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Bills Included				
SB 44	SB 45	SB 52		

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State of South Dakota

EIGHTY-THIRD SESSION
LEGISLATIVE ASSEMBLY, 2008

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SENATE AGRICULTURE AND NATURAL RESOURCES

ENGROSSED NO. SB 44 - 1/17/2008

Introduced by: The Committee on Agriculture and Natural Resources at the request of the Public Utilities Commission

FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the licensing and regulation of grain dealers and buyers.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 49-45-1 be amended to read as follows:

49-45-1. Before transacting the business of a grain ~~dealer~~ buyer in this state, a person shall obtain a grain ~~dealer~~ buyer license from the commission. A violation of this section is a ~~Class 2~~ Class 1 misdemeanor. Each purchase of grain without a license is a separate offense.

Operation as a grain ~~dealer~~ buyer without a license may be enjoined upon complaint of the commission. In addition, the commission may assess a civil fine against an unlicensed grain ~~dealer~~ buyer in the amount of one ~~hundred~~ thousand dollars for each purchase of grain up to a maximum fine of ~~five~~ twenty thousand dollars.

Section 2. That § 49-45-1.1 be amended to read as follows:

49-45-1.1. Terms used in this chapter mean:

(1) "Commission," the Public Utilities Commission;

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(2) "Grain," grain, grain sorghums, beans, and oil seeds. However, the term does not include grain that has been cleaned, processed, and specifically identified for an intended use of planting for reproduction ~~and for which a grain warehouse receipt has not been issued~~ or grain purchased to feed livestock;

(3) "Grain ~~dealer," any person who buys grain for the purpose of resale. However, nothing in this chapter applies to the isolated or occasional resale of grain by a person who does not hold himself or herself out as engaging in the business of reselling grain or to a person who purchases grain for the person's own use or consumption. The word, use, or the word, consumption, as used in this subdivision, does not mean the sale of the grain at retail or wholesale~~ buyer," any person who purchases grain for the purpose of reselling the unprocessed grain or who purchases three hundred thousand dollars worth or more of grain directly from producers in a calendar year;

(4) "Person," any natural person, firm, corporation, company, limited liability company, partnership, association, joint stock company or the lessee, trustee, or receiver appointed by any court for any one of the foregoing;

(5) "Voluntary credit sale," a sale of grain or seeds pursuant to which the sale price is to be paid more than thirty days after the delivery or release of the grain for sale, including those contracts commonly referred to as deferred-payment contracts, deferred-pricing contracts and price-later contracts.

Section 3. That § 49-45-3 be amended to read as follows:

49-45-3. ~~Every~~ Each license issued pursuant to § 49-45-1 expires on the next June thirtieth following the issuance of the license. The ~~Public Utilities Commission~~ commission may at any time for cause shown revoke or suspend any grain ~~dealer~~ buyer license. However, ~~such~~ the grain ~~dealer~~ buyer has the right of appeal from such decisions as provided by chapter 1-26 for the

review of final decisions of the commission.

Section 4. That § 49-45-6 be amended to read as follows:

49-45-6. The ~~Public Utilities Commission~~ commission shall supervise the business of grain ~~dealers~~ buyers in this state and administer the laws relating thereto. The commission may promulgate rules, pursuant to chapter 1-26, concerning:

(1) The form of a grain ~~dealer's~~ buyer's bond and application and the information required to be included for licensing;

(2) Requirements for posting grain ~~dealer's~~ buyer's licenses;

(3) Requirements and procedures for obtaining, placing, and returning grain ~~dealer~~ buyer decals and replacement decals;

(4) Notice requirements to sellers who enter into voluntary credit sale agreements; ~~and~~

(5) Requirements for filing financial statements with the commission and the financial standards by which the statements are approved when considering whether to license a grain ~~dealer~~ buyer; and

(6) Requirements for grain buyers to provide information to sellers regarding the statutes and rules relating to grain buyers.

Section 5. That § 49-45-7 be amended to read as follows:

49-45-7. An application for a grain ~~dealer~~ buyer license shall be filed with the commission and shall be in a form prescribed by the commission. The application shall set forth the name of each owner or principal in the management of the business. If the applicant is a corporation, the application shall include the name of the president, secretary, and treasurer of the corporation. The application shall also include the location of the principal office or place of business and any additional places of business of the applicant and the number of tractors, truck tractors, or straight trucks that will be used in the transportation of grain purchased under this

chapter.

Upon receipt of an application and sufficient bond as required by § 49-45-9, the commission may grant the license applied for or may, for good cause shown and after notice and an opportunity for hearing, deny the issuance of the license.

Section 6. That chapter 49-45 be amended by adding thereto a NEW SECTION to read as follows:

An applicant may apply for a Class A grain buyer's license or a Class B grain buyer's license. No grain buyer with a Class B grain buyer's license may purchase grain in excess of ten million dollars for the annual licensed period or enter into voluntary credit sale contracts. The commission shall require an applicant for a Class A grain buyer's license to submit a more detailed review of its financial condition than an applicant for a Class B grain buyer's license.

Section 7. That § 49-45-9 be amended to read as follows:

49-45-9. Before any grain ~~dealer~~ buyer license is issued by the commission, the applicant shall file with the commission a bond conditioned to secure the faithful performance of the applicant's obligations as a grain ~~dealer~~ buyer and full and unreserved compliance with the laws of this state and the rules of the commission, relating to the purchase of grain by the grain ~~dealer~~ buyer. The bond is for the specific purpose of protecting persons selling grain to the grain ~~dealer~~ buyer. However, the bond may not benefit any person entering into a voluntary credit sale with a grain ~~dealer~~ buyer. Any person who does business as a grain ~~dealer~~ buyer without a bond is guilty of a ~~Class 2~~ Class 1 misdemeanor. Each day a person conducts the business of a grain ~~dealer~~ buyer without a bond is a separate offense.

~~The minimum bond required to obtain a grain dealer license is fifty thousand dollars.~~ The amount of the bond for a Class A or Class B grain buyer's license shall be based on a rolling average of the dollar amount of grain purchased by the applicant in South Dakota during the last

three calendar years. For a new grain buyer, the first year's bond shall be based on projected purchases. For a grain buyer with less than three years experience as a grain buyer, the bond shall be based on the average actual purchases made by the grain buyer in all of its previous years as a grain buyer. The bond applies to all grain purchases for all of the grain buyer's business locations.

The amount of the bond for a Class A grain buyer's license is:

Dollar Amount of Grain Purchased	Bond Requirement
<$2,000,000	$50,000
$2,000,001 - $10,000,000	$75,000
$10,000,001 - $50,000,000	$100,000
$50,000,001 - $100,000,000	$200,000
>$100,000,000	$300,000

The amount of the bond for a Class B grain buyer's license is:

Dollar Amount of Grain Purchased	Bond Requirement
<$2,000,000	$50,000
$2,000,001 - $10,000,000	$75,000

~~If the commission finds, after an opportunity for notice and hearing, that the bond filed by a grain dealer, pursuant to this section, is inadequate because of circumstances peculiar to that grain dealer, the amount of that bond may be increased to such amount as the commission determines. In addition, the~~ The grain ~~dealer~~ buyer may stipulate to a higher bond amount requested by the commission.

Section 8. That chapter 49-45 be amended by adding thereto a NEW SECTION to read as follows:

If the commission determines, because a corporate surety company becomes insolvent or ceases to write grain buyer bonds in this state, that a bond in the sum required by § 49-45-9

cannot be executed, the commission may, by rule promulgated pursuant to chapter 1-26, authorize the filing of other financial documents in lieu of a corporate surety bond.

Section 9. That § 49-45-10 be amended to read as follows:

49-45-10. A grain ~~dealer~~ buyer shall pay the purchase price to the owner or ~~his~~ the owner's agent for grain upon delivery or demand of the owner or agent unless payment is to be made in accordance with the terms of a voluntary credit sale which complies with the requirements of this chapter and rules promulgated thereto.

Section 10. That chapter 49-45 be amended by adding thereto a NEW SECTION to read as follows:

Upon receiving grain, a grain buyer shall issue to the seller an original uniform scale ticket or comparable receipt for each load of grain received. Tickets or receipts shall be numbered consecutively and a copy of each ticket or receipt shall be retained for six years.

Section 11. That § 49-45-11 be amended to read as follows:

49-45-11. All voluntary credit sales of grain entered into by a grain ~~dealer~~ buyer shall be in writing. The ~~Public Utilities Commission~~ commission may, by ~~rule~~ rules promulgated pursuant to chapter 1-26, prescribe the form and content of such writings. If a grain buyer's license is terminated or not renewed, the grain buyer shall pay for grain subject to a voluntary credit sale within ten days after the license expiration date.

Section 12. That § 49-45-13 be amended to read as follows:

49-45-13. The ~~Public Utilities Commission~~ commission shall cause the business facilities of every grain ~~dealer~~ buyer, whether licensed or unlicensed, to be inspected at such times as ~~it~~ the commission considers necessary~~, by one or more members of the commission or by one of its agents or employees, who~~. The inspector shall report in writing to the commission the result of ~~such~~ the examination. The ~~commission or its agents or employees~~ inspector may at any time

during ~~ordinary~~ business hours enter any ~~office~~ structure, vehicle, or enclosure in which the books ~~and~~ or accounts of any grain ~~dealer~~ buyer are kept, and may examine all the books or accounts relating to the transactions of ~~such~~ the grain ~~dealer~~ buyer either within or without the state. The commission may, in all matters arising under this chapter, exercise the power of subpoena and examine witnesses in accordance with chapter 1-26.

Section 13. That chapter 49-45 be amended by adding thereto a NEW SECTION to read as follows:

Upon completing an inspection, an inspector may issue a memorandum of adjustments. The commission may assess a civil fine in the amount of two hundred dollars for failure to comply with the memorandum of adjustments within thirty days. After thirty days, each day that the memorandum goes uncorrected may be considered a separate offense.

Section 14. That § 49-45-14 be amended to read as follows:

49-45-14. Every grain ~~dealer~~ buyer licensed ~~as such~~ in this state shall, at such times as the ~~Public Utilities Commission~~ commission requires, furnish the commission on forms prepared by the commission, reports showing the facts and information required by the commission. The reports are not for public inspection, but the commission may, upon request, furnish the total of the figures shown on such reports ~~when~~ if the figures requested are for not less than four grain ~~dealers~~ buyers. The commission may also ~~call for, from time to time, and~~ require that a grain ~~dealer shall~~ buyer provide~~,~~ any other information regarding the business of the grain ~~dealer~~ buyer. A violation of this section is a ~~Class 2~~ Class 1 misdemeanor.

