

SENATE COMMITTEE SUBSTITUTE

FOR

HOUSE COMMITTEE SUBSTITUTE

FOR

HOUSE BILL NO. 959

AN ACT

To repeal section 407.825, RSMo, and to enact in lieu thereof two new sections relating to the motor vehicle franchise practices act.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI,
AS FOLLOWS:

Section A. Section 407.825, RSMo, is repealed and two new sections enacted in lieu thereof, to be known as sections 407.824 and 407.825, to read as follows:

407.824. 1. As used in this section, the following terms mean:

(1) "Goods", the same meaning as is ascribed to such term under section 400.2-105, except that such term shall not include moveable displays, brochures, and promotional materials containing material subject to the intellectual property rights of a manufacturer or franchisor;

(2) "Substantial reimbursement", a reimbursement in an amount equal to or greater than the cost of the savings that would result if the franchisee were to utilize a vendor of the franchisee's own selection instead of using the vendor identified by the manufacturer or franchisor.

2. No manufacturer or franchisor shall coerce or otherwise

require any franchisee to construct improvements to facilities or install new signs or other franchise or image elements that replace or substantially alter improvements, signs, or franchise elements completed within the last ten years that were required and approved by the manufacturer or franchisee. For purposes of this subsection, the term "substantially alter" shall not include routine maintenance that is reasonably necessary to keep a franchisee's dealership facility in a safe and attractive condition.

3. Unless the manufacturer or franchisor provides substantial reimbursement for the goods or services, no manufacturer or franchisor shall require a franchisee to purchase goods or services to make improvements to the franchisee's facilities from a vendor selected, identified, or designated by the manufacturer or franchisor by agreement, program, incentive provision, bulletin, or otherwise, without allowing or making available to the franchisee the option to obtain goods or services of comparable grade, kind, quality, and overall design and the same materials and characteristics from a vendor chosen by the franchisee and approved by the manufacturer or franchisor. Approval by a manufacturer or franchisor shall not be unreasonably withheld. This subsection shall not be construed to eliminate, impair, damage, or otherwise limit a manufacturer's or franchisor's intellectual property rights in any way.

4. The ten-year period set forth in this section shall commence for a franchisee, including such franchisee's successors and assigns, on the date that the manufacturer or franchisor gave final written approval of the facility, facility improvements, or

installation of signs or other franchise or image elements or on the date that the franchisee receives a certificate of occupancy for the improved facility, whichever is later.

5. Nothing in this section shall prohibit a manufacturer or franchisor from requiring changes or updates to signs that contain the manufacturer or franchisor's brand, logo, or other intellectual property protected by federal intellectual property law more frequently than every ten years, provided that the manufacturer or franchisor shall offer the franchisee compensation for the sign or pay for the sign if sign changes are required less than five years apart.

407.825. Notwithstanding the terms of any franchise agreement to the contrary, the performance, whether by act or omission, by a motor vehicle franchisor, whether directly or indirectly through an agent, employee, affiliate, common entity, or representative, or through an entity controlled by a franchisor, of any or all of the following acts enumerated in this section are hereby defined as unlawful practices, the remedies for which are set forth in section 407.835:

(1) To engage in any conduct which is capricious or not in good faith or unconscionable and which causes damage to a motor vehicle franchisee or to the public; provided, that good faith conduct engaged in by motor vehicle franchisors as sellers of new motor vehicles or parts or as holders of security interest therein, in pursuit of rights or remedies accorded to sellers of goods or to holders of security interests pursuant to the provisions of chapter 400, uniform commercial code, shall not constitute unfair practices pursuant to sections 407.810 to

407.835;

(2) To coerce, attempt to coerce, require or attempt to require any motor vehicle franchisee to accept delivery of any new motor vehicle or vehicles, equipment, tools, parts or accessories therefor, or any other commodity or commodities which such motor vehicle franchisee has not ordered after such motor vehicle franchisee has rejected such commodity or commodities, or which is not required by law or the franchise agreement. It shall not be deemed a violation of this section for a motor vehicle franchisor to require a motor vehicle franchisee to have an inventory of parts, tools, and equipment reasonably necessary to service the motor vehicles sold by a motor vehicle franchisor; or new motor vehicles reasonably necessary to meet the demands of dealers or the public or to display to the public the full line of a motor vehicle franchisor's product line;

