HB352

196923-5

By Representative Rowe

RFD: Commerce and Small Business

First Read: 04-APR-19
SYNOPSIS: This bill creates the Protect Alabama Small Businesses Act.

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

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

This bill would require the compensation of a franchisee for the fair market value of the business upon termination or nonrenewal without good cause by the franchisor of the franchise.
This bill would provide that all franchise agreements are subject to this act.

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

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

A BILL
TO BE ENTITLED
AN ACT
To create the Protect Alabama Small Businesses Act; to provide legislative intent; to regulate the conduct of franchisors and their representatives to prevent fraud, unfair business practices, unfair methods of competition, impositions, and other abuses upon franchisees in the state; to address requirements for the sale, transfer, or assignment of franchises, and for the mandatory repurchase by a franchisor of a franchise or an interest in a franchise, and for the repurchase of certain assets, including inventory, supplies, equipment, goodwill, and furnishings, upon termination, nonrenewal, or expiration of a franchise; to require the compensation of a franchisee for the fair market value of the business upon termination or nonrenewal without good cause by the franchisor of the franchise; to provide that all franchise agreements are subject to this act; and in connection therewith to have as its purpose or effect the requirement of a new or increased expenditure of local funds within the meaning of Amendment 621 of the Constitution of Alabama of 1901, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

Section 2. (a) The Legislature finds and declares that the welfare of franchisees, including the success and failure of their franchise businesses, greatly affects the
general economy of this state, the public interest, and the public welfare. The intent of the Legislature is to promote fair business relations between franchisees and franchisors and to protect franchisees against unfair treatment by franchisors. Therefore, it is necessary to regulate the conduct of franchisors and their representatives in order to prevent fraud, unfair business practices, unfair methods of competition, impositions, and other abuses upon franchisees in this state.

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

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

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

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

a. Sell or negotiate the sale of a franchise in the name or on behalf of the franchisor.
b. Become an area developer and develop a franchise for the benefit of that person or affiliates of that person.

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

(4) FRANCHISE or FRANCHISE AGREEMENT.

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

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

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

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

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

(5) FRANCHISE BUSINESS. A business unit that is owned or operated by a franchisee and that is subject to a marketing plan or system prescribed by the franchise.
(6) FRANCHISE FEE. A fee, charge, or the provision of a service, the value of which is greater than one hundred dollars ($100) annually which a franchisee agrees to pay or provide, directly or indirectly, to or for the benefit of the franchisor for the right to enter into or continue a franchise including, but not limited to, a payment for goods or provision of services. A fee or charge that a franchisee pays or agrees to pay the franchisor for goods at a bona fide wholesale price, if no obligation is imposed upon the franchisee to purchase or pay for a quantity of goods in excess of that which a reasonable person normally would purchase by way of a starting inventory or supply or to maintain an ongoing inventory or supply, is not considered a franchise fee.

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

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

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

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

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

c. An intentional failure to disclose a material fact.
d. Any artifice employed to deceive another.

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

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

Section 4. (a) Except as otherwise provided in this act, a franchisor may not terminate or refuse to renew a franchise except for good cause. The termination or nonrenewal of a franchise without good cause constitutes an unfair termination. Except as otherwise provided in subsection (b), good cause is limited to the failure of the franchisee to substantially comply with a provision of the franchise agreement, which is both reasonable and of material significance to the franchise, after receiving written notice of the failure to comply and being given a reasonable opportunity of not less than 90 days after the date of the notice of noncompliance to cure the failure. If the franchisee cures the failure within the time given to cure, the termination notice is void and unenforceable.
(b) A franchisor may give to a franchisee an immediate notice of termination without an opportunity to cure if, during the period in which the franchise is in effect, any one of the following events relevant to the franchise occurs:

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

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

3. The franchisor and franchisee agree in writing to terminate the franchise.

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

5. Insolvency of the franchisee, the filing of any petition by or against the franchisee under any bankruptcy or receivership law, or the assignment for the benefit of
creditors or dissolution or liquidation of the franchisee which materially affects the ability of the franchisee to remain in business.

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

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

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

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

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

Section 6. (a) A franchisor may not deny the surviving spouse, heir, or estate of a deceased franchisee or of the person controlling a majority interest in the
franchisee the opportunity to participate in the ownership of
the franchise or franchise business under a valid franchise
agreement.

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

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

(2) A franchisor may not prevent a franchisee from
selling, transferring, or assigning a franchise, all or
substantially all of the assets of the franchise business,
including the assignment of the rights of the franchisee under
the agreement, or an interest in the franchisee to another
person or entity if the purchaser meets the nondiscriminatory,
material, and reasonable qualifications of the franchisor for
the approval of new or renewing franchises in effect at the
time the franchisor receives notice of the proposed sale, transfer, or assignment.

