

1 SB129
2 196923-3
3 By Senator Elliott
4 RFD: Governmental Affairs
5 First Read: 19-MAR-19

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8 SYNOPSIS: This bill creates the Protect Alabama Small
9 Businesses Act.

10 This bill would regulate the conduct of
11 franchisors and their representatives in an effort
12 to prevent fraud, unfair business practices, unfair
13 methods of competition, impositions, and other
14 abuses upon franchisees in the state.

15 This bill would address requirements for the
16 sale, transfer, or assignment of franchises, and
17 for the mandatory repurchase by a franchisor of a
18 franchise or an interest in a franchise, and for
19 the repurchase of certain assets, including
20 inventory, supplies, equipment, goodwill, and
21 furnishings, upon termination, nonrenewal, or
22 expiration of a franchise, except where the
23 termination or nonrenewal is for good cause.

24 This bill would require the compensation of
25 a franchisee for the fair market value of the
26 business upon termination or nonrenewal without
27 good cause by the franchisor of the franchise.

1 This bill would provide that all franchise
2 agreements are subject to this act.

3 Amendment 621 of the Constitution of Alabama
4 of 1901, now appearing as Section 111.05 of the
5 Official Recompilation of the Constitution of
6 Alabama of 1901, as amended, prohibits a general
7 law whose purpose or effect would be to require a
8 new or increased expenditure of local funds from
9 becoming effective with regard to a local
10 governmental entity without enactment by a 2/3 vote
11 unless: it comes within one of a number of
12 specified exceptions; it is approved by the
13 affected entity; or the Legislature appropriates
14 funds, or provides a local source of revenue, to
15 the entity for the purpose.

16 The purpose or effect of this bill would be
17 to require a new or increased expenditure of local
18 funds within the meaning of the amendment. However,
19 the bill does not require approval of a local
20 governmental entity or enactment by a 2/3 vote to
21 become effective because it comes within one of the
22 specified exceptions contained in the amendment.

23
24 A BILL
25 TO BE ENTITLED
26 AN ACT
27

1 To create the Protect Alabama Small Businesses Act;
2 to provide legislative intent; to regulate the conduct of
3 franchisors and their representatives to prevent fraud, unfair
4 business practices, unfair methods of competition,
5 impositions, and other abuses upon franchisees in the state;
6 to address requirements for the sale, transfer, or assignment
7 of franchises, and for the mandatory repurchase by a
8 franchisor of a franchise or an interest in a franchise, and
9 for the repurchase of certain assets, including inventory,
10 supplies, equipment, goodwill, and furnishings, upon
11 termination, nonrenewal, or expiration of a franchise; to
12 require the compensation of a franchisee for the fair market
13 value of the business upon termination or nonrenewal without
14 good cause by the franchisor of the franchise; to provide that
15 all franchise agreements are subject to this act; and in
16 connection therewith to have as its purpose or effect the
17 requirement of a new or increased expenditure of local funds
18 within the meaning of Amendment 621 of the Constitution of
19 Alabama of 1901, now appearing as Section 111.05 of the
20 Official Recompilation of the Constitution of Alabama of 1901,
21 as amended.

22 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

23 Section 1. This act shall be known and may be cited
24 as the Protect Alabama Small Businesses Act.

25 Section 2. (a) The Legislature finds and declares
26 that the welfare of franchisees, including the success and
27 failure of their franchise businesses, greatly affects the

1 general economy of this state, the public interest, and the
2 public welfare. The intent of the Legislature is to promote
3 fair business relations between franchisees and franchisors
4 and to protect franchisees against unfair treatment by
5 franchisors. Therefore, it is necessary to regulate the
6 conduct of franchisors and their representatives in order to
7 prevent fraud, unfair business practices, unfair methods of
8 competition, impositions, and other abuses upon franchisees in
9 this state.

10 (b) In order to promote the intention and policies
11 in this section, this act shall be liberally construed.

