REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

Divorcement and Representative Offering for Inclusion in the Virginia Petroleum Products Franchise Act

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 49

COMMONWEALTH OF VIRGINIA
RICHMOND
1991

MEMBERS OF THE JOINT SUBCOMMITTEE

The Honorable Alan A. Diamonstein, *Chairman*
The Honorable Elmon T. Gray, *Vice Chairman*
The Honorable George F. Allen
The Honorable Clarence E. Phillips
The Honorable William P. Robinson, Jr.
The Honorable Robert L. Calhoun
The Honorable Richard J. Holland
Mr. Steve Stone, Governor's Appointee
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For Inclusion in the
Virginia Petroleum Products Franchise Act
To
The Governor and the General Assembly of Virginia

Richmond, Virginia
January, 1991

TO: The Honorable L. Douglas Wilder, Governor of Virginia
and
The General Assembly of Virginia

I. STUDY AUTHORITY AND SCOPE

House Joint Resolution No. 120 (attached as Appendix A), agreed to during the 1990 Session of the General Assembly, established a joint subcommittee to study divorcement and representative offering for inclusion in the Virginia Petroleum Products Franchise Act. The resolve clause in the resolution directed the subcommittee to propose any legislation it deemed appropriate which relates to divorcement and representative offering.

The subcommittee consisted of nine members. The Speaker of the House of Delegates appointed four members from the House Committee on General Laws. The Senate Committee on Privileges and Elections appointed three members, two from the Senate Committee on Agriculture, Conservation, and Natural Resources, and one from the Senate Committee on Commerce and Labor. In addition, one member representing the Virginia Small Business Council, and one citizen member appointed by the Governor, served on the subcommittee.

II. EXECUTIVE SUMMARY

Although the General Assembly chose to enact Senate Bill 235 (Chapter 907 of the 1990 Acts of Assembly), it also passed HJR 120 to examine the allegations made by dealers that refiners were trying to force dealers out of business by imposing rigid operating standards and employing unfair marketing practices in the sale of motor fuel. Refiners refuted these allegations and pointed to changing business and economic conditions as the reason behind dealer troubles. The controversy begun with Senate Bill 235 continued during the course of this study.

The main focus of HJR 120 was divorcement and representative offering which are defined as follows:

Divorcement -- the prohibition of a refiner from operating any major brand, secondary brand, or unbranded retail outlet in the Commonwealth of Virginia with company personnel.

Representative Offering (wholesale competition option, or limited open supply) -- the ability of a dealer to sell one grade of motor fuel, which was purchased from sources other than the refiner with whom the dealer has entered into a franchise agreement, through leased underground storage and dispensing equipment, so long as the dealer fully observes all trademark identification requirements established by such refiner and fully complies with all federal and state laws and regulations pertaining to motor fuel quality specifications, handling practices, and labeling requirements.

Partial retail divorcement has been the law in the Commonwealth since 1979 and limits the operation of refiner-operated retail outlets to 1.5 miles from any franchised dealer outlet. Proponents of divorcement argued that total retail divorcement is necessary to ensure the economic viability of dealer operated outlets. Likewise, proponents of representative offering argued that open supply is necessary to ensure the economic survival of dealers. Proponents also claim that open supply will enhance their ability to compete as small businessmen, resulting in lower cost to consumers.

The subcommittee met four times during 1990 to consider its charge under House Joint Resolution 120. In addition to its initial organizational meeting at which testimony was heard, the subcommittee conducted two public hearings. The work of the subcommittee culminated in a final work session at which recommendations for legislation were formulated and put to a vote.

Several issues were resolved by this study. During the 1990 Session, language was added establishing a standard for refiners in charging dealers for the use of refiner credit cards. The standard limited the fee charged by refiners to the customary fee charged by credit card services to retailers who authorize use of credit card purchases. The testimony presented to the subcommittee indicated that the "customary fee" standard was, at best, a nebulous one and one which required disclosure of confidential bank records and other matters of contract between private parties. As a result, the subcommittee voted overwhelmingly to remove this standard from the provisions of the Virginia Petroleum Products Franchise Act.

On the issue of divorcement, the subcommittee rejected by a 2 to 1 margin any move toward implementation of full and total retail divorcement in Virginia. The vote of the subcommittee reflected the concern that total retail divorcement would reduce competition in the market place and therefore limit consumers' freedom of choice in the products they buy. By a majority, the subcommittee also rejected an attempt to relax the application of the 1.5 mile rule to allow refiners to operate company-operated retail outlets so long as such outlets were no closer than 1.5 miles from outlets operated by the refiner's franchised dealers.

On the issue of open supply, the subcommittee, by majority, voted against the implementation of limited open supply in the Commonwealth. The subcommittee pointed to testimony which indicated that open supply provisions are already part of a number of franchise agreements and are not utilized by dealers. Further, the subcommittee questioned the wisdom of legislating the terms of private contractual matters.

III. BACKGROUND

The Virginia Petroleum Products Franchise Act was enacted in 1973 in response to the gasoline shortages occurring during the oil embargo. A legislative history of the Virginia Petroleum Products Franchise Act is attached to this report as Appendix B. Although the Virginia Petroleum Products Franchise Act has been the subject of a study, no legislative documents resulting from this study of the Virginia Petroleum Products Franchise Act are available. House Joint Resolution No. 242, agreed to during the 1979 Session of the General Assembly, directed the House General Laws Committee and the Senate Agriculture, Conservation and Natural Resources Committee to conduct a joint study of petroleum marketing practices. The resolution noted that the effects of legislation prohibiting the operation of retail gasoline outlets by refiners of petroleum products were far-reaching and that the existence of such practices and the effect of such legislation on these practices were the subject of dispute. That resolution also asserted that there were certain laws in effect -- the federal Petroleum Marketing Practices Act, the Virginia Unfair Sales Act and the Virginia Antitrust Act, which were related to these marketing practices. House Joint Resolution No. 242 directed that a study be conducted to determine the existence of alleged unfair marketing practices. The resolve clause provided that if any unfair marketing practices were found to exist, the joint subcommittee of the two standing committees should then determine the effectiveness of existing federal and state laws. If the laws were found to be ineffective, the joint subcommittee was directed to propose the appropriate and necessary legislation. That subcommittee did not issue a report.

The 1979 study resolution cited three acts relating to marketing practices. Of those three acts, the federal Petroleum Marketing Practices Act and the Virginia Antitrust Act are still in effect. However, the Virginia Unfair Sales Act was repealed in 1984 when the Cigarette Sales Below Wholesale Cost Act was enacted. (The Cigarette Sales Below Wholesale Cost Act was subsequently repealed in 1986.)

