

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, FEBRUARY 2, 2018

COMMONWEALTH OF VIRGINIA, *ex rel.*

STATE CORPORATION COMMISSION

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Ex Parte: In the matter of
Adopting Revisions to the Rules
Governing the Virginia Retail Franchising Act

CASE NO. SEC-2017-00050

ORDER ADOPTING AMENDED RULES

By order entered on October 11, 2017, all interested persons were ordered to take notice that the State Corporation Commission ("Commission") would consider the adoption of a revision to Chapter 110 of Title 21 of the Virginia Administrative Code ("Regulations"). On October 18, 2017, the Division of Securities and Retail Franchising ("Division") sent the Order to Take Notice of the proposed Regulations to all registrants and applicants and to all interested parties pursuant to the Virginia Retail Franchising Act ("Act"), § 13.1-557 *et seq.* of the Code of Virginia, regarding the exemption for Substantial Investment in a Franchise ("Substantial Investment Exemption"). The Order to Take Notice describes the proposed amendments and afforded interested parties an opportunity to file written comments or requests for hearing by December 1, 2017.

The Commission received three comments on the proposed Substantial Franchise Exemption, one from the Franchise Practice Group of the law firm of Gray Plant Mooty ("Gray Plant Mooty");¹ one from Regina Amolsch, of the law firm of Plave Koch PLC ("Amolsch");²

¹ Comments filed on November 30, 2017, Doc. Con. Cen. No. 171139340.

² Comments filed on December 1, 2017, Doc. Con. Cen. No. 171210003.

and one from Keith Kanouse.³ In general, the commenters supported the Commission's adoption of the proposed exemption. There were no requests for hearing.

Commenters provided comments regarding: (i) the threshold investment amount; (ii) the actual initial investment as well as expanding the exemption to eliminate the notice filing and disclosure to potential franchisees; (iii) the definition of the term "single unit franchise," (iv) adding the terms "or affiliates" after the term "franchisee representative;" and (v) redacting "in a type of business operated under the franchise" from the proposed exemption.

On January 16, 2018, the Division filed a response to the comments made on the proposed amendments.⁴ Based upon those comments, the Division recommended that the Commission adopt certain requested revisions to the proposed Regulations, including: (i) reducing the threshold investment amount to claim the exemption from \$5 million to \$3 million; (ii) clarifying the term "actual minimum initial investment" to be those expenses designated in Item 7 of the franchise disclosure document; (iii) adding the language "or affiliates" after the term "franchisee representative;" and (iv) redacting the language "in a type of business operated under the franchise" from the proposed exemption.

The Division however, did not recommend that the Commission adopt the proposed amendments regarding the term "single unit franchise," nor did the Division recommend that the Commission expand the exemption to eliminate the notice filing provision and disclosure to potential franchisees.

³ The Division sent Mr. Kanouse a written response to his comments on November 28, 2017. His comments were not relevant to the proposed rules.

⁴ Response of the Division of Securities and Retail Franchising to the Proposed Amendments to the Virginia Franchise Rules, Doc. Con. Cen. No. 180110203.

NOW THE COMMISSION, upon consideration of the proposed amendments to the Regulations, as modified, the recommendation of the Division, and the record in this case, finds that the proposed amendments to the Regulations, as modified herein, should be adopted.

Accordingly, IT IS ORDERED THAT:

(1) The proposed regulations, as modified herein, attached hereto and made a part hereof are hereby ADOPTED effective March 1, 2018.

(2) This matter is dismissed from the Commission's docket, and the papers herein shall be placed in the file for ended causes.

AN ATTESTED COPY hereof shall be sent by regular mail to each of the following: Gray Plant Mooty, 500 IDS Center, 80 South 8th Street, Minneapolis, Minnesota 55402; Regina Amolsch, Esquire, Plave Koch PLLC, 12005 Sunrise Valley Drive, Suite 2200, Reston, Virginia 20191; and shall be sent via email to ramolsch@plavekoch.com and Keith@Kanouse.com; and copies also shall be given to the Commission's Division of Information Resources; the Commission's Office of General Counsel; and such other persons as the Division deems appropriate.