12 Section 3. For the purposes of this act, the
13 following terms shall have the following meanings:

14 (1) AFFILIATE. A person controlling, controlled by,
15 or under common control with another person or, in the case of
16 a business entity, the officer, director, or other person in
17 control of the activities of the business entity.

18 (2) AREA FRANCHISE. A contract or agreement,
19 expressed or implied, written or oral, regardless of whether
20 the contract or agreement is designated as a franchise,
21 permit, license, resolution, contract, certificate, agreement,
22 or otherwise, between a franchisor and another person through
23 which that person is granted the right, for consideration in
24 whole or in part, to do any of the following:

25 a. Sell or negotiate the sale of a franchise in the
26 name or on behalf of the franchisor.

1 b. Become an area developer and develop a franchise
2 for the benefit of that person or affiliates of that person.

3 (3) AREA FRANCHISEE. The owner of an area franchise.

4 (4) FRANCHISE or FRANCHISE AGREEMENT.

5 a. A contract or agreement, expressed or implied,
6 written or oral, regardless of whether the contract or
7 agreement is designated as a franchise, permit, license,
8 resolution, contract, certificate, agreement, or otherwise,
9 for a definite or indefinite time, between two or more persons
10 for which all of the following are provided:

11 1. A franchisee is granted the right to engage in
12 the business of offering, selling, or distributing goods or
13 services under a marketing plan or system prescribed in
14 substantial part by a franchisor.

15 2. The operation of the franchise business pursuant
16 to that marketing plan or system is substantially associated
17 with the trademark, service mark, trade name, logotype,
18 advertising, or other commercial symbol of the franchisor
19 designating the franchisor or its affiliate.

20 3. The franchisee is required to provide, directly
21 or indirectly, a franchise fee.

22 b. The term franchise or franchise agreement
23 includes an area franchise.

24 (5) FRANCHISE BUSINESS. A business unit that is
25 owned or operated by a franchisee and that is subject to a
26 marketing plan or system prescribed by the franchise.

1 (6) FRANCHISE FEE. A fee, charge, or the provision
2 of a service, the value of which is greater than one hundred
3 dollars (\$100) annually which a franchisee agrees to pay or
4 provide, directly or indirectly, to or for the benefit of the
5 franchisor for the right to enter into or continue a franchise
6 including, but not limited to, a payment for goods or
7 provision of services. A fee or charge that a franchisee pays
8 or agrees to pay the franchisor for goods at a bona fide
9 wholesale price, if no obligation is imposed upon the
10 franchisee to purchase or pay for a quantity of goods in
11 excess of that which a reasonable person normally would
12 purchase by way of a starting inventory or supply or to
13 maintain an ongoing inventory or supply, is not considered a
14 franchise fee.

15 (7) FRANCHISEE. A person to whom a franchise is
16 offered or granted.

17 (8) FRANCHISOR. A person who grants a franchise to a
18 franchisee.

19 (9) FRAUD. Actual fraud or constructive fraud as
20 normally defined, in addition to the following:

21 a. A misrepresentation in any manner, whether
22 intentionally false or arising from negligence, of a material
23 fact.

24 b. A promise or representation not made honestly and
25 in good faith.

26 c. An intentional failure to disclose a material
27 fact.

1 d. Any artifice employed to deceive another.

2 (10) PERSON. A natural person, corporation, limited
3 liability company, association, partnership, trust, or other
4 business entity and, in the case of a business entity, any
5 other affiliate of that business entity.

6 (11) SALE. The issuance, transfer, agreement for
7 transfer, exchange, pledge, hypothecation, or mortgage in any
8 manner or form, whether by transfer in trust or otherwise, of
9 any goods or interest therein, or of any franchise related
10 thereto, for a consideration, and any option, subscription or
11 other contract, or solicitation, looking to a sale, or offer
12 or attempt to sell in any form, whether in written or oral
13 form, for a consideration.