In addition to the protection afforded by the federal Petroleum Marketing Practices Act and antitrust laws, § 59.1-68.2 authorizes the Attorney General to investigate and bring action in the name of the Commonwealth to enjoin any violations of Chapters 2.1 (§ 59.1-21.1 et seq.) through 3.1 (§ 59.1-41.1 et seq.) of Title 59.1 and of Article 8 (§ 18.2-214 et seq.) of Chapter 6 of Title 18.2. The Virginia Petroleum Products Franchise Act appears as Chapter 2.2 of Title 59.1, and is therefore one of the chapters the Attorney General is authorized to investigate for violations and bring action in the name of the Commonwealth to enjoin violations.

As introduced, Senate Bill 235 (1990) was an attempt to address dealer concerns that refiners were trying to force dealers out of business by imposing rigid standards of operation and undercutting gasoline prices. Senate Bill 235 articulated the concern for the preservation of the rights and independence of small businesses in Virginia. The bill proposed to give dealers increased power in negotiating franchise agreements by establishing statutory minimum requirements. The bill also allowed dealers to purchase fuel from sources other than their refiner provided a representative offering of the refiners products were also available. Finally, the bill proposed total retail divorcement after January 1, 1991.

Senate Bill 235 was the subject of considerable controversy. The bill was amended several times during the session in an attempt to strike a balance between refiners and dealers of petroleum products. Testimony at the committee level, and debate on the floor, reflected the division between refiners and dealers and the public policy issues underlining that disagreement. Positions remained polarized as the session concluded. The version of Senate Bill 235 which was enacted into law prohibited refiners from imposing minimum work hours or imposing purchase or sales quotas by agreement on their franchised dealers. Senate Bill 235 also prohibited refiners from charging a fee directly or indirectly to a dealer for credit card services provided by such refiner, in excess of the customary fee charged by credit card services to retailers. Senate Bill 235, however, did not provide for limited open supply nor did it impose full retail divorcement, except to the extent that a moratorium on construction of new refiner-operated outlets was declared.

IV. WORK OF THE SUBCOMMITTEE

A. Study Participants

During the course of its study, the subcommittee received materials and heard testimony on the issues from a wide variety of persons and groups at its meetings, including the Virginia Citizens Consumer Council, the Virginia Business Council, the Virginia Bankers Association Bank Card Committee, the Virginia Service Station and Automobile Services Association, the Virginia Petroleum Council, the Office of the Comptroller of Maryland, and the Federal Trade Commission.

B. Issues Before the Subcommittee

The primary issues addressed by the subcommittee were:

(i) Divorcement -- The extent to which divorcement should be implemented in the Commonwealth;

(ii) Representative Offering -- The extent to which representative offering should be implemented in the Commonwealth; and

(iii) Whether the fees charged by refiners to dealers for credit card services are reasonable and should be allowed.

Additionally, the Subcommittee addressed policy considerations related to the primary issues. The struggle begun during the session over the need and extent of government interference into private contractual matters in the name of competition and consumerism continued to be the focus of extensive debate. The subcommittee wrestled with quantifying dealer concerns that refiners are trying to force competitors (including their franchised dealers) out of the market place. Subcommittee members were concerned about the constitutional questions raised by refiners that (i) they had vested property rights in their existing retail outlets and (ii) the government could not interfere with existing contracts between refiners and their dealers.

C. Testimony

During the course of the study, the Subcommittee received extensive testimony by opponents and proponents of divorcement and open supply. For each argument made in support of divorcement and open supply, another, equally viable, argument was made in opposition.

A summary of the testimony follows, distinguishing opponents from proponents on the issues of divorcement and open supply.

Proponents of Divorcement and Open Supply maintain that:

◆ Divorcement and open supply are necessary to assure the economic survival of independent service station dealers and to enhance their ability to compete as small businessmen.

◆ Divorcement will increase the competition in the retail delivery of motor fuel in the Commonwealth.

◆ Currently oil companies are violating the intent of the Virginia Petroleum Products Franchise Act and are attempting to control, monopolize, restrict competition and unduly influence the retail delivery of motor fuel.

◆ Through lease agreements with dealers, refiners control a significant portion of dealers' operating costs (station rents, wholesale product costs, and branding charges, such as credit card services). Due to artificial increases in these costs, many dealers have been forced out of business.

◆ Oil companies' integrated methods of operation allow them to "subsidize" low gas prices at their company stores by providing gasoline to those outlets at prices that are both below cost and below the wholesale prices charged to lessee dealers with profits obtained from other levels of operation and force retail competitors out of business. The reason for the subsidization is to drive the lessee-dealers out of business in order to replace them with company-owned and -operated stations.

◆ Through unreasonable clauses in renewal leases and other tactics, oil companies are forcing independent dealers out of business so that oil companies can expand in that area; the result is an increase in control by oil companies over the retail delivery of motor fuel and the lessening of competition.

◆ Elimination of the oil companies' monopolistic controls over the dealer will permit the dealer to make business decisions to effectively compete in the market place.

Opponents of Divorcement maintain that:

◆ Government and academic studies show that gasoline marketing is highly competitive with no evidence of predatory pricing.

◆ Reductions in the number of service stations are not due to predatory practices (deliberately selling gasoline below cost with the intent to injure competition, a practice actionable under antitrust laws) of oil companies; instead, they can be attributed to changing business and economic conditions such as escalating service station construction and operating costs, crude oil prices, government oil pricing and changing consumer preferences.

◆ Total divorcement would sharply reduce competition and thus limit the consumers' freedom of choice in the products they buy.

◆ Restricted competition will result in higher overall gas prices for consumers.

◆ The three federal agencies charged with monitoring retail gasoline marketing competition -- the U.S. Department of Justice, the Department of Energy and the Federal Trade Commission -- have all reported that they found no evidence of predatory pricing in the industry.

◆ Various studies of the effects of refiner divorcement in Maryland, where the strictest form of refiner divorcement is in effect, indicate that divorcement has raised gasoline prices and reduced the average hours of operation of stations which were divested.

◆ A study by Dr. Philip E. Sorensen, professor of economics, Florida State University, dated January 1989, showed that refiner-operated gasoline outlets provided employment for 4,588 Virginia workers in 1988 at outlets in 45 counties and 18 cities in the Commonwealth. The study found that 143 company-operated outlets were owned by major refiners. Surveys of the major refiners conducted by the Virginia Petroleum Council showed 172 major refiner-operated outlets in 1977 and 150 in 1983. These statistics clearly show the presence of company-operated stations by major refiners diminishing since the partial divorcement law passed in 1979.

