurred in bringing the action.<sup>7</sup>

The Department of Legal Affairs, or the Department of Legal Affairs and the Department of Agriculture and Consumer Services jointly, on behalf of the people of Florida, may sue for injunctive relief against franchise or distributorship plans or activities that engage in the intentional misrepresentations described above.<sup>8</sup>

### **The Florida Sale of Business Opportunities Act**

The Florida Sale of Business Opportunities Act (SBOA)<sup>9</sup> requires persons offering business opportunities to make specified disclosures about the business to a prospective purchaser.<sup>10</sup> The required disclosures must be made if the purchaser is required to pay an initial fee or sum of money exceeding \$500 to the seller, and if the seller represents that the seller:<sup>11</sup>

- Will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases, currency or card operated equipment, or other similar devices or currency-operated amusement machines or devices on premises neither owned nor leased by the purchaser or seller;
- Will purchase any or all products made, produced, fabricated, grown, bred, or modified by the purchaser using in whole or in part the supplies, services, or chattels sold to the purchaser;
- Guarantees a partial or full refund to the seller; or
- Provides a sales program or marketing program, excepting a sales or marketing program made in conjunction with the licensing of a registered trademark or service mark.

A "business opportunity" does not include the sale of ongoing businesses when the owner sells and intends to sell up to five businesses, the sale of not-for-profit demonstration equipment, materials, or samples for a price up to \$500 or any sales training course offered by the seller at a cost up to \$500, or the sale or lease of laundry and drycleaning equipment.<sup>12</sup>

The sale of a franchise is exempt from the required disclosures if the franchise satisfies the Federal Trade Commission's (FTC) definition of a franchise<sup>13</sup> and applies for the exemption with the Department of Agriculture and Consumers (DACs).<sup>14</sup>

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<sup>7</sup> See s. 817.416(3), F.S.

<sup>8</sup> See s. 817.416(4), F.S.

<sup>9</sup> Part VII of ch. 559, F.S.

<sup>10</sup> Section 559.803, F.S.

<sup>11</sup> Section 559.801(1)(a), F.S.

<sup>12</sup> Section 559.801(1)(b), F.S.

<sup>13</sup> See *Federal Trade Commission, Franchise Rule, 16 CFR, Part 436 Compliance Guide*, (FTC Compliance Guide) at : <https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf> (last visited Jan. 22, 2018). The FTC Compliance Guide provides a sample disclosure document and general instructions. See <https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf> (last visited Jan. 22, 2018), at pages 34-154.

<sup>14</sup> See s. 559.803, F.S.

The FTC defines “franchise” to mean any continuing commercial relationship or arrangement in which the purchaser’s business uses the trademark of the seller’s business, the seller exercises significant control over how the business operates, and the purchaser pays a fee to the seller.<sup>15</sup>

The application for the exemption through the DACS requires only the name of the applicant, the name of the franchise and the name under which the applicant intends to, or does, transact business, if different, the applicant’s principal business address, and the applicant’s federal employer identification number.<sup>16</sup>

### **Federal Trade Commission Regulations Affecting Franchises**

The Federal Trade Commission’s rule on franchises gives prospective franchise purchasers information to weigh the risks and benefits of an investment in a franchise.<sup>17</sup> The rule requires franchisors to provide all potential franchisees with a disclosure document with 23 specific items of information about the offered franchise, its officers, and other franchisees.<sup>18</sup> The FTC Compliance Guide provides a sample disclosure document and general instructions concerning the mandatory disclosures.<sup>19</sup>

### **Florida Deceptive and Unfair Trade Practices Act**

Part II of ch. 501, F.S., the “Florida Deceptive and Unfair Trade Practices Act” (FDUTPA) addresses protection of the public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce. Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.<sup>20</sup>

Section 501.203(2), F.S., addresses who is authorized to enforce the FDUTPA (enforcing authority), which includes the:

- Office of the state attorney when a violation occurs in or affects the judicial circuit under the jurisdiction of that state attorney; or
- Department of Legal Affairs, if the violation occurs in or affects more than one judicial circuit, or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.

The enforcing authority may pursue actions:

- To obtain a declaratory judgment that an act or practice violates the FDUTPA;

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<sup>15</sup> 16 C.F.R. s. 436.1(h) (2017).

<sup>16</sup> Section 559.803(3), F.S., and Florida Admin. R. 5J-10.002 (2012). The form for the application is available at the DACS website: <http://www.freshfromflorida.com/Business-Services/Sellers-of-Business-Opportunities> (last visited Jan. 22, 2018).