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

(2) The franchisor, within 60 days after receipt of all of the written notice or any shorter period required by the franchise agreement, shall notify the franchisee of the approval or disapproval of the proposed sale, transfer, or assignment. If the proposed sale, transfer, or assignment is disapproved, the franchisor shall include in the notice of disapproval a statement specifying the reasons for the disapproval. A proposed sale, transfer, or assignment is deemed approved unless disapproved by the franchisor in the manner provided in this subdivision. The reasonableness of the decision of the franchisor shall be a question of fact requiring consideration of all existing circumstances.

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

Section 7. (a)(1) A franchisee shall have the opportunity to monetize any equity that the franchisee may have developed in the franchise business before the effective
date of any termination or nonrenewal without good cause, or
expiration of the franchise agreement pursuant to this act.
Therefore, upon termination or nonrenewal without good cause,
or expiration of a franchise agreement, a franchisor shall
repurchase at fair market value the inventory, supplies,
goods, fixtures, equipment, and furnishings of the franchise
business. The franchisor shall also either purchase the
goodwill of the franchise business or waive any and all
noncompete obligations of the franchisee so that the
franchisee, at its option, may continue in business.

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

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

(4) This section does not apply to inventory,
supplies, goods, fixtures, equipment, or furnishings sold by
the franchisee between the date of the notice of termination,
nonrenewal, or expiration and the date the franchisee ceases
to operate the franchise business pursuant to a termination,
nonrenewal, or expiration.
(b) If a franchisor fails or refuses to repurchase any inventory, supplies, goods, fixtures, equipment, goodwill, or furnishings required to be repurchased under subsection (a) within 60 days after the termination, nonrenewal, or expiration of a franchise, the franchisor is civilly liable for the entire value of the inventory, supplies, goods, fixtures, equipment, goodwill, and furnishings required to be repurchased under subsection (a), plus the reasonable attorney fees of the franchisee, court costs, and interest on the inventory, supplies, goods, fixtures, equipment, goodwill, and furnishings computed at the legal interest rate provided in Section 8-8-10, Code of Alabama 1975, from the 61st day after termination.

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

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

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

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

b. The known required total investment for such franchise.
c. Any effort to sell or establish more franchises
than is reasonable to expect the market or market area for the
particular franchise to sustain.

(3) It is prohibited and deemed an unfair and
deceptive act or practice, or an unfair method of competition,
and a violation of this section for a franchisor or
subfranchisor, or an officer, agent, employee, or other
representative thereof, to directly or indirectly do any of
the following:

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

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

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

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

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

f. Require a franchisee by any means directly to
participate in or contribute to any local or national
advertising fund controlled directly or indirectly by a
franchisor or resort to or use false or misleading advertising
in connection with its business as a franchisor, or an
officer, agent, or other representative thereof.
g. Without prior written disclosure to a franchisee, obtain vendor rebates, kickbacks, or other similar payments from another person with whom the franchisee does business or employs on account of or in relation to the transactions between the franchisee, the franchisor, and the other person.

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

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

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

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

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

m. Impose upon a franchisee, by contract or rule, written or oral, any unreasonable or overbroad noncompetition agreement. If a judge or jury finds that a noncompetition
agreement is in violation of state law, the entire noncompetition agreement is void and unenforceable.

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

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

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

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

Section 10. A provision in a franchise agreement restricting the venue to a forum outside of this state or selecting the law of any other state or jurisdiction other than Alabama is void with respect to any claim arising under or relating to a franchise agreement involving a franchisee that, at the time of signing, was a resident of this state or a business entity established in this state or involving a franchise business either operating or planning to be operated in this state.
Section 11. This act does not limit the right of a franchisor and franchisee to agree, before or after a dispute arises, to binding arbitration to settle a claim under this act if the standards applied and the remedies available in the arbitration are not less than the requirements specified in this act.

Section 12. (a) If a franchisor terminates a franchise agreement without good cause or otherwise in violation of this act, or fails to consent to a proper assignment of the franchise, or fails to renew a franchise, or allows a franchise to expire in violation of this act, the franchisee is entitled to receive from the franchisor the fair market value of the franchise business and franchise assets in addition to any other damages caused by the violation.

(b) In addition to any relief specified in this act, any person aggrieved or injured in his or her business or property by any violation of this act may bring an action in the appropriate state or federal court of this state and shall recover the damages sustained and the costs of such action, including reasonable attorney fees. Every cause of action under this act shall survive the death of the franchisee.

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

(d) In an action for monetary damages, if a judge or jury finds that the franchisor acted maliciously, or in a manner not otherwise authorized by state law, the judge or jury may award punitive damages as authorized by state law.

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

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

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

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

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

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

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

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

Section 14. This act may not be construed as
amending or affecting any provision of the Motor Vehicle
Franchise Act, Chapter 20, Title 8, Code of Alabama 1975, and
the relationship between a motor vehicle dealer and a
manufacturer or distributor, as defined in that act, shall be
governed by that act. This act may not be construed as
amending or affecting any provision of Chapter 9, Title 28,
Code of Alabama 1975, and the relationship between wholesalers
and suppliers of beer, as defined in that chapter, shall be
governed by that chapter.

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

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