◆ Consumers in Virginia are able to choose among a wider range of gasoline brands, services, prices, and hours of operation as a result of the presence of refiners among the other retailers of gasoline in the Commonwealth. Attractive opportunities for employment, training, and advancement in gasoline retailing are offered to Virginia workers by refiner-operators. The safety of underground storage tanks has also been enhanced by refiner investments in new and safer tanks. These advantages would be lost if a total divorcement law were enacted in Virginia.

◆ Virginia already has a limit on new refiner-operated stations within 1.5 miles of any dealer operation which has been in place since 1979. Divorcement is anticompetitive, anticonsumer and unnecessary -- anticompetitive, because it removes an entire segment of the retail gasoline market place: refiner-operated stations. This would lead to a distribution system that is less competitive and less responsive to Virginia's consumers. Divorcement would grant a monopoly of the entire gasoline market to dealers, jobbers and non-refiner markets. This, in turn, would reduce market innovation which has typically been a strength of refiners' operations. Divorcement is anticonsumer for it could cause an increase in the cost of gasoline and limit consumer choice and service since refiners would be forced to reduce their investment in gasoline marketing. It is unnecessary because the rights of service station dealers are already protected by the Federal Petroleum Marketing Practices Act and the current law in Virginia.

Opponents of Open Supply maintain that:

◆ Refiners have invested millions of dollars on service stations in Virginia leased as outlets for their branded gasoline. These investments cannot be justified if the refiner's various grades of gasoline are not always available at each station to meet demand for them.

◆ Open supply would appear to increase dealer options, but the effects of such marketing can be quite detrimental. For example, many Virginians today may seek out a particular grade and brand of gasoline which they believe is especially suited to their cars. Under open supply, it is possible for consumers to drive into a branded station and find that the grade of gasoline they sought is not available. This would force the consumer to drive away in search of the right branded grade, or to accept a product they did not seek to buy.

◆ The end result of open supply could be to destroy the economic basis of branded service station dealerships. This would not only be contrary to the interests of motorists and refiners, but also run against the best interests of branded dealers that open supply would supposedly protect.

◆ The use of a refiner's trademark carries with it an obligation to meet that refiner's product requirements. This is in the best interest of all parties, including consumers. Mandatory open supply would ultimately cripple or destroy branded marketing, mainly because motorists would come to doubt the usefulness of trademarks as indicators of quality. The average quality of major brand gasoline could be expected to fall because major refiners would be unable to assure that the branded gasoline is not mingled with unbranded gasoline.

◆ Environmental regulations apply to gasoline vapor pressure and underground storage tank requirements. Complex legal issues and business conflicts arise when considering the refiner's liability for the nonbranded gasoline sold at the refiner's station.

◆ An open supply network in Virginia would confuse consumers. There is widespread dependence on branded gasoline and choice of grades---just as consumers depend on brand name soft drinks, cereals, laundry detergents and other goods. Virginia consumers should continue to expect a consistency of quality and assurance in the petroleum products they buy.

◆ Major refiners have invested millions of dollars in Virginia service stations which are licensed as outlets for their branded gasoline. These investments cannot be justified unless the refiner can be assured that its brands and grades of gasoline will always be available to each station to meet consumer demand.

◆ "Open-supply" provisions could lead to the demise of branded marketing. The dealer's ability to switch back and forth between different suppliers would confuse motorists and would increase the potential for consumer fraud and misrepresentation. In addition, a refiner could be held unfairly liable for defective gasoline which it did not supply but which was sold at its stations and from its tanks.

D. Related Information

Testimony before the Subcommittee continually referred to Maryland's experience with divorcement. As a result, the Subcommittee examined the Maryland divorcement law and its effects on Maryland consumers and the motor fuel industry. Additionally, the Subcommittee sought input from the Federal Trade Commission in their role as the administrator of the federal Petroleum Marketing Practices Act. The Subcommittee also monitored the developments of a lawsuit filed by Mobil Oil Corporation against the Attorney General of Virginia in the U.S. District Court, Richmond, Virginia, relating to the constitutionality of the Virginia Petroleum Products Franchise Act. A discussion of these matters follows.

Maryland's Experience With Divorcement.

Total retail divorcement has been the law in Maryland since 1979. Maryland's divorcement experience has been the topic of many reports and much controversy. In 1990, the Director of the Motor Vehicle Fuel Tax Division for the state of Maryland stated that Maryland's law was primarily concerned with assuring the Maryland motorist a fair supply of fuel as well as maintaining automotive service facilities, adequate hours of operation and use of credit cards which were all being threatened at the time. It was noted that the effect of divorcement on prices was not a primary concern and that the Division's position has constantly been that the more competitors in the marketplace, the fairer the price will be due to that increased competition.

The assertion was made that while it is impossible to definitely state the amount, the Division believes that the consumers have saved money as a result of Maryland's divorcement and the Division has met its major goal of stabilizing the marketplace. It was acknowledged that studies have tended to cloud the issue by referring only to posted price which includes varying tax rates, transportation costs, and other items over which the retail dealer has no control.

The Director of the Department of Fiscal Services in Maryland reported to the General Assembly of Maryland on the Department's review of the studies and reports relating to the economic impact of Maryland's gasoline service station divorcement legislation. One study the Department reviewed indicated that divorcement resulted in considerable savings to consumers while other studies found that divorcement resulted in higher consumer costs. Evaluation of the studies and review of the data relating to gasoline prices before and after divorcement led the Department of Fiscal Services to conclude that divorcement has resulted in higher gasoline prices for consumers. The magnitude of the increase could not be quantified. Changes in the marketing of gasoline also made it difficult to compute a dollar impact in today's marketing climate.

The following flaws in the 1987 Putnam, Hayes and Bartlett report (the consulting firm hired by the Comptroller of the Treasury to study the long-term effects of Maryland's divorcement law) have been alleged:

- The report failed to isolate the price effects from divorcement from all other market and cost factors that impinge on prices. There may be differences in these cities with regard to the degree of competition, wage and capital costs, taxes other than gasoline taxes, the regulatory structure, seasonal demand factors, and so on. All of these elements effect the retail prices. By ignoring them, Putnam, Hayes and Bartlett (PHB) are implicitly assuming that market conditions are identical in the seven widely separated areas, an assumption that certainly needs to be examined empirically before it can be accepted.

- Abstracting from market differences, if prices were lower in Baltimore before divorcement, there is a saving from divorcement only if the price differential widened. The saving is not the entire differential, but only the portion that exceeds the original, i.e. pre-divorcement, differential. Owing to the limitations of the data series, PHB does not know whether the Baltimore-other cities price differentials widened, narrowed, or stayed the same. In short, PHB cannot claim that divorcement rewarded consumers because the study does not contain the necessary information.