(3) To withhold, reduce, delay, or refuse to deliver in reasonable quantities and within a reasonable time after receipt of orders for new motor vehicles, such motor vehicles as are so ordered and as are covered by such franchise and as are specifically publicly advertised by such motor vehicle franchisor to be available for immediate delivery; provided, however, the failure to deliver any motor vehicle shall not be considered a violation of sections 407.810 to 407.835 if such failure is due to an act of God, work stoppage, or delay due to a strike or labor difficulty, shortage of products or materials, freight delays, embargo or other causes of which such motor vehicle franchisor shall have no control;

(4) To coerce, attempt to coerce, require or attempt to

require any motor vehicle franchisee to enter into any agreement with such motor vehicle franchisor or its agent, employee, affiliate, or representative, or a person controlled by the franchisor or to do any other act prejudicial to such motor vehicle franchisee;

(5) To terminate, cancel, refuse to continue, or refuse to renew any franchise without good cause, unless such new motor vehicle franchisee, without good cause, substantially defaults in the performance of such franchisee's reasonable, lawful, and material obligations under such franchisee's franchise. In determining whether good cause exists, the administrative hearing commission shall take into consideration all relevant circumstances, including, but not limited to, the following factors:

(a) The amount of business transacted by the franchisee;

(b) The investments necessarily made and obligations incurred by the franchisee, including but not limited to goodwill, in the performance of its duties under the franchise agreement, together with the duration and permanency of such investments and obligations;

(c) The potential for harm and inconvenience to consumers as a result of disruption of the business of the franchisee;

(d) The franchisee's failure to provide adequate service facilities, equipment, parts, and qualified service personnel;

(e) The franchisee's failure to perform warranty work on behalf of the manufacturer, subject to reimbursement by the manufacturer;

(f) The franchisee's failure to substantially comply, in

good faith, with requirements of the franchise that are determined to be reasonable, lawful, and material;

(g) The franchisor's failure to honor its requirements under the franchise;

(h) The potential harm to the area that the franchisee serves;

(i) The demographic and geographic characteristics of the area the franchisee serves; and

(j) The harm to the franchisor;

(6) To prevent by contract or otherwise, any motor vehicle franchisee from changing the capital structure of the franchisee's franchise or the means by or through which the franchisee finances the operation of the franchisee's franchise, provided the motor vehicle franchisee at all times meets any reasonable capital standards agreed to between the motor vehicle franchisee and the motor vehicle franchisor and grants to the motor vehicle franchisor a purchase money security interest in the new motor vehicles, new parts and accessories purchased from the motor vehicle franchisor;

(7) (a) To prevent, by contract or otherwise, any sale or transfer of a franchisee's franchise or interest or management thereof; provided, if the franchise specifically permits the franchisor to approve or disapprove any such proposed sale or transfer, a franchisor shall only be allowed to disapprove a proposed sale or transfer if the interest being sold or transferred when added to any other interest owned by the transferee constitutes fifty percent or more of the ownership interest in the franchise and if the proposed transferee fails to

satisfy any standards of the franchisor which are in fact normally relied upon by the franchisor prior to its entering into a franchise, and which relate to the qualification, capitalization, integrity or character of the proposed transferee and which are reasonable. A franchisee or proposed franchisee may request, at any time, that the franchisor provide a copy of the standards which are normally relied upon by the franchisor to evaluate a proposed sale or transfer and a proposed transferee;

(b) The franchisee and the prospective franchisee shall cooperate with the franchisor in providing information relating to the prospective transferee's qualifications, capitalization, integrity and character;

(c) In the event of a proposed sale or transfer of a franchise, the franchisor shall be permitted to exercise a right of first refusal to acquire the franchisee's assets or ownership if:

a. The franchise agreement permits the franchisor to exercise a right of first refusal to acquire the franchisee's assets or ownership in the event of a proposed sale or transfer;

b. Such sale or transfer is conditioned upon the franchisor or franchisee entering a franchise agreement with the proposed transferee;

c. The exercise of the right of first refusal shall result in the franchisee and the franchisee's owners receiving the same or greater consideration and the same terms and conditions as contracted to receive in connection with the proposed sale or transfer;

d. The sale or transfer does not involve the sale or

transfer to an immediate member or members of the family of one or more franchisee owners, defined as a spouse, child, grandchild, spouse of a child or grandchild, brother, sister or parent of the franchisee owner, or to the qualified manager, defined as an individual who has been employed by the franchisee for at least two years and who otherwise qualifies as a franchisee operator, or a partnership or corporation controlled by such persons; and

e. The franchisor agrees to pay the reasonable expenses, including attorney's fees which do not exceed the usual, customary and reasonable fees charged for similar work done for other clients, incurred by the proposed transferee prior to the franchisor's exercise of its right of first refusal in negotiating and implementing the contract for the proposed sale or transfer of the franchise or the franchisee's assets. Notwithstanding the foregoing, no payment of such expenses and attorney's fees shall be required if the franchisee has not submitted or caused to be submitted an accounting of those expenses within fourteen days of the franchisee's receipt of the franchisor's written request for such an accounting. Such accounting may be requested by a franchisor before exercising its right of first refusal;