<sup>17</sup> See 16 C.F.R. Part 436.1(h). See also <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/franchise-rule> (last visited Jan. 22, 2018).

<sup>18</sup> See <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/franchise-rule> (last visited Jan. 22, 2018).

<sup>19</sup> *Id.* at pages 34-154.

<sup>20</sup> See s. 501.202, F.S.

- To enjoin any person who has violated, is violating, or is otherwise likely to violate, the FDUTPA; and
- For the actual damages caused by an act or practice in violation of the FDUTPA, on behalf of one or more consumers or governmental entities, except that damages are not recoverable against a retailer who has in good faith engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated the FDUTPA.<sup>21</sup>

Any person, firm, corporation, association, or entity, or any agent or employee of such persons, who is willfully using, or has willfully used, a method, act, or practice declared unlawful, or who is willfully violating any of the rules of the Department of Agriculture and Consumer Services (DACS) adopted under part II of ch. 501, F.S., is liable for a civil penalty of not more than \$10,000 for each such violation.<sup>22</sup>

Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive or prohibited by rule.<sup>23</sup> The civil penalty may be recovered in any action brought under FDUTPA by the enforcing authority; or the enforcing authority may terminate any investigation or action upon the agreement to pay a civil penalty by the person, firm, corporation, association, or entity, or their agent or employee.<sup>24</sup>

The DACS or the court may waive a civil penalty if the person, firm, corporation, association, or entity, or the agent or employee of the foregoing, has previously made full restitution or reimbursement or has paid actual damages to the consumers or governmental entities who have been injured by the unlawful act or practice or rule violation.<sup>25</sup> If civil penalties are assessed in any litigation, the enforcing authority is entitled to reasonable attorney's fees and costs; a civil penalty accrues to the state.<sup>26</sup>

Violations of the FDUTPA involving senior citizens, those with disabilities, or active duty or veteran members of the United States Armed Forces, may result in penalties of not more than \$15,000 for each violation, if the violator knew or should have known the conduct was unfair or deceptive.<sup>27</sup>

### III. Effect of Proposed Changes:

**Section 1** of the bill provides that the act may be cited as the "Protect Florida Small Business Act" (act).

The act regulates the conduct of franchisors and their representatives to prevent fraud, unfair business practices, unfair methods of competition, impositions, and other actions taken as to franchisees in Florida.

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<sup>21</sup> See s. 501.207(1), F.S.

<sup>22</sup> See s. 501.2075, F.S.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See s. 501.2077, F.S.

**Section 2** of the bill sets forth legislative findings and intent that the welfare of franchisees, including the success and failure of their franchise businesses, affects the state economy and the public, and requires promotion of fair business relations between franchisees and franchisors, and protection of franchisees against unfair treatment by franchisors.

**Section 3** of the bill creates s. 686.103, F.S., to define the following terms:

- “Area franchise” means a contract or agreement, expressed or implied, written or oral, regardless of whether the contract or agreement is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, between a franchisor and another person through which that person is granted the right, for consideration in whole or in part for such right:
  - To sell or negotiate the sale of a franchise in the name or on behalf of the franchisor; or
  - To become an area developer and develop a franchise for the benefit of that person or that person’s affiliates.
  
- “Area franchisee” means the owner of an area franchise.
  
- “Franchise” or “franchise agreement” means a contract or agreement, expressed or implied, written or oral, regardless of whether the contract or agreement is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, for a definite or indefinite time, between two or more persons by which:
  - A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;
  - The operation of the franchise business pursuant to that marketing plan or system is substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and
  - The franchisee is required to pay, directly or indirectly, a franchise fee.
  
- The term “franchise” or “franchise agreement” includes an area franchise, but does not include any of the following:
  - A franchise governed by the Agricultural Equipment Manufacturers and Dealers Act.
  - Any activity under by ss. 686.501-686.506, F.S., pertaining to art dealers.
  - A franchise governed by the Outdoor Power Equipment Manufacturers, Distributors, Wholesalers, and Servicing Dealers Act.
  - A motor vehicle franchise or agreement governed by ss. 320.60-320.70, F.S. F.S.
  - A business relationship between a beer distributor and a manufacturer governed by s. 563.022, F.S.
  - A professional sports franchise as described in s. 288.11625(2)(c), F.S.
  