Section 15. That § 49-45-16 be amended to read as follows:

49-45-16. ~~If any~~ The commission may immediately suspend the license of a grain buyer and the grain buyer shall surrender the license to the commission if:

(1) The grain ~~dealer~~ buyer, whether licensed or unlicensed, refuses, neglects, or is

unable, upon proper demand, to redeem any scale ticket issued by ~~him~~ the grain buyer, through redelivery or cash payment~~, or if any~~;

(2) The grain ~~dealer~~ buyer refuses, neglects, or is unable to provide ~~the requisite~~ a bond ~~to procure a grain dealer's license, the commission shall~~ in an amount required by the commission; or

(3) The commission has knowledge of any act of insolvency, including the filing of a petition in bankruptcy naming the grain buyer as debtor.

Within fifteen days the grain buyer may request a hearing pursuant to chapter 1-26 to determine if the license should be revoked. If no request is made within fifteen days, the commission shall revoke the license. If the commission determines it is necessary, the commission may apply to the circuit court in the county in which the grain ~~dealer~~ buyer operates for that court to appoint a receiver. The receiver ~~shall have~~ has such powers and duties as the court~~, from time to time,~~ may direct.

Section 16. That § 49-45-17 be amended to read as follows:

49-45-17. Any person injured by the breach of any obligation of a grain ~~dealer~~ buyer, for the performance of which a bond has been given under any of the provisions of this chapter, may sue on such bond in ~~his~~ the person's own name in any court of competent jurisdiction to recover any damages ~~he~~ the person may have sustained by reason of such breach.

Section 17. That § 49-45-18 be amended to read as follows:

49-45-18. If the commission becomes aware of any act by any grain ~~dealer~~ buyer as described in § 49-45-16, ~~or has knowledge of any act of insolvency, including, but not limited to, the filing of a petition in bankruptcy naming the grain dealer as debtor,~~ the commission ~~shall~~ may:

(1) ~~Take immediate possession of the grain dealer's facility, and undertake~~ Undertake an

immediate audit and verify the names and addresses of all outstanding scale ticket holders as revealed by the audit, and audit and certify the quantity and class or classes of grain therein;

(2) Immediately notify the surety named in the grain ~~dealer~~ buyer bond, if any, held by such grain ~~dealer~~ buyer.

Section 18. That § 49-45-19 be amended to read as follows:

49-45-19. Upon revocation, termination, or cancellation of a grain ~~dealer~~ buyer license, any claim against the grain ~~dealer~~ buyer arising under this chapter shall be made in writing with the commission, grain ~~dealer~~ buyer and surety on the grain ~~dealer~~ buyer bond within six months after receiving notice of revocation, termination, or cancellation. Failure to make a timely claim shall relieve the surety of all obligations to the claimant. However, this section may not be construed to reduce the aggregate liability of the surety to other claimants below the face amount of the bond then in effect. Upon revocation of a grain ~~dealer~~ buyer license, the commission shall cause notice of ~~such~~ the revocation to be published once each week for two consecutive weeks in a newspaper of general circulation in each of the counties in which the licensee maintains a business location and in a newspaper of general circulation within the state and shall cause notice of ~~such~~ the revocation to be sent by certified mail to all scale ticket holders named in the audit prepared pursuant to § 49-45-18. The notice shall state the name and address of the grain ~~dealer~~ buyer, the effective date of revocation, and the name and address of the surety on the grain ~~dealer~~ buyer bond. The notice shall also state that any claims against the grain ~~dealer~~ buyer shall be made in writing and sent by ordinary mail to the commission, the grain ~~dealer~~ buyer and the surety on the grain ~~dealer~~ buyer bond within six months after receiving notice of revocation. The provisions of this section do not apply if a receiver is appointed as provided in § 49-45-16 before the expiration of six months after receiving notice of revocation, termination, or

cancellation of the license.

Section 19. That § 49-45-20 be repealed.

~~49-45-20. Every grain dealer shall keep posted at all times in a conspicuous place in his facilities a printed copy of the statutes relating to, and the rules of the commission relating to the conduct of grain dealers. A violation of this section is a Class 2 misdemeanor.~~

Section 20. That chapter 49-45 be amended by adding thereto a NEW SECTION to read as follows:

A grain buyer with a Class A license shall keep all company owned grain in the grain buyer's possession insured at current market value of the grain against loss by fire, windstorm, and extended coverage risks. The grain buyer shall furnish the commission with proof of the insurance when the grain buyer applies for a license. A violation of this section is a Class 1 misdemeanor.

Section 21. That chapter 49-45 be amended by adding thereto a NEW SECTION to read as follows:

A grain buyer shall keep all records of grain purchased and all contracts issued and canceled in a safe place. The records shall be kept current and open for inspection by the commission. Each record shall be retained for a period of six years.

Section 22. That chapter 49-45 be amended by adding thereto a NEW SECTION to read as follows:

A grain buyer shall notify the commission, within twenty-four hours, if the facility of a facility-based grain buyer is destroyed or substantially damaged.

Section 23. That § 49-45-21 be amended to read as follows:

49-45-21. The commission may contract with the Wheat Commission pursuant to § 38-10-41, with the South Dakota Oilseeds Council pursuant to § 38-27-19, the Soybean Research and

Promotion Council pursuant to § 38-29-14, the South Dakota Corn Utilization Council pursuant to § 38-32-24, and the South Dakota Pulse Crop Council pursuant to § 38-34-21. Under the terms of any such contract, the commission may inspect the records of licensed grain ~~dealers~~ buyers to determine compliance with assessment and checkoff requirements imposed by chapters 38-10, 38-27, 38-29, and 38-32 and the provisions of chapter 38-34.

Section 24. That § 49-43-34 be repealed.

~~49-43-34. Authorized inspectors employed by the Public Utilities Commission may place a person under arrest without warrant for a violation of any provision of this chapter which is committed in the presence of such inspector. Commission inspectors having been given such limited arrest powers are not "law enforcement officers" for the purposes of § 23-3-27.~~

State of South Dakota

EIGHTY-THIRD SESSION
LEGISLATIVE ASSEMBLY, 2008

400P0222

SENATE AGRICULTURE AND NATURAL RESOURCES

ENGROSSED NO. SB 45 - 1/17/2008

Introduced by: The Committee on Agriculture and Natural Resources at the request of the Public Utilities Commission

FOR AN ACT ENTITLED, An Act to revise the requirements regarding the licensing and regulation of public grain warehouses, to establish a grain warehouse fund, and to make a continuous appropriation from that fund.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 49-43-1 be amended to read as follows:

49-43-1. ~~If the operator of any public grain warehouse receives grain into such warehouse, he shall designate in writing whether the grain is to be sold or stored, such designation to be made in accord with any prior agreement with the owner, and settlement~~ Any grain delivered to a public grain warehouse shall be considered stored at the time of delivery unless an arrangement has been made with the public grain warehouse operator prior to or at the time of delivery to apply the grain on contract, for shipment or consignment, or for cash sale. Grain may be held in open storage, a grain bank account, or placed on a warehouse receipt. The warehouse shall issue a scale ticket for any grain received by the warehouse. The warehouse shall keep sufficient grain inventory to cover all stored grain. Settlement for all grain stored or sold shall

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be made immediately on demand by the owner.

Section 2. That § 49-43-1.1 be amended to read as follows:

49-43-1.1. Terms used in this chapter mean:

(1) "Commission," the Public Utilities Commission of this state;

(1A) "Grain bank," grain which is received by a public grain warehouse from depositors for storage and is to be withdrawn and processed into feed as needed;

(1B) "Open storage grain," grain received by a public grain warehouse from a depositor for which a warehouse receipt has not been issued or a purchase made and is not grain bank;

(2) "Public grain warehouse," any public warehouse where grain, as defined in subdivision 49-45-1.1(2), is received for storage for hire. A public grain warehouse may also purchase, receive or handle grain in accordance with the provisions of chapter 49-45 relating to grain ~~dealers~~ buyers;

(3) "Receipt," a warehouse receipt which complies with the requirements of this chapter and the rules of the commission promulgated pursuant thereto;

(4) "Scale ticket," a memorandum issued by a public grain ~~warehouseman~~ warehouse or grain ~~dealer~~ buyer to a depositor at the time grain is initially delivered, showing the weight of the load, kind of grain, date of delivery, and indicates whether the grain is to be sold or stored ~~or sold~~ under a warehouse receipt, in open storage, or in a grain bank account.

Section 3. That § 49-43-2 be amended to read as follows:

49-43-2. If any grain is delivered to any person doing a public grain warehouse business in this state~~, and a receipt is issued therefor providing for a delivery of a like kind, amount and grade to the holder of the receipt in return, such~~ and is held in open storage, in a grain bank

account, or placed on a warehouse receipt, the delivery is a bailment and not a sale of the grain ~~so delivered~~.

Section 4. That § 49-43-2.1 be amended to read as follows:

49-43-2.1. The ~~lessee, owner or manager~~ operator of a public grain warehouse shall give a receipt for the grain received by it for storage, except for grain held in open storage or a grain bank account. No receipt ~~forms~~ form may be used except ~~those~~ any form requested and ordered in accordance with the ~~Public Utilities Commission~~ commission's rules promulgated pursuant to chapter 1-26.

The commission shall determine by rule or order the form and contents of ~~the~~ any receipt ~~forms~~ form, which shall be uniform.

~~All~~ Any receipt ~~forms~~ form may be recovered by the commission ~~or its agents or employees~~ if the ~~warehouseman's~~ public grain warehouse license is revoked, suspended, or otherwise terminated.

A violation of this section is a ~~Class 2~~ Class 1 misdemeanor.

Section 5. That § 49-43-3 be amended to read as follows:

49-43-3. In no case ~~shall~~ is the grain stored under a receipt as required by § 49-43-2.1, ~~be~~ open storage grain, or grain bank liable to seizure upon process of any court in any action against the bailee, except an action by the owner of open storage grain, owner of grain bank, or owner or holder of ~~such~~ a warehouse receipt to enforce the terms of the same. In the event of the failure or insolvency of ~~such~~ the bailee, grain on hand in the public grain warehouse shall first be applied to the redemption and satisfaction of outstanding receipts issued ~~from such~~ by the warehouse and to owners of open storage grain and grain bank.

Section 6. That § 49-43-4 be repealed.

