

of whom I'd just read?  
Curled up on a poncho,  
the floor for a bed?

I realized the families  
that I saw this night,  
owed their lives to these soldiers  
who were willing to fight.

Soon round the world,  
the children would play,  
and grown-ups would celebrate  
a bright Christmas day.

They all enjoyed freedom  
each month of the year,  
because of the soldiers,  
like the one lying here.

I couldn't help wonder  
how many lay alone,  
on a cold Christmas eve  
in a land far from home.

The very thought  
brought a tear to my eye,  
I dropped to my knees  
and started to cry.

The soldier awakened  
and I heard a rough voice,  
"Santa don't cry,  
this life is my choice;  
I fight for freedom,  
I don't ask for more,  
my life is my god,  
my country, my Corps."

The soldier rolled over  
and drifted to sleep,  
I couldn't control it,  
I continued to weep.

I kept watch for hours,  
so silent and still  
and we both shivered  
from the cold night's chill.

I didn't want to leave  
on that cold, dark, night,  
this guardian of honor  
so willing to fight.

Then the soldier rolled over,  
with a voice soft and pure,  
whispered, "carry on Santa,"  
it's Christmas Day, all is secure."

One look at my watch,  
and I knew he was right  
"Merry Christmas my friend,  
and to all a good night."

IN HONOR OF THE UKRAINIAN  
BANDURIST CHORUS

**HON. DENNIS J. KUCINICH**

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

*Tuesday, November 9, 1999*

Mr. KUCINICH. Mr. Speaker, I rise today to congratulate the Ukrainian Bandurist Chorus on their 50th Anniversary in America. The Ukrainian Bandurist Chorus is an all-male musical ensemble consisting of 20 instrumentalists and vocalists. The chorus was originally founded in Kyiv, Ukraine in 1918. The ensemble relocated in Detroit, Michigan in 1949. This internationally recognized ensemble has performed at such well-known theaters as Carnegie Hall, the Kennedy Center, Bolshoi Theater, and Massey Hall. In addition, the Ukrainian Bandurist Chorus has entertained many world figures and personalities with their exciting programs of folk songs, religious works and the exotic sounds of the bandura.

Three generations of members have passed through the ranks of the Ukrainian Bandurist

EXTENSIONS OF REMARKS

Chorus since its displacement from Ukraine in 1942. In addition to its mission of carrying the tradition of the bandura to the 21st century, the Chorus is also charged with preserving its past for future generations. The history of the Ukraine Bandurist Chorus can be traced directly to the 12th Archeological Congress in Kharkiv, Ukraine in 1902. The first professional bandurist chorus was formed in Kyiv in 1918 during the height of the country's brief period of independence. During a time of increased popularity and resurgence of the Ukrainian arts and culture, the group developed into a professional touring group. Following this time of heightened regard, the Chorus' history evolved into a turbulent one. The bandurist ideal of God, truth, freedom, and human dignity herald through song were under attack by the newly formed Soviet Union. As a result many of the original members of the Ukrainian bandurist Chorus were executed. After years of persecution and exploitation the Chorus was forced to immigrate to Detroit. During a time of devastation and uncertainty, Hryhory Kytasty, the long standing director acted as a role model and inspiration to the young bandurists. Kytasty worked hard to further the art of the bandura in the free world.

Today, the majority of the Chorus members are 2nd and 3rd generation Americans and Canadians. Fortified by a whole new generation of young musicians, the Chorus has captivated audiences in major concert halls in the United States, Canada, Europe and Australia for more than 50 years. The current director of the Ukrainian Bandurist Chorus is Oleh Mahlay, a recognized prized musician and a member of the chorus since 1987. Mahlay, who hails from Cleveland, Ohio, received a bachelor of arts in music history and literature from Case Western University. He also studied voice and piano at the Cleveland Institute of Music. Mahlay has received numerous accolades for his musical abilities and contributions such as the Kennedy Prize for Creative Achievement in Music from Carnegie Mellon University. He has participated in the Chorus' two triumphant tours of Ukraine in 1991 and 1994, and had his premier as a conductor of the group in 1994.

It is truly an honor for me to recognize this exceptional group. The music of the Ukrainian Bandurist Chorus is as captivating as it is moving and visibly heartfelt. The songs of the group are full of emotion and stand testimony to the ideals of the bandurist. My distinguished colleagues, please join me in honoring the very special anniversary of the magnificent Ukrainian Bandurist Chorus.