- “Franchise fee” means a fee or charge greater than \$100 annually which a franchisee is required to pay or agrees to pay, directly or indirectly, to or for the benefit of the franchisor for the right to enter into or continue a franchise, including, but not limited to, a payment for goods or services. However, the term does not include a fee or charge that a franchisee pays or agrees to pay the franchisor for goods at a bona fide wholesale price, if no obligation is imposed upon the franchisee to purchase or pay for a quantity of goods in excess of that

which a reasonable person normally would purchase by way of a starting inventory or supply or to maintain an ongoing inventory or supply.

- “Franchisee” means a person to whom a franchise is offered or granted.
- “Franchisor” means a person who grants a franchise to a franchisee.
- “Person” means a natural person, corporation, limited liability company, association, partnership, trust, or other business entity and, in the case of a business entity, includes any other affiliate of such entity.

**Section 4** of the bill creates s. 686.104, F.S., relating to termination or nonrenewal of a franchise. Except as otherwise provided in the act, a franchisor may not terminate or refuse to renew a franchise except for good cause. If a franchise is terminated without good cause, then that action constitutes an actionable unfair termination.

With limited exceptions, good cause is limited to the failure of the franchisee to substantially comply with the reasonable and material requirements imposed upon the franchisee by the franchise agreement after being given notice at least 90 days in advance of the termination and a reasonable opportunity of not less than 60 days after the date of the notice of noncompliance, to cure the failure. If the franchisee cures the failure within the time given to cure, the termination notice is void.

An immediate notice of termination may be given to a franchisee by a franchisor without an opportunity to cure if, during the period in which the franchise is in effect, any of the following events, relevant to the franchise, occurs:

- The franchisee has been judicially determined to be insolvent, has had all or a substantial part of its assets assigned to or for the benefit of any creditor, or has admitted its inability to pay its debts as they come due.
- The franchisee abandons, by failing to operate, the franchise business for 10 consecutive days during which, under the terms of the franchise, the franchisee is required to operate the franchise business, unless such failure to operate is due to an act of God; a work stoppage; a strike or labor difficulty; a fire, flood, hurricane, or sinkhole; or other cause beyond the franchisee’s control.
- The franchisee fails, for a period of 10 days after a notice of noncompliance, to comply with any federal, state, or local law or regulation, including, but not limited to, any health, safety, building, or labor law or regulation applicable to the operation of the franchise.
- The franchisee is convicted of a felony, if that felony significantly, directly, and adversely affects the operation of the franchise business.
- The franchisor makes a reasonable determination that continued operation of the franchise business by the franchisee will result in imminent and substantial danger to public health or safety.

**Section 5** of the bill creates s. 686.105, F.S., relating to sales, transfers, and assignments of franchises.

A franchisor may not deny the surviving spouse, heir, or estate of a deceased franchisee (the survivors), or of a deceased person who controlled a majority interest in the franchise, the opportunity to participate in the ownership of the franchise or franchise business under a valid franchise agreement for at least 180 days after the death of the franchisee or the death of a person controlling a majority interest in the franchise (the status quo period). During the status quo period, the surviving spouse, heir, or estate must either meet all of the existing reasonable qualifications for a purchaser of a franchise or must sell, transfer, or assign the franchise to a person who meets the franchisor's existing reasonable qualifications for new franchisees. The surviving spouse, heir, or estate must maintain all standards and obligations of the franchise.

With the prior written consent of the franchisor, a franchisee may sell, transfer, or assign a franchise. The franchisor's consent may not be withheld unless the purchaser, transferee, or assignee does not meet the qualifications for new or renewing franchisees, or the franchisee and the purchaser, transferee, or assignee fail to comply with other reasonable transfer conditions specified in the franchise agreement.

A franchisor may not prevent a franchisee from selling, transferring, or assigning a franchise, all or substantially all of the assets of the franchise business, or an interest in the franchise to another person, if that person meets the franchisor's reasonable qualifications for the approval of new or renewing franchisees in effect at the time the franchisor receives notice of the proposed sale, transfer, or assignment. The franchisor must make the list of qualifications available to the franchisee, and must consistently apply such qualifications to similarly situated franchisees operating within the franchise brand.

**Section 6** of the bill creates s. 686.106, F.S., concerning the rights and prohibitions that govern the relations between a franchisor and its franchisee, to require that the parties must deal with each other in good faith and in a commercially reasonable manner.<sup>28</sup>

A franchisor may not:

- Terminate or fail to renew a franchise agreement in violation of the act.
- Prevent a sale, transfer, or assignment of a franchise in violation of the requirements regarding sales, transfers, and assignments set forth in proposed s. 686.105, F.S., created in this bill (*see Section 5* above).
- Violate the Florida Deceptive and Unfair Trade Practices Act<sup>29</sup> or s. 817.416, F.S., relating to claims for franchise misrepresentations, in connection with its business as a franchisor, or an officer, agent, or other representative thereof.
- Require a franchisee to assent to a release, assignment, novation, waiver, or estoppel that would relieve any person from liability imposed under the act, including, but not limited to, through the use of a disclaimer or checklist designed to avoid a protection under the act.
- Require a franchisee to assent to the use of a choice of law provision by selecting a different state's law to govern the relationship of the parties.