~~49-43-4. Any public grain warehouseman storing his own grain and seed is subject to the~~

~~grain warehouse law of this state and to the rules made thereunder.~~

Section 7. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

The commission may promulgate rules pursuant to chapter 1-26 concerning:

(1) The procedure for filing grain reports;

(2) The form of a public grain warehouse's bond and application, and the information required to be included for licensing;

(3) Requirements and procedures for releasing bonds;

(4) Requirements for posting public grain warehouse's licenses;

(5) Procedures and requirements for license suspension, revocation, transfer of ownership, or insolvency by a public grain warehouse;

(6) Requirements for the form of, procedures for, and the issuance and control of grain warehouse receipts and scale tickets;

(7) Specifications for the safe storage of grain;

(8) Requirements for filing financial statements with the commission and the financial standards by which the statements are approved when considering whether to license a public grain warehouse; and

(9) The rates for receiving, handling, redelivering, and storing grain.

Section 8. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

No owner, lessee, or manager of any public grain warehouse may transact any business as a public grain warehouse until a license has been issued by the commission. Any person who does business as a public grain warehouse without a license is guilty of a Class 1 misdemeanor. Each day a person conducts the business of a public grain warehouse without a license is a

separate offense. The operation of a public grain warehouse without a license may be enjoined by the commission. In addition, the commission may assess a civil fine against an unlicensed warehouse operator in the amount of one thousand dollars a day up to a maximum of twenty thousand dollars.

Section 9. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

Before any license is granted to a public grain warehouse, the warehouse operator shall file with the commission a bond conditioned to secure the faithful performance of the warehouse operator's obligations as a public warehouse and full and unreserved compliance with the laws of this state and the rules of the commission, relating to the storage of property for hire by the public warehouse. The bond shall be in the amount specified by § 49-43-5.3. Operation as a public grain warehouse without a bond is a Class 1 misdemeanor. Each day a person conducts the business of a public grain warehouse without a bond is a separate offense.

Section 10. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

Upon receipt of an application and sufficient bond, the commission may grant the license applied for or may, for good cause shown, deny the issuance of the license.

Section 11. That § 49-43-5.3 be amended to read as follows:

49-43-5.3. The bond required by ~~§ 49-42-5.1~~ section 9 of this Act for public grain ~~warehousemen~~ warehouses is for the specific purpose of protecting persons storing grain with the ~~warehousemen~~ warehouse.

The ~~warehouseman~~ warehouse operator shall furnish a single bond in an amount equal to one-half of the local market value of the grain stored in ~~his~~ the warehouse, or if multiple warehouses are operated by the ~~warehouseman~~ warehouse operator, the bond shall equal

one-half of the local market value of the grain stored at all warehouse locations. However, a ~~warehouseman~~ warehouse operator shall provide a minimum bond of twenty-five thousand dollars at any one municipality or location. ~~Such~~ The minimum bond amounts per municipality or location does not limit the bond coverage available to depositors at any one warehouse location. The entire bond, up to the amount on its face, shall provide coverage to a depositor conducting business at any of the ~~warehouseman's~~ warehouse operator's locations.

The bond shall describe with particularity the exact locations of the warehouses to be covered.

Section 12. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

Each license issued pursuant to section 10 of this Act expires on the next June thirtieth following the issuance of the license. The commission may at any time for good cause shown revoke or suspend any grain warehouse license. However, the grain warehouse operator has the right of appeal from the decision provided by chapter 1-26 for the review of final decisions of the commission.

Section 13. That § 49-43-5.6 be amended to read as follows:

49-43-5.6. ~~If any warehouseman~~ The commission may immediately suspend the license of a warehouse operator and the warehouse operator shall surrender the license to the commission if:

(1) The warehouse operator, whether licensed or unlicensed, refuses, neglects, or is unable, upon proper demand, to redeem any warehouse receipt or scale ticket for grain in open storage or in grain bank issued by ~~him~~ the warehouse operator, through redelivery or cash payment~~, or if any warehouseman~~;

(2) The warehouse operator refuses, neglects, or is unable to provide ~~the requisite~~ a bond

~~to procure a warehouseman's license, the Public Utilities Commission shall~~ in an amount required by the commission; or

(3) The commission has knowledge of any act of insolvency, including the filing of a petition in bankruptcy naming the warehouse as debtor.

Within fifteen days the warehouse operator may request a hearing pursuant to chapter 1-26 to determine if the license should be revoked. If no request is made within fifteen days, the commission shall revoke the license. If the commission determines it is necessary, the commission may apply to the circuit court in the county in which the ~~warehouseman~~ warehouse operator operates for that court to appoint a receiver. The receiver shall have such powers and duties as the court~~, from time to time,~~ may direct.

Section 14. That § 49-43-5.8 be amended to read as follows:

49-43-5.8. If the ~~Public Utilities Commission~~ commission becomes aware of any act by any ~~warehouseman~~ warehouse operator as described in § 49-43-5.6, ~~or has knowledge of any act of insolvency, including but not limited to the filing of a petition in bankruptcy naming the warehouseman as debtor,~~ the commission ~~shall~~ may:

(1) Take immediate possession of the warehouse facility, and undertake an immediate audit and verify the names and addresses of all outstanding warehouse receipt holders and scale ticket holders as revealed by the audit, and audit and certify the quantity and class or classes of grain therein;

(2) Immediately notify the surety named in both the ~~warehouseman's~~ warehouse's and ~~dealer's~~ grain buyer's bonds, if any, held by ~~such warehouseman~~ the warehouse.

Section 15. That § 49-43-9 be amended to read as follows:

49-43-9. The operator of ~~every~~ each public grain warehouse shall, on or before the tenth day of each month and at such additional times as the commission requires, furnish the commission

on forms prepared by the commission, reports showing the facts and information required by the commission. The reports are not for public inspection, but the commission may, upon request, furnish the total of the figures shown on ~~such~~ the reports ~~when~~ if the figures requested are for not less than four public grain warehouses. Nothing in this section prohibits the commission from providing the reports to state or federal governmental agencies who may not release information on individual reports to the public. A violation of this section by an operator is a ~~Class 2~~ Class 1 misdemeanor.

Section 16. That § 49-43-10 be amended to read as follows:

49-43-10. Each public grain warehouse shall obtain a yearly measurement of all the grain in its facility and shall provide the results of the measurement to the commission along with a daily position report as of the time of the measurement. The measurement shall be performed by a qualified person independent of the warehouse. If the commission finds the person performing the measurement is not qualified or independent, the commission may require a different person to perform the measurement.

The commission may also ~~call for, from time to time, and~~ require the operator of a public grain warehouse ~~shall~~ to furnish under oath, a written report showing the condition and management of the business, the total number of bushels of each kind and grade of grain purchased and in store, the number delivered out, the number remaining in store at the date of the report, and any other information regarding the business of the public grain warehouse which the commission requires. A violation of this section is a ~~Class 2~~ Class 1 misdemeanor.

No ~~warehouseman~~ warehouse need weigh the grain on hand more than once in each year, unless the commission requires an additional measurement as part of an investigation of the warehouse. If required by the commission, a ~~warehouseman~~ warehouse shall measure ~~his~~ its grain inventory at ~~his~~ its expense. The commission shall designate a person who is qualified to

perform the measurement, which may be an agent or employee of the ~~warehouseman~~ warehouse or a third party as appropriate under the circumstances of the investigation.

Section 17. That § 49-43-11 be amended to read as follows:

49-43-11. The lessee, owner, or manager of a public grain warehouse which has furnished a bond and received a public grain warehouse license, shall receive for storage all grain offered for storage at the warehouse, which at the time of ~~such~~ the offer are in suitable condition for storage, and which are tendered in the usual course of business. ~~However, if the capacity of the warehouse to receive the grain is exhausted and the owner, lessee or manager of the warehouse is prevented from shipping the grain to a terminal market by inability to obtain cars for shipment or some other valid cause rendering the receiving of such grain impossible and over which the owner, lessee, or manager has no control, the provisions of this section are waived.~~ However, a warehouse operator may refuse to store grain if the capacity of the warehouse is exhausted or for other good cause. If requested, a warehouse operator that refuses to store grain shall provide the person requesting storage with the reason for the refusal in writing. The written notice of refusal shall state that the person being refused storage may file a complaint with the commission contesting the refusal. A violation of this section is a ~~Class 2~~ Class 1 misdemeanor.

Section 18. That § 49-43-13 be amended to read as follows:

49-43-13. ~~The storage period for grain deposited in a public grain warehouse shall terminate on June thirtieth of each year. In the absence of a demand for delivery, order to sell, or request by the holder of an outstanding storage receipt, accompanied by the payment of all accrued storage and handling charges as prescribed by law, the warehouseman may, upon the expiration of the storage contract, sell such stored grain at the local market price, on the close of business of that day, deduct from the proceeds thereof all legal accrued charges and cash advances which may have been made upon such stored grain by the warehouseman and pay the balance of such~~

~~proceeds to the owner upon surrender of the storage receipt.~~ By June thirtieth of each year, each warehouse operator shall provide written notice to each current depositor of all outstanding warehouse receipts, grain in open storage, and grain in a grain bank account. The notice shall state the market value of the grain and any accrued storage charges. Copies of the notices shall be kept and made available for inspection by the commission.

Section 19. That § 49-43-15 be amended to read as follows:

49-43-15. No warehouse receipt may be issued by a public grain warehouse except upon actual delivery of grain into the warehouse; nor may a receipt be issued for a greater quantity of grain than was actually received; nor may more than one receipt be issued for the same lot of grain, unless receipt for part of a lot is desired, and then the aggregate receipts for a particular lot shall cover that lot and no more. A violation of this section is a ~~Class 2~~ Class 1 misdemeanor.

Section 20. That § 49-43-22 be amended to read as follows:

49-43-22. Upon the return of any storage receipt by a receipt holder, a scale ticket for open storage grain, or a scale ticket for grain in a grain bank account, to the public grain warehouse issuing the receipt or scale ticket, and the tender of all proper charges on the grain represented by the receipt or scale ticket, ~~such~~ the grain or an equal quantity of the same grade, kind and quality shall immediately be delivered to the holder of ~~such~~ the receipt or scale ticket as rapidly as due diligence, care, and prudence justify.

