This revised analysis replaces the analysis dated 7-10-90

House
Legislative
Analysis
Section

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MOTOR FUEL FRANCHISE ACT

House Bill 4244 as enrolled
Revised Third Analysis (10-11-90)

Sponsor: Rep. Curtis Hertel
House Committee: Transportation
Senate Committee: Commerce & Technology

THE APPARENT PROBLEM:

Since the oil embargo of 1973 the motor fuel distribution industry has undergone radical restructuring. Oil companies ("franchisors") attempted to, and in many cases, did, extend their control over gas service station dealers ("franchisees") in order to more carefully regulate volume of sales and reduce losses. The extension of control by the companies apparently has left many dealers with little say in decision-making processes concerning service stations. One of these decisions involves the transfer of franchise ownership to a third party. Oil companies usually reserve the right within a written contract to grant or refuse transfer of ownership of a franchise to another party, which includes ownership transfer to a relative upon the station owner's death ("survivorship"). While some transfers may be granted, service station owners apparently find the opposite is true in many instances; their position is further frustrated since oil companies do not have to even give reasons for refusing a transfer. Some people feel legislation is needed to give franchisees greater control over decisions regarding transfer of ownership, and, specifically, that an oil company should be prevented from "unreasonably" withholding its consent to a transfer, assignment, or survivorship of a franchise.

THE CONTENT OF THE BILL:

The bill would create the Motor Fuel Distribution Act to regulate the termination and transfer of motor fuel franchises and to provide for certain business practices. All of the bill's provisions would take effect October 1, 1990 except for the "recognized holiday" provisions, which would take effect December 1, 1991.

Franchise Survivorship. Following the death of a motor fuel retailer franchisee (who was not a "trial franchise retailer") the franchise would pass to the designated successor or secondary designee of the franchisee if, prior to the franchisee's death, he or she notified the franchisor in writing of the name, address, and relationship of the successor/designee. The designated successor or secondary designee would have to meet the "reasonable standards normally required" by the franchisor of a prospective franchisee at the time of the franchisee's death, and if the designated successor was unable to operate the franchise it would pass to the secondary designee. The successor/designee would be limited to, unless otherwise agreed to by both parties, the franchisee's surviving spouse, adult child, stepchild, son-in-law, or daughter-in-law, and could not be a previously terminated or nonrenewed retailer of a franchisor.

Within 30 days of a franchisee's death the successor/designee would have to give written notice to the franchisor of his or her election to assume and operate the franchise and would have to promptly provide any information the franchisor reasonably requested. The successor/designee would have no further rights or obligations under the franchise if 1) he or she failed to give the notice, 2) the franchisor gave the successor/designee written notice specifying reasons why the successor/designee failed to meet at least one of the reasonable standards normally required for a prospective franchisee, or 3) the franchise had not been operated in accordance with the terms and conditions contained in the franchise. These provisions, however, would not apply to a franchise where a mutual termination had been executed or an outstanding notice of termination or nonrenewal was given by the franchisor prior to the franchisee's death.

Franchise Transfer or Assignment. A franchise agreement between a franchisor and franchisee would be transferable or assignable if the franchisor consented to the assignment; the franchisor's consent, however, could not be "unreasonably" withheld. Also, a proposed assignee would have to meet the franchisor's "normally required" standards. Prior to any transfer or assignment, the franchisee would have to give written notice to the franchisor of an intention to transfer or assign setting forth the prospective assignee's name, address, statement of financial qualification and business experience during the previous five years, and other information the franchisor reasonably requested.

Within 60 days after receiving the notice of intent and other information, the franchisor would have to advise the franchisee of its consent or objection to the transfer or assignment. If it objected to the transfer or assignment, the franchisor would have to state its reasons in writing to the franchisee. If the franchisor failed to reply within 60 days, however, its approval would be considered granted. The transfer or assignment would not be valid until the assignee agreed in writing to comply with all the requirements of the franchise and any other lease or agreement in connection with the franchise then in effect and assumed all of the franchisee's obligations. A franchisee could not exercise the right of assignment or transfer after he or she had been notified of termination or nonrenewal for a cause permitted in the federal Petroleum Marketing Practices Act.

A franchisee could not sell, convey, or otherwise dispose of the franchisee's interest in a lease, any franchise relationship attendant to a lease, or the franchisee's business related to a lease without first giving the franchisor an option to purchase or otherwise acquire the interest on the same terms and conditions as set forth in any contract entered into and fully executed by the franchisee in a bona fide transaction, except for a sale or transfer from the franchisee to his or her spouse, adult child, stepchild, son-in-law, or daughter-in-law.