- No statistical analysis was performed on the price differentials. Since the differentials are so small relative to prices and the price data are based on sampling, at issue is whether they are statistically significant. It is possible that the computed price differences are due merely to statistical happenstance. In that case, the dollar differences are meaningless.

- It is not necessarily true that the reported price differences between Baltimore and the six other cities are indicative of the situation in Maryland vis-a-vis the other states.

- Attributing all price changes before divorcement was completed to divorcement is questionable.

- Several critiques of the PHB study pointed out several mathematical errors in the PHB tables. Three study papers attempted to measure the price differentials on a before and after divorcement basis using the same date as PHB. All three concluded that, contrary to PHB's finding, divorcement actually cost Maryland's consumers approximately $300 million over the July 1979-September 1986 period. These studies suffer from the same defects as the PHB study--no adjustments were made for market differences, the cities are not necessarily representative of the states, and the Lundberg data are not adequate for the task.

The U.S. Department of Energy (DOE) issued a report in 1984 examining the state of the gasoline marketing industry since gasoline prices had been decontrolled in January 1981. DOE observed that the predicted effects of divorcement on gasoline prices depend on one's view of the competitiveness of the gasoline marketing industry.

One of the studies evaluated by DOE was conducted by the Administrator of Maryland's Motor Fuel Inspection program. DOE found that study to be seriously flawed.

Federal Trade Commission.

The Director of Litigation with the Federal Trade Commission (FTC) expressed concern regarding various portions of Senate Bill No. 235. Charged by statute with preventing unfair methods of competition and unfair or deceptive practices affecting commerce (15 USC § 45), the Federal Trade Commission seeks to identify restrictions that impede competition without offering countervailing benefits to consumers. Also mentioned was the considerable experience the Commission and its staff had in assessing the competitive impact of regulations and business practices in the oil industry.

In discussing divorcement and open supply, the director of litigation noted that claims that vertical integration by refiners into gasoline retailing is anticompetitive in and of itself or because of refiner subsidization did not appear to be well founded. Although most refiners in the United States are vertically integrated into gasoline retailing because such integration is efficient, the major oil companies targeted by the divorcement and open supply in Virginia are the least integrated into retailing. Major oil companies have been "integrated by contract,"relying heavily on franchised dealer networks to sell their refined products. It was stated that although the legislation was intended to remedy the alleged unfair activities of major, integrated refiners, the legislation could affect the major refiners less severely than it would smaller refiners who may want to compete for new locations for retail stations.

The FTC pointed out that predatory or monopolistic behavior in the petroleum industry is subject to federal law and the Virginia Antitrust Act which address possible anticompetitive practices in the industry more effectively than legislation restricting new entry by potential competitors.

The present law in Virginia limits competition between refiner-operated stations and lessee-dealers by prohibiting refiner-operated retail stations closer than 1.5 miles from any franchised dealer stations. The assertion was made that this law reflects compromise that may preserve whatever cost savings may be associated with vertical integration between the refinery and retail distribution levels of the industry. Divorcement is likely to result in fewer choices for Virginia consumers and visitors and add costs to the distribution of gasoline which will probably be passed on to consumers.

Mobile Oil Corporation v. Attorney General, et al.

On June 29, 1990, Mobile Oil Corporation filed a complaint in the U.S. District Court, Richmond, Virginia (No. 3:90 CV003 81, October 14, 1990) against the Attorney General and the Commissioner of Agriculture and Consumer Services seeking a declaratory judgment that certain amendments contained in Senate Bill No. 235 relating to the prohibition against refiners (i) imposing purchase or sales quotas; (ii) imposing minimum hours of operation; (iii) limiting the number of stations operated by one dealer; and (iv) charging credit card fees in excess of the customary fee charged by credit card services to retailers are unconstitutional and otherwise unlawful, and seeking an injunction against their enforcement by the Commonwealth. In October, 1990, the Commissioner of Agriculture and Consumer Services and the Attorney General were dismissed as defendants. Mobil Oil Corporation has filed an appeal. To date, no final case decision at the appellate level has been rendered.

E. Deliberations

As the testimony suggests, opponents and proponents of divorcement and open supply held fast to their respective positions, each side arguing that increased competition and consumer benefits would be derived from adoption of their position. The subcommittee endeavored to quantify the need for legislation, or at least, common ground which would benefit consumers and balance the interests of small and large businesses in Virginia.

The subcommittee examined the effectiveness of existing state and federal antitrust and related laws in addressing allegations of unfair competition. As a result, the Subcommittee discussed the feasibility of proposing legislation, the focus of which would encourage fair and honest competition as well as safeguarding the public against unfair practices involving the sale of motor fuel. The discussion included provision for private causes of action in addition to certain civil penalties. No consensus, however, among Subcommittee members was reached.

On the issue of divorcement, the subcommittee rejected by a 2 to 1 margin any move toward implementation of full and total retail divorcement in Virginia. The vote of the subcommittee reflected the concern that total retail divorcement would reduce competition in the market place and therefore limit consumers' freedom of choice in the products they buy. By a majority, the subcommittee also rejected an attempt to relax the application of the 1.5 mile rule to allow refiners to operate company-operated retail outlets so long as such outlets were no closer than 1.5 miles from outlets operated by the refiner's franchised dealers.

On the issue of open supply, the subcommittee, by majority, voted against the implementation of limited open supply in the Commonwealth. The subcommittee pointed to testimony which indicated that open supply provisions are already part of a number of franchise agreements and are not utilized by dealers. Further, the subcommittee questioned the wisdom of legislating the terms of private contractual matters.

F. Conclusion

The members of the subcommittee received materials and heard testimony from a great number of groups and individuals and the process educated all involved. The process, however, failed to discern a clear pattern of unfair competition or other abuses alleged to exist in the sale of motor fuels.

V. RECOMMENDATIONS

The subcommittee recommends against: (i) the implementation of total retail divorcement, and (ii) the implementation of representative offering in the Commonwealth. The subcommittee, however, recommends that the Virginia Petroleum Products Franchise Act be amended to eliminate the requirement that credit card fees charged to dealers by their refiners be limited to the "customary fee" charged by credit card services. A copy of the Subcommittee's legislative proposal, amending Chapter 2.2 (§ 59.1-21.8 et seq.) of Title 59.1 is attached to this report as Appendix C.