Section 21. That § 49-43-23 be amended to read as follows:

49-43-23. Nothing in § 49-43-22 means the delivery of the identical grain specified in the receipt or scale ticket. A ~~warehouseman~~ warehouse may instead deliver an equal amount of the same grade, kind and quality. If the grain ~~so~~ delivered has not been cleaned by the ~~warehouseman~~ warehouse, there shall be added to the amount ~~so~~ delivered the amount originally

deducted from the grain stored for ~~dirt. When such~~ dockage and foreign material. If the grain is to be delivered from some terminal market point, the public grain ~~warehouseman~~ warehouse issuing ~~such~~ the storage receipts or scale tickets shall guarantee weight, grade, and quality.

Section 22. That § 49-43-27 be repealed.

~~49-43-27. A representative of the Division of Commercial Inspection and Licensing may at any time without notice enter any public warehouse in this state and test and seal any weighing scale and measure used in conducting the warehouse business. The division may acquire standard weights and measures and such additional facilities and equipment, including motor vehicles or such other means of conveyance it deems necessary and suitable in carrying on the work of inspecting, testing, and correcting scales in this state.~~

Section 23. That § 49-43-28 be repealed.

~~49-43-28. If the person making an inspection pursuant to § 49-43-27 finds any scales in use in the public warehouse inaccurate, he shall condemn the scales and attach thereto a card, notice, or other device indicating that the scales are condemned. It is thereafter a Class 2 misdemeanor for any person to remove, deface or destroy such card, notice or other device placed upon the condemned scales, or to again use, or permit the use of such scales for any purpose, until they have been repaired, retested, and found to be correct, and until the Division of Commercial Inspection Licensing, or the person making the inspection, consents to the further use of such scales.~~

Section 24. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

Open storage grain is considered stored grain and is covered by the warehouse bond required pursuant to § 49-43-5.3.

Section 25. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as

follows:

A public grain warehouse shall keep all grain in the warehouse insured at current market value against loss by fire, windstorm, and extended coverage risks. The warehouse operator shall furnish the commission with proof of the insurance when the operator applies for a license. A violation of this section is a Class 1 misdemeanor.

Section 26. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

A public grain warehouse shall keep all records of grain purchased and stored and all receipts, scale tickets, and contracts issued and canceled in a safe place. The records shall be kept current and open for inspection by the commission. Each record shall be retained for a period of six years.

Section 27. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

The operator of a public grain warehouse shall notify the commission, within twenty-four hours, if the public grain warehouse is destroyed or substantially damaged.

Section 28. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

The commission shall cause every public grain warehouse to be inspected at such times as the commission considers necessary. The inspector shall report in writing to the commission the result of the inspection. The inspector may at any time during ordinary business hours enter any public grain warehouse or any office in which the books and accounts of any public warehouse are kept, and may examine all the books relating to the transaction of business in such public grain warehouse either within or without the state. The commission may in all matters arising under chapters 49-43 to 49-44, inclusive, exercise the power of subpoena and examine witnesses

in accordance with chapter 1-26.

Section 29. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

Any public grain warehouse operator in the state who refuses access to the warehouse's books and accounts or hinders and delays the commission or any of its employees or agents in examining the books and accounts, may be punished by a civil fine not exceeding two thousand dollars. In addition, the commission may revoke the license of the public warehouse.

Section 30. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

Upon completing an inspection an inspector may issue a memorandum of adjustments. The commission may assess a civil fine in the amount of two hundred dollars for failure to comply with the memorandum of adjustments within thirty days. After thirty days, each day that the memorandum goes uncorrected may be considered a separate offense.

Section 31. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

Unless otherwise specifically provided by this chapter, the provisions regarding uniform warehouse receipts in chapter 57A-7 apply to the receipts and contracts of public grain warehouses operating within this state.

Section 32. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

Any public grain warehouse operator, or any officer, agent, or employee, who issues a receipt knowing that the goods for which the receipt is issued have not been actually received by the warehouse, or are not under the warehouse's actual control at the time of issuing the receipt, is guilty of a Class 5 felony.

Section 33. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

Any grain warehouse operator, or any officer, agent, or employee who fraudulently issues a receipt for goods knowing that it contains any false statement, is guilty of a Class 1 misdemeanor.

Section 34. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

Any grain warehouse operator, or any officer, agent or employee, who issues a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word, duplicate, except in the case of a lost or destroyed receipt after proceedings as provided for in subdivision 57A-7-601(1), is guilty of a Class 5 felony.

Section 35. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

If there are deposited with or held by a warehouse goods of which the warehouse is owner, either solely or jointly or in common with others, the warehouse operator, or any officer, agent, or employee, who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state the ownership, is guilty of a Class 1 misdemeanor.

Section 36. That chapter 49-33 be amended by adding thereto a NEW SECTION to read as follows:

Any grain warehouse operator, or any officer, agent, or employee, who delivers goods out of the possession of the grain warehouse, knowing that a negotiable receipt, the negotiation of which would transfer the right to the possession of such goods, is outstanding and uncanceled, without obtaining the possession of the receipt at or before the time of the delivery, except in

the cases provided for in subdivisions 57A-7-206(1) to (3), inclusive, subdivisions 57A-7-210(1) and (2), and subdivision 57A-7-601(1), is guilty of a Class 1 misdemeanor.

Section 37. That chapter 49-33 be amended by adding thereto a NEW SECTION to read as follows:

Any person who deposits goods to which the person does not have title, or upon which there is a lien or mortgage, and who takes for the goods a negotiable receipt which the person afterwards negotiates for value with intent to deceive and without disclosing the person's lack of title or the existence of the lien or mortgage is guilty of a Class 1 misdemeanor.

Section 38. That chapter 49-33 be amended by adding thereto a NEW SECTION to read as follows:

An aggrieved party may appeal any decision of the commission made in the course of administration of this chapter in accordance with chapter 1-26.

Section 39. That chapter 49-33 be amended by adding thereto a NEW SECTION to read as follows:

It is a Class 1 misdemeanor for any person to falsely weigh any grain or any other agricultural product.

Section 40. That chapter 49-43 be amended by adding thereto a NEW SECTION to read as follows:

Any money collected by the commission pursuant to chapters 49-43 and 49-45 shall be paid into the state treasury and credited to the grain and warehouse fund which is hereby established in the state treasury. Any money credited in the fund and any interest earned on the fund are continuously appropriated to the commission for the implementation of the provisions of chapters 49-43 and 49-45.

Section 41. The balance of funds in the grain and warehouse fund as established by § 49-42-

1 8 shall be transferred to the grain and warehouse fund established by this Act.

State of South Dakota

EIGHTY-THIRD SESSION
LEGISLATIVE ASSEMBLY, 2008

400P0229

SENATE COMMERCE ENGROSSED NO. SB 52 - 1/17/2008

Introduced by: The Committee on Commerce at the request of the Department of Revenue and Regulation

FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the regulation of franchises and business opportunities.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. Terms used in this Act, unless the context otherwise requires, mean:

(1) "Action," any complaint, cross claim, counterclaim, and third-party complaint in a judicial action or proceeding, and their equivalent in an administrative action or arbitration;

(2) "Affiliate," any entity controlled by, controlling, or under common control with another entity;

(3) "Confidentiality clause," any contract, order, or settlement provision that directly or indirectly restricts a current or former franchisee from discussing the franchisee's personal experience as a franchisee in the franchisor's system with any prospective franchisee. The term does not include any clause that protects franchisor's trademarks or other proprietary information;

250 copies of this document were printed by the South Dakota Legislative Research Council at a cost of $.04 per page.

Insertions into existing statutes are indicated by underscores.
Deletions from existing statutes are indicated by ~~overstrikes~~.

(4) "Director," the director of the Division of Securities;

(5) "Disclosure document," the Federal Trade Commission franchise disclosure document as set forth pursuant to 16 C.F.R. Part 436, as of January 1, 2008;

(6) "Disclose, state, describe, and list," to present all material facts accurately, clearly, concisely, and legibly in plain English;

(7) "Filing, filed," the receipt pursuant to this Act of a record by the director;

(8) "Financial performance representation," any representation, including any oral, written, or visual representation, to a prospective franchisee, including a representation in the general media, that states, expressly or by implication, a specific level or range of actual or potential sales, income, gross profits, or net profits. The term includes any chart, table, or mathematical calculation that shows possible results based on a combination of variables;

(9) "Fiscal year," the franchisor's fiscal year;

(10) "Fractional franchise," any franchise relationship that satisfies the following criteria when the relationship is created:

(a) The franchisee, or any of the franchisee's current directors or officers, or any current directors or officers of a parent or affiliate, has more than two years of experience in the same type of business; and

(b) The parties have a reasonable basis to anticipate that the sales arising from the relationship will not exceed twenty percent of the franchisee's total dollar volume in sales during the first year of operation;

(11) "Franchise," any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:

(a) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;

(b) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and

(c) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate;

(12) "Franchisee," any person who is granted a franchise;

(13) "Franchise seller," any person that offers for sale, sells, or arranges for the sale of a franchise. The term includes the franchisor and the franchisor's employees, representatives, agents, subfranchisors, and third-party brokers who are involved in franchise sales activities. The term does not include existing franchisees who sell only their own outlet and who are otherwise not engaged in franchise sales on behalf of the franchisor;

(14) "Franchisor," any person who grants a franchise and participates in the franchise relationship. Unless otherwise stated, the term includes subfranchisors. For purposes of this subdivision, a subfranchisor is any person who functions as a franchisor by engaging in both pre-sale activities and post-sale performance;

(15) "Leased department," any arrangement whereby a retailer licenses or otherwise permits a seller to conduct business from the retailer's location where the seller purchases no goods, services, or commodities directly or indirectly from the retailer,

a person the retailer requires the seller to do business with, or a retailer-affiliate if the retailer advises the seller to do business with the affiliate;

(16) "Offer," any attempt to dispose of, and any solicitation of an offer to buy, a franchise or interest in a franchise for value by purchase, license, or otherwise. The term does not include an offer to extend or renew an existing franchise if there is no interruption in the franchisee's operation of the business, unless the terms and conditions of the extension or renewal differ materially from the original agreement. The term also does not include an offer of a franchise by an existing franchisee if the franchisor has had no significant involvement with the prospective franchisee. A franchisor's prior dealing with a prospective franchisee alone is not deemed to be significant involvement;

(17) "Order," any consent, authorization, approval, prohibition or requirement, or other order applicable to a specific case, issued by the director;

(18) "Notice filing application," the form adopted by the director and used to make notice filings of franchises;

(19) "Parent," an entity that controls another entity directly, or indirectly through one or more subsidiaries;

(20) "Person," any individual, group, association, limited or general partnership, corporation, limited liability company, or any other entity;