<sup>28</sup> For purposes of Florida's Uniform Commercial Code (ch. 670 through ch. 680, F.S.), (Code), s. 671.201(20), F.S., defines the term "good faith" to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing" unless otherwise provided in the Code. *See* s. 672.103(1)(b), F.S., where the term is used in connection with sales, and s. 677.102(1)(f), F.S., where the term is used in connection with documents of title.

<sup>29</sup> *See* ss. 501.201-213, F.S.



A person who proves in court that a violation of this section has occurred is entitled to the remedies set forth in proposed s. 686.109, F.S., created in this bill (*see Section 9* below).

**Section 7** of the bill creates s. 686.107, F.S., and provides that a franchise agreement or other contract, any part thereof, or any practice under such contract, that violates any provision of the act is deemed against public policy and is void and unenforceable. The bill provides that an aggrieved party may choose to seek to void only the unenforceable portion of a franchise agreement and continue to enforce the remainder of the agreement.

**Section 8** of the bill creates s. 686.108, F.S., to provide that provisions in a franchise agreement restricting the venue to a forum outside of Florida or selecting the law of any other state or jurisdiction other than Florida, are void with respect to any claim arising under or relating to a franchise agreement involving a franchisee that was, at the time of signing, a resident of Florida, or a business entity established in Florida, or a franchise business either operating or planning to be operated in Florida.

The bill also provides the act does not apply to a franchise agreement between a Florida-based franchisor and a franchisee that was not, at the time of signing, a resident of Florida, or a business entity established in Florida, or involving a franchise operating or to be operated in Florida, even if the agreement says Florida law applies.

**Section 9** of the bill creates s. 686.109, F.S., and provides that in addition to relief specified in the act, any person aggrieved or injured in his or her business or property by a violation of the act may bring an action in state or federal court in Florida, to recover the damages sustained and the costs of such action, including reasonable attorney fees.

In addition to any other remedy or relief to which a person is entitled, any person aggrieved by a violation of the act also may bring an action to obtain a declaratory judgment stating that an action or a practice violates the act, and injunctive relief enjoining a franchisor that has violated, is violating, or is otherwise likely to violate the act from committing the violation.

These remedies are in addition to any other remedies provided by law or in equity, including, but not limited to, the Florida Deceptive and Unfair Trade Practices Act<sup>30</sup> and s. 817.416, F.S., relating to claims for franchise misrepresentations.

**Section 10** of the bill creates s. 686.11, F.S., and provides that any person or franchisor who engages directly or indirectly in an agreement or contract in Florida concerning a franchise, and any franchise whose franchisee is a Florida resident or is domiciled in Florida, or whose franchise business is, has been, or is intended to be operated in Florida, is subject to the act and to the jurisdiction of Florida courts, in accordance with Florida law, for violations of the act.

The act expressly applies to:

- Any franchise entered into, renewed, amended, or revised after the effective date of the act;

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<sup>30</sup> See ss. 501.201-.213, F.S.

- Any existing franchise of an indefinite duration which may be terminated by the franchisee or franchisor without cause; and
- Any existing franchise entered into before the effective date of the act, only to the extent that the act does not significantly impair the existing contract rights between the parties.

**Section 11** of the bill amends s. 817.416, F.S., relating to claims for franchise misrepresentations, to substitute the term “area franchise” (defined in proposed s. 686.103, F.S., created in this bill (*see Section 3* above)), for the term “distributorship.” The bill also provides that the provisions of s. 817.416, F.S., “may not be waived by any choice of venue clause, choice of law clause, checklist, or any other contract provision, scheme, or device that would otherwise affect a person’s rights to make a claim” thereunder.

**Section 12** of the bill directs the Division of Law Revision and Information to replace the phrase “the effective date of the act” wherever it occurs in the act, with the date that the act becomes a law.