(d) For determining whether good cause exists for the purposes of this subdivision, the administrative hearing commission shall take into consideration all relevant circumstances, including, but not limited to, the following factors:

a. Whether the franchise agreement specifically permits the

franchisor to approve or disapprove any proposed sale or transfer;

b. Whether the interest to be sold or transferred when added to any other interest owned by the proposed transferee constitutes fifty percent or more of the ownership interest in the franchise;

c. Whether the proposed transferee fails to satisfy the standards of the franchisor which are in fact normally relied upon by the franchisor prior to its entering into a franchise, and which related to the qualification, capitalization, integrity or character of the proposed transferee and which are lawful and reasonable;

d. The amount of business transacted by the franchisee;

e. The investments and obligations incurred by the franchisee, including but not limited to goodwill, in the performance of its duties under the franchise agreement, together with the duration and permanency of such investments and obligations;

f. The investments and obligations that the proposed transferee is prepared to make in the business;

g. The potential for harm and inconvenience to consumers as a result of the franchisor's decision;

h. The franchisor's failure to honor its requirements under the franchise;

i. The potential harm to the area that the franchisee serves;

j. The ability or willingness of the franchisee to continue in the business if the proposed transfer is not permitted;

k. The demographic and geographic characteristics of the area the franchisee serves; and

l. The harm to the franchisor;

(8) To prevent by contract or otherwise any motor vehicle franchisee from changing the executive management of the motor vehicle franchisee's business, unless the motor vehicle franchisor demonstrates that such change in executive management will be detrimental to the distribution of the motor vehicle franchisor's motor vehicles;

(9) To impose unreasonable standards of performance upon a motor vehicle franchisee or to require, attempt to require, coerce or attempt to coerce a franchisee to adhere to performance standards that are not applied uniformly to other similarly situated franchisees;

(10) To require, attempt to require, coerce, or attempt to coerce a motor vehicle franchisee at the time of entering into a franchise or any other arrangement to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by sections 407.810 to 407.835;

(11) To prohibit directly or indirectly the right of free association among motor vehicle franchisees for any lawful purpose;

(12) To provide any term or condition in any lease or other agreement ancillary or collateral to a franchise, including, but not limited to, any agreement with a common entity or any person required by the franchisor or controlled by or affiliated with the franchisor, which term or condition directly or indirectly violates the provisions of sections 407.810 to 407.835;

(13) Upon any termination, cancellation, refusal to continue, or refusal to renew any franchise or any discontinuation of any line-make or parts or products related to such line-make, failing to pay reasonable compensation to a franchisee as follows:

(a) The franchisee's net acquisition cost for any new, undamaged and unsold vehicle in the franchisee's inventory of either the current model year or one year-prior model year purchased from the franchisor or another franchisee of the same line-make in the ordinary course of business prior to receipt of a notice of termination or nonrenewal, provided the vehicle has less than seven hundred fifty miles registered on the odometer, including mileage incurred in delivery from the franchisor or in transporting the vehicle between dealers for sale;

(b) The franchisee's cost of each new, unused, undamaged and unsold part or accessory if the part or accessory is in the current parts catalog, less applicable allowances. In the case of sheet metal, a comparable substitute for the original package may be used. Reconditioned or core parts shall be valued at their core value, the price listed in the current parts catalog or the amount paid for expedited return of core parts, whichever is higher. If the part or accessory was purchased by the franchisee from an outgoing authorized franchisee, the franchisor shall purchase the part or accessory for the price in the current parts catalog. In the case of parts or accessories which no longer appear in the current parts catalog, the franchisor shall purchase the parts or accessories for the price in the last version of the parts catalog in which the part or accessory

appeared;

(c) The fair market value of each undamaged sign owned by the franchisee which bears a trademark or trade name used or claimed by the franchisor if the sign was purchased from, or purchased at the request of, the franchisor. During the first seven years after its purchase, the fair market value of each sign shall be the franchisee's costs of purchasing the sign, less depreciation, using straight-line depreciation and a seven-year life of the asset;