(21) "Plain English," the organization of information and language usage understandable by a person unfamiliar with the franchise business. The term incorporates short sentences; definite, concrete, everyday language; active voice; and tabular presentation of information, whenever possible. The term avoids legal jargon, highly technical business terms, and multiple negatives;

(22) "Predecessor," any person from whom the franchisor acquired, directly or indirectly, the major portion of the franchisor's assets;

(23) "Principal business address," the street address of a person's home office in the United States. The term does not include a post office box or private mail drop;

(24) "Prospective franchisee," any person (including any agent, representative, or employee) who approaches or is approached by a franchise seller to discuss the possible establishment of a franchise relationship;

(25) "Record," information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

(26) "Required payment," any consideration that the franchisee must pay to the franchisor or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the franchise. The term does not include any payment for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease;

(27) "Rule," any rule promulgated by the director in accordance with chapter 1-26;

(28) "Sale of a franchise," any agreement whereby a person obtains a franchise from a franchise seller for value by purchase, license, or otherwise. The term does not include extending or renewing an existing franchise agreement if there has been no interruption in the franchisee's operation of the business, unless the new agreement contains terms and conditions that differ materially from the original agreement. The term also does not include the transfer of a franchise by an existing franchisee if the franchisor has had no significant involvement with the prospective transferee. A franchisor's approval or disapproval of a transfer alone is not deemed to be significant involvement;

(29) "Signature," a person's affirmative method of authenticating his or her identity. The term includes a person's handwritten signature, as well as a person's use of security codes, passwords, electronic signatures, and similar devices to authenticate his or her identity;

(30) "Trademark," any trademark, service mark, name, logo, and other commercial symbol;

(31) "Willfully," if applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. The term does not require any intent to violate law, or to injure another, or to acquire any advantage;

(32) "Written or in writing," any document or information in printed form or in any form capable of being preserved in tangible form and read. The term includes: type-set, word processed, or handwritten document; information on computer disk or CD-ROM; information sent via email; or information posted on the internet. The term does not include mere oral statements.

Section 2. This Act applies to any franchise that is offered or sold in this state. A franchise is offered in this state if:

(1) An offer to sell is made in this state;

(2) The offer originates from within this state; or

(3) The offer is directed by the offeror into this state from outside this state and is received where directed.

A franchise is sold in this state if the offer to sell is accepted in this state.

A franchise is offered or sold in this state if the franchise is offered or sold to a resident of this state and the franchise is to be operated in this state, or, if the franchisee is domiciled in this

state when the franchised business is or will be operated in this state.

Section 3. An offer to sell is not made in this state solely because the offer appears in a newspaper or other publication of general and regular circulation which had more than two-thirds of its circulation outside this state during the past twelve months or solely because the offer appears in a broadcast or transmission originating outside this state.

An offer to sell or to purchase is not made in this state if the offer to sell is made over the internet or similar proprietary or common carrier electronic system if the following conditions are met:

(1) The internet offer indicates that the franchise is not being offered to residents of South Dakota;

(2) The internet offer is not directed to any person in South Dakota by or on behalf of the franchisor or anyone acting with the franchisor's knowledge; and

(3) No franchise is sold in South Dakota by or on behalf of the franchisor until the offering has been filed by notice and the franchise disclosure document has been delivered to the purchaser prior to the sale and in compliance with this Act.

An offer or sale of a franchise is not made in this state if the offer or sale is made to a person not a resident of this state, if the franchise will not be located in this state, and if the offer or sale does not constitute a violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful attempt to evade this Act.

Section 4. It is unlawful for any person to offer or sell a franchise in this state unless the franchise has properly notice filed under this Act or is exempt from notice filing pursuant to sections 12 to 15, inclusive, of this Act.

Section 5. An initial application for the notice filing of a franchise shall be made by filing with the director of the Division of Securities a franchise notice filing application and one clean

copy of the disclosure document and consent to service of process, accompanied by a fee of two hundred fifty dollars.

If after considering identified conditions and events and management's plans, the auditor concludes that there is substantial doubt about the franchisor's ability to continue as a going concern for a reasonable period of time, the director shall be notified by separate letter as to the going concern issue with the notice filing application.

After a notice filing becomes effective, the applicant has a continuing obligation to notify the director of a going concern within fifteen days after the auditor concludes there is a going concern.

Except as otherwise provided in this section, if no order or injunction pursuant to section 41 or 48 of this Act is in effect, and the filing is complete as required by this section, a notice filing is effective upon receipt by the director.

If the director requires the submission of additional information pursuant to section 6 or 36 of this Act, and if no order or injunction pursuant to section 41 or 48 of this Act is in effect, the notice filing becomes effective on the fifteenth business day after the additional information is filed with and approved by the director, or at such earlier time as the director determines, unless the applicant requests postponement of the effectiveness of the notice filing. Business day means any day on which state offices are open for regular business.

The notice filing of a franchise under this Act expires one year following the date of receipt of the initial application, unless the director prescribes a different period by rule or order. A notice filing may be renewed for one year or a shorter period if designated by the director by filing an application to renew in the same manner as set forth in this section, except that the renewal fee is one hundred fifty dollars. Any filing received after the expiration date shall be treated as an initial filing subject to a filing fee of two hundred fifty dollars.

An applicant may withdraw a notice filing if the applicant files a written request for withdrawal with the director. Withdrawal is effective fifteen days from the day on which the withdrawal request is filed unless a shorter period is designated by the director.

The director may by rule or order construe any public offering, disclosure document, or similar statement which complies with the requirements of any federal law or administrative rule or with the law of any other state requiring substantially the same disclosure of information as is required by this Act to be in full or partial compliance with this section.

The director may by rule or order provide that any information required in the disclosure document need not be included by any class of franchisors if the director finds that the information is inappropriate to the class and that disclosure adequate for the protection of prospective franchisees is otherwise included within the disclosure document.

The director may accept any disclosure document or other document filed with the director in an electronic format that is readily accessible by the Division of Securities' then existing electronic systems and in a format that can be downloaded, printed, or otherwise maintained as a record for future reference. If the director accepts electronic filings, the director shall publish a notice on the division's website stating the acceptance of electronic filing and the electronic format to be used.

If the franchisor is unable to demonstrate to the director the franchisor's financial ability to fulfill its initial obligations to franchisees, the director may require an escrow of funds paid by the franchisee to the franchisor or its affiliate until the franchisor performs its initial obligations and the franchisee has commenced operations. The director may allow alternatives to escrow depending upon the various facts presented on a case by case basis.

Section 6. The director may require the franchisor to alter or amend the proposed disclosure document in order to assure full and fair disclosure to prospective purchasers.

1 Section 7. There is no filing required with the division for updating disclosure documents;
2 but disclosure information shall be updated as follows:
3 (1) Any information in the disclosure document shall be current as of the close of the
4 franchisor's most recent fiscal year. After the close of the fiscal year, the franchisor
5 shall, within one hundred twenty days, prepare a revised disclosure document, after
6 which a franchise seller may distribute only the revised document and no other
7 disclosure document;
8 (2) The franchisor shall, within a reasonable time after the close of each quarter of the
9 fiscal year, prepare revisions to be attached to the disclosure document to reflect any
10 material change to the disclosures included, or required to be included, in the
11 disclosure document. Each prospective franchisee shall receive the disclosure
12 document and the quarterly revisions for the most recent period available at the time
13 of disclosure;
14 (3) If applicable, the annual update shall include the franchisor's first quarterly update,
15 either by incorporating the quarterly update information into the disclosure document
16 itself, or through an addendum;
17 (4) When furnishing a disclosure document, the franchise seller shall notify the
18 prospective franchisee of any material changes that the seller knows or should have
19 known occurred in the information contained in any financial performance
20 presentation; and
21 (5) Information that must be audited pursuant to the disclosure requirements need not be
22 audited for quarterly revisions if the franchisor states in immediate conjunction with
23 the information that the information was not audited.
24 Section 8. For the purposes of section 7 of this Act, a start-up franchise system that does not

yet have audited financial statements, may phase-in the use of audited financial statements by providing, at a minimum, the following statements in the times indicated below:

(1) The franchisor's first partial or full fiscal year selling franchises: an unaudited opening balance sheet;

(2) The franchisor's second fiscal year selling franchises: audited balance sheet opinion as of the end of the first partial or full fiscal year selling franchises; and

(3) The franchisor's third and subsequent fiscal years selling franchises: all required financial statements for the previous fiscal year, plus any previously disclosed audited statements that still must be disclosed such as the franchisor's balance sheet for the previous two fiscal year-ends before the disclosure document issuance date and statements of operations, stockholders equity, and cash flows for each of the franchisor's previous three fiscal years.

Section 9. For the purposes of section 7 of this Act, a start-up franchisor may phase-in the disclosure of audited financial statements, if the franchisor:

(1) Prepares audited financial statements as soon as practicable;

(2) Prepares unaudited statements in a format that conforms as closely as possible to audited statements; and

(3) Includes one or more years of unaudited financial statements or clearly and conspicuously discloses in the disclosure document that the franchisor has not been in business for three years or more, and cannot include all of the financial statements required in the disclosure document such as the franchisor's balance sheet for the previous two fiscal year-ends before the disclosure document issuance date and statements of operations, stockholders equity, and cash flows for each of the franchisor's previous three fiscal years.

Section 10. This Act does not prevent the negotiation of the terms and conditions of a franchise before it is sold. After the initial offer, a franchisor need not amend its disclosure document to negotiate with an offeree, or make supplementary disclosure to that offeree, by reason of a change negotiated in the terms and conditions of a franchise.

Section 11. The person offering or selling any franchise subject to the requirements of sections 17 and 18 of this Act shall obtain a receipt, signed by the prospective franchisee, acknowledging that the prospective franchisee has received a copy of the disclosure document prior to the prospective franchisee affixing a signature to any franchise or other agreement and prior to the payment of any consideration by the prospective franchisee. The receipt shall be kept in the possession of the franchise seller, subject to inspection by the director, for a period of three years from the date the receipt is taken.

Section 12. The following are exempt from this Act:

(1) Any franchise relationship covered by the Petroleum Marketing Practices Act, 15 U.S.C. 2801, as of January 1, 2008;

(2) Any franchise relationship where there is no written document that describes any material term or aspect of the relationship or arrangement;

(3) Any fractional franchise;

(4) Any leased department;

(5) The total of the required payments, or commitments to make a required payment, to the franchisor or an affiliate that are made any time from before to within six months after commencing operation of the franchisee's business is less than five hundred dollars;

(6) Any franchise relationship covering farm machinery, motor vehicles, or recreational vehicles, including snowmobiles, motorcycles, motor homes, mobile homes, and

manufactured homes.