Respectfully submitted,

The Honorable Alan A. Diamonstein, *Chairman*
The Honorable Elmon T. Gray, *Vice Chairman*
The Honorable George F. Allen
The Honorable Clarence E. Phillips
The Honorable William P. Robinson, Jr.
The Honorable Robert L. Calhoun
The Honorable Richard J. Holland
Mr. Steve Stone
Mr. Lindsay U. Bruce, Jr.

VI. APPENDICES

A. House Joint Resolution No. 120

B. Virginia Petroleum Products Franchise Act Legislative History

C. Draft Legislation to Amend Chapter 2.2
(§ 59.1-21.8 et seq.) of Title 59.1

APPENDIX A

House Joint Resolution No. 120

GENERAL ASSEMBLY OF VIRGINIA--1990 SESSION

HOUSE JOINT RESOLUTION NO. 120

Establishing a joint subcommittee to study divorcement and representative offering for inclusion in the Virginia Petroleum Products Franchise Act.

Agreed to by the House of Delegates, March 9, 1990
Agreed to by the Senate, March 7, 1990

WHEREAS, a competitive distribution system of motor fuel has a significant impact on the economy of Virginia, its transportation system, and the public; and

WHEREAS, "divorcement" is the prohibition of a refiner operating any major brand, secondary brand, or unbranded retail outlet in the Commonwealth of Virginia with company personnel, a parent company, or under a contract with any person, firm, or corporation managing a retail outlet or service station on a fee arrangement with a refiner; and

WHEREAS, "representative offering," "wholesale competition option," or "limited open supply" is the ability of a dealer to sell one grade of motor fuel, which was purchased from sources other than the refiner with whom the dealer has entered into a franchise agreement, through leased underground storage and dispensing equipment, so long as the dealer fully observes all trademark identification requirements established by such refiner and fully complies with all federal and state laws and regulations pertaining to motor fuel quality specifications, handling practices, and labeling requirements; and

WHEREAS, an interest has been expressed to study divorcement and representative offering for inclusion in the Virginia Petroleum Products Franchise Act; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study revisions to the Virginia Petroleum Products Franchise Act regarding divorcement and representative offering. The joint subcommittee shall propose any legislation it deems appropriate which is related to divorcement and representative offering.

The joint subcommittee shall consist of nine members to be appointed as follows: four members from the House Committee on General Laws, to be appointed by the Speaker of the House; two members from the Senate Committee on Agriculture, Conservation and Natural Resources and one member from the Senate Committee on Commerce and Labor, to be appointed by the Senate Committee on Privileges and Elections; one representative of the Virginia Small Business Council; and one citizen member to be appointed by the Governor.

The joint subcommittee shall report its findings to the Governor and 1991 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

The indirect costs of this study are estimated to be $10,650; the direct costs of this study shall not exceed $6,480.

APPENDIX B

Virginia Petroleum Products Franchise Act
Legislative History

VIRGINIA PETROLEUM PRODUCTS FRANCHISE ACT LEGISLATIVE HISTORY

Enacted in 1973: Chapter 423, 1973 Acts of Assembly

§ 59.1-21.8. Provided that the chapter may be cited as the Virginia Petroleum Products Franchise Act.

§ 59.1-21.9. Expressed the finding of the General Assembly that it was necessary to define the relationships and responsibilities of the parties to certain agreements pertaining to the distribution and sales through franchise arrangements of petroleum products.

§ 59.1-21.10. Provided definitions for the following terms: distributor, dealer, franchise, engaged in the sale of petroleum products, retail, retail outlet, and person.

◆ A distributor was defined as any person engaged in the refining and subsequent sale, consignment or distribution of petroleum products to retail outlets which it owns, leases, controls or with which it maintains a contractual relationship for the sale of such products and shall include a subsidiary or other entity in which such person has more than a thirty percent beneficial interest.

◆ A dealer was defined as any person, other than an agent or employee of a distributor, who is engaged in the retail sale of petroleum products under a franchise agreement.

◆ A franchise or franchise agreement was defined as an express or implied agreement between a distributor and a dealer under which the dealer is granted the right to use a trademark, trade name, service mark, or other identifying symbol or name owned by the distributor, or an agreement between a distributor and a dealer by which the dealer is granted the right to occupy premises owned, leased or controlled by the distributor, for the purpose of engaging in the retail sale of petroleum products of the distributor.

◆ Engaged in the sale of petroleum products, in the case of a dealer was defined as at least fifty per cent of the gross revenue being derived from such sale.

◆ Retail was defined as the sale of petroleum products for purposes other than resale.

◆ Retail outlet was defined as the premises at which petroleum products are sold.

◆ Person was defined as being consistent with the definition of persons provided in § 1.13-19 of the Code.

§ 59.1-21.11. Outlined the following specific provisions which are included in every agreement between a distributor and a dealer whether or not they are expressly set forth in the agreement:

◆ The dealer may agree, but in the absence of an agreement shall not be required to keep his retail outlet open for business for more than sixteen consecutive hours per day, nor more than six days per week; however, this provision shall not be construed to prevent any retail outlet being open when required to be open to conform to any state or federal law or regulation.

◆ The dealer or distributor has the right to cancel the agreement until midnight of the third business day after the day on which the agreement was signed, by giving the other party to the agreement, in person or by certified mail, written notice of the cancellation; provided that any money, equipment, or merchandise loaned, sold or delivered to the dealer are returned to the distributor for full credit, together with delivery of full possession of the service station location to the distributor.

◆ The right of either party to trial by jury or to the interposition of counterclaims or crossclaims shall not be waived.

◆ In the absence of any express agreement, the dealer shall not be required to participate financially in the use of any premium, coupon, give-away or rebate in the operation of his retail outlet; provided that the distributor may require the dealer to distribute to customers premiums, coupons or give-aways which are furnished to the dealer at the expense of the distributor.

◆ The distributor shall not unreasonably disapprove the transfer or assignment of a franchise by a dealer to a qualified transferee or assignee.

◆ The term of the initial agreement between the distributor and the dealer relating to specific premises shall not be less than one year; the term of the second agreement relating to the same premises shall also be for not less than one year; and the term of all subsequent agreements relating to the same premises shall not be for less than two years; provided that where the distributor is the lessee of the premises, this provision shall not be construed to require a term of greater duration than the remainder of the term to which the distributor is entitled under its lease without regard to any renewal rights which the distributor may have.

§ 59.1-21.12. Provided that any person who violates any provision of this chapter shall be civilly liable for liquidated damages of $500, plus provable damages caused as a result of the violation, and subject to such other remedies, legal or equitable, as may be available to the party damaged by the violation. The action shall be brought in the circuit court of the jurisdiction wherein the franchised premises are located. No action may be brought pursuant to this chapter for a cause of action which arises more than two years prior to the date on which the action is brought.

