

GENERAL NOTICE

NOTICE 1099 OF 2010

THE CONSUMER PROTECTION ACT, 2008 (ACT NO. 68 OF 2008)

I, Dr Rob Davies, Minister of Trade and Industry, pursuant to the signing of the Consumer Protection Act, 2008 by the President, hereby give notice in terms of section 120 (2)(a) of the Consumer Protection Act, 2008, as follows:

1. The proposed Consumer Protection Regulations, 2010 are hereby published for public comment with effect from date of publication to 31 January 2011.
2. Members of the public are hereby requested to send their comments to cparegs@thedti.gov.za or Fax (012) 394 2383. For more information please contact Mr. Ntutuzelo Vananda at 012 394 1383.



DR ROB DAVIES, MP

MINISTER OF TRADE AND INDUSTRY

DATE: 23/11/2010/ 2010

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GOVERNMENT NOTICE
DEPARTMENT OF TRADE AND INDUSTRY

No. R.

[Day][Month][Year]

Consumer Protection Act Regulations

I, Dr Rob Davies, Minister of Trade and Industry, in terms of and under section 120(1)(a) and (e)(ii) of the Consumer Protection Act, 2008 (Act No. 68 of 2008), read together with the respective sections indicated in the regulations below, do hereby make the regulations set out in the schedule hereto.

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Short title and definitions

1.(1) These regulations are the Consumer Protection Act Regulations.

(2) In these regulations, unless the context indicates otherwise, any word or expression to which a meaning has been assigned in the Consumer Protection Act, 2008, has the same meaning, and -

"Department" means the Department of Trade and Industry; and

"the Act" means the Consumer Protection Act, 2008 (Act No. 68 of 2008).

*Draft for public consultation - 28 October 2010***Franchise agreements**

2. (1) This regulation must be read together with section 7 of the Act.

- (2)(a) Every franchise agreement must contain the exact text of section 7(2) of the Act at the top of the first page of the franchise agreement, together with a reference of the section and the Act.
- (b) Every franchise agreement must contain, as a minimum, the contents provided for in subregulation (3).
- (c) Any provision provided for in these regulations that are not included in a franchise agreement are deemed to be included in that franchise agreement, and where applicable, on the terms and conditions which are reasonable in the sector or industry to which that franchise agreement pertains.
- (d) A franchise agreement must contain provisions which prevent -
 - (i) the unreasonable overvaluation of fees, prices or other direct or indirect consideration;
 - (ii) conduct which is unnecessary and unreasonable in relation to the risks to be incurred by one party; and
 - (iii) conduct that is not reasonably necessary for the protection of the legitimate business interests of the franchisor, franchisee or franchise system.
- (e) A franchise agreement must contain clauses stipulating that -
 - (i) a franchisor is not entitled to any undisclosed direct or indirect benefit or compensation from suppliers to its franchisees or the franchise system, unless the fact thereof is disclosed in writing with an explanation of how it will be applied; and
 - (ii) the general principles of honesty, fairness, reasonability and equity must guide the interpretation of the franchise agreement and relationship between the parties.
- (f) The franchisor and franchisee of a franchise agreement in force on the date of commencement of these regulations which does not meet the requirements of these regulations must within 6 (six) months of the date of commencement sign an annexure to that franchise agreement, or at the choice of the franchisee enter into a new franchise agreement, to ensure that the franchise agreement which henceforth regulates their legal relationship meets such requirements, but -

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- (i) subregulation (b) does not apply to existing franchise agreements which are amplified by an annexure;
 - (ii) subregulation (c) does not apply where a new franchise agreement is entered into as contemplated in this subregulation.
- (g) Any provision in a franchise agreement in conflict with this regulation is void to the extent of such a conflict.
- (3) A franchise agreement must as a minimum contain the following specific information –
- (a) the name and description of the goods and/or services which the franchisee is entitled to provide, produce, render or sell;
 - (b) the obligations of the franchisor;
 - (c) the obligations of the franchisee;
 - (d) a description of the applicable franchise business and system,
 - (e) the direct or indirect consideration payable by the franchisee to the franchisor;
 - (f) the territorial rights, if any, granted to the franchisee;
 - (g) a description of the site or premises and location from which the franchisee is to conduct the franchise business and a copy of the signed lease if the franchisor is the lessor, or a copy of the signed sublease if the franchisor sublet to the franchisee, or a copy of the lease in respect of the site or premises the franchisor has selected to be leased by the franchisee from a third party;
 - (h) the conditions under which the franchisee or his, her or its estate may transfer or assign the rights and obligations under the franchise;
 - (i) a description of the trade mark or any other intellectual property owned by the franchisor, or otherwise licensed to the franchisor which is, or will be used in the franchise, and the conditions under which they may so be used;
 - (j) if the agreement is related to a master franchise, the franchisor's identity and details of the rights obtained by the master franchisee from the franchisor;
 - (k) particulars of the initial and ongoing training and assistance provided by the franchisor, and the time frames within which such training and education must be provided by the franchisor;
 - (l) the duration and the terms of the renewal of the franchise agreement;