Section 13. The following franchises are subject to this Act but are exempt from sections 4 and 17 of this Act, if any of the following conditions are satisfied:

(1) The franchisee's initial investment, excluding any financing received from the franchisor or an affiliate, and excluding the cost of unimproved land, totals at least one million dollars and the prospective franchisee signs an acknowledgment verifying the grounds for the exemption. The acknowledgment shall state: The franchise sale is for more than one million dollars, excluding the cost of unimproved land and any financing received from the franchisor or an affiliate;

(2) The franchisee (or its parent or any affiliates) is an entity that has been in business for at least five years and has a net worth of at least five million dollars; or

(3) The offer or sale of a franchise by an executor, administrator, sheriff, marshal, receiver, trustee, trustee in bankruptcy, guardian, or conservator on behalf of a person other than the franchisor or the estate of the franchisor; or

(4) One or more purchasers of at least a fifty percent ownership interest in the franchise; within sixty days of the sale, has been, for at least two years, an officer, director, general partner, individual with management responsibility for the offer and sale of the franchisor's franchises or the administrator of the franchised network; or within sixty days of the sale, has been, for at least two years, an owner of at least a twenty-five percent interest in the franchise.

Section 14. The following franchises are subject to this Act but are exempt from section 4 of this Act if any of the following conditions are satisfied:

(1) The offer or sale to an existing franchisee of an additional franchise that is substantially the same as the franchise that the franchisee has operated for at least two

1 years at the time of the offer or sale; or

2 (2) The offer or sale of a franchise to a bank, saving and loan association, financial
3 organization or life insurance corporation within the meanings given these terms by
4 chapters 43-41B, 52-1, and 58-1.

5 Section 15. The director may by rule or order exclude the offer and sale of a franchise from
6 the requirements of sections 4 and 17 of this Act if the filing or disclosure is not necessary or
7 appropriate in the public interest or for the protection of prospective franchisees.

8 Section 16. For purposes of the exemptions set forth in subdivision (5) of section 12 of this
9 Act and subdivisions (1) and (2) of section 13 of this Act, the director may adjust by rule or
10 order the size of the thresholds.

11 Section 17. In connection with the offer or sale of a franchise in this state, unless the
12 transaction is exempted by the provisions of sections 12 to 16, inclusive, of this Act, it is a
13 prohibited practice and a violation of this Act for any person, directly or indirectly, to:

14 (1) Fail to furnish a prospective franchisee with a copy of the franchisor's current
15 disclosure document at least fourteen calendar-days before the prospective franchisee
16 signs a binding agreement with, or makes any payment to, the franchisor or an
17 affiliate in connection with the proposed franchise sale;

18 (2) Alter unilaterally and materially the terms and conditions of the basic franchise
19 agreement or any related agreements attached to the disclosure document without
20 furnishing the prospective franchisee with a copy of each revised agreement at least
21 seven calendar-days before the prospective franchisee signs the revised agreement.
22 Any change to an agreement that arises out of negotiations initiated by the
23 prospective franchisee does not trigger this seven calendar-day period; or

24 (3) Fail to include all of the information required in the disclosure document if preparing

the disclosure document to be furnished to a prospective franchisee. A franchise seller is liable for a violation of this subdivision if the seller either directly participated in the preparation of the disclosure document or had the authority to control those who did.

Section 18. For purposes of subdivision (1) and (2) of section 17 of this Act, the franchisor has furnished the disclosure documents by the required date if:

(1) A copy of the disclosure document was hand-delivered, faxed, e-mailed, or otherwise delivered to the prospective franchisee by the required date;

(2) Directions for accessing the disclosure document on the internet were provided to the prospective franchisee by the required date; or

(3) A paper or tangible electronic copy was sent to the address specified by the prospective franchisee by first-class United States mail at least three days before the required date.

Section 19. Every franchisor offering or selling a franchise in this state shall maintain complete and accurate books and records of the offers and sales of franchises. The books and records shall include all of the disclosure documents and advertising and correspondence that have been used with franchisees and prospective franchisees including past and present operations manuals, training records, training manuals, copies of executed agreements, and any due diligence records concerning franchisees. The books and records shall be maintained at an office readily accessible to the franchisor for three years. The books and records may be kept on photographic or electronic media but shall be printed if the director requests.

Section 20. In any proceeding under this Act the burden of proving an exemption is upon the person claiming it.

Section 21. A written provision in a franchise contract evidencing a transaction involving

commerce to settle by arbitration a controversy thereafter arising out of the 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 the contract, transaction, or refusal, is valid, irrevocable, and enforceable except upon such grounds as exist at law or in equity for the revocation of any contract. However, any condition, stipulation, or provision requiring a franchisee to waive compliance with or relieving a person of a duty or liability imposed by or a right provided by this Act or a rule or order under this Act is void.

Section 22. Each applicant for notice filing under this Act, and each franchisor on whose behalf an application for notice filing is filed, except any applicant and franchisor which are domestic South Dakota entities, shall file with the director an irrevocable consent to service of process.

The irrevocable consent to service shall be in such form as the director may prescribe. The irrevocable consent to service of process shall appoint the director to be the applicant's or franchisor's agent to receive service of any lawful process in any civil action against the applicant or franchisor or their successor, executor, or administrator, which arises under this Act or any rule or order thereunder.

After the irrevocable consent to service of process has been filed, it has the same force and validity as if served personally on the applicant or franchisor or their successor, executor, or administrator.

If any person, including any nonresident of this state and any foreign corporation, or other entity engages in conduct prohibited or made actionable by this Act, whether or not they have filed a consent to service of process pursuant to this section, and personal jurisdiction over them cannot otherwise be obtained in this state, that conduct shall be considered equivalent to their appointment of the director to be their agent to receive service of any lawful process in any suit

against them or their successors, executor, or administrator which grows out of that conduct and which is brought under this Act, with the same force and validity as if served on them personally.

If, under this section, the director is an agent to receive process, service may be made by leaving a copy of the process in the office of the director as follows:

(1) The process is not effective unless the plaintiff, who may be the director in an action instituted by the director, forthwith sends notice of the service and a copy of the process by certified mail to the defendant, or forthwith sends notice of the service and a copy of the process to the respondent at their last known address on file with the director; and

(2) The plaintiff's affidavit of compliance with this section is filed with the court at the time as the filing of the complaint.

Section 23. No person may publish or cause to be published in this state any advertisement concerning any franchise after the director has found that the advertisement contains any statement that is false or misleading or omits to make any statement necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and has so notified the person by written order. The director may issue an order without prior notice or hearing.

After the issuance of an order, the person desiring to use the advertisement may, in writing, request a hearing on the order. Upon the receipt of the written request, the director shall set a hearing to commence within fifteen days after the receipt of the request unless the person making the request consents to a later date. After the hearing, which shall be conducted in accordance with chapter 1-26, the director shall, by written order, either affirm, modify, or vacate the order.

Unless the director requests the filing of an advertisement, there is no requirement to file advertising with the division.

Section 24. No person may, directly or indirectly, employ a device, scheme, or artifice to defraud in connection with the offer or sale of a franchise. A violation of this section is a fraudulent practice and a Class 4 felony.

Section 25. No person may, directly or indirectly, in connection with the offer or sale of a franchise willfully:

(1) Make an untrue statement of material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;

(2) Engage in an act, practice, or course of business which operates or would operate as a fraud or deceit on a person;

(3) Represent to a prospective franchisee that the notice filing of a franchise application constitutes a finding by the director that a disclosure document filed under this Act is true, complete, and not misleading or that the director has passed upon the merits of the disclosure document and the franchise;

(4) Violate an order of the director after the person receives notice that the order was issued;

(5) Misrepresent that a franchise is notice filed or exempted from notice filing under this Act; and

(6) Omit to state a material fact or make or cause to be made an untrue statement of a material fact in any application, notice, or report filed with the director under this Act.

A violation of this section is a Class 6 felony.

1 Section 26. No person may, directly or indirectly, in connection with the offer or sale of a
2 franchise:
3 (1) Make any claim or representation, orally, visually, or in writing, that contradicts the
4 information required to be in the disclosure document;
5 (2) Misrepresent that any person:
6 (a) Purchased a franchise from the franchisor or operated a franchise of the type
7 offered by the franchisor; or
8 (b) Can provide an independent and reliable report about the franchise or the
9 experiences of any current or former franchisees;
10 (3) Disseminate any financial performance representations to prospective franchisees
11 unless the franchisor has a reasonable basis and written substantiation for the
12 representation at the time the representation is made, and the representation is
13 included in the franchisor's disclosure document and the franchise seller:
14 (a) Discloses the dates when the reported level of financial performance was
15 achieved and of those outlets whose data were used in arriving at the
16 representation, and the number and percent that actually attained or surpassed
17 the stated results if the representation relates to the past performance of the
18 franchisor's outlets; and
19 (b) Includes a clear and conspicuous admonition that a new franchisee's individual
20 financial results may differ from the result stated in the financial performance
21 representation;
22 (4) Fail to make available to prospective franchisees, and to the director upon reasonable
23 request, written substantiation for any financial performance representations made
24 in the disclosure document;

(5) Fail to furnish a copy of the franchisor's disclosure document to a prospective franchisee earlier in the sales process than required by section 17 of this Act, upon reasonable request;

(6) Fail to furnish a copy of the franchisor's most recent disclosure document and any quarterly updates to a prospective franchisee, upon reasonable request, before the prospective franchisee signs a franchise agreement;

(7) Present for signing a franchise agreement in which the terms and conditions differ materially from those presented as an attachment to the disclosure document, unless the franchise seller informed the prospective franchisee of the differences at least seven days before execution of the franchise agreement;

(8) Disclaim or require a prospective franchisee to waive reliance on any representation made in the disclosure document or in its exhibits or amendments. However, this provision is not intended to prevent a prospective franchisee from voluntarily waiving specific contractual terms and conditions set forth in his or her disclosure document during the course of franchise sale negotiations; and

(9) Fail to return any funds or deposits in accordance with any conditions disclosed in the franchisor's disclosure document, franchise agreement, or any related document.

Section 27. The director may not approve or express any opinion on the legality of any matter a franchisor may be required to disclose under this Act.

Section 28. The director shall administer this Act.