14 Section 4. (a) Except as otherwise provided in this
15 act, a franchisor may not terminate or refuse to renew a
16 franchise except for good cause. The termination or nonrenewal
17 of a franchise without good cause constitutes an unfair
18 termination. Except as otherwise provided in subsection (b),
19 good cause is limited to the failure of the franchisee to
20 substantially comply with a provision of the franchise
21 agreement, which is both reasonable and of material
22 significance to the franchise, after receiving written notice
23 of the failure to comply and being given a reasonable
24 opportunity of not less than 90 days after the date of the
25 notice of noncompliance to cure the failure. If the franchisee
26 cures the failure within the time given to cure, the
27 termination notice is void and unenforceable.

1 (b) A franchisor may give to a franchisee an
2 immediate notice of termination without an opportunity to cure
3 if, during the period in which the franchise is in effect, any
4 one of the following events relevant to the franchise occurs:

5 (1) The franchisee has been judicially determined to
6 be insolvent, has had all or a substantial part of its assets
7 assigned to or for the benefit of any creditor, or has
8 admitted its inability to pay its debts as they come due,
9 which materially affects the ability of the franchisee to
10 remain in business.

11 (2) The franchisee abandons, by failing to operate,
12 the franchise business for 60 consecutive days during which,
13 under the terms of the franchise, the franchisee is required
14 to operate the franchise business unless such failure to
15 operate is due to an act of God; a work stoppage; a strike or
16 labor difficulty; a fire, flood, hurricane, or sinkhole; or
17 other causes beyond the control of the franchisee.

18 (3) The franchisor and franchisee agree in writing
19 to terminate the franchise.

20 (4) The franchisee fails, for a period of 60 days
21 after a notice of noncompliance, to comply with any federal,
22 state, or local law or rule including, but not limited to, any
23 health, safety, building, and labor law or rule applicable to
24 the operation of the franchise.

25 (5) Insolvency of the franchisee, the filing of any
26 petition by or against the franchisee under any bankruptcy or
27 receivership law, or the assignment for the benefit of

1 creditors or dissolution or liquidation of the franchisee
2 which materially affects the ability of the franchisee to
3 remain in business.

4 (6) The franchisee is convicted of a felony that
5 significantly, directly, and adversely affects the operation
6 of the franchise business.

7 (7) The franchisor makes a reasonable determination
8 that continued operation of the franchise business by the
9 franchisee will result in imminent and substantial danger to
10 public health or safety.

11 Section 5. A franchise agreement, regardless of its
12 stated term of years, is deemed to be continuing unless either
13 of the following occur:

14 (1) Termination of the franchise agreement is
15 authorized under Section 4.

16 (2) The franchisor completely withdraws from
17 directly or indirectly distributing its products or services
18 in the geographic market then being served by the franchisee,
19 provided that in any such instance in which the franchisor
20 subsequently reintroduces its products or services into the
21 same geographic market the franchisee may resume the franchise
22 and the terms and conditions of the agreement between the
23 franchisee and franchisor shall continue in full force and
24 effect.

25 Section 6. (a) A franchisor may not deny the
26 surviving spouse, heir, or estate of a deceased franchisee or
27 of the person controlling a majority interest in the

1 franchisee the opportunity to participate in the ownership of
2 the franchise or franchise business under a valid franchise
3 agreement.

4 (b) A franchisor may not deny the assignment of the
5 franchise agreement, upon the death of the franchisee or
6 person controlling a majority interest in the franchisee, to
7 any other person who meets all of the existing
8 nondiscriminatory, material, and reasonable qualifications for
9 a purchaser of a franchise.

10 (c) (1) A franchisee may sell, transfer, or assign a
11 franchise, all or substantially all of the assets of the
12 franchise business, or an interest in the franchisee with the
13 prior written consent of the franchisor. The consent of the
14 franchisor may not be withheld unless the purchaser,
15 transferee, or assignee does not meet the qualifications for
16 new or renewing franchisees described in subdivision (2) or
17 the franchisee and the purchaser, transferee, or assignee fail
18 to comply with other reasonable and material transfer
19 conditions specified in the franchise agreement.