(d) The fair market value of all equipment, tools, data processing programs and equipment and automotive service equipment owned by the franchisee which were recommended in writing and designated as equipment, tools, data processing programs and equipment, and automotive service equipment and purchased from, or purchased at the request of, the franchisor, if the equipment, tools, programs and equipment are in usable and good condition, except for reasonable wear and tear. During the first seven years after their purchase, the fair market value of each item of equipment, tools, and automotive service equipment shall be the franchisee's costs of purchasing the item, less depreciation, using straight-line depreciation and a seven-year life of the asset. During the first three years after its purchase, the fair market value of each item of required data processing programs and equipment shall be the franchisee's cost of purchasing the item, less depreciation, using straight-line depreciation and a three-year life of the asset;

(e) In addition to the costs referenced in paragraphs (a) to (d) of this subdivision, the franchisor shall pay the

franchisee an additional five percent for handling, packing, storing and loading of any property subject to repurchase pursuant to this section, and the franchisor shall pay the shipper for shipping the property subject to repurchase from the location of the franchisee to the location directed by the franchisor;

(f) The amount remaining to be paid on any equipment or service contracts required by or leased from the franchisor or a subsidiary or company affiliated with or controlled or recommended by the franchisor. However, if the franchise agreement is voluntarily terminated by the franchisee, without coercion by the franchisor, then:

a. If the amount remaining to be paid on any equipment or service contract is owed to the franchisor, the franchisor shall cancel the obligation rather than paying the amount to the franchisee; and

b. If the amount remaining to be paid on any equipment or service contract is owed to a subsidiary or a company affiliated with or controlled or recommended by the franchisor, the franchisor may pay such amount to the subsidiary or the company affiliated with or controlled by the franchisor, but if the franchisor does not pay such amount to the subsidiary or the company affiliated with or controlled by the franchisor, such amount may be paid to the franchisee by the subsidiary or company affiliated with or controlled by the franchisor;

(g) If the dealer leases the dealership facilities, then the franchisor shall be liable for twelve months' payment of the gross rent or the remainder of the term of the lease, whichever

is less. If the dealership facilities are not leased, then the franchisor shall be liable for the equivalent of twelve months' payment of gross rent. This paragraph shall not apply when the termination, cancellation, or nonrenewed line was under good cause related to a conviction and imprisonment for a felony involving moral turpitude that is substantially related to the qualifications, function, or duties of a franchisee as well as fraud and voluntary terminations of a franchise. Gross rent is the monthly rent plus the monthly cost of insurance and taxes. Such reasonable rent shall be paid only to the extent that the dealership premises are recognized in the franchise and only if they are used solely for performance in accordance with the franchise and not substantially in excess of those facilities recommended by the manufacturer or distributor. If the facility is used for the operations of more than one franchise, the gross rent compensation shall be adjusted based on the planning volume and facility requirements of the manufacturers, distributors, or branch or division thereof;

(h) The franchisor shall pay to the franchisee the amount remaining to be paid on any leases of computer hardware or software that is used to manage and report data to the manufacturer or distributor for financial reporting requirements and the amount remaining to be paid on any manufacturer or distributor required equipment leases, service contracts, and sign leases. The franchisor's obligation shall not exceed one year on any such lease. However, if the franchise agreement is voluntarily terminated by the franchisee, without coercion by the franchisor, then:

a. If the amount remaining to be paid is owed to the franchisor, the franchisor shall cancel the obligation rather than paying the amount to the franchisee; and

b. If the amount remaining to be paid is owed to a subsidiary or a company affiliated with or controlled or recommended by the franchisor, the franchisor may pay such amount to the subsidiary or the company affiliated with or controlled by the franchisor, subject to the limit of the franchisor's one-year obligation, but if the franchisor does not pay such amount to the subsidiary or the company affiliated with or controlled by the franchisor, such amount may be paid to the franchisee by the subsidiary or company affiliated with or controlled by the franchisor, subject to the limit of the franchisor's one-year obligation;

(i) In addition to the other payments set forth in this section, if a termination, cancellation, or nonrenewal is premised upon the franchisor discontinuing the sale in this state of a line-make that was the subject of the franchise, then the franchisor shall also be liable to the franchisee for an amount at least equivalent to the fair market value of the franchisee's goodwill for the discontinued line-makes of the motor vehicle franchise on the date immediately preceding the date the franchisor announces the action which results in termination, cancellation, or nonrenewal, whichever amount is higher. At the franchisee's option, the franchisor may avoid paying fair market value of the motor vehicle franchise to the franchisee under this paragraph if the franchisor, or another motor vehicle franchisor under an agreement with the franchisor, offers the franchisee a

replacement motor vehicle franchise with terms substantially similar to that offered to other same line-make dealers;