Section 29. The director may promulgate rules pursuant to chapter 1-26 to carry out the provisions of this Act including forms governing disclosure documents, applications, financial statements, and defining any terms, whether or not used in this Act, if the definitions are not inconsistent with this Act. For the purpose of rules the director may classify franchises, persons

and matters within the director's jurisdiction, and prescribe different requirements for different classes.

Section 30. The director may, upon request and upon payment of a fee of fifty dollars, respond to requests for interpretive opinions relating to this Act.

Section 31. A document is filed when it is received by the director.

Section 32. The director shall maintain a record which shows the notice filed franchise and for whom filed, and shall specify the conditions, limitations, and restrictions upon the filing, if any, or shall make proper reference to a formal order of the director on file showing the conditions, limitations, and restrictions.

Section 33. Each application, notice and report filed with the director under this Act is open to public inspection in accordance with rules prescribed by the director. The director may publish information filed with the director or obtained by the director, if, in the judgment of the director, such action is in the public interest.

No record obtained by the director pursuant to section 35 of this Act is open to public inspection.

Section 34. The director shall upon request furnish copies to any person, at a reasonable charge, certified under the director's seal of office if certification is requested, of any notice filing, application and order on file in the director's office. Any copy so certified is admissible in evidence under chapter 19-4.

Section 35. The director may make such public or private investigations within or outside of this state as the director deems necessary to determine if any person has violated or is about to violate any rule, order, or provision under this Act or to aid in the enforcement of this Act and in the prescribing of rules and forms under this Act. The director may publish information concerning the violation of any rule, order, or provision under this Act.

1 Section 36. The director may make a written request to any person for information
2 concerning any investigation being conducted by the director. Failure to respond fully and
3 completely to such a request within fifteen days after receipt thereof constitutes cause for the
4 issuance of a cease and desist order.

5 Section 37. For the purpose of any investigation or proceeding under this Act, the director
6 or any person designated by the director may administer oaths and affirmations, subpoena
7 witnesses and compel their attendance, take evidence and require the production of any books,
8 papers, correspondence, memoranda, agreements, or other documents or records which the
9 director deems relevant or material to the inquiry.

10 Any order of the director shall be served by mailing a copy thereof by certified mail to the
11 most recent address of the recipient of the order as it appears in the files of the director. Any
12 subpoena shall be served in the same manner as provided in civil actions in circuit court.

13 No provision of this Act either creates any privilege or derogates from any privilege which
14 exists at common law or otherwise, if documentary or other evidence is sought under a
15 subpoena directed to the director or any of the director's officers or employees.

16 If any person refuses to obey a subpoena, the circuit court, upon application by the director,
17 may issue an order directing the person to appear before the director, or the officer designated
18 by the director, to produce documentary evidence if so ordered, or to give evidence on the
19 matter under investigation or in question. Failure to obey the order of the court is punishable by
20 the court as a contempt of court.

21 Section 38. No person is excused from attending and testifying or from producing any
22 document or record before the director, in obedience to a subpoena of the director or any person
23 designated by the director in any proceeding instituted by the director, on the grounds that the
24 testimony or evidence required of the director may tend to incriminate the person or subject the

1 person to a penalty or forfeiture. No person may be prosecuted or subjected to any penalty or
2 forfeiture on account of any transaction, matter, or thing concerning which the person is
3 compelled, after claiming the privilege against self-incrimination, to testify or produce evidence.
4 However, the person testifying is not exempt from prosecution and punishment for perjury or
5 contempt committed in testifying.

6 Section 39. It is a Class 2 misdemeanor for the director or any of the director's officers or
7 employees to use for personal benefit any information which is filed with or obtained by the
8 director and which is not generally available to the public. Nothing in this Act authorizes the
9 director or any of the director's officers or employees to disclose any confidential information
10 except among themselves or to other administrators or regulatory authorities or if necessary or
11 appropriate in a proceeding or investigation under this Act.

12 Section 40. To encourage uniformity in franchise matters among the federal government,
13 self-regulatory organizations, states and foreign governments, the director may cooperate with
14 federal, state or foreign agencies or administrators and law enforcement agencies, including:

15 (1) Conducting joint examinations and investigations;
16 (2) Holding joint administrative hearings;
17 (3) Filing and prosecuting joint civil or administrative proceedings;
18 (4) Sharing and exchanging information and documents;
19 (5) Sharing and exchanging personnel;
20 (6) Formulating statutes, rules, regulations, statements of policy, guidelines, proposed
21 statutory changes and interpretive opinions and releases; and
22 (7) Issuing and enforcing subpoenas at the request of the Federal Trade Commission or
23 an agency administering franchise statutes in another jurisdiction if the information
24 sought would also be subject to lawful subpoena for conduct occurring in this state.

1 Section 41. The director, with or without prior notice or hearing, may issue a cease and
2 desist order and may issue an order denying, suspending, or revoking any notice filing,
3 amendment, or exemption if the director finds:
4 (1) That the applicant, or franchisor or any officer, director, agent, or employee thereof
5 or any other person has violated or failed to comply with any provision of this Act
6 or any rule or order of the director;
7 (2) That the offer, sale, or purchase of the franchise would constitute misrepresentation
8 to, or deceit or fraud upon, purchasers thereof, or has worked or tended to work a
9 fraud upon purchasers or would so operate;
10 (3) That the applicant, or franchisor or any officer, director, agent, or employee thereof
11 or any other person is engaging or is about to engage in false, fraudulent, or deceptive
12 practices in connection with the offer and sale of a franchise;
13 (4) That any person identified in the disclosure document has been convicted of or had
14 a civil judgment entered against him or her for fraud, theft, fraudulent conversion,
15 restraint of trade, unfair or deceptive practices or misappropriation of property, or is
16 subject to an order issued, after notice and opportunity for hearing, by a state or
17 federal regulatory agency and the involvement of the person in the business of the
18 applicant or franchisor creates a substantial risk to prospective franchisees;
19 (5) That the financial condition of the franchisor adversely affects or would adversely
20 affect the ability of the franchisor to fulfill its obligations under the franchise
21 agreement; or
22 (6) That the franchisor's enterprise or method of business includes or would include
23 activities which are illegal where performed.
24 Section 42. As an alternative to the procedure prescribed in section 41of this Act, the

director may issue an order to show cause setting a hearing and requiring an applicant, notice filer, franchisor, or other person to appear and show cause why a cease and desist order should not be issued, or why an order denying, suspending, or revoking a notice filing, amendment, or exemption should not be issued. The order shall give reasonable notice of the time and place for hearing, and shall state the reasons for the entry of the order. The hearing shall be conducted in accordance with chapter 1-26. After the hearing, the director shall enter an order making such disposition of the matter as the facts require.

Section 43. The director may impose a civil penalty against a person named in an order issued pursuant to subdivisions (1) to (3), inclusive, and subdivision (6) of section 41of this Act. The amount of the civil penalty may not exceed five thousand dollars for each act or omission that constitutes the basis for issuing the order. The civil penalty may only be imposed:

(1) Following an opportunity for a hearing pursuant to section 44 of this Act if the notice delivered to all named persons includes notice of the director's authority to impose a civil penalty under this section; or

(2) As part of an order issued pursuant to subdivisions (1) to (3), inclusive and subdivision (6) of section 41 of this Act, if the order is stipulated to by each person subject to the civil penalty.

Any civil penalty collected pursuant to this section shall be deposited into the state general fund.

Section 44. Upon the entry of an order pursuant to section 41 of this Act without a hearing, the director of the Division of Securities shall promptly serve a copy of the order upon the subject applicant, franchisor, or other person. The order shall state the reasons for its issuance and shall either order a hearing, which shall be set for no later than twenty days from the date of the order, or specify that upon the written request of the applicant, franchisor, or other person,

the matter will be set for hearing within fifteen days after receipt of the request. With the consent of the applicant, franchisor, or other person a hearing may be held subsequent to the expiration of either period specified in this section. On all orders of the director which do not fix the date for hearing, the interested person may within thirty days demand a hearing on the order.

Section 45. If no hearing is requested and none is ordered by the director, an order entered pursuant to section 41 of this Act without a hearing shall remain in effect until it is modified or vacated by the director.

Section 46. If a hearing is requested or ordered, the director, after notice and hearing held in accordance with chapter 1-26 shall affirm, modify, or vacate the order.

Section 47. If the director has reasonable cause to believe that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Act or any rule or order thereunder, the director may, in addition to all other remedies, through the attorney general, with such assistance as the attorney general may request of the state's attorneys in the several counties, institute a civil action pursuant to section 49 of this Act.

Section 48. In addition to all other penalties and remedies provided by this Act, whether administrative or judicial in nature, the courts of this state have jurisdiction to grant such temporary or permanent injunctive relief as is necessary to prevent and restrain violations of this Act, and may upon a proper showing appoint a receiver for the property, assets, business, and affairs of a franchisor.

Section 49. A person who violates any provision of this Act or any rule or order thereunder is liable to the franchisee for actual damages, costs, and attorneys and experts fees. In the case of a violation of section 4, sections 7 to 9, inclusive, or section 17 of this Act, the franchisee may also sue for rescission. No person is liable under this section if the defendant proves that

1 the plaintiff affirmed the transaction with knowledge of the facts concerning the violation.

2 Each person who directly or indirectly controls a person liable under this section, each
3 principal executive officer or director of a person so liable, each person occupying a similar
4 status or performing similar functions, and each agent, employee of a person so liable, who
5 materially aids in the act or transaction constituting the violation, is also liable jointly and
6 severally with and to the same extent as such person, unless the person liable proves that he or
7 she did not know, and in the exercise of reasonable care could not have known, of the existence
8 of the facts by reason of which the liability is alleged to exist.

9 In any suit authorized by this section, other relief may be awarded as the court deems
10 appropriate and the court may in its discretion, if the circumstances are sufficiently egregious,
11 increase the award of damages to an amount not to exceed three times the actual damage
12 sustained.

13 Except as explicitly provided in this section, no civil liability in favor of any private party
14 may arise against any person by implication from or as a result of the violation of any provision
15 of this Act or any rule or order thereunder. Nothing in this section limits any liability which
16 would exist by virtue of any other statute or under common law if this Act were not in effect.

17 Section 50. No person may obtain relief for an action pursuant to section 49 of this Act:

18 (1) In an action for rescission pursuant to section 4, sections 7 to 9, inclusive, or section
19 17 of this Act unless the action is instituted within one year after the violation
20 occurred;

21 (2) In an action for actual damages, costs, and attorneys and experts fees unless instituted
22 within the earlier of two years after discovery of the facts constituting the violation
23 or three years after the violation; or

24 (3) Upon receipt by the franchisee of a rescission offer in a form approved by the director

unless the action is instituted within ninety days after the receipt by the franchisee of a rescission.