**STATE CORPORATION COMMISSION, DIVISION OF SECURITIES AND RETAIL
FRANCHISING**

Franchise Rules 2017

21VAC5-110-75. Exemptions.

Any offer or sale of a franchise in a transaction that meets the requirements of this section is exempt from the registration requirement of § 13.1-560 of the Act.

1. Sale or transfer by existing franchisee. The sale or transfer of a franchise by a franchisee who is not an affiliate of the franchisor for the franchisee's own account is exempt if:
 - a. The franchisee's entire franchise is sold or transferred, and the sale or transfer is not effected by or through the franchisor.
 - b. The sale or transfer is not effected by or through a franchisor merely because a franchisor has a right to approve or disapprove the sale or transfer or requires payment of a reasonable transfer fee.
2. Renewal or extension of existing franchise. The offer or sale of a franchise involving a renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business, and there is no material change in the franchise relationship, is exempt. For purposes of this subdivision, an interruption in the franchised business solely for the purpose of renovating or relocating that business is not a material change in the franchise relationship or an interruption in the operation of the franchised business.
3. Offers and sales to existing franchisees. The offer or sale of an additional franchise to an existing franchisee of the franchisor for the franchisee's own account is exempt if the franchise being sold is substantially the same as the franchise that the franchisee has

operated for at least two years at the time of the offer or sale of the franchise, provided the prior sale to the franchisee was pursuant to a franchise offering that was registered or exempt pursuant to the requirements of the Act.

4. Seasoned franchisor.

a. The offer or sale of a franchise by a franchisor is exempt if:

(1) The franchisor has a net equity, according to its most recently audited financial statements, of not less than ~~\$15,000,000~~ \$15 million on a consolidated basis, or ~~\$1,000,000~~ \$1 million on an unaudited basis and is at least 80% owned by a corporation or entity that has a net equity, on a consolidated basis, according to its most recently audited financial statements, of not less than ~~\$15,000,000~~ \$15 million, and the 80% owner guarantees the performance of the franchisor's obligations;

(2) The auditor's report accompanying the audited financial statements described in subdivision 4 a (1) of this section does not contain an explanatory paragraph expressing doubt as to the entity's ability to continue as a going concern; and

(3) The franchisor or any 80% owner of the franchisor or the franchisor's predecessor, or any combination thereof, has had at least 25 franchisees conducting substantially the same franchise business to be offered or sold for the entire five-year period immediately preceding the offer or sale;

b. The exemption set forth in this subdivision 4 ~~of this section~~ may be claimed only if the franchisor:

(1) Files a Form H Notice of Claim of Exemption and other material as set forth in subdivision 7 8 of this section no later than 10 business days before the offer or sale of any franchise; and

(2) Submits financial statements demonstrating compliance with the conditions set forth in subdivision 4 a (1) of this section.

c. An initial exemption filing and any renewal filing shall expire after a period of one year. The franchisor shall file for a renewal by making an exemption filing if it intends to offer or sell franchises for any additional period annually, at least 10 business days before the expiration of the previously filed Notice of Claim of Exemption.

5. Institutional franchisee.

a. The offer or sale of a franchise to a bank, savings bank, savings and loan association, trust company, insurance company, investment company, or other financial institution, or to a broker-dealer is exempt when the:

(1) Purchaser is acting for itself or in a fiduciary capacity; and

(2) Franchise is not being purchased for the purpose of resale to an individual not exempt under this regulation.

b. The exemption set forth in subdivision 5 a of this section may be claimed only if the franchisor files an initial filing Form H, Notice of Claim of Exemption, and other material as set forth in subdivision 7 8 a of this section, at least 10 business days before each offer or sale of each franchise.