(j) The franchisor shall pay the franchisee all amounts incurred by the franchisee to upgrade its facilities that were required by the franchisor within twelve months prior to receipt of a notice of termination or nonrenewal; however, a franchisee shall not receive any benefits under this subdivision if it was terminated for the grounds set forth in subdivision (1) of subsection 4 of section 407.822. However, if the franchise agreement is voluntarily terminated by the franchisee, without coercion by the franchisor, and for a reason other than the death or incapacitation of the dealer principal, then the franchisor shall have no obligation under this paragraph; **[and]**

(k) The franchisor shall pay the franchisee the amounts specified in this subdivision along with any other amounts that may be due to the franchisee under the franchise agreement within sixty days after the tender of the property subject to the franchisee providing evidence of good and clear title upon return of the property to the franchisor. The franchisor shall remove the property within sixty days after the tender of the property from the franchisee's property. Unless previous arrangements have been made and agreed upon, the franchisee is under no obligation to provide insurance for the property left after sixty days;

(l) This subdivision shall not apply to a termination, cancellation or nonrenewal due to a sale of the assets or stock of the motor vehicle dealership;

(14) To prevent or refuse to honor the succession to a

franchise or franchises by any legal heir or devisee under the will of a franchisee, under any written instrument filed with the franchisor designating any person as the person's successor franchisee, or pursuant to the laws of descent and distribution of this state; provided:

(a) Any designated family member of a deceased or incapacitated franchisee shall become the succeeding franchisee of such deceased or incapacitated franchisee if such designated family member gives the franchisor written notice of such family member's intention to succeed to the franchise or franchises within one hundred twenty days after the death or incapacity of the franchisee, and agrees to be bound by all of the lawful terms and conditions of the current franchise agreement, and the designated family member meets the current lawful and reasonable criteria generally applied by the franchisor in qualifying franchisees. In order for the franchisor to claim that any such reasonable criteria are generally applied by the franchisor in qualifying franchisees, it shall have previously provided a copy to the proposed successor franchisee within ten days after receiving the proposed successor franchisee's notice. A franchisee may request, at any time, that the franchisor provide a copy of such criteria generally applied by the franchisor in qualifying franchisees;

(b) The franchisor may request from a designated family member such personal and financial data as is reasonably necessary to determine whether the existing franchise agreement should be honored. The designated family member shall supply the personal and financial data promptly upon the request;

(c) If the designated family member does not meet the reasonable and lawful criteria generally applied by the franchisor in qualifying franchisees, the discontinuance of the current franchise agreement shall take effect not less than ninety days after the date the franchisor serves the required notice on the designated family member pursuant to subsection 4 of section 407.822;

(d) The provisions of this subdivision shall not preclude a franchisee from designating any person as the person's successor by written instrument filed with the franchisor, and if such an instrument is filed, it alone shall determine the succession rights to the management and operation of the franchise; and

(e) For determining whether good cause exists, the administrative hearing commission shall take into consideration all circumstances, including, but not limited to, the following factors:

a. Whether the franchise agreement specifically permits the franchisor to approve or disapprove any successor;

b. Whether the proposed successor substantially fails to satisfy the material standards of the franchisor which are in fact normally relied upon by the franchisor prior to the successor entering into a franchise, and which relate to the proposed management or ownership of the franchise operation or to the qualification, capitalization, integrity or character of the proposed successor and which are lawful and reasonable;

c. The amount of the business transacted by the franchisee;

d. The investments in and the obligations incurred by the franchisee, including but not limited to goodwill in the

performance of its duties under the franchise agreement, together with the duration and permanency of such investments and obligations;

e. The investments and obligations that the proposed successor franchisee is prepared to make in the business;

f. The potential for harm and inconvenience to consumers as a result of the franchisor's decision;

g. The franchisor's failure to honor its requirements under the franchise;

h. The potential harm and injury to the public welfare in the area that the franchisee serves;

i. The ability or willingness of the franchisee to continue in the business if the proposed transfer is not permitted;

j. The demographic and geographic characteristics of the area the franchisee serves; and

k. The harm to the franchisor;

