

<b>LFC Requester:</b>	<b>Hilla, Emily</b>
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**AGENCY BILL ANALYSIS - 2025 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO**

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**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

**Date Prepared:** 2/20/25 *Check all that apply:*  
**Bill Number:** SB 439 Original  Correction   
 Amendment  Substitute

**Sponsor:** Sen. Joshua A. Sanchez **Agency Name and Code:** AOC  
**Short Title:** Deceptive Franchise Practices Act **Number:** 218  
**Person Writing:** Kathleen Sabo **Phone:** 505-470-3214 **Email:** aoccaj@nmcourts.gov

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		
None	None	Rec.	General

(Parenthesis ( ) indicate expenditure decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		
Unknown	Unknown	Unknown	Rec.	General

(Parenthesis ( ) indicate revenue decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Unknown	Unknown	Unknown	Unknown	Rec.	General

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None.

Duplicates/Relates to Appropriation in the General Appropriation Act: None.

### **SECTION III: NARRATIVE**

#### **BILL SUMMARY**

Synopsis: SB 439 enacts the “Deceptive Franchise Practices Act”, (DFPA) providing a private right of action to recover damages or reform a franchise agreement for a franchisee who is a party to a franchise agreement entered into or renewed after July 1, 2025 that contains a prohibited provision set forth in Section 3 of the DFPA or who is injured by an unfair act or practice set for in Section 3 of the DFPA.

SB 439, Section 3, specifies provisions, inclusion of which in a franchise agreement entered into between a franchisor and a franchisee who is either a resident of New Mexico or a nonresident who will be operating a franchise in New Mexico, is unlawful. Provisions include:

- Requiring assent to a non-compete clause for more than two years
- Limiting litigation brought for breach of the agreement in any manner
- Imposing exclusive purchasing requirements
- Allowing franchisor to establish competing outlets within a franchisee’s territory
- Allowing unilateral modification of agreements
- Permitting unilateral termination without good cause

SB 439, Section 4, specifies unlawful acts and practices, including:

- Discriminating unfairly among its franchisees or unreasonably failing or refusing to comply with any terms of a franchise agreement
- Using deceptive advertising or engaging in deceptive acts in connection with the franchise or the franchisor’s business
- Coercing the franchisee to undertake specified actions or practices
- Establishing competing outlets within a franchisee’s territory

SB 439, Section 5, requires a termination of a franchise or election not to renew a franchise be made on at least 90 days’ notice, unless otherwise provided in the agreement.

SB 439 provides for a 5-year statute of limitations for actions brought for violations of the DPFA.

SB 439 provides that the provisions of the Act apply only to agreements entered into or renewed, or an act or a practice occurring, after June 30, 2025.

The effective date of the Act is July 1, 2025.

#### **FISCAL IMPLICATIONS**

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced actions to recover damages or reform a franchise agreement under the DFPA. New laws, amendments to existing laws and new hearings have the

potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

## SIGNIFICANT ISSUES

- 1) California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington and Wisconsin have enacted laws that can be considered “Deceptive Franchise Practices Acts”. See *Overview of Federal and State Laws Regulating Franchises, Distributorships, Dealerships, Business Opportunities and Sales Representatives*, Unidroit, March 2012, <https://www.unidroit.org/english/guides/2007franchising/country/usa.pdf>. These laws are comprised of robust franchise regulations to protect against deceptive practices by franchisors, although the law may vary by state. In addition, the Federal Trade Commission has enacted the “Franchise Rule” to protect against deceptive practices by franchisors. See *Franchise Rule, 16 C.F.R. Part 436, Compliance Guide*, May 2008, <https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf>. See also *Franchise Laws and Regulations Report*, International Comparative Legal Guides, <https://iclg.com/practice-areas/franchise-laws-and-regulations/usa>.

Under these various state laws, there is no legal definition of a “franchise”.

Various states’ laws mirror the FTC Franchise Rule’s definition of a franchise. For example, the laws of California, Illinois, Indiana, Iowa, Maryland, Michigan, North Dakota, Oregon, Rhode Island, Virginia, Washington, and Wisconsin provide that a “franchise” exists if, under the terms of the contract:

- i. a franchisee is granted the right to offer, sell, or distribute goods or services under a marketing plan or system prescribed or suggested in substantial part by a franchisor;
- ii. the operation of the franchisee’s business pursuant to such plan or system is substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and
- iii. the person granted the right to engage in such business is required to pay to the franchisor or an affiliate of the franchisor, directly or indirectly, a franchise fee of \$500 or more.