6. Substantial investment.

a. The offer or sale of a franchise by a franchisor is exempt if:

(1) The offer or sale is of a single unit franchise in which the actual minimum initial investment is in excess of \$ [5-3] million[;]. This amount will be based on the Item 7 requirements of the Franchise Disclosure Document;]

(2) The prospective franchisee is represented by legal counsel in the transaction; and

(3) The franchisor reasonably believes immediately before making the offer or sale that the prospective franchisee, either alone or with the prospective franchisee's representative [or affiliates], has sufficient knowledge and experience [in the type of business operated under the franchise] such that the prospective franchisee is capable of evaluating the merits and risks of the prospective franchise investment.

b. The exemption set forth in subdivision 6 a of this section may be claimed only if the franchisor:

(1) Files a Form H, Notice of Claim of Exemption, and other materials as set forth in subdivision 8 of this section no later than 10 business days before the offer or sale of any franchise; and

(2) Obtains from the prospective franchisee a signed certification verifying the grounds for the exemption.

c. The exemption set forth in subdivision 6 a of this section applies only to the registration provisions, and not the disclosure provisions, of the Act.

d. An initial exemption filing and any renewal filing shall expire after a period of one year. The franchisor shall file for a renewal by making an exemption filing if it intends to offer or sell franchises for any additional period annually at least 10 business days before the expiration of the previously filed Form H, Notice of Claim of Exemption.

6- 7. Disclosure requirements.

a. If a franchisor relies upon any of the exemptions set forth in subdivision 3, 4 or 5, or 6 of this section, the franchisor shall provide a disclosure document complying with 21VAC5-110-55 and 21VAC5-110-95 together with all proposed agreements relating to the sale of the franchise to a prospective franchisee 14 calendar days before the signing of the agreement or the payment of any consideration.

~~b. Franchisors filing a claim of exemption under subdivisions 4 or 5 of this section shall include a self-addressed stamped envelope by which the commission may return to the franchisor a confirmation of receipt of the filing and the exemption file number assigned. Correspondence shall refer to the assigned file number in all subsequent related filings and correspondence with the commission.~~

7. 8. Filing requirements for exemptions set forth in subdivisions 4 and 5, and 6 of this section.

a. Initial exemption filing.

(1) The initial exemption period shall expire after a period of one year.

(2) ~~Franchisor~~ The franchisor files an application for exemption of a franchise by filing with the commission no later than 10 business days before the offer or sale of any franchise, the following completed forms and other material:

(a) Notice of Claim of Exemption, Form H;

(b) Uniform Consent to Service of Process, Form C;

(c) If the applicant is a corporation or partnership, an authorizing resolution is required if the application is verified by a person other than applicant's officer or general partner;

(d) Franchise Disclosure Document on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising;

(e) ~~Files an~~ An undertaking by which it agrees to supply any additional information the commission may reasonably request; and

(f) Application fee of \$500 (payable to the Treasurer of Virginia).

b. Amendment to exemption filing.

(1) Upon the occurrence of a material change, the franchisor shall amend the effective exemption filed at the commission.

(2) An application to amend a franchise exemption is made by submitting the following completed forms and other material:

(a) Notice of Claim of Exemption, Form H;

(b) One clean copy of the amended Franchise Disclosure Document on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising; and

(c) Application fee of \$100 (payable to the Treasurer of Virginia).

c. Renewal exemption filing.

(1) A franchise exemption expires at midnight on the annual exemption effective date. An application to renew the franchise exemption shall be filed 10 days prior to the expiration date in order to prevent a lapse of exemption under the Act.

(2) An application for renewal of a franchise exemption is made by submitting the following completed forms and other material:

(a) Notice of Claim of Exemption, Form H;

(b) One clean copy of the Franchise Disclosure Document on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising; and

(c) Application fee of \$250 (payable to the Treasurer of Virginia).

FORMS (21VAC5-110)

FORM A, Uniform Franchise Registration Application (rev. 7/08):

FORM B, Franchisor's Costs and Sources of Funds (rev. 7/08):

FORM C, Uniform Consent to Service of Process (rev. 7/08):

FORM E, Affidavit of Compliance -- Franchise Amendment/Renewal (rev. 7/08):

FORM F, Guarantee of Performance (rev. 3/13):

FORM G, Franchisor's Surety Bond (rev. 7/99):

FORM H, Notice of Claim of Exemption (rev. 7/08):

FORM H, Notice of Claim of Exemption (undated, filed 10/2017)

FORM K, Escrow Agreement (eff. 7/07):