(15) To coerce, attempt to coerce, require, or attempt to require a franchisee under any condition affecting or related to a franchise agreement, to waive, limit or disclaim a right that the franchisee may have pursuant to the provisions of sections 407.810 to 407.835. Any contracts or agreements which contain such provisions shall be deemed against the public policy of the state of Missouri and are void and unenforceable. Nothing in this section shall prohibit voluntary settlement agreements that specifically identify the provisions of sections 407.810 to 407.835 that the franchisee is waiving, limiting, or disclaiming;

(16) To initiate any act enumerated in this section on grounds that it has advised a franchisee of its intention to

discontinue representation at the time of a franchisee change or require any franchisee to enter into a site control agreement as a condition to initiating any act enumerated in this section. Such condition shall not be construed to nullify an existing site control agreement for a franchisee's property;

(17) To require, attempt to require, coerce, or attempt to coerce any franchisee in this state to refrain from, or to terminate, cancel, or refuse to continue any franchise based upon participation by the franchisee in the management of, investment in or the acquisition of a franchise for the sale of any other line of new vehicle or related products in the same or separate facilities as those of the franchisor. This subdivision does not apply unless the franchisee maintains a reasonable line of credit for each make or line of new vehicle, the franchisee remains in compliance with the franchise and any reasonable facilities requirements of the franchisor, and no change is made in the principal management of the franchisee. The reasonable facilities requirement shall not include any requirement that a franchisee establish or maintain exclusive facilities, personnel, or display space, when such requirements would not otherwise be justified by reasonable business considerations. Before the addition of a line-make to the dealership facilities the franchisee shall first request consent of the franchisor, if required by the franchise agreement. Any decision of the franchisor with regard to dualing of two or more franchises shall be granted or denied within sixty days of a written request from the franchisee. The franchisor's failure to respond timely to a dualing request shall be deemed to be approval of the

franchisee's request;

(18) To fail or refuse to offer to sell to all franchisees for a line-make reasonable quantities of every motor vehicle sold or offered for sale to any franchisee of that line-make; however, the failure to deliver any such motor vehicle shall not be considered a violation of this section if the failure is due to a cause over which the franchisor has no control. A franchisor may impose reasonable requirements on the franchisee including, but not limited to, the purchase of reasonable quantities of advertising materials, the purchase of special tools required to properly service a motor vehicle, the undertaking of sales person or service person training related to the motor vehicle, the meeting of reasonable display and facility requirements as a condition of receiving a motor vehicle, or other reasonable requirements; provided, that if a franchisor requires a franchisee to purchase essential service tools with a purchase price in the aggregate of more than seventy-five hundred dollars in order to receive a particular model of new motor vehicle, the franchisor shall upon written request provide such franchisee with a good faith estimate in writing of the number of vehicles of that particular model that the franchisee will be allocated during that model year in which the tools are required to be purchased;

(19) To directly or indirectly condition the awarding of a franchise to a prospective franchisee, the addition of a line-make or franchise to an existing franchisee, the renewal of a franchise of an existing franchisee, the approval of the relocation of an existing franchisee's facility, or the approval

of the sale or transfer of the ownership of a franchise on the willingness of a franchisee, proposed franchisee, or owner of an interest in the dealership facility to enter into a site control agreement or exclusive use agreement. For purposes of this subdivision, the terms "site control agreement" and "exclusive use agreement" include any agreement that has the effect of either requiring that the franchisee establish or maintain exclusive dealership facilities or restricting the ability of the franchisee, or the ability of the franchisee's lessor in the event the dealership facility is being leased, to transfer, sell, lease, or change the use of the dealership premises, whether by sublease, lease, collateral pledge of lease, right of first refusal to purchase or lease, option to purchase, option to lease, or other similar agreement, regardless of the parties to such agreement. Any provision contained in any agreement entered into on or after August 28, 2010, that is inconsistent with the provisions of this subdivision shall be voidable at the election of the affected franchisee, prospective franchisee, or owner of an interest in the dealership facility, provided this subdivision shall not apply to a voluntary agreement where separate, adequate, and reasonable consideration have been offered and accepted;

(20) Except for the grounds listed in subdivision (1) of subsection 4 of section 407.822, prior to the issuance of any notice of intent to terminate a franchise agreement under the MVFP act for unsatisfactory sales or service performance, the franchisor shall provide the franchisee with no less than one hundred twenty days written notice of the specific asserted

grounds for termination. Thereafter, the franchisee shall have one hundred twenty days to cure the asserted grounds for termination, provided the grounds are both reasonable and of material significance to the franchise relationship. If the franchisee fails to cure the asserted grounds for termination by the end of the cure period, then the franchisor may give the sixty-day notice required by subsection 4 of section 407.822 if it intends to terminate the franchise;