INTRODUCTION OF THE SMALL  
BUSINESS FRANCHISE ACT OF 1999

**HON. JOHN CONYERS, JR.**

OF MICHIGAN

IN THE HOUSE OF REPRESENTATIVES

*Tuesday, November 9, 1999*

Mr. CONYERS. Mr. Speaker, today I am proud to reintroduce, with my good friend from North Carolina, Mr. COBLE, the Small Business Franchise Act. This legislation represents hard work, and a good faith effort to strike an ap-

propriate, bipartisan balance between the rights of franchisors and franchisees. These issues have been the subject of a hearing in this Judiciary Committee earlier this year, and the issues merit action by this Congress.

Protecting the rights of franchisees is ultimately about protecting the rights of small business. They often face enormous odds and a daunting inequality of bargaining power when dealing with national franchisors. Unfortunately, the law often offers little recourse in the face of great harm.

There is currently no federal law establishing standards of conduct for parties to a franchise contract. The Federal Trade Commission rule promulgated in 1979, (16 CFR §436), was designed to deter fraud and misrepresentation in the re-sales process and provide disclosure requirements and prohibitions concerning franchise agreements. The FTC maintains, however, that it has no jurisdiction after the franchise agreement is signed.

As a result, in the absence of any Federal regulation, a number of complaints have been lodged in recent years, principally stemming from the fact that franchisees do not have equal bargaining power with large franchisors. The concerns include the following:

(1) Taking of Property without Compensation. Franchise agreements generally include a covenant not-to-compete that prohibits the franchisee from becoming an independent business owner in a similar business upon expiration of the contract. This can appropriate to the franchisor all of the equity built up by the franchisee without compensation.

(2) Devaluation of Assets. Franchisors often induce a franchisee to invest in creating a business and then establish a competing outlet in such proximity to the franchisee that the franchisee suffers economic harm.

(3) Restraint of Trade. Most franchise relationships mandate that franchisees purchase supplies, furniture, etc. from the franchisor or sources approved by the franchisor. While it may be appropriate for franchisors to exercise some control concerning the products or services offered to franchisees, tying franchisees to certain vendors can cost franchisees millions of dollars, prevents competition among vendors, and can have an adverse impact upon consumers.

(4) Inflated Pricing. Many franchise agreements specify that the franchisor has the right to enter into contractual arrangements with vendors who sell goods and services to franchisees that are mandated by the franchise agreement. It has been alleged that these vendors often provide kickbacks and commissions to the franchisor in return for being allowed to sell their products and services to a captive market. Instead of passing these kickbacks and commissions on to the franchisee to reduce their cost of goods sold and increase their margin, these payments, it is asserted, benefit the franchisor.

While our nation has enjoyed an unprecedented economic boom, it is essential that Congress ensure that prosperity reaches down to the small businesses that make up the heart and soul of our economy. We have an obligation to ensure that the law governing this segment of the economy, which every American patronizes routinely is fair and balanced.

I urge my colleagues to join with me and the gentleman from North Carolina in supporting this overdue and needed reform.

The following is a section-by-section description of the legislation:

#### SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

Sets forth the short title of the Act and the table of contents.

#### SECTION 2. FINDINGS AND PURPOSE.

Subsection (a) specifies a series of Congressional findings. Subsection (b) states that the purpose of the Act is to promote fair and equitable franchise agreements, to establish uniform standards of conduct in franchise relationships, and to create uniform private Federal remedies for violations of Federal law.

#### SECTION 3. FRANCHISE SALES PRACTICES.

Subsection (a) prohibits any person, in connection with the advertising, offering, or sale of any franchise, from (1) employing a device, scheme, or artifice to defraud; (2) engaging in an act, practice, course of business, or pattern of conduct which operates or is intended to operate as a fraud upon any prospective franchisee; and (3) obtaining property, or assisting others in doing so, by making an untrue statement of a material fact or failing to state a material fact.

Subsection (b) prohibits franchisors, sub franchisors, and franchise brokers, in connection with any disclosure document, notice, or report required by any law, from (i) making an untrue statement of material fact, (ii) failing to state a material fact, or (iii) failing to state any fact which would render any required statement or disclosure either untrue or misleading. The subsection also prohibits franchisors, sub franchisors, and franchise brokers from failing to furnish any prospective franchisee with all information required to be disclosed by law and at the time and in the manner required and from making any claim or representation to a prospective franchisee, whether orally or in writing, which is inconsistent with or contradicts such disclosure document.

"Disclosure document" is defined as the disclosure statement required by the Federal Trade Commission in Trade Regulation Rule 436 (16 CFR 436) or an offering circular prepared in accordance with Uniform Franchise Offering Circular guidelines as adopted and amended by the North American Securities Administrators Association, Inc. or its successor.