20 (2) A franchisor may not prevent a franchisee from
21 selling, transferring, or assigning a franchise, all or
22 substantially all of the assets of the franchise business,
23 including the assignment of the rights of the franchisee under
24 the agreement, or an interest in the franchisee to another
25 person or entity if the purchaser meets the nondiscriminatory,
26 material, and reasonable qualifications of the franchisor for
27 the approval of new or renewing franchises in effect at the

1 time the franchisor receives notice of the proposed sale,
2 transfer, or assignment.

3 (d) (1) To invoke the protections under this section,
4 a franchisee shall provide the franchisor with prior written
5 notice of its intent to sell, transfer, or assign the
6 franchise, all or substantially all of the assets of the
7 franchise business, or an interest in the franchisee.

8 (2) The franchisor, within 60 days after receipt of
9 all of the written notice or any shorter period required by
10 the franchise agreement, shall notify the franchisee of the
11 approval or disapproval of the proposed sale, transfer, or
12 assignment. If the proposed sale, transfer, or assignment is
13 disapproved, the franchisor shall include in the notice of
14 disapproval a statement specifying the reasons for the
15 disapproval. A proposed sale, transfer, or assignment is
16 deemed approved unless disapproved by the franchisor in the
17 manner provided in this subdivision.

18 (e) Nothing in this section shall prohibit a
19 franchisor from exercising its contractual right of first
20 refusal to purchase a franchise, all or substantially all of
21 the assets of a franchise business, or an interest in a
22 franchisee.

23 Section 7. (a) (1) A franchisee shall have the
24 opportunity to monetize any equity that the franchisee may
25 have developed in the franchise business before the effective
26 date of any termination or nonrenewal without good cause, or
27 expiration of the franchise agreement pursuant to this act.

1 Therefore, upon termination or nonrenewal without good cause,
2 or expiration of a franchise agreement, a franchisor shall
3 repurchase at fair market value the inventory, supplies,
4 goods, fixtures, equipment, and furnishings of the franchise
5 business. The franchisor shall also either purchase the
6 goodwill of the franchise business or waive any and all
7 noncompete obligations of the franchisee so that the
8 franchisee, at its option, may continue in business.

9 (2) This section does not apply if the franchisee
10 declines a bona fide offer of renewal from the franchisor
11 which is consistent with the franchise agreement between the
12 franchisor and franchisee, provided the terms of the renewal
13 are not in violation of this act.

14 (3) This section does not apply if the franchisor
15 and franchisee agree in writing within 30 days before the
16 termination, nonrenewal, or expiration of the franchise to
17 terminate or not renew the franchise, or to allow the
18 franchise to expire.

19 (4) This section does not apply to inventory,
20 supplies, goods, fixtures, equipment, or furnishings sold by
21 the franchisee between the date of the notice of termination,
22 nonrenewal, or expiration and the date the franchisee ceases
23 to operate the franchise business pursuant to a termination,
24 nonrenewal, or expiration.

25 (b) If a franchisor fails or refuses to repurchase
26 any inventory, supplies, goods, fixtures, equipment, goodwill,
27 or furnishings required to be repurchased under subsection (a)

1 within 60 days after the termination, nonrenewal, or
2 expiration of a franchise, the franchisor is civilly liable
3 for the entire value of the inventory, supplies, goods,
4 fixtures, equipment, goodwill, and furnishings required to be
5 repurchased under subsection (a), plus the reasonable attorney
6 fees of the franchisee, court costs, and interest on the
7 inventory, supplies, goods, fixtures, equipment, goodwill, and
8 furnishings computed at the legal interest rate provided in
9 Section 8-8-10, Code of Alabama 1975, from the 61st day after
10 termination.