(21) To require, attempt to require, coerce, or attempt to coerce a franchisee, by franchise agreement or otherwise, or as a condition to the renewal or continuation of a franchise agreement, to:

(a) Exclude from the use of the franchisee's facilities a line-make for which the franchisee has a franchise agreement to utilize the facilities; or

(b) Materially change the franchisee's facilities or method of conducting business if the change would impose substantial or unreasonable financial hardship on the business of the franchisee;

(22) To fail to perform or cause to be performed any written warranties made with respect to any motor vehicle or parts thereof;

(23) To withhold, reduce, or delay unreasonably or without just cause services contracted for by franchisees;

(24) To coerce, attempt to coerce, require, or attempt to require any franchisee to provide installment financing with a specified financial institution;

(25) To require, attempt to require, coerce, or attempt to

coerce any franchisee to close or change the location of the franchisee[, or to make any substantial alterations to the franchise premises or facilities when doing so would be unreasonable under the current market and economic conditions. Prior to suggesting the need for any such action, the franchisor shall provide the franchisee with a written good faith estimate of the minimum number of the models of new motor vehicles that the franchisor will supply to the franchisee during a reasonable time period, not less than three years, so the franchisee may determine if it is a sufficient supply of motor vehicles so as to justify such changes, in light of the current market and reasonably foreseeable projected and economic conditions. A franchisor or its common entity or an entity controlled by or affiliated with the franchisor may not take or threaten to take any action that is unfair or adverse to a franchisee who does not enter into an agreement with the franchisor under this subdivision. This subdivision does not affect any contract between a franchisor and any of its franchisees regarding relocation, expansion, improvement, remodeling, renovation, or alteration which exists on August 28, 2010];

(26) To authorize or permit a person to perform warranty service repairs on motor vehicles unless the person is a franchisee with whom the manufacturer has entered into a franchise agreement for the sale and service of the manufacturer's motor vehicles unless:

(a) For emergency repairs when a franchisee is not available;

(b) For repairs pursuant to a fleet contract as long as all

parts and labor to perform the repairs are less than one thousand five hundred dollars at retail per repaired vehicle; or

(c) For repairs performed by a facility under subsection 2 of section 407.826;

(27) To discriminate between or refuse to offer to its same line-make franchisees all models manufactured for that line-make based upon unreasonable sales and service standards;

(28) To fail to make practically available any incentive, rebate, bonus, or other similar benefit to a franchisee that is offered to another franchisee of the same line-make within this state;

(29) To condition a franchise agreement on improvements to a facility unless reasonably required by the technology of a motor vehicle being sold at the facility;

(30) To condition the sale, transfer, relocation, or renewal of a franchise agreement, or to condition sales, services, parts, or finance incentives, upon site control or an agreement to renovate or make improvements to a facility; except that voluntary acceptance of such conditions by the franchisee shall not constitute a violation;

(31) Failing to offer to all of its franchisees of the same line-make any consumer rebates, dealer incentives, price or interest rate reduction, or finance terms that the franchisor offers or advertises, or allows its franchisees of the same line-make to offer or advertise;

(32) Offering rebates, cash incentives, or other promotional items for the sale of a vehicle by its franchisees unless: the same rebate, cash incentive, or promotion is offered

to all of its franchisees of the same line-make; and any rebate, cash incentive, or promotion that is based on the sale of an individual vehicle is not increased for meeting a performance standard;

(33) Unreasonably discriminating among its franchisees in any program that provides assistance to its franchisees, including internet listings, sales leads, warranty policy adjustments, marketing programs, and dealer recognition programs;

(34) To fail to include in any franchise with a franchisee the following language: "If any provision herein contravenes the laws or regulations of any state or other jurisdiction wherein this agreement is to be performed, or denies access to the procedures, forums, or remedies provided for by such laws or regulations, such provision shall be deemed to be modified to conform to such laws or regulations, and all other terms and provisions shall remain in full force," or words to that effect;

(35) To withhold, reduce, or delay unreasonably or without just cause delivery of motor vehicle parts and accessories, commodities, or moneys due franchisees;

(36) To use or consider the performance of a franchisee relating to the sale of the franchisor's vehicles or the franchisee's ability to satisfy any minimum sales or market share quota or responsibility relating to the sale of the new vehicles in determining:

(a) The franchisee's eligibility to purchase program, certified, or other used motor vehicles from the franchisor;

(b) The volume, type, or model of program, certified, or other used motor vehicles that a franchisee is eligible to

purchase from the franchisor;