#### SECTION 4. UNFAIR FRANCHISE PRACTICES.

Subsection (a) prohibits any franchisor or subfranchisor, in connection with the performance, enforcement, renewal and termination of any franchise agreement, from (1) engaging in an act, practice, course of business, or pattern of conduct which operates as a fraud upon any person; (2) hindering, prohibiting, or penalizing, either directly or indirectly, the free association of franchisees for any lawful purpose, including the formation of or participation in any trade association made up of franchisees or of associations of franchisees; and (3) discriminating against a franchisee by imposing requirements not imposed on other similarly situated franchisees or otherwise retaliating, directly or indirectly, against any franchisee for membership or participation in a franchisee association.

Subsection (b) prohibits a franchisor from terminating a franchise agreement prior to its expiration without good cause.

Subsection (c) prohibits a franchisor from prohibiting, or enforcing a prohibition against, any franchisee from engaging in any

business at any location after expiration of a franchise agreement. This subsection does not prohibit enforcement of a franchise contract obligating a franchisee after expiration or termination of a franchise to (i) cease or refrain from using a trademark, trade secret or other intellectual property owned by the franchisor or its affiliate, (ii) alter the appearance of the business premises so that it is not substantially similar to the standard design, decor criteria, or motif in use by other franchisees using the same name or trademarks within the proximate trade or market area of the business, or (iii) modify the manner or mode of business operations so as to avoid any substantial confusion with the manner or mode of operations which are unique to the franchisor and commonly in practice by other franchisees using the same name or trademarks within the proximate trade or market area of the business.

#### SECTION 5. STANDARDS OF CONDUCT.

Subsection (a) imposes a duty to act in good faith in the performance and enforcement of a franchise contract on each party to the contract.

Subsection (b) imposes a nonwaivable duty of due care on the franchisor. Unless the franchisor represents that it has greater skill or knowledge in its undertaking with its franchisees, or conspicuously disclaims that it has skill or knowledge, the franchisor is required to exercise the skill and knowledge normally possessed by franchisors in good standing in the same or similar types of business.

Subsection (c) imposes a fiduciary duty on the franchisor when the franchisor undertake to perform bookkeeping, collection, payroll, or accounting services on behalf of the franchisee, or when the franchisor requires franchisees to make contributions to any pooled advertising, marketing, or promotional fund which is administered, controlled, or supervised by the franchisor. A franchisor that administers or supervises the administration of a pooled advertising or promotional fund must (i) keep all pooled funds in a segregated account that is not subject to the claims of creditors of the franchisor, (ii) provide an independent certified audit of such pooled funds within sixty days following the close of the franchisor's fiscal year, and (iii) disclose the source and amount of, and deliver to the fund or program, any discount, rebate, compensation, or payment of any kind from any person or entity with whom such fund or program transacts.

#### SECTION 6. PROCEDURAL FAIRNESS

Subsection (a) prohibits a franchisor from requiring any term or condition in a franchise agreement, or in any agreement ancillary or collateral to a franchise, which violates the Act. It also prohibits a franchisor from requiring that a franchisee relieve any person from a duty imposed by the Act, except as part of a settlement of a bona fide dispute, or assent to any provision which would protect any person against any liability to which he would otherwise be subject under the Act by reason of willful misfeasance, bad faith, or gross negligence in the performance of duties, or by reason of reckless disregard of obligations and duties under the franchise agreement. Nor may a franchisor require that a franchisee agree to not make any oral or written statement relating to the franchise business, the operation of the franchise system, or the franchisee's experience with the franchise business.

Subsection (b) makes void and unenforceable any provision of a franchise agreement,

or of any agreement ancillary or collateral to a franchise, which would purport to waive or restrict any right granted under the Act.

Subsection (c) forbids any stipulation or provision of a franchise agreement or of an agreement ancillary or collateral to a franchise from (i) depriving a franchisee of the application and benefits of the Act or any Federal law or any law of the State in which the franchisee's principal place of business is located, (ii) depriving a franchisee of the right to commence an action or arbitration against the franchisor for violation of the Act, or for breach of the franchise agreement or of any agreement or stipulation ancillary or collateral to the franchise, in a court or arbitration forum in the State of the franchisee's principal place of business, or (iii) excluding collective action by franchisees to settle like disputes arising from violation of the Act by civil action or arbitration.

Subsection (d) states that compliance with the Act or with an applicable State franchise law is not waived, excused or avoided, and evidence of violation of the Act or State law shall not be excluded, by virtue of an integration clause, any provision of a franchise agreement or an agreement ancillary or collateral to a franchise, the parol evidence rule, or any other rule of evidence purporting to exclude consideration of matters outside the franchise agreement.