11 Section 8. The following rights and prohibitions
12 govern the relations between a franchisor or subfranchisor and
13 its franchisee:

14 (1) The parties shall deal with each other in good
15 faith and in a commercially reasonable manner.

16 (2) A person, during the selling or establishing of
17 a franchise, may not intentionally misrepresent or fail to
18 disclose any of the following:

19 a. The prospects or chances for success of the
20 proposed or existing franchise.

21 b. The known required total investment for such
22 franchise.

23 c. Any effort to sell or establish more franchises
24 than is reasonable to expect the market or market area for the
25 particular franchise to sustain.

26 (3) It is prohibited and deemed an unfair and
27 deceptive act or practice, or an unfair method of competition,

1 and a violation of this section for a franchisor or
2 subfranchisor, or an officer, agent, employee, or other
3 representative thereof, to directly or indirectly do any of
4 the following:

5 a. Terminate or fail to renew a franchise agreement
6 in violation of this act.

7 b. Allow a franchise agreement to expire without
8 complying with this act.

9 c. Prevent a sale, transfer, or assignment of a
10 franchise in violation of Section 6.

11 d. Fail to repurchase inventory, supplies, goods,
12 fixtures, equipment, goodwill, and furnishings in violation of
13 Section 7.

14 e. Violate the Deceptive Trade Practices Act in
15 connection with its business as a franchisor, or an officer,
16 agent, or other representative thereof.

17 f. Require a franchisee by any means directly to
18 participate in or contribute to any local or national
19 advertising fund controlled directly or indirectly by a
20 franchisor or resort to or use false or misleading advertising
21 in connection with its business as a franchisor, or an
22 officer, agent, or other representative thereof.

23 g. Without prior written disclosure to a franchisee,
24 obtain vendor rebates, kickbacks, or other similar payments
25 from another person with whom the franchisee does business or
26 employs on account of or in relation to the transactions
27 between the franchisee, the franchisor, and the other person.

1 h. Require a franchisee to assent to a release,
2 assignment, novation, waiver, or estoppel that would relieve
3 any person from liability imposed under this act including,
4 but not limited to, through the use of a disclaimer or
5 checklist designed to avoid a protection under this act.

6 i. Require a franchisee to assent to the use of a
7 choice of law provision by selecting the law of a different
8 state to govern the relationship of the parties.

9 j. Restrict or inhibit, directly or indirectly, the
10 right of a franchisee to join a franchisee association or the
11 free association for any lawful purpose among franchisees.

12 k. Impose upon a franchisee, by contract or rule,
13 written or oral, any unreasonable standard of conduct.

14 l. Require a franchisee to waive its rights to a
15 jury trial or waive any procedure or remedy otherwise
16 available in this state; however, a binding arbitration clause
17 is enforceable if it complies with Section 11.

18 (4) A person who executes or carries out a scheme,
19 plan, or organization that violates any provision of this
20 section, if knowledge or intent is proved, commits a Class C
21 misdemeanor, punishable as provided by law.

22 (5) A person who shows in a civil court of law a
23 violation of this section is entitled to the remedies in
24 Section 12.

25 (6) The Attorney General may sue on behalf of the
26 people of this state for injunctive relief against any
27 franchisor plan or activity that is in violation of this act.

1 Section 9. A franchise agreement or other contract,
2 a part thereof, or practice thereunder which is in violation
3 of this act is deemed against public policy and is void and
4 unenforceable. An aggrieved party may choose to seek to void
5 only the portion of the agreement that is unenforceable and
6 continue to enforce the remainder of the agreement.

7 Section 10. A provision in a franchise agreement
8 restricting the venue to a forum outside of this state or
9 selecting the law of any other state or jurisdiction other
10 than Alabama is void with respect to any claim arising under
11 or relating to a franchise agreement involving a franchisee
12 that, at the time of signing, was a resident of this state or
13 a business entity established in this state or involving a
14 franchise business either operating or planning to be operated
15 in this state.