(c) The price of any program, certified, or other used motor vehicle that the franchisee purchased from the franchisor; or

(d) The availability or amount of any discount, credit, rebate, or sales incentive that the franchisee is eligible to receive from the franchisor, for the purpose of any program, certified, or other used motor vehicle offered for sale by the franchisor;

(37) To refuse to allocate, sell, or deliver motor vehicles; to charge back or withhold payments or other things of value for which the franchisee is otherwise eligible under a sales promotion, program, or contest; to prevent a franchisee from participating in any promotion, program, or contest; or to take or threaten to take any adverse action against a franchisee, including charge-backs, reducing vehicle allocations, or terminating or threatening to terminate a franchise because the franchisee sold or leased a motor vehicle to a customer who exported the vehicle to a foreign country or who resold the vehicle, unless the franchisor proves that the franchisee knew or reasonably should have known that the customer intended to export or resell the motor vehicle. There is a rebuttable presumption that the franchisee neither knew nor reasonably should have known of its customer's intent to export or resell the vehicle if the vehicle is titled or registered in any state in this country. A franchisor may not take any action against a franchisee, including reducing its allocations or supply of motor vehicles to the franchisee, or charging back a franchisee for an incentive

payment previously paid, unless the franchisor first meets in person, by telephone, or video conference with an officer or other designated employee of the franchisee. At such meeting, the franchisor shall provide a detailed explanation, with supporting documentation, as to the basis for its claim that the franchisee knew or reasonably should have known of the customer's intent to export or resell the motor vehicle. Thereafter, the franchisee shall have a reasonable period, commensurate with the number of motor vehicles at issue, but not less than fifteen days, to respond to the franchisor's claims. If, following the franchisee's response and completion of all internal dispute resolution processes provided through the franchisor, the dispute remains unresolved, the franchisee may file a complaint with the administrative hearing commission within thirty days after receipt of a written notice from the franchisor that it still intends to take adverse action against the franchisee with respect to the motor vehicles still at issue. If a complaint is timely filed, the administrative hearing commission shall notify the franchisor of the filing of the complaint, and the franchisor shall not take any action adverse to the franchisee until the administrative hearing commission renders a final determination, which is not subject to further appeal, that the franchisor's proposed action is in compliance with the provisions of this subdivision. In any hearing under this subdivision, the franchisor has the burden of proof on all issues raised by this subdivision;

(38) To require a franchisee to provide its customer lists or service files to the franchisor, unless necessary for the sale

and delivery of a new motor vehicle to a consumer, to validate and pay consumer or dealer incentives, for reasonable marketing purposes or for the submission to the franchisor for any services supplied by the franchisee for any claim for warranty parts or repairs. Nothing in this section shall limit the franchisor's ability to require or use customer information to satisfy any safety or recall notice obligation;

(39) To mandate the use by the franchisee, or condition access to any services offered by the franchisor on the franchisee's use, or condition the acceptance of an order of any product or service offered by the franchisor on the franchisee's use, or condition the acceptance of any claim for payment from the franchisee on the franchisee's use, or condition the franchisee's participation in any program offered by the franchisor, a common entity or an entity controlled by the franchisor on the franchisee's use of any form, equipment, part, tool, furniture, fixture, data processing program or equipment, automotive service equipment, or sign from the franchisor, a vendor recommended by the franchisor, a common entity or an entity controlled by the franchisor if the franchisee is able to obtain the identical or reasonably equivalent product from another vendor;

(40) Establishing any performance standard or program for measuring franchisee performance that may have a material impact on a franchisee that is not fair, reasonable, and equitable, or applying any such standard or program to a franchisee in a manner that is not fair, reasonable, and equitable. Within ten days of a request of a franchisee, a franchisor shall disclose in writing

to the franchisee a description of how a performance standard or program is designed and all relevant information used in the application of the performance standard or program to that franchisee unless the information is available to the franchisee on the franchisor's website;

(41) Establishing or implementing a plan or system for the allocation, scheduling, or delivery of new motor vehicles, parts, or accessories to its franchisees that is not fair, reasonable, and equitable or modifying an existing plan or system so as to cause the plan or system to be unreasonable, unfair, or inequitable. Within ten days of any request of a franchisee, the franchisor shall disclose in writing to the franchisee the method and mode of distribution of that line-make among the franchisor's franchisees of the same line-make within the same metro area for franchisees located in a metropolitan area and within the county and contiguous counties of any franchisee not located in a metropolitan area; and

(42) To violate any other provision of the MVFP act that adversely impacts a franchisee.