**Section 13** of the bill provides that the bill is effective upon becoming law.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

SB 1076 creates provisions affecting persons who engage, directly or indirectly, in an agreement or contract in Florida in connection with a franchise, and any franchise whose franchisee is a Florida resident or is domiciled in Florida, or whose franchise business is, has been, or is intended to be operating in this state. (*See Section 10* of the bill.) Such persons are made subject to the act and to jurisdiction of Florida courts for violations of the act. With respect to *existing* franchise agreements or contracts, certain provisions of the bill may implicate constitutional concerns relating to impairment of contract.<sup>31</sup>

In *Pomponio v. Claridge of Pompano Condominium, Inc.*,<sup>32</sup> the Florida Supreme court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid application used by the United States

<sup>31</sup> Article I, s. 10, U.S. Constitution and Art. I, s. 10, Fla. Const.

<sup>32</sup> *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (Fla. 1979).

Supreme Court. The Florida Supreme Court invalidated a statute, as an unconstitutional impairment of contract, which required the deposit of rent into a court registry during litigation involving obligations under a contract lease. The court set forth several factors to be considered in balancing whether a state law has in fact operated as a substantial impairment of a contractual relationship, stating “[t]he severity of the impairment measures the height of the hurdle the state legislation must clear.”<sup>33</sup>

The court stated that if there is minimal alteration of contractual obligations, the inquiry may end at its first stage. Severe impairment pushes the inquiry into a careful examination of the nature and purpose of the state legislation. The factors to be considered are whether:

- The law was enacted to deal with a broad, generalized economic or social problem;
- The law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- The effect on the contractual relationships is temporary, or whether it is severe, permanent, immediate, and retroactive.<sup>34</sup>

In *United States Fidelity & Guaranty Co. v. Department of Insurance*,<sup>35</sup> the Florida Supreme Court followed *Pomponio* and said that the method requires a balancing of a person’s interest to not have his or her contracts impaired, with the state’s interest in exercising its legitimate police power. The court adopted the method used by the U.S. Supreme Court, in which the threshold inquiry is “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.”<sup>36</sup> The severity of the impairment increases the level of scrutiny.

Relevant to the extent of the impairment is whether the industry the complaining party had entered had been regulated in the past because if the party was already subject to regulation when the contract was entered, then it is understood that it would be subject to further legislation upon the same topic.<sup>37</sup> If the state regulation constitutes a substantial impairment, the state must have a significant and legitimate public purpose<sup>38</sup> and any adjustment of the rights and responsibilities of the contracting parties must be appropriate to the public purpose justifying the legislation.<sup>39</sup>

Furthermore, although retroactive application of a law may be constitutional in certain situations,<sup>40</sup> in 2011, the Florida Supreme Court unanimously held, in *Cohn v. The Grand Condominium Association, Inc.*,<sup>41</sup> that by changing the distribution of voting power between residential owners and other owners in a mixed-use condominium (i.e., a provision of an existing contract), the retroactive application of the law at issue in that case altered the rights of the unit owners in contravention of their contractual agreement and, thus, impaired the obligation of contract as applied.

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<sup>33</sup> *Pomponio*, 378 So. 2d at 779.

<sup>34</sup> *Id.*

<sup>35</sup> *United States Fidelity & Guaranty Co. v. Department of Insurance*, 453 So. 2d 1355 (Fla. 1984).

<sup>36</sup> *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (quoting *Allied Structural Steel Co., v. Spannaus*, 438 U.S. 234, 244 (1978)).

<sup>37</sup> *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 242, n. 13).

<sup>38</sup> *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (citing *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977)).

<sup>39</sup> *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1361.

<sup>40</sup> *Century Village, Inc. v. Wellington*, 361 So. 2d 128 (Fla. 1978).

<sup>41</sup> *Cohn*, 62 So. 3d 1120, 1122 (Fla. 2011).

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

SB 1076 may impact the financial interests of persons who engage, directly or indirectly, in an agreement or contract in Florida in connection with a franchise, and any franchise whose franchisee is a Florida resident or is domiciled in Florida, or whose franchise business is, has been, or is intended to be operating in this state.

**C. Government Sector Impact:**

The Department of Legal Affairs, or the Department of Legal Affairs and the Department of Agriculture and Consumer Services jointly, are authorized to sue for injunctive relief against franchise or area franchise plans or activities in which a person intentionally misrepresents or fails to disclose certain information, in violation of s. 817.416(2), F.S. There may be additional costs associated with enforcement deemed necessary in connection with activities conducted pursuant to the act.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 817.416 of the Florida Statutes.

This bill creates the following sections of the Florida Statutes: 686.101, 686.102, 686.103, 686.104, 686.105, 686.106, 686.107, 686.108, 686.109, and 686.11.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.