16 Section 11. This act does not limit the right of a
17 franchisor and franchisee to agree, before or after a dispute
18 arises, to binding arbitration to settle a claim under this
19 act if the standards applied and the remedies available in the
20 arbitration are not less than the requirements specified in
21 this act.

22 Section 12. (a) If a franchisor terminates a
23 franchise agreement without good cause or otherwise in
24 violation of this act, or fails to consent to a proper
25 assignment of the franchise, or fails to renew a franchise, or
26 allows a franchise to expire in violation of this act, the
27 franchisee is entitled to receive from the franchisor the fair

1 market value of the franchise business and franchise assets in
2 addition to any other damages caused by the violation.

3 (b) In addition to any relief specified in this act,
4 any person aggrieved or injured in his or her business or
5 property by any violation of this act may bring an action in
6 the appropriate state or federal court of this state and shall
7 recover the damages sustained and the costs of such action,
8 including reasonable attorney fees.

9 (c) Without regard and in addition to any other
10 remedy or relief to which a person is entitled, any person
11 aggrieved by a violation of this act may bring an action to
12 obtain a declaratory judgment stating that an action or a
13 practice violates these sections and may obtain injunctive
14 relief enjoining a franchisor that has violated, is violating,
15 or is otherwise likely to violate these sections from
16 committing the violation.

17 (d) In an action for monetary damages, if a judge or
18 jury finds that the franchisor acted maliciously, the judge or
19 jury may award punitive damages as authorized by state law.

20 (e) The Attorney General may bring an action for
21 injunctive relief or other appropriate civil relief for a
22 violation of this act.

23 (f) The remedies provided in this section are in
24 addition to any other remedies provided by law or in equity
25 including, but not limited to, the Deceptive Trade Practices
26 Act.

1 Section 13. (a) Any person or franchisor who engages
2 directly or indirectly in an agreement or contract within this
3 state in connection with a franchise, or any franchise whose
4 franchisee is a resident of this state or is domiciled in this
5 state or whose franchise business is, has been, or is intended
6 to be operated in this state, is subject to this act and to
7 the jurisdiction of the courts of this state, in accordance
8 with the laws of this state, for violations of this act.

9 (b) This act applies to all of the following:

10 (1) Any written or oral agreement between a
11 franchisor and a franchisee including, but not limited to, a
12 franchise offering; a franchise agreement; a sale of goods,
13 services, and advertising; a lease or mortgage of real or
14 personal property; a promise to pay; a security interest; a
15 pledge; an insurance contract; an advertising contract; a
16 construction or installation contract; a servicing contract;
17 and any other agreement in which the franchisor has a direct
18 or indirect interest.

19 (2) Any franchise entered into, renewed, amended, or
20 revised prior to and after the effective date of this act,
21 including any existing franchise of an indefinite duration
22 which may be terminated by the franchisee or franchisor
23 without cause.

24 (3) A successor to a franchisor that continues in
25 business as a franchisor shall be bound by all terms and
26 conditions of each franchise agreement of the franchisor in
27 effect on the date of succession.

1 (c) This act is supplemental to, and does not
2 preempt, local ordinances dealing with prohibited or unlawful
3 conduct in the manufacturing, distribution, wholesaling,
4 advertising, or sale of goods if such ordinances are not
5 inconsistent with this act.

6 Section 14. This act may not be construed as
7 amending or affecting any provision of the Motor Vehicle
8 Franchise Act, Chapter 20, Title 8, Code of Alabama 1975.

9 Section 15. Although this bill would have as its
10 purpose or effect the requirement of a new or increased
11 expenditure of local funds, the bill is excluded from further
12 requirements and application under Amendment 621, now
13 appearing as Section 111.05 of the Official Recompilation of
14 the Constitution of Alabama of 1901, as amended, because the
15 bill defines a new crime or amends the definition of an
16 existing crime.

17 Section 16. This act shall become effective on the
18 first day of the third month following its passage and
19 approval by the Governor, or its otherwise becoming law.