The laws of Hawaii, Minnesota, Mississippi, Nebraska and South Dakota vary from the FTC Franchise Rule model by identifying a “community of interest” rather than a “marketing plan” as an element of a “franchise”. A “community of interest” means a continuing financial interest between the franchisor and a franchisee in the operation of the franchised business.

Connecticut, Missouri, New York and New Jersey provide a “two-pronged” definition of a “franchise”. For example, New Jersey law provides that a franchise exists where:

- i. there is a written agreement in which one person grants another a license to use a trade name, trademark, service mark, or related characteristic; and
- ii. there is a community of interest in the marketing of the goods and services being offered.

The New York's Franchise Sales Act's ("NYFSA") "two-pronged" approach provides for a more expansive definition of a franchise. A franchise exists under the NYFSA where: (i) the franchisee pays a franchise fee (the "First Prong"); and (ii) the franchisee *either*: (a) operates under a marketing plan; or (b) is granted the use of a trademark (the "Second Prong").

*Franchise Laws and Regulation Report, Id.*

The SB 439 definition of "franchise" contains the following elements:

- oral or written arrangement
- granting of a license to use a trade name, service mark or related characteristic
- community of interest in the marketing of products or services exists

Unlike some laws in other states, SB 439 does not define "community of interest". Hawaii, for example, defines "community interest" to mean a continuing financial interest between the franchisor and franchisee in the operation of a franchise business. HRS Section 482E-2 (2024) Where other states have used the term "community of interest" but not defined it, courts have stepped in to define the term. For example, in *C&J Delivery, Inc. v. Emery Air Freight Corp.*, 647 F.Supp. 867 (E.D. Mo. 1986), the court held that a "community of interest is found where either (1) the franchisor benefits from the franchisee's marketing of the franchisor's product or service, or (2) the franchisee benefits from the franchisor's marketing of the product or service.

- 2) SB 439, Section 4(H) provides that it is unlawful for a franchisor to use deceptive advertising or engaging in deceptive acts in connection with the franchise or the franchisor's business, yet does not define "deceptive advertising" or "deceptive acts."

New Mexico's Unfair Practice Act, Section 57-12-1 NMSA 1978 et. seq, defines both "unfair or deceptive trade practice" and "unconscionable trade practice", in the former case, with a fair amount of specificity.

It is suggested that defining "deceptive advertising" and/or "deceptive acts" to include specified actions and practices could help guide franchisors and help prevent violations of the DFPA, and remove any ambiguity as to whether specified actions and practices are deceptive and actionable under the DFPA.

- 3) Section 57-12-10 NMSA 1978, within the Unfair Practices Act, provides private remedies, including granting an injunction for a person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another.

In contrast, SB 439, Section 6, permits a franchisee to bring an action to recover damages or reform the franchise agreement, but does not specifically allow for the granting of an injunction.

## **PERFORMANCE IMPLICATIONS**

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

## **ADMINISTRATIVE IMPLICATIONS**

See “Fiscal Implications,” above.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

None.

## **TECHNICAL ISSUES**

- 1) SB 439, Section 6, provides a private right of action for a franchisee whose timely agreement contains “any provision set forth in Section 3 of the Deceptive Franchise Practices Act or who is injured by an unfair act or practice set forth in Section 3 of that act...”

Section 3 of the DFPA governs unlawful provisions of franchise agreements. Section 4 governs unlawful acts and practices.

It is suggested that the second mention of “Section 3” in Section 6 of the DFPA, p. 9, line 11, as described above, should be replaced with “Section 4”.

## **OTHER SUBSTANTIVE ISSUES**

## **ALTERNATIVES**

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

## **AMENDMENTS**

- 1) Define “community of interest”. See “Significant Issues”. #1, above.
- 2) Define “deceptive advertising” and/or “deceptive acts”. See “Significant Issues”, #2, above.
- 3) See “Technical Issues”, #1, above.