One Recognized Holiday Annually. A franchisor could not prevent a franchisee from closing during one "recognized" *holiday per calendar year as determined by the franchisee.* The franchisee would have to provide the franchisor with

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at least 60 days' notice of any closing due to a holiday, and the period of closing would be limited to the 36-hour period of 6 p.m. the day before the holiday to 6 a.m. the day after the holiday. This provision would not apply to marketing premises used by the franchisee that were within one half mile of an interstate highway exit or U.S. route. These provisions would take effect December 1, 1991.

Legal Recourse for Violations. Under the bill, a person injured in the person's business or property by reason of a violation of the bill could bring an action in any court having jurisdiction in the county where the defendant resided or was found, where the defendant's agent resided or was found, or where service could be obtained for injunctive relief or to recover damages sustained, or both, and could be awarded attorney fees together with the costs of the action. Also, the bill would not apply to any distributor who was not authorized to distribute motor fuels under a trademark owned or controlled by a refiner.

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bill would not have state or local budgetary implications. (7-10-90)

ARGUMENTS:

For:

Currently, a dealer may sell or transfer a station only if an oil company concedes to the deal and agrees with the dealer's choice of purchaser. Thus, a dealer may have worked hard to build up a station only to find that he or she cannot sell the station to the most appropriate buyer. The bill would allow dealers to sell their franchises to qualified third parties and specifies that an oil company could withhold its consent to such a sale only if the prospective franchisee did not meet the standards "normally required" by the franchisor. Thus, oil companies would be protected from sales of franchises to clearly unacceptable third parties, while dealers would have a say in deciding the purchaser of a franchise.

For:

Upon the death of a franchised dealer, a franchise may be terminated. Many service station franchises are family-owned and the families of these franchise owners face an uncertain future because of the stipulation concerning a franchisee's death. There is no reason that a competent spouse or adult child of the deceased should not be able to take over a franchise. A survivor will probably be more capable of running a franchise than a new dealer because in many cases the survivor probably will have already successfully dealt with customers and the oil company involved. The bill would ensure that a franchise would be transferred to a qualified survivor upon a franchisee's death, but would still protect an oil company's right to terminate an incompetent survivor.

Response: The bill's survivorship provisions could very well be meaningless as similar provisions within the federal Petroleum Marketing Practices Act specify that a contract terminates upon the death of a franchisee. Even if these provisions are interpreted as preempting the PMPA, they nonetheless violate fair business practices and sanction open nepotism. Future dealers would be chosen based upon their relationship with a dealer instead of through open competition among qualified applicants.

For:

Due to decreased traffic on some major holidays, the bill would allow dealers the option to choose one holiday per year on which they would not be open for business, covering a 36-hour period beginning before and ending after the holiday itself. Since many people tend to drive little or not at all on certain holidays, dealers forced to stay open during these times often are wasting their own time and money. This provision, however, would not apply to dealers located within one half mile of an interstate highway exit or a U.S. route to ensure that drivers (especially commercial drivers) along well-traveled routes would have uninterrupted access to fuel.

Response: According to an oil company spokesman, many contracts between franchisors and their dealers include provisions where dealers receive discounts on oil purchases when they meet certain monthly sales quotas. As such quotas are based on the assumption that a dealer will stay open every day, closing for even one day in a month (especially on certain holidays, such as July 4 when travel is usually at a peak) could be costly to dealers. Reply: A dealer would not have to close anytime but could choose to do so once a year (presumably during slower holidays, such as on Christmas day) at his or her own discretion, even if this meant forgoing the financial incentive which remaining open may afford. In fact, this discount often is not enough to help dealers recover their costs in staying open on slower holidays.

Against:

While it seems reasonable to prevent oil companies from "unreasonably" withholding their consent to a franchise transfer, the bill may be misguided in trying to legislate this. Contractual agreements between private parties should be free from state intrusion. Although the enrolled version of the bill parrots language found in many franchisor/franchisee contracts regarding survivorship, transfers, and assignments, the bill may only encourage further state intrusion into contract agreements which, ultimately, could seriously impact the ownership interests of not only oil companies but of other franchisors in the state as well. The bill could impact the state's economy if companies that would be affected by the bill (or by the threat of future legislation that might follow the bill) — who felt that the risk of losing their ownership rights in franchise agreements offset the potential to profit from locating their holdings here — decided either not to locate here or to relocate their holdings elsewhere.

Response: The bill is patterned after similar laws adopted in over 20 other states throughout the country and merely follows current trends in regulating franchisor/ franchisee relationships among oil companies. Also, the enrolled version of the bill represents a compromise which has been agreed to by both sides on the issue.