§ 59.1-21.13. Provided that in the event of any termination, cancellation or failure to renew, a distributor shall make or cause to be made a good faith offer to repurchase from the dealer, his heirs, successors and assigns, at the current wholesale prices any and all merchantable products purchased by the dealer from the distributor; provided that in such event the distributor shall have the right to apply the proceeds against any existing indebtedness owed to him by the dealer and that the repurchase obligation is conditioned upon there being no other claims or liens against the products by or on behalf of other creditors of the dealer.

§ 59.1-21.14. Provided that no distributor may directly or indirectly through any officer, agent or employee, terminate, cancel or fail to renew a franchise without having first given written notice by certified mail to the dealer at least sixty days in advance of the termination, cancellation, or failure to renew; provided that where the cancellation, termination or failure to renew is based upon (i) voluntary abandonment by the franchisee of the franchise relationship, or (ii) conviction of the franchisee of an offense involving moral turpitude, the cancellation, termination, or failure to renew shall be effective immediately upon notice given by certified mail to the franchisee at his last known address.

§ 59.1-21.15. Provided that the distributor shall disclose to any prospective dealer the following information, before any franchise agreement is concluded:

- The gallonage volume history, if any, of the location under negotiation for and during the three-year period immediately past or for the entire period which the location has been supplied by the distributor, whichever is shorter.

- The name and last known address of the previous dealer or dealers for the last three years, or for and during the entire period which the location has been supplied by the distributor, whichever is shorter.

- Any legally binding commitments for the sale, demolition or other disposition of the location.

- The training programs, if any, and the specific goods and services the distributor will provide for and to the dealer.

- Full disclosure of any and all obligations which will be required of the dealer.

- Full disclosure of all restrictions on the sale, transfer, and termination of the agreement.

§ 59.1-21.16. Provided that the chapter shall not be construed as limiting the authority of the Attorney General under the provisions of § 59.1-68.2.

§ 59.1-21.17. Provided that the chapter would be applicable to franchise agreements entered into on and after July 1, 1973.

§ 59.1-21.18. Provided for the severability of the provisions of the chapter.

1978: Chapter 822 of the 1978 Acts of Assembly

Senate Bill No. 232 added § 59.1-21.16:1 to the Virginia Petroleum Products Franchise Act. The section prohibited a distributor from opening a new retail outlet, or converting an existing retail outlet to a direct distributor operation. Any such retail outlet must be operated by a dealer. Three exceptions were also provided. The provisions of this section expired on March 1, 1979.

1979: Chapter 306 of the 1979 Acts of Assembly

House Bill No. 458 amended several sections of the Virginia Petroleum Products Franchise Act and added a new section to that Act.

◆ § 59.1-21.10 amended the definition of distributor by deleting that term and inserting producer or refiner. The amount of beneficial interest a person must have to be considered a producer or refiner under the Act was increased from thirty percent to fifty percent. In addition the definition was expanded to provide that the term producer or refiner shall not include (i) a person engaged in the general retail business whose total volume of sales consists of more than 95% of non-petroleum products, where the sale of petroleum products is from the same premises or commercial complex or shopping center or (ii) any customer or agent of a producer or refiner who either retails the petroleum products of the producer or refiner or supplies such petroleum products to dealers on consignment from the producer or refiner, provided that the producer or refiner supplying the customer or agent with the petroleum products shall not establish, suggest or recommend the retail price of the petroleum products so supplied.

The definition for engaged in the sale of petroleum products was repealed and the definition for retail outlet amended to clarify that the sales of petroleum products by retail outlets shall be made to the public.

A definition for petroleum products was added providing that the term included gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways. Also added was a definition for operation of a retail outlet. The term was defined as the ownership or option to buy a properly zoned parcel of property for which a permit to build a retail outlet has been granted.

◆ § 59.1-21.14 was amended to provide that a franchisor may elect not to renew a franchise which involves the lease by the franchisor to the franchisee of premises, in the event the franchisor determines, in the case of any retail service station opened after July 1, 1979, under a franchise term of at least three years, in good faith and in the normal course of business that renewal of the petroleum products franchise is likely to be uneconomical to the producer or refiner despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the dealer.

◆ § 59.1-21.16:2 was added to prohibit, after July 1, 1979, the operation by a producer or refiner of petroleum products of any major brand, secondary brand or unbranded retail outlet in Virginia with company personnel, a parent company or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The statute specifies that a producer or refiner may operate the retail outlet with such persons if the outlet is located not less than one and one-half miles from the nearest retail outlet operated by any franchised dealer; and provided, that once in operation, no producer or refiner shall be required to change or cease operation of any retail outlet by the provisions of the Act. During periods of shortages, the producer or refiner of petroleum products shall apportion all gasoline and special fuels among their purchasers on an equitable basis. The section also directed the Secretary of Commerce and Resources to promulgate rules and regulations pertaining to the operation of retail outlets, franchise dealers, and producers and refiners. The statute specified that the section would not be applicable to retail outlets operated by producers or refiners on July 1, 1979.

Other sections in the Act were amended to change references of distributor to producer or refiner.

1982: Chapter 350 of the 1982 Acts of Assembly

House Bill No. 501 amended § 59.1-21.11 pertaining to required provisions in agreements between producers or refiners and dealers. An added subdivision (g) allowed a producer or refiner to require a dealer to pay a fee or charge for the privilege of honoring a credit card issued by the producer or refiner and used by customers of the dealer in purchasing at retail products and services at retail outlets which bear the brand name or trademark of the producer or refiner. The fee or charge would be allowed only if the producer or refiner has deducted the cost of extending retail credit from the tankwagon price charged dealers, and has notified the dealer in writing of the deduction and the fee is a part of a program designed (i) to induce retail purchases for cash or (ii) to separate the cost of extending retail credit from the tankwagon price paid by the dealer. The amount of any fee or charge shall be directly related to the actual cost incurred by the producer or refiner in the extension of retail credit.

1984

House Bill No. 815, pertaining to the Secretarial System of the Commonwealth, amended § 59.1-21.16:2 by changing a reference from the Secretary of Commerce and Resources to the Commissioner of Agriculture and Consumer Services.