#### SECTION 7. ACTIONS BY STATE ATTORNEYS GENERAL

Subsection (a) permits a State attorney general to bring an action under the Act in an appropriate United States district court using the powers conferred on the attorney general by the laws of his State.

Subsection (b) states that this section does not prohibit a State attorney general from exercising the powers conferred on him by the laws of his State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

Subsection (c) states that any civil action brought under subsection (a) in a United States district court may be brought in the district in which the defendant is found, is an inhabitant, or transacts business, or wherever venue is proper under 28 U.S.C. 1391 which establishes general venue rules. Process may be served in any district in which the defendant is an inhabitant or in which he may be found.

Subsection (d) states that nothing in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State.

#### SECTION 8. TRANSFER OF A FRANCHISE

Subsection (a) permits a franchisee to assign an interest in a franchised business and franchise to a transferee if the transferee satisfies the reasonable qualifications generally applied in determining whether or not a current franchisee is eligible for renewal. If the franchisor does not renew a significant number of its franchisees, then the transferee may be required to satisfy the reasonable conditions generally applied to new franchisees. The qualifications must be based upon legitimate business reasons. If the qualifications are not met, the franchisor may refuse to permit the transfer, provided that the refusal is not arbitrary or capricious and the franchisor states the grounds for its refusal in writing to the franchisee.

Subsection (b) requires that a franchisee give the franchisor at least thirty days' written notice of a proposed transfer, and that a

franchisee, upon request, will provide in writing to the franchisor a list of the ownership interests of all persons holding or claiming an equitable or beneficial interest in the franchise subsequent to the transfer.

Subsection (c) states that a franchisor is deemed to have consented to a transfer thirty days after the request for consent is submitted, unless the franchisor withholds consent in writing during that time period specifying the reasons for doing so. Any such notice is privileged against a claim of defamation.

Subsection (d) establishes that a franchisor may require the following four conditions before consenting to a transfer: (1) the transferee successfully complete a reasonable training program, (2) payment of a reasonable transfer fee, (3) the franchisee pay or make reasonable provisions to pay any amount due the franchisor or the franchisor's affiliate, (4) the financial terms of the transfer at the time of the transfer comply with the franchisor's current financial requirements for franchisees. A franchisor may not condition its consent to a transfer on (1) a franchisee forgoing existing rights other than those contained in the franchise agreement, (2) entering into a release of claims broader in scope than a counterpart release of claims offered by the franchisor to the franchisee, or (3) requiring the franchisee or transferee to make, or agree to make, capital improvements, reinvestments, or purchases in an amount greater than the franchisor could have reasonably required under the terms of the franchisee's existing franchise agreement.

Subsection (e) permits a franchisee to assign his interest for the unexpired term of the franchise agreement and prohibits the franchisor from requiring the franchisee or transferee to enter an agreement which has different material terms or financial requirements as a condition of the transfer.

Subsection (f) prohibits a franchisor from withholding its consent without good cause to a franchisee making a public offering of its securities if the franchisee or owner of the franchisee's interest retains control over more than 25 percent of the voting power as the franchisee.

Subsection (g) prohibits a franchisor from withholding its consent to a pooling of interests, to a sale or exchange of assets or securities, or to any other business consolidation among its existing franchisees, provided the constituents are each in material compliance with their respective obligations to the franchisor.

Subsection (h) establishes six occurrences which shall not be considered transfers requiring the consent of the franchisor under a franchise agreement and for which the franchisor shall not impose any fees or payments or changes in excess of the franchisor's cost to review the matter.

Subsection (i) prohibits a franchisor from enforcing against the transferor any covenant of the franchise purporting to prohibit the transferor from engaging in any lawful occupation or enterprise after the transfer of a transferor's complete interest in a franchise. This subsection does not limit the franchisor from enforcing a contractual covenant against the transferor not to exploit the franchisor's trade secrets or intellectual property rights except by agreement with the franchisor.

#### SECTION 9. TRANSFER OF FRANCHISE BY FRANCHISOR

Subsection (1) prohibits a franchisor from transferring interest in a franchise by sale or in any other manner unless he gives notice

thirty days prior to the effective date of the transfer to every franchisee of his intent to transfer the interest.

Subsection (2) requires that the notice given contains a complete description of the business and financial terms of the proposed transfer or transfers.

Subsection (3) requires that the entity assuming the franchisor's obligations have the business experience and financial means necessary to perform the franchisor's obligations.