Section 51. That §§ 37-5A-1 to 37-5A-87, inclusive, be repealed.

Section 52. Any action or proceeding that is pending on July 1, 2008 or may be instituted on the basis of conduct occurring before July 1, 2008, is still subject to the provisions of chapter 37-5A as of June 30, 2008. However, no civil action may be maintained to enforce any liability under chapter 37-5A unless instituted within any period of limitation that applied when the cause of action accrued or within three years after July 1, 2008, whichever is earlier.

Section 53. Any effective registration and administrative order relating to the registrations, rules, statements of policy, interpretative opinions, declaratory rulings, no action determinations, and conditions imposed on the registrations prior to July 1, 2008 remain in effect while they would have remained in effect if this Act had not been enacted. They are considered to have been filed, issued, or imposed under this Act, but are exclusively governed by chapter 37-5A as of June 30, 2008.

Section 54. Chapter 37-5A as of June 30, 2008, exclusively applies to an offer or sale made within one year after the effective date of this Act pursuant to an offering made in good faith before the effective date of this Act on the basis of an exemption available under chapter 37-5A.

Section 55. That § 37-25A-1 be amended to read as follows:

37-25A-1. Terms used in this chapter, unless the context otherwise requires, mean:

(1) "Advertising," any circular, prospectus, advertisement, or other material or any communication by radio, television, pictures, or similar means used in connection with an offer or sale of any business opportunity;

(2) "Business opportunity," a contract or agreement, between a seller and purchaser, express or implied, orally or in writing, wherein it is agreed that the seller shall

provide to the purchaser any products, equipment, supplies, or services enabling the purchaser to start a business and the seller represents that:

(a) The seller shall provide or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases, or other similar devices, on premises neither owned nor leased by the purchaser or seller;

(b) The seller shall provide or assist the purchaser in finding outlets or accounts for the purchaser's products or services;

(c) The seller shall purchase any products made, produced, fabricated, grown, bred, or modified by the purchaser;

(d) The seller guarantees that the purchaser shall derive income from the business which exceeds the price paid to the seller;

(e) The seller shall refund all or part of the price paid to the seller, or repurchase any of the products, equipment, or supplies provided by the seller, if the purchaser is dissatisfied with the business; or

(f) The seller shall provide a marketing plan;

(3) "Director," the director of the division of securities;

(4) "Franchise," a contract or agreement as defined in ~~§ 37-5A-1~~ section 1 of this Act;

(5) "Franchisee," a person to whom a franchise is granted;

(6) "Franchisor," a ~~person who grants a franchise or an area franchise~~ franchisor as defined in section 1 of this Act;

(7) "Marketing plan," advice or training provided to the purchaser by the seller pertaining to the sale of any products, equipment, supplies, or services and the advice or training includes, but is not limited to, preparing or providing:

(a) Promotional literature, brochures, pamphlets, or advertising materials;

(b) Training regarding the promotion, operation, or management of the business opportunity; or

(c) Operational, managerial, technical, or financial guidelines or assistance;

(8) "Offer" or "offer to sell," includes every attempt to dispose of a business opportunity for value or solicitation of an offer to purchase a business opportunity;

(9) "On-going business," an existing business that, for at least six months prior to the offer, has been operated from a specific location, has been open for business to the general public and has substantially all of the equipment and supplies necessary for operating the business;

(10) "Person," an individual, corporation, trust, partnership, incorporated or unincorporated association or any other entity;

(11) "Purchaser," a person who enters into a contract or agreement for the acquisition of a business opportunity or a person to whom an offer to sell a business opportunity is directed;

(12) "Sale" or "sell," includes every contract or agreement of sale, contract to sell, disposition of a business opportunity or interest in a business opportunity for value;

(13) "Seller," a person who sells or offers to sell a business opportunity or any agent or person who directly or indirectly acts on behalf of such person or a person recommended by the seller.

Section 56. That § 37-25A-2 be amended to read as follows:

37-25A-2. For the purposes of this chapter, the term "business opportunity," does not include:

(1) Any offer or sale of an on-going business operated by the seller and sold in its entirety;

(2) Any offer or sale of a business opportunity to an on-going business if the seller provides products, equipment, supplies, or services which are substantially similar to the products, equipment, supplies or services sold by the purchaser in connection with the purchaser's on-going business;

(3) Any offer or sale of a business opportunity which ~~is registered~~ has notice filed or is exempt from ~~registration~~ notice filing pursuant to ~~chapter 37-5A~~ sections 1 to 50, inclusive, of this Act or any offer or sale of a business opportunity that is excluded from the definition of business opportunity as set forth in 16 C.F.R. Part 437 as of January 1, 2008;

(4) Any offer or sale of a business opportunity registered pursuant to chapter 47-31B;

(5) Any offer or sale of a business opportunity involving a marketing plan made in conjunction with the licensing of a federally registered trademark or federally registered service mark if the seller had a minimum net worth of one million dollars as determined by the seller's most recent audited financial statement, prepared within thirteen months of the first offer in this state. Net worth may be determined on a consolidated basis if the seller is at least eighty percent owned by one person and that person expressly guarantees the obligations of the seller with regard to the offer or sale of any business opportunity claimed to be excluded under this subdivision;

(6) Any offer or sale of a business opportunity by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator or a judicial offer or sale of a business opportunity.

Section 57. That § 37-25A-3 be amended to read as follows:

37-25A-3. The following business opportunities are exempt from §§ 37-25A-7 to 37-25A-24, inclusive:

(1) Any offer or sale of a business opportunity for which the immediate cash payment made by the purchaser for any business opportunity is at least twenty-five thousand dollars if the immediate cash payment does not exceed twenty percent of the purchaser's net worth as determined exclusive of principal residence, furnishings therein, and automobiles. However, the director of the Division of Securities may, by rules adopted pursuant to chapter 1-26, withdraw or further condition the availability of this exemption;

(2) Any offer or sale of a business opportunity for which the purchaser is required to make a payment to the seller or a person recommended by the seller ~~not to exceed two~~ that is less than five hundred ~~fifty~~ dollars during the period from any time before commencing operation to within six months after commencing operation of the business opportunity;

(3) Any offer or sale of a business opportunity if the seller has a net worth of not less than one million dollars as determined by the seller's most recent audited financial statement, prepared within thirteen months of the first offering in this state. Net worth may be determined on a consolidated basis if the seller is at least eighty percent owned by one person and that person expressly guarantees the obligations of the seller with regard to the offer or sale of any business opportunity claimed to be exempt under this subdivision. The director may, by rules adopted pursuant to chapter 1-26, withdraw or further condition the availability of this exemption;

(4) Any offer or sale of a business opportunity if the purchaser is a bank, savings and loan association, trust company, insurance company, credit union, or investment company as defined by the Investment Company Act of 1940, pension or profit sharing trust, or other financial institution or institutional buyer or a dealer registered pursuant to

chapter 47-31B, if the purchaser is acting for itself or in a fiduciary capacity;

(5) Any offer or sale of a business opportunity which is defined as a franchise in subdivision 37-25A-1(4) if the seller delivers to each purchaser at ~~the earlier of the first personal meeting, or ten business~~ least fourteen calendar days prior to the earlier of the execution by a purchaser of any contract or agreement imposing a binding legal obligation on the purchaser or the payment by a purchaser of any consideration in connection with the offer or sale of the business opportunity, a ~~uniform franchise offering circular prepared in accordance with the guidelines adopted by the North American Securities Administrators Association, Inc., as amended through September 21, 1983,~~ disclosure document as defined in section 1 of this Act and ~~registered~~ notice filed with the ~~division of securities~~ Division of Securities pursuant to ~~chapter 37-5A~~ sections 1 to 50, inclusive, of this Act, or any offer or sale of a business opportunity that is exempt from the disclosure requirements as set forth in 16 C.F.R. Part 437 as of January 1, 2008;

(6) Any offer or sale of a business opportunity for which the cash payment made by a purchaser for any business opportunity does not exceed five hundred dollars and the payment is made for the not-for-profit sale of sales demonstration equipment, material, or samples, or the payment is made for product inventory sold to the purchaser at a bona fide wholesale price;

(7) Any offer or sale of a business opportunity which the director exempts by order or a class of business opportunities which the director exempts by rule upon the finding that such exemption is not contrary to public interest and that registration is not necessary or appropriate for the protection of purchasers.

Section 58. That § 37-25A-8 be amended to read as follows:

37-25A-8. In order to register a business opportunity, the seller shall file with the director of the Division of Securities one of the following disclosure documents with the appropriate cover sheet as required by § 37-25A-15, a consent to service of process as specified in § 37-25A-9 and the appropriate fee as required by § 37-25A-10:

(1) A ~~uniform franchise offering circular prepared in accordance with the guidelines adopted by the North American Securities Administrators Association, Inc. and registered with the division of securities pursuant to chapter 37-5A~~ disclosure document prepared pursuant to § 37-25A-15; or

(2) A disclosure document prepared pursuant to ~~§ 37-25A-15~~ 16 C.F.R. Part 437 as of January 1, 2008.

Section 59. That chapter 37-25A be amended by adding thereto a NEW SECTION to read as follows:

The director may impose a civil penalty against a person named in an order issued under § 37-25A-30 for violation of §§ 37-25A-7, and 37-25A-43 to 37-25A-46, inclusive. The amount of the civil penalty may not exceed five thousand dollars for each act or omission that constitutes the basis for issuing the order. Any civil penalty collected pursuant to this section shall be deposited into the state general fund. The civil penalty may only be imposed:

(1) Following an opportunity for a hearing under § 37-25A-30 if notice delivered to all named persons includes notice of the director's authority to impose a civil penalty under this section; or

(2) As part of an order issued pursuant to § 37-25A-30(1) if the order is stipulated to by each person subject to the civil penalty.

Section 60. That § 4-4-4.3 be amended to read as follows:

4-4-4.3. There is established within the state treasury the securities operating fund and the

insurance operating fund, into which shall be deposited all fees received by each division. All moneys in the funds created by this section shall be budgeted and expended in accordance with the provisions of Title 4 on warrants drawn by the state auditor on vouchers approved by the secretary of the Department of Revenue and Regulation. Expenditures from these funds may be made only to pay the necessary expenses of purposes specified in sections 1 to 50, inclusive, of this Act, and chapters ~~37-5A,~~ 37-25A, 47-31B, 47-33, and Title 58.