1985

House Bill No. 1229 amended § 59.1-21.11 of the Virginia Petroleum Products Franchise Act by adding a subdivision (h) pertaining to the designation of a family member to succeed to the dealer's interests under a franchise agreement. Effective upon his death or retirement, a dealer shall have his interest under a franchise agreement with a producer or refiner assigned to a designated family member. The member must be approved by the producer or refiner. The franchise agreement shall contain a provision identifying the designated family member who is entitled to succeed to the interests of the dealer under the agreement upon his death or retirement. The designated family member may be required to accept a trial franchise and to attend a training program. The dealer and the producer or refiner may mutually agree to change the designated family member entitled to succeed to the dealer's interests under a franchise agreement. The producer or refiner shall not be obligated to accept a designated family member who does not meet the reasonable standards uniformly imposed by the producer or refiner. Any refusal to accept the designated family member as a successor dealer shall be given by the producer or refiner in writing to the dealer not later than 90 days after the date of the designation of the designated family member by the dealer, and shall fairly state the reasons for the refusal.

1987

House Bill No. 1165 amended § 59.1-21.11 pertaining to required provisions in agreements between producers or refiners and dealers. Designations of the subdivisions by alphabets were changed to numbers. A new division 9 was added relating to assignment, transfer, sale or renewal of a franchise agreement. No producer or refiner shall condition approval of an assignment, transfer, sale or renewal of a franchise agreement on the payment by the dealer, or the proposed successor dealer, of a franchise fee or penalty unless the assignment, transfer or sale is of a franchise agreement covering a new or newly remodeled facility. A producer or refiner may require a dealer to pay a franchise fee or penalty upon the assignment, transfer or sale of a franchise agreement (i) covering a new facility within the first three years of the initial term of the franchise agreement or (ii) covering a newly remodeled facility within the first three years after the completion of the remodeling. The amount of the fee shall not exceed (i) 60% of the profit realized by the dealer if the assignment, transfer or sale takes place within the first twelve-month period; (ii) 25% of the profit realized if the assignment, transfer or sale takes place within the second twelve-month period; and (iii) 10% of the profit realized by the dealer if the assignment, transfer or sale takes place within the third twelve-month period. In the case of a new facility, a franchise fee may be charged at the time the first franchise agreement is entered into. Producers and refiners are not authorized to impose a franchise fee or penalty upon an assignment, transfer or sale to a family member pursuant to subdivision 8a of the section.

1990

Senate Bill No. 235 amended §§ 59.1-21.9, 59.1-21.10, 59.1-21.11, 59.1-21.12, 59.1-21.13, 59.1-21.15, and 59.1-21.16:2 of the Virginia Petroleum Products Franchise Act. Section 59.1-21.9, pertaining to the findings of the General Assembly, was amended to add a reference to the preservation of the rights, responsibilities, and independence of the small businesses in the Commonwealth as an essential component to economic vitality. The definitional section, § 59.1-21.10, contained numerous housekeeping amendments, such as placing the definitions in alphabetical order, inserting definitions from other sections of the Petroleum Products Franchise Act into § 59.1-21.10 and removing references to repealed definitions. References to producers were eliminated throughout the Petroleum Products Franchise Act. Definitions for some terms, such as "dealer," "refiner" and "franchise or franchise agreement" were changed.

Section 59.1-21.11 was amended to prohibit the requirement that a dealer keep his retail outlet open for business for more than sixteen consecutive hours per day, or more than six days per week. Previously dealers were allowed to agree to such hours of operation, but in the absence of an agreement could not be required to adhere to those hours of operation. An additional amendment allows the dealer to operate his business for more than sixteen consecutive hours per day or more than six days per week when the dealer determines that market conditions warrant such operation. A provision was added specifying that subdivision 1 of § 59.1-21.11 would not apply to retail outlets which participate in the travel services signing program of the Virginia Department of Transportation. Subdivision 2 of § 59.1-21.11 pertaining to the right to cancel the agreement until midnight of the third business day after the day on which the agreement was signed was repealed and subsequent subdivisions renumbered as necessary.

Section 59.1-21.11 was also amended to provide that agreements or franchises shall not limit, restrict, or impair the number of retail outlets which an individual dealer may operate for the same refiner, nor may they establish working hours for the dealer. However, the agreement or franchise may require the dealer to be involved in the operation of the business of the dealer's retail outlet or outlets for not more than an average of 60 hours per month. However, trial franchises may require the dealer to be on the marketing premises of the dealer's retail outlet or outlets for a reasonable number of hours per week, not to exceed twenty hours per week. Subdivision 5 of the section was amended to add a 45-day time limit for the refiner to notify the dealer of the approval or denial of a proposed transferee or assignee of the franchise. Reasons for the failure of the proposed transferee or assignee to meet the refiner's reasonable and normal qualifications shall be specifically stated.

An amendment to subdivision 6 requires rental provisions to be based on commercially fair and reasonable standards, uniformly applied to all similarly situated dealers of the same refiner in the same geographic area. Terms of all subsequent agreements between a refiner and dealer for the same marketing premises shall not be for less than three years. Previous law required the term of a second agreement between the refiner and dealer to be for at least one year and all agreements subsequent to the second agreement to be for terms of at least two years. Repealed was a provision providing that where the refiner was the lessee of the premises, the subdivision would not be construed to require a term of greater duration than the remainder of the term to which the refiner is entitled under its lease without regard to any renewal rights which the refiner may have.

A provision was added to subdivision 7 of § 59.1-21.11 prohibiting refiners from charging a fee directly or indirectly to a dealer for credit card services provided by the refiner in excess of the customary fee charged by credit card services to retailers who authorize use of credit card purchases. As provided in subdivision 8, dealers may assign their interests under a franchise agreement to designated family members upon permanent and total disability. Previously this right could only be exercised upon the dealer's death or retirement. Standards used by refiners in qualifying proposed designated family members must now be uniform in addition to reasonable. Refusals to accept the designated family member as a successor dealer must now state with specificity the reasons for the refusal.

The final amendment to § 59.1-21.11 was the addition of subdivision 10 which provides that any provision in any agreement or franchise purporting to waive any right or remedy under the Virginia Petroleum Products Franchise Act or any applicable provisions of the Petroleum Marketing Practices Act shall be null and void.

Section 59.1-21.12 was amended to provide reasonable attorney's fees and increase the civil liability for violations of the Act from \$500 to \$2,500. Additionally, a proposed transferee, assignee, or designated family member who is not approved as a dealer will now have legal standing to challenge a refiner's compliance with the provisions of this section relating to assignment.

The final amendments to the Act were contained in § 59.1-21.16:2. They provided that during the period July 1, 1990, through June 30, 1991, no refiner may construct and operate with company personnel any new major brand, secondary brand, or unbranded retail outlet in Virginia, except on any property purchased or under option to purchase by March 1, 1990. In addition, no new lease, lease renewal, new supply contract, or new supply contract renewal under the Act shall impose purchase or sales quotas.