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- (m) if the franchise agreement provides that a franchisee must directly or indirectly contribute to an advertising, marketing or other similar fund, the franchise agreement must -
- (i) specify the amount, or if expressed as a percentage, the method of calculation of such contribution;
 - (ii) stipulate that within 3 (three) months after the end of the last financial year, the franchisor will provide a franchisee with a copy of an audited financial statement which reflects the fund's receipts and expenses for the last financial year, including amounts spent, and the method of spending on advertising and/or marketing of franchisees and the franchise system's goods and services, but it must relate to intellectual property and/or system branding,
 - (iii) stipulate that, in addition to subparagraph (ii), the franchisor must for every 3 (three) months period make financial management accounts relating to the funds available to franchisees;
 - (iv) stipulate that moneys in the fund may not be spent on advertising and marketing of the franchisor's franchises for sale;
 - (v) be accompanied by a certificate of a registered accountant or accounting officer, as the case may be, confirming that the fund's account has been audited and that the statements to the best of his or her knowledge provide a true reflection of the matters stated in this subregulation (m);
 - (vi) stipulate that a franchisee can request a copy of the statement and certificate issued in terms of or statements or audited for purposes of paragraph (v), and that the franchisor must within 14 (fourteen) days of such request provide such copies;
 - (vii) contain a clause that any contribution to such a fund will be deposited in a separate bank account and used only for purposes of the fund;
 - (viii) contain a clause specifying the franchisor's contribution to such fund, if any; and
 - (ix) a clause providing that the franchisor and or franchisor associated franchised businesses do not enjoy any direct or indirect benefit not afforded to independent franchisees;
- (n) the effect of the termination or expiration of the franchise;

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- (o) extension or renewal terms, or whether there is no option to renew or extend the agreement;
- (p) a written explanation of any terms or sections not fully understood by the prospective franchisee upon the prospective franchisee's written request;
- (q) the franchisor's legal name, trading name, registered office and franchise business office, street address, postal address, e-mail address, telephone number and fax number;
- (r) the name, identity number, cellular telephone number, e-mail address, town of residence, job titles and qualifications of the franchisor's executive officers;
- (s) except where the franchisor is a company listed on a stock exchange, details of any proprietor, member or shareholder if they are different from the persons referred to in paragraph (r);
- (t) particulars of any restrictions to be imposed on the franchisee;
- (u) the nature and extent of the franchisor's involvement or approval in the process of site selection;
- (v) a summary of the terms and conditions relating to termination, renewal, goodwill and assignment of the franchise;
- (w) a summary of the main obligations of the franchisor in respect of initial and ongoing training to be provided;
- (x) a description of how any deposits paid by the prospective franchisee deposited into a separate bank account will be dealt with;
- (y) full particulars of the financial obligations of the franchisee in terms of the franchise agreement or otherwise related to the franchised business including -
 - (i) the initial fee payable to the franchisor on the signing of the franchise agreement, including the purpose for which it is to be applied;
 - (ii) the funds required to establish the franchised business including, purchase or lease of property, site conversion costs, décor and signage, equipment, furniture, hiring and training of staff, opening stock, legal and financial charges, as may be applicable;
 - (iii) the initial working capital setting out the basis on which it is calculated;
 - (iv) the total investment required including at least, the upfront fee, establishment costs, initial working capital and any other funding;

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- (v) a clear statement as to whether or not any expenses, any salary/wages of employees of the franchised business and the costs of servicing loans are included in the purchase price.
- (vi) the amount of funding that is available from the franchisor, if any, and the applicable conditions;
- (vii) the total amount that the franchisee must contribute towards the necessary funding before borrowing; and
- (viii) ongoing amounts payable to the franchisor, with details as to -
 - (aa) whether the amounts are fixed or variable;
 - (bb) whether all or part of the amounts are built into the cost of goods or services that must be purchased from the franchisor or other preferred suppliers;
 - (cc) the dates, or intervals, at which the amounts fall due (e.g. three months after trading by the franchisee commences); and
 - (dd) if any fee is payable in respect of management services provided by the franchisor, details of such services.

