

12/18/89

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE

IN THE MATTER OF THE PROPOSED
AMENDMENTS TO FRANCHISE RULES

STATEMENT OF
NEED AND REASONABLENESS

STATEMENT OF AUTHORITY

Minnesota Statutes, Section 80C.18, subdivision
1 provides that:

Subdivision 1. The Commissioner may promulgate rules to carry out the provisions of sections 80C.01 to 80C.22, including rules and forms governing public offering statements, applications, financial statements and annual reports, and defining any terms, whether or not used in sections 80C.01 to 80C.22, insofar as the definitions are not inconsistent with sections 80C.21 to 80C.22.

Additional rulemaking authority provided in Minnesota Statutes Section 45.023 authorizes the Commissioner to "adopt, amend, suspend, or repeal rules ... whenever necessary or proper in discharging the Commissioner's official responsibilities."

The Commissioner finds the proposed rules to be necessary and consistent with the purposes fairly intended by the policies and provisions of Chapter 45 and 80C.

FACTS ESTABLISHING NEED AND REASONABLENESS

BACKGROUND:

The Minnesota Franchise Act has been amended frequently in the last years. However, the Minnesota Franchise Rules have not been amended to conform to these statutory changes. Most of the proposed amendments attempt to make the franchise rules consistent with current law. The amendment to Part 2860.4400, (J) will clarify the current rule and expand it to a certain extent.

Rule Parts 2860.0200

The amendments to this part are technical ones which make the references to clauses in Minnesota Statute 80C.03 consistent with that statute.

Rule Part 2860.0500

The law which governs the filing of annual reports is found at Minnesota Statute 80C.08. It requires the registrant to file an annual report within 120 days after the registrant's fiscal year end.

The amendment to this part substitutes 120 days for 90 days for filing of the annual report and again makes the rule consistent with statutory law.

Rule Part 2860.3800

The provision being amended allows the Commissioner to accept the Uniform Franchise Registration Application adopted by the Midwest Securities Commissioners Association as application for registration.

The amendment replaces the reference to the Midwest Securities Commissioners Association with the North American Securities Administrators Association. The North American Securities Administrators is a cooperative organization of securities commissioners from the states, the District of Columbia, Puerto Rico and several Canadian provinces which succeeded the Midwest Securities Commissioners Association.

Rule Part 2860.4200

This part requires that a copy of each advertisement used in connection with the offer and sale of a franchise be filed with the Commissioner at least three business days prior to its first publication.

The amendment substitutes five business days for three business days bringing the rule into conformity with Minnesota Statute 80C.09, subdivision 1.

Rule Part 2860.4400

This part enumerates certain franchise contracts or agreements and other devices or practices which are unfair and inequitable per se. The language is meant to track that found in Minnesota Statute 80C.14.

One of the unfair practices deals with termination or cancellation of franchises. That provision has been amended by the Minnesota Legislature. The statutory amendment required that the franchisee be given 90 days advance written notice of termination or cancellation rather than the previous 60 day notice

and 60 days to correct the reasons set forth in the written notice for termination. The amendment to Letter E of this Part repeats the language in Minnesota Statute 80C.14, subdivision 3.

Letter J of Part 2860.4400 makes it an unfair and inequitable practice to require a franchisee to waive his rights to a trial, consent to liquidated damages, termination penalties, on judgment notes. However, the section does not bar "a voluntary arbitration of any matter if the proceeding is conducted by an independent tribunal under the rules of the American Arbitration Association."

Minnesota Statute 80C.14 provides that "No person, whether by means of a term or condition of a franchise or otherwise, shall engage in any unfair or inequitable practice ..." The statute gives the Commissioner specific authority to adopt rules "defining as to franchises the words 'unfair and inequitable'".

The franchise statutes exist not only to prevent fraud and abuse by franchisors but also to prevent the franchisor from taking advantage of its superior bargaining position. Historically, franchisors have been the more sophisticated parties to the franchise agreement. The situation is rife with opportunity for contracts

of adhesion. The statutes function to level the playing field so that the unwary franchisee has significant protections, both before and after entering into the agreement. Since the adoption of the legislation, the franchisor has the affirmative responsibility to act in an equitable manner, and fails to do so at his own peril.

In view of this unequal bargaining power, the Commissioner finds the amendment to Letter J of this Part to be reasonable and necessary. The amendment makes it an unfair and equitable practice to require, as a condition to entering into the franchise contract, that a franchisee waive his rights to a jury trial or waive his rights to any procedure, forum, or remedies provided for by the laws of the jurisdiction, or consent to liquidated damages, termination penalties, or judgment notes; provided that the franchise agreement may contain an exclusive arbitration clause if the agreement allows the franchisee to opt out of the requirements of the clause."

The Commissioner believes that franchisees should not be required to give up rights given them under the law in order to enter into a franchise contract. If the franchisee can be forced to give up his basic

legal rights by the franchisor, then one of the primary purposes of the franchise act, that of creating a level playing field for the parties, is thwarted. The Commissioner believes, however, that certain franchisees may wish to waive their rights to trial in favor of arbitration. Therefore, the rule allows an exclusive arbitration clause if the franchisee has the right to opt out of that clause.

The amendments to Letter M of this part are consistent with the amendments which the legislature made to Subdivision 4 of Minnesota Statute 80C.14. These amendments extend the notice period for failure to renew a franchise from 90 to 180 days and require the franchisor to give the franchisee an opportunity to "operate the franchise over a sufficient period of time to enable the franchisee to recover the fair market value of the franchise as a going concern as determined and measured from the date of the failure to renew."

Rule Part 2860.4500

This amendment deletes the reference to Minnesota Statute 80C.15, which has been repealed.

Rule Part 2860.5500

The amendment to this part reflects changes made to Minnesota Statute 80C.14, subdivision 3.

The proposed change amends the notice period for cancellation from 60 days to 90 days and gives the franchisee a 60 day period to correct the reasons for cancellation.

Rule Part 2860.5600

This amendment again reflects the changes made to Minnesota Statute 80C.14, subdivision 4 dealing with written notice of intent not to renew.

Small Business Considerations

The amendments which are being proposed to bring the rules into conformity with the language of the Franchise Act will have no impact on small business.

The amendment to Rule Part 2860.4400 (J) will have a positive effect on small business. It will remove the advantage that large sophisticated franchisors have over small franchisees and will elevate the bargaining

power held by small businesses when they negotiate franchise contracts.

Because any impact of these rules on small business will be positive, there is no need to discuss the methods for reducing the impact which are enumerated in Minnesota 14.155, subdivision 2.