APPENDIX C

Draft Legislation to Amend Chapter 2.2
(§ 59.1-21.8 et seq.) of Title 59.1

D 12/18/90 Everett T 12/19/90 mlt

SENATE BILL NO. .... HOUSE BILL NO. ....

A BILL to amend and reenact § 59.1-21.11 of the Code of Virginia, relating to the Virginia Petroleum Products Franchise Act.

Be it enacted by the General Assembly of Virginia:

1. That § 59.1-21.11 of the Code of Virginia is amended and reenacted as follows:

§ 59.1-21.11. Required provisions pertaining to agreements between refiners and dealers.--Every agreement between a refiner and a dealer shall be subject to the following provisions, whether or not expressly set forth therein:

1. The dealer shall not be required to keep his retail outlet open for business for more than sixteen consecutive hours per day, nor more than six days per week. This subdivision shall not be construed to prevent any retail outlet being open when required to be open to conform to any local, state or federal law or regulation, nor shall this subdivision be construed to prevent any retail outlet from being open for business for more than sixteen consecutive hours per day or more than six days per week when the dealer determines that market conditions warrant such operation. This subdivision shall not apply to retail outlets which participate in the travel services signing program of the Virginia Department of Transportation.

2. The right of either party to trial by jury or to the interposition of counterclaims or cross claims shall not be waived.

3. In the absence of any express agreement, the dealer shall not be required to participate financially in the use of any premium, coupon, give-away, or rebate in the operation of a retail outlet. The refiner may require the dealer to distribute to customers premiums, coupons, or give-aways which are furnished to the dealer at the expense of the refiner.

4. No agreement or franchise subject to the provisions of this chapter shall limit, restrict, or impair the number of retail outlets which an individual dealer may operate for the same refiner, nor may any agreement or franchise establish working hours for the dealer. However, an agreement or franchise may require the dealer to be involved in the operation of the business of the dealer's retail outlet or retail outlets for not more than an average of sixty hours per month. Notwithstanding the provisions of this subdivision, a refiner may impose a requirement in a trial franchise only, that a dealer be on the marketing premises of the dealer's retail outlet or retail outlets for a reasonable number of hours per week not to exceed twenty hours per week.

5. No transfer or assignment of a franchise by a dealer to a qualified transferee or assignee shall be unreasonably disapproved by the refiner. A refiner shall have forty-five days, after the date of submission by a proposed transferee or assignee of all personal and financial information required by the refiner's reasonable and uniform standards, within which to notify a dealer in writing that a proposed transferee or assignee meets or fails to meet the refiner's reasonable and uniform qualifications. If the proposed transferee or assignee fails to meet the refiner's reasonable and normal qualifications, t notice to the dealer shall state with specificity the reasons for such

failure.

6. The term of the initial agreement between the refiner and the dealer relating to specific marketing premises shall not be less than one year; the term of all subsequent agreements between the refiner and the dealer, relating to the same marketing premises, shall not be for less than three years. The rental provisions in any such agreement or franchise shall be based on commercially fair and reasonable standards, uniformly applied to all similarly situated dealers of the same refiner in the same geographic area.

7. A refiner may require a dealer to pay a fee or charge for the privilege of honoring a credit card issued by the refiner and used by customers of the dealer in purchasing at retail products and services at retail outlets which bear the brand name or trademark of the refiner only if such refiner has deducted the cost of extending retail credit from the tankwagon price charged dealers, has notified the dealer in writing of such deduction and such fee is a part of a program designed (i) to induce retail purchases for cash or (ii) to separate the cost of extending retail credit from the tankwagon price paid by the dealer. The amount of any such fee or charge shall be directly related to the actual cost incurred by the refiner in the extension of retail credit. ~~No-refiner-shall-charge-a-fee-directly-or indirectly-to-a-dealer-for-credit-card-services-provided-by-such-refiner,-in-excess-of-the-customary-fee-charged-by-credit-card-services-to-retailers-who-authorize-use-of-credit-card-purchases.~~

8. A dealer shall have the right, effective upon his death, permanent and total disability, or retirement, to have his interests under a franchise agreement with a refiner assigned to a designated family member who has been approved by the refiner in accordance with

the refiner's reasonable and uniform standards for personal and financial condition unless the refiner shows that the designated family member no longer meets the reasonable and uniform standards at the time of the previous approval. All franchise agreements shall contain a provision identifying the designated family member who is entitled to succeed to the interests of the dealer under the agreement upon his death, permanent and total disability, or retirement. The foregoing shall not prohibit a refiner from requiring that the designated family member accept a trial franchise within twenty-one days of the dealer's death, permanent and total disability, or retirement and that the designated family member attend a training program offered by the refiner.

A dealer and the refiner may mutually agree to change the designated family member entitled to succeed to the dealer's inter under a franchise agreement. The designated family member shall provide, upon the request of the refiner, personal and financial information that is reasonably necessary to determine whether the succession should be honored. The refiner shall not be obligated to accept a designated family member under this subdivision who does not meet the reasonable and uniform standards uniformly imposed by the refiner; however, any refusal to accept the designated family member as a successor dealer shall be given by the refiner in writing to the dealer, not later than ninety days after the date of the designation of the designated family member by the dealer, and shall state with specificity the reasons for such refusal.

9. a. No refiner shall condition approval of an assignment, transfer, sale, or renewal of a franchise agreement on the paymen the dealer, or the proposed successor dealer, of a franchise fee or

penalty unless the assignment, transfer, or sale is of a franchise agreement covering a new or newly remodeled facility.

b. A refiner may require a dealer to pay a franchise fee or penalty, as hereinafter provided, upon the assignment, transfer, or sale of a franchise agreement covering a new facility within the first three years of the initial term of the franchise agreement, or upon the assignment, transfer or sale of a franchise agreement covering a newly remodeled facility within the first three years after the completion of the remodeling:

(1) An amount not to exceed sixty percent of the profit realized by the dealer if the assignment, transfer, or sale takes place within the first twelve-month period.

(2) An amount not to exceed twenty-five percent of the profit realized by the dealer if the assignment, transfer, or sale takes place within the second twelve-month period.

(3) An amount not to exceed ten percent of the profit realized by the dealer if the assignment, transfer, or sale takes place within the third twelve-month period.

c. Nothing in this section shall authorize a refiner to impose a franchise fee or penalty upon an assignment, transfer, or sale to a family member pursuant to subdivision 8 of this section.

d. In the case of a new facility, a franchise fee may be charged at the time the first franchise agreement is entered into.

10. Any provision in any agreement or franchise purporting to waive any right or remedy under this chapter or any applicable provisions of the Petroleum Marketing Practices Act (15 U.S.C. § 2802 et seq.) shall be null and void.

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