Disclosure document for prospective franchisee

- 3.(a) Every franchisor must provide a prospective franchisee with a disclosure document, dated and signed by an authorised officer of the Franchisor, at least 14 days prior to the signing of a franchise agreement, which as a minimum must contain -
- (i) a viability statement given by the franchisor's owners, directors or principals, as the case may be, containing key financial information regarding the turnover and net profit of the franchisor;
 - (ii) the number of individual outlets franchised by the franchisor;
 - (iii) a description of the growth of the franchisor's turnover, net profit and the number of individual outlets, if any, franchised by the franchisor during the period of 12 (twelve) months prior to date on which the prospective franchisee receives a copy of the disclosure document;
 - (iv) a formula and a calculation that the franchisee may use to calculate the maximum selling price of the franchised business, should the franchisee wish to sell its business in the future, and the factors and assumptions on which it is based;

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- (v) a statement to the effect that any deposits paid by the prospective franchisee will be deposited into a separate bank account and dealt with as provided for in the franchise agreement;
 - (vi) a statement by certifying that there have been no significant or material changes in the company's or franchisor's financial position since the date of the accounting officer or auditor's certificate and the company or franchisor has reasonable grounds to believe that it will be able to pay its debts as and when they fall due;
 - (vii) written projections in respect of levels of potential sales, income, gross or net profits or other financial projections for the franchised business or franchises of a similar nature with particulars of the assumptions upon which these representations are made.
- (b) Each page of the disclosure document contemplated in subregulation (a) above must -
- (i) be qualified in respect of the assumptions contained therein; and
 - (ii) carry a statement to the effect that such projections in no way represent any form of guarantee or undertaking by the franchisor to the franchisee or any third party that any figures set out therein will be achieved.
- (c) The disclosure document contemplated in subregulation (a) above must be accompanied by a certificate on an official letterhead from a person eligible in law to be registered as the accounting officer of a close corporation, or the auditor of a company, as the case may be, certifying that -
- (i) the business of the franchisor is a going concern; and
 - (ii) to the best of his or her knowledge, the assets of the franchisor's business exceed its liabilities;
 - (iii) to the best of his or her knowledge the franchisor is able to meet its current and contingent liabilities;
 - (iv) the franchisor is capable of meeting all of its financial commitments in the ordinary course of business as they fall due; and
- the franchisor's audited annual financial statements for the most recently expired financial year have been drawn up -
- (aa) in accordance with generally accepted accounting principles;
 - (bb) except to the extent stated therein, on the basis of accounting policies consistent with prior years;
 - (cc) in accordance with the provisions of the Companies Act (No. 71 of 2008), and all other applicable laws; and

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- (dd) fairly reflect the financial position, affairs, operations and results of the franchisor as at that date and for the period to which they relate.
- (d) The disclosure document contemplated in subregulation (a) above must be accompanied by -
 - (i) a list of current franchisees, if any, and of outlets owned by the franchisor, stating, in respect of any franchisee -
 - (aa) the name under which it carries on business;
 - (bb) the name of its representative;
 - (cc) its physical address; and
 - (dd) its e-mail and cellular telephone number, together with a clear statement that the prospective franchisee is entitled to contact any of the franchisees listed, or alternatively to visit any outlets operated by a current franchisee to assess the information disclosed by the franchisor and the franchise opportunity offered by it;
 - (ii) an organogram depicting the support system in place for franchisees;
 - (iii) a copy of the most recent black economic empowerment rating certificate of the franchisor issued by an accredited agency, or, if the franchisor does not comply with applicable black economic empowerment requirements, the franchisor must disclose its strategy in respect of black economic empowerment, setting out the time period within and the manner in which it intends to compliance with such requirements.

Mechanisms to block direct marketing communication

- 4. (1) For purposes of section 11(1) of the Act, if a consumer has -
 - (a) in writing informed any other person; or
 - (b) placed any communication or sign on a postal box or other container for mail, indicating that he or she does not wish to receive any material related to direct marketing, no person may place or attach any such material, in whichever physical format, in or on or near the postal box, container or premises of the consumer.
- (2) The phrase "no junk mail" or any translation thereof in an official language of the Republic is sufficient to meet the requirements of subregulation (1).