#### SECTION 10. INDEPENDENT SOURCING OF GOODS AND SERVICES

Subsection (a) prohibits a franchisor from prohibiting or restricting a franchisee from obtaining equipment, fixtures, supplies, goods or services used in the establishment or operation of the franchised business from sources of the franchisee's choosing, except that such goods or services may be required to meet established uniform system-wide quality standards promulgated or enforced by the franchisor.

Subsection (b) requires that if the franchisor approves vendors of equipment, fixtures, supplies, goods, or services used in the establishment or operation of the franchised business, the franchisor will provide and continuously update an inclusive list of approved vendors and will promptly evaluate and respond to reasonable requests by franchisees for approval of competitive sources of supply. The franchisor shall approve not fewer than two vendors for each piece of equipment, each fixture, each supply, good, or service unless otherwise agreed to by both the franchisor and a majority of the franchisees.

Subsection (c) requires a franchisor and its affiliates officers and/or its managing agents, must fully disclose whether or not it receives any rebates, commissions, payments, or other benefits from vendors as a result of the purchase of goods or services by franchisees and requires a franchisor to pass all such rebates, commissions, payments, and other benefits directly to the franchisee.

Subsection (d) requires a franchisor to report not less frequently than annually, using generally accepted accounting principles, the amount of revenue and profit it earns from the sale of equipment, fixtures, supplies, goods, or services to the franchisee.

Subsection (e) excepts reasonable quantities of goods and services that the franchisor requires the franchisee to obtain from the franchisor or its affiliate from the requirements of subsection (a), but only if the goods and services are central to the franchised business and either are actually manufactured or produced by the franchisor or its affiliate, or incorporate a trade secret or other intellectual property owned by the franchisor or its affiliate.

#### SECTION 11. ENCROACHMENT

Subsection (a) prohibits a franchisor from placing, or licensing another to place, one or more, new outlet(s) in unreasonable proximity to an established outlet, if (i) the intent or probable effect of establishing the new outlet(s) is to cause a diminution of gross sales by the established outlet of more than five percent in the twelve months immediately following establishment of the new outlet(s), and (ii) the established franchisee offers goods or services identified by the same trademark as those offered by the new outlet(s), or has premises that are identified by the same trademark as the new outlet(s).

Subsection (b) creates an exception to this section if, before a new outlet(s) opens for

business, a franchisor offers in writing to each franchisee of an established outlet concerned to pay to the franchisee an amount equal to fifty percent of the gross sales of the new outlet(s), for the first twenty-four months of operation of the new outlet(s), if the sales of the established outlet decline by more than five percent in the twelve months immediately following establishment of the new outlet(s), as a consequence of the opening of such outlet(s).

Subsection (c) places upon the franchisor the burden of proof to show that, or the extent to which, a decline in sales of an established franchised outlet occurred for reasons other than the opening of the new outlet(s), if the franchisor makes a written offer under subsection (b) or in an action or proceeding brought under section 12.

#### SECTION 12. PRIVATE RIGHT OF ACTION

Subsection (a) gives a party to a franchise who is injured by a violation or impending violation of this Act a right of action for all damages caused by the violation, including costs of litigation and reasonable attorney's fees, against any person found to be liable for such violation.

Subsection (b) makes jointly and severally liable every person who directly or indirectly controls a person liable under subsection (a), every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions and every employee of a person so liable who materially aids in the act or transaction constituting the violation, unless the person who would otherwise be liable hereunder had no knowledge of or reasonable grounds to know of the existence of the facts by reason of which the liability is alleged to exist.

Subsection (c) states that nothing in the Act shall be construed to limit the right of a franchisor and a franchisee to engage in arbitration, mediation, or other nonjudicial dispute resolution, either in advance or after a dispute arises, provided that the standards and protections applied in any binding nonjudicial procedure agreed to by the parties are not less than the requirements set forth in the Act.

Subsection (d) prohibits an action from being commenced more than five years after the date on which the violation occurs, or three years after the date on which the violation is discovered or should have been discovered through exercise of reasonable diligence.

Subsection (e) provides for venue in the jurisdiction where the franchise business is located.

Subsection (f) states that the private rights created by the Act are in addition to, and not in lieu of, other rights or remedies created by Federal or State law.

#### SECTION 13. SCOPE AND APPLICABILITY

Subsection (a) applies the requirements of the Act to franchise agreements entered into, amended, exchanged, or renewed after the date of enactment of the Act, except as provided in subsection (b).

Subsection (b) delays implementation of Section 3 of the act until ninety days after the date of enactment of the Act and applies Section 3's requirements only to actions, practices, disclosures, and statements occurring on or after such date.

#### SECTION 14. DEFINITIONS

